Supreme Court Nominee Elena Kagan: Administrative Law and the Nondelegation Doctrine

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Summary

This report discusses and analyzes Supreme Court nominee Elena Kagan's 2001 article, *Chevron's Nondelegation Doctrine*, which she coauthored with David J. Barron, an assistant professor at Harvard Law School, during her time as a professor there.

The article provides an overview of two traditional dichotomies in administrative law on which courts rely in choosing between whether to accord deference to agency interpretations of statutory provisions: (1) the use of formal or informal procedures, such as the procedures set forth in the Administrative Procedure Act (APA), and (2) the general or particular applicability of agency decisions, such as whether an agency action binds more than one party. The authors propose a new method of determining what type of judicial review should apply to agency actions. They term this approach the *Chevron* nondelegation doctrine and emphasize its roots in ideas of political accountability and discipline of agency action.

Under Barron and Kagan's *Chevron* nondelegation doctrine, the agency's interpretation would receive a type of substantial deference from the courts, known as "*Chevron* deference," if the individual designated by Congress to carry out the statute (the statutory delegatee) has formally adopted the agency's decision after a meaningful review and issued the decision under her name. The agency's interpretation would receive a weaker type of judicial deference, known as *Skidmore* deference, if the statutory delegatee subdelegated her decisionmaking authority to a lower-level agency official (other than her close advisors). Thus, under the *Chevron* nondelegation doctrine, the choice between whether agencies or courts should interpret and resolve ambiguous statutes would depend on the question of who in the agency makes the interpretation—a high- or low-level agency employee.

If adopted by the Supreme Court, the *Chevron* nondelegation doctrine would appear to result in a major reformulation of the Court's jurisprudence regarding which agency actions receive *Chevron* deference. Courts generally do not focus on the identity of the agency decisionmaker, but rather view agencies as a single entity and do not differentiate in the levels of deference that they grant to decisions issued by civil servants or political appointees, branch chiefs or headquarters officials, agency heads or low-level employees.

Barron and Kagan's proposed *Chevron* nondelegation doctrine would address a phenomenon of "judicial channeling" that the authors call "unfortunate"—that an agency's discretion in choosing from the multitude of legitimate modes of agency decisionmaking is both influenced and limited by the courts' application of the more substantial *Chevron* deference to decisions undertaken with greater procedural formality or that apply more generally. Their *Chevron* nondelegation doctrine appears to address this problem by relegating the procedural requirements of the APA to a threshold determination of whether the agency's decision or interpretation is a lawful, or valid, action.

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This report analyzes Supreme Court nominee Elena Kagan's co-authored article, written with David Barron,[1] on the nondelegation doctrine and the seminal administrative law case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[2] The article, which was written in 2001 while Kagan was a professor at Harvard Law School, covers a range of concepts in administrative law. Administrative law may be described as the body of law governing agency procedures, structure, and powers, as well as how citizens interact with the government.

Administrative law and process encompass the implementation and interpretation of policies and programs enacted by Congress, the deference that should be accorded to different types of agency decisions and actions, and who ultimately decides whether agency interpretations of statutory ambiguities are permissible. The question of whether and when agencies or courts should take the predominant role in resolving statutory ambiguities through their interpretations raises classic separation of powers issues.

While agencies generally fall within the executive branch of government, it is Congress that determines, in an act establishing the agency or subsequent statutes, the powers of the agency.[3] Courts both interpret statutes and grant varying levels of deference to agency interpretations when examining questions such as whether an agency's action is in excess of its delegated statutory authority.[4] According to Barron and Kagan, judicial deference to agency interpretations of legislative gaps presently depends on the formality of the procedures used by the agency and whether the agency's decision has general or particular applicability.[5] Barron and Kagan find that the Supreme Court's focus on these dichotomies of proceduralism and generality "fail[s] to generate the most appropriate distribution of interpretive power."[6] Instead, the authors advocate drawing the line between administrative and judicial power to resolve statutory ambiguities on the basis of the position and authority of the agency actor who makes the decision, rather than the agency's use of formal procedures or the agency's issuance of a generally applicable decision.

After providing background on the administrative law concepts discussed in the article, this report discusses the article itself and provides reactions to and considerations of its propositions.

Brief Overview of the Administrative Procedure Act

The Administrative Procedure Act (APA) applies to all agencies, including independent regulatory agencies such as the Federal Trade Commission.[7] The APA prescribes procedures for agency actions such as rulemaking and adjudication. Barron and Kagan's *Chevron* nondelegation theory would shift the applicable type of judicial deference away from a focus on the agency's use of formal procedures, such as those set forth in the APA, or informal procedures. The authors'

[1] David J. Barron and Elena Kagan, Chevron's *Nondelegation* Doctrine, 2001 Sup. Ct. Rev. 201 (2001).

[2] 467 U.S. 837 (1984).

[3] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

[4] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27(2001); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 490-91 (4th ed. 2006).

[5] Barron & Kagan, *supra* note 1, at 203.

[6] *Id.*

[7] 5 U.S.C. § 551(a).

Chevron nondelegation doctrine would similarly discount whether the rule or order issued by the agency has general applicability or only applies to the particular parties to the proceeding.

Agency Rulemaking[8]

Agencies issue rules pursuant to delegated authority from Congress.[9] The APA imposes several procedural requirements on the issuance of substantive rules, which are also known as legislative rules. Substantive rules have the force of law and may create new rights or duties.[10] Under a process known as informal or notice-and-comment rulemaking, the APA generally requires that all agencies publish a notice of proposed rulemaking in the *Federal Register*, after which interested persons and the public may submit comments that may affect the resulting final rule.[11] Final rules must be published 30 days before they become effective as substantive rules.[12] However, these requirements do not apply to nonlegislative rules, which include "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[13] The procedural distinction between substantive, or legislative, rules and nonlegislative rules underlies the type of deference that a reviewing court may grant the rule at issue.

Agency Adjudication[14]

The APA also provides procedures for formal adjudications, which are also referred to as "on the record" hearings.[15] The APA provides that when a statute requires an agency adjudication to be

[8] The APA defines a rulemaking as the "agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5), where a rule "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...." 5 U.S.C. § 551(4).

[9] TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 30 n.3 (1947), http://www.law.fsu.edu/library/admin/1947iii.html [hereinafter AG MANUAL].

[10] General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc).

[11] 5 U.S.C. § 553. There are some exceptions to the publication requirement. *Id.* The APA does not apply to rules involving military or foreign affairs functions, or matters relating to agency management or personnel or public property, loans, grants, benefits, or contracts. 5 U.S.C. § 553(a).

[12] 5 U.S.C. § 552(a)(1)(D); 5 U.S.C. § 553(d) (providing exceptions to the 30 day requirement, such as for rules issued under the good cause exception, which allows the agency to make a rule effective immediately, subject to judicial review). The final rule also must contain "a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

[13] 5 U.S.C. § 553(b)(3)(A); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001). The *Attorney General's Manual on the Administrative Procedure Act* defined an interpretive rule as one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." AG MANUAL, *supra* note 9, at 30. Interpretive rules do not "effect[] a substantive change in the regulations." Warder v. Shalala, 149 F.3d 73, 80 (1st Cir. 1998)(quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)). General statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." AG MANUAL, *supra* note 9, at 30 n.3. An example of a rule of agency organization, procedure, or practice is a Department of Health and Human Services "manual governing the procedures for medical peer review inspections in the Medicare program." Lubbers, *supra* note 4, at 69 (discussing American Hospital Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987)).

[14] The APA defines generally adjudication as the "agency process for the formulation of an order," 5 U.S.C. § 551(7), where an order is "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. § 551(6).

[15] 5 U.S.C. § 554(a). Requirements regarding "on the record" hearings are set forth at 5 U.S.C. §§ 554. The APA provisions that govern hearings, presiding officers, evidence, and the content of decisions are set forth at 5 U.S.C. §§ 556 and 557.

determined "on the record," an Administrative Law Judge (ALJ) or the agency head must preside over the hearing.[16] In general, ALJs hear cases that fall into four different categories: (1) enforcement cases, (2) entitlement cases, (3) regulatory cases, and (4) contract cases.[17] The subject matter of the hearing or proceeding varies among the agencies and includes disability determinations as well as licensing, sanctions, and civil penalty determinations.[18] Informal adjudications do not necessarily apply APA procedures and, as a result, an agency may create its own procedures and use non-ALJ hearing officers to adjudicate disputes before the agency.[19]

Judicial Review of Agency Action

The Supreme Court has stated that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[20] With regard to the standards of judicial review of agency action that a court will use to evaluate whether an agency's action is valid,[21] the relevant APA provision for purposes of Barron and Kagan's article states that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[22] This standard of judicial review concerns congressional delegations of legislative authority to administrative agencies.[23] Courts grant varying levels of deference to agency interpretations of statutes when examining questions such as whether an agency's action is in excess of its delegated statutory authority.[24]

Judicial Deference to Agency Implementation of a Statutory Provision

Judicial deference is the degree to which a court will uphold and respect the validity of an agency's interpretation of a statutory provision during judicial review of the agency's decisions. The amount of deference that an agency interpretation of its own statute will receive from a

[16] 5 U.S.C. §§ 554, 556-57. If the agency head presides, his or her decision is a final order, subject to judicial review. However, "[a]gency heads seldom have the time to preside." Harold Levinson, *The Status of the Administrative Judge*, 38 AM. J. OF COMP. LAW 523, 526 (1990).

[17] PAUL R. VERKUIL ET AL., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, THE FEDERAL ADMINISTRATIVE JUDICIARY, VOLUME II, at 784-85 (1992) [hereinafter ACUS 1992].

[18] The APA excludes certain proceedings, such as those where decisions rest solely on inspections, tests, or elections. 5 U.S.C. § 554(a)(1)-(6).

[19] MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 69-70 (3d ed. 2009). When the APA was enacted, the statute did not require agencies to use ALJs because Congress "intended to leave the decision to employ ALJs to agency-specific legislation by stating that ALJs would only be required where statutes called for 'on the record' hearings." ACUS 1992, *supra* note 17, at 790; *see also* 5 U.S.C. §§ 553, 554. These sections, which govern cases in which agency proceedings are required to be on the record, mandate the application of 5 U.S.C. § 556, which requires ALJs to preside over such hearings.

[20] Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 151 (2000); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

[21] LUBBERS, *supra* note 4, at 469. The APA provides several types of judicial review that apply unless otherwise specified by statute. *Id.*

[22] 5 U.S.C. § 706(2)(C).

[23] *See* LUBBERS, *supra* note 4, at 490.

[24] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27(2001); LUBBERS, *supra* note 4, at 490-91.

reviewing court "has been understood to vary with the circumstances."[25] This section briefly outlines two types of deference that a court may accord to an agency's administration of a statutory provision—*Chevron* (substantial deference) and *Skidmore* (weak deference)—that Barron and Kagan discuss in their law review article.[26] While the law review article focuses primarily on *Chevron* deference, it also discusses *Skidmore* deference in cases where *Chevron* deference would be inapplicable.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.

Chevron is the leading case on judicial review of agency interpretations of statutes.[27] This case involved the Environmental Protection Agency's rules defining "stationary source" for purposes of nationwide regulation of emissions under the Clean Air Act. In *Chevron*, the Court enunciated a two-step test for judicial review of an agency's interpretation of its own statute: (1) Has Congress "directly spoken to the precise question at issue?" and (2) if Congress has not done so and "the statute is silent or ambiguous with respect to the specific issue," is the agency's answer "based on a permissible construction of the statute?"[28] Under *Chevron* step one, if Congress has spoken directly to the question at issue, then *Chevron* deference is not due and the Court "must give effect to the unambiguously expressed intent of Congress."[29] If Congress's intent is unclear or if Congress is silent, the Court's role at *Chevron* step two is to defer to any reasonable agency interpretation of the pertinent statutory language.[30] *Chevron* thus entered the heart of, and continues to factor in, the debate as to whether agencies or courts should address questions of statutory interpretation, when courts should defer to agency interpretations, and what level of deference courts should apply.[31]

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[25] *Mead*, 533 U.S. at 228, 236-37.

[26] Courts recognize additional types of deference to agency action, such as *Auer* deference: "An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation." Gonzales v. Oregon, 546 U.S. 243, 255 (2006)(citing Auer v. Robbins, 519 U.S. at 461-63). Under *Auer* deference, the Court will "accept the agency's position unless it is 'plainly erroneous or inconsistent with the regulation'" Federal Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) (quoting *Auer*, 519 U.S. at 461). In what has been termed the "anti-parroting" cannon of *Gonzales v. Oregon*, the Court found "that *Auer* deference is inapplicable where an agency seeks deference for its interpretation of a regulation that merely parrots the statute." Kathryn Watts, *Judicial Review*, i*n* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2007-2008, at 88 (Jeffrey S. Lubbers, ed., 2009)(quoting *Gonzales*, 546 U.S. at 257, as stating that the "near-equivalence of the statute and regulation belies *Auer* deference"); *see also* Kentucky Retirement Systems v. Equal Employment Opportunity Commission, 554 U.S. 135, __ (2008); 128 S. Ct. 2361, 2370 (2008).

[27] 467 U.S. 837 (1984). For a fuller discussion of *Chevron*, see CRS Report R41260, *The Jurisprudence of Justice John Paul Stevens: The Chevron Doctrine*, by Todd Garvey.

[28] *Chevron*, 467 U.S. at 842-43. The *Chevron* Court also discussed express and implied congressional delegations of legislative authority to agencies: "If 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.... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44.

[29] *Id.* at 843.

[30] *Id.* at 843.

[31] *See, e.g.*, Robert Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 187 (2010).

United States v. Mead Corporation

The 2001 case *United States v. Mead Corporation* focused on a tariff classification ruling by the Customs Service and held that the ruling "fail[ed] to qualify" for *Chevron* deference.[32] The Court qualified its decision in *Chevron* by holding that *Chevron* deference to an agency's interpretation of an ambiguous statute was "warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation was promulgated in exercise of that authority.'"[33] These threshold determinations of whether Congress delegated authority and whether the agency has exercised its authority to act with the force of law, such as in notice-and-comment rulemaking or formal adjudication, has been referred to as *Chevron* step zero.[34] The *Mead* Court held that congressional delegation of authority to an agency to make rules with the force of law "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[35] As the Court had explained earlier in *Christensen v. Harris County*,[36] policy statements, agency manuals, enforcement guidelines, and interpretive opinion letters do not warrant *Chevron*-level deference.[37]

Barnhart v. Walton

In the 2002 case *Barnhart v. Walton*, which was decided after the publication of Barron and Kagan's article, the Court focused on the longstanding nature of the agency's interpretation and found that *Chevron* deference may apply to agency interpretations reached "through means less formal than 'notice-and-comment' rulemaking."[38] The *Barnhart* Court pointed to factors that highlighted "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[39]

With regard to the level of judicial deference that should be accorded to informal procedures, courts appear to be required to make a "threshold determination: whether to apply the criteria for determining *Chevron* worthiness from *Mead* or those from *Barnhart* ... Thus, *Chevron* deference appears to depend on whether the court evaluating a particular interpretive procedure favors *Mead*-style factors or *Barnhart*-style factors."[40] If the agency's interpretation does not qualify for

[32] 533 U.S. 218, 226-27 (2001).

[33] Gonzales v. Oregon, 546 U.S. 243, 255-56 (2005)(quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001))(internal citations omitted).

[34] Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191, 207 (2006). *But see Mead*, 533 U.S. at 231 ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

[35] *Mead*, 533 U.S. at 226-27.

[36] 529 U.S. 576 (2000).

[37] *Id.* at 587.

[38] 525 U.S. 212, 221-22 (2002).

[39] *Id.* at 222.

[40] Richard Murphy, et al., *Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2004-2005, at 99 (Jeffrey S. Lubbers, ed., 2006).

Chevron deference, it is otherwise "'entitled to respect' only to the extent it has the 'power to persuade'" under the standard of deference set forth in *Skidmore v. Swift & Co*.[41]

Skidmore v. Swift & Co.

If *Chevron* deference does not apply to the agency's interpretation—such as in cases when the agency interprets a statute that also applies to other agencies or when the agency has issued an opinion letter—"courts ordinarily will give some deference or weight to an agency's interpretation of a statute that it administers."[42] Under *Skidmore v. Swift & Co.*, a court may defer to such agency interpretations, as they are entitled to a "respect proportional to [their] 'power to persuade.'"[43] The *Skidmore* Court stated that "[t]he weight [granted an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[44] In other words, courts will often give weight to an agency's interpretations, due to the agency's "specialized experience" in the administration of its given functions.[45]

An Overview of the Congressional Nondelegation Doctrine

The nondelegation doctrine concerns the delegation of legislative power to administrative or executive branch agencies. The premise of the nondelegation doctrine is that Article I of Constitution vests legislative power in Congress to make the laws that are necessary and proper,[46] and "the legislative power of Congress cannot be delegated" to other branches of government.[47] There are two rationales for the nondelegation doctrine—a separation of powers argument and a checks and balances argument—in addition to several policy justifications.[48]

Before the New Deal, the nondelegation doctrine consisted of several Supreme Court rulings that pronounced that Congress may not delegate its legislative powers.[49] In each of these cases, and

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[41] Gonzales v. Oregon, 546 U.S. 243, 255-56 (2005)(internal citations omitted).

[42] LUBBERS, *supra* note 4, at 507 (quoting AMERICAN BAR ASSOCIATION, SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 31 (2004)); Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[43] *Mead*, 533 U.S. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[44] *Skidmore*, 323 U.S. at 140.

[45] United States v. Mead Corp., 533 U.S. 218, 234 (2001)(quoting *Skidmore*, 323 U.S. at 140).

[46] "All legislative Powers [granted by the Constitution] shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1.

[47] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932); *see also* Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

[48] ASIMOW & LEVIN, *supra* note 19, at 374; *see* Mistretta v. United States, 488 U.S. 361, 371 (1989)("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 54-55 (2010).

[49] *See, e.g.*, Wayman v. Southhard, 10 Wheat. (23 U.S.) 1, 42 (1825); Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

others as well, the delegations were in fact, if not in name, approved under various theories. Modern delegation doctrine may trace its inception *to J.W. Hampton, Jr. & Co. v. United States*,[50] where the Court noted that in order to govern effectively Congress must seek the assistance of other branches and observed that the extent of the assistance "must be fixed according to common sense and the inherent necessities of the governmental co-ordinaton."[51] A congressional delegation of legislative authority would be sustained, the Court announced, whenever Congress provides an "intelligible principle" that executive branch officials must follow and that their actions may be evaluated against.[52] Stated otherwise, it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."[53]

The Court has struck down two legislative delegations as lacking an "intelligible principle" under the nondelegation doctrine.[54] In *Panama Refining Co. v. Ryan*, the Court found no "intelligible principle" when Congress provided the President with the authority to prohibit the interstate transfer of petroleum without providing any standards or limits constraining when such authority was to be exercised.[55] Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, Congress was found to have created an unauthorized delegation of legislative authority when it gave the President the authority to enact "codes of fair competition."[56] In support of its decision in *Schechter*, the Court noted both that "fair competition" was not a term which could easily be defined and that the breadth of the President's authority was markedly different from other cases in which executive officials had been delegated solely the authority to establish prices or issue licenses.

The Court has not struck down a congressional delegation to an executive agency since these two New Deal cases in 1935.[57] After these cases, the Court has continued to discuss the nondelegation doctrine, while upholding congressional delegations of legislative power to executive agencies,

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[50] 276 U.S. 394 (1928).

[51] *J.W. Hampton & Co.*, 276 U.S. at 406.

[52] *Id.* at 409. The "intelligible principle" test of *Hampton* is the same as the "legislative standards" test of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). Accordingly, Congress may vest agencies with broad policymaking power, providing it is not "standardless." *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-73(2001); Loving v. United States, 517 U.S. 748, 771 (1996); Touby v. United States, 500 U.S. 160, 165-66 (1991)(upholding an authorization in the Controlled Substances Act to the Attorney General to temporarily add a drug to the schedule of controlled substances as a constitutional delegation of legislative power because the statutory provision contained an "intelligible principle").

[53] American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 105 (1946).

[54] *Whitman*, 531 U.S. at 474 (stating one statute that lacked the "intelligible principle" "provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'").

[55] *Panama Refining*, 293 U.S. at 431 ("There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.").

[56] *Schechter Poultry*, 295 U.S. at 504, 541-42.

[57] *See Whitman*, 531 U.S. at 472-76 (reviewing the Supreme Court's nondelegation decisions since 1935 and concluding "In short, we have 'almost never felt qualified to second guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.' Mistretta v. United States, 488 U.S. 361, 416 (1999) (Scalia, J., dissenting); *see id.* at 373 (majority opinion)."). In *Whitman*, the author of the opinion, Justice Scalia, who was the lone dissenter in a prior nondelegation doctrine case, *Mistretta v. United States*, modified his position on the doctrine.

and has sanctioned many delegations that lacked optimal legislative specificity.[58] The Court also has construed legislation to impose more requirements than is textually required in order to avoid constitutional nondelegation issues.[59] After the Court's 2001 decision in *Whitman v. American Trucking Associations, Inc.*, which did not find a violation of the nondelegation doctrine,[60] the nondelegation doctrine has been declared by several commentators to be, if not "dead,"[61] at least "on life support, with the Supreme Court neither willing to pull the plug nor prepared to revive it."[62]

The *Chevron* nondelegation doctrine proposed by Barron and Kagan would apply *Chevron* deference to agency decisions based on internal agency decisionmaking processes.[63] Under their *Chevron* nondelegation doctrine, *Chevron* deference would be accorded to lawful agency decisions that are made by the individual to which the relevant statute has delegated the decisionmaking authority, who would typically be the agency head.[64] *Chevron* deference would be due if this congressionally-designated agency official met two conditions: (1) the statutory delegatee (or her senior advisors[65]) formally adopted the agency's decision as her own and issued the decision under her name, and (2) the statutory delegatee (or her immediate advisors) conducted a meaningful review of the agency's decision.[66] If the statutory delegatee subdelegates her decisionmaking authority, or if a decision is made by a lower-level agency official, that agency interpretation would not be eligible for *Chevron* deference, but could instead still potentially receive *Skidmore* deference.[67]

[58] *See, e.g.*, Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001); Loving v. United States, 517 U.S. 748, 768-74 (1996); Touby v. United States, 500 U.S. 160, 167-68 (1991); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218-20 (1989)(upholding the Secretary of Transportation's ability to assess pipeline safety user fees); Mistretta v. United States, 488 U.S. 361, 371-79 (1989)(approving a congressional delegation to the Sentencing Commission created within the judicial branch to promulgate standards, within congressional guidelines, to bind all federal judges in sentencing convicted offenders, subject to limited deviation).

[59] Ind. Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

[60] 531 U.S. 457, 474 (2001).

[61] Cass R. Sunstein, *Nondelegation Cannons*, 67 U. CHI. L. REV. 315, 315-16 (2000).

[62] Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038 (2007). While federal courts have upheld delegation, states have not necessarily followed this view. *See* Thygesen v. Callahan, 385 N.E.2d 699 (Ill. 1979)("Here, where the legislature has not only failed to provide any additional standards to guide defendant's discretion, but has failed to communicate to defendant the harm it intended to prevent, it is clear that the legislature has unlawfully delegated its power to set such maximum rates."); ASIMOW & LEVIN, *supra* note 19, at 393 ("Many state supreme courts insist that a delegation of authority to an agency may not be upheld absent adequate statutory safeguards that constrain the agency's discretion.").

[63] Barron & Kagan, *supra* note 1, at 264.

[64] A delegation to the Secretary of the Interior to promulgate regulations "requiring a safety case [to] be submitted along with each new application for a permit to drill on the outer Continental Shelf" would be an example of a delegation to a "statutory delegatee." S. 3516, § 6(h) (111th Cong.)(would amend the Outer Continental Shelf Lands Act, 43 U.S.C. § 1347).

[65] Barron & Kagan, *supra* note 1, at 245.

[66] *Id.* at 238-39, 263.

[67] *Id.* at 201-02, 261.

Barron & Kagan's *Chevron* Nondelegation Doctrine

Introduction

Barron and Kagan's law review article compares its proposal for a new method of judicial deference to agency decisionmaking, which the authors refer to as the *Chevron* nondelegation doctrine, to the congressional nondelegation doctrine.[68] As discussed above, the Supreme Court has already elucidated several types of judicial deference to agency action, including *Chevron* and *Skidmore* deference. Under the *Chevron* nondelegation doctrine proposed in the article, whether an agency decision receives *Chevron* or a lesser type of deference for its actions depends on whether one or two delegations have occurred.[69] The first delegation is the delegation of legislative power from Congress to a particular agency official. The second delegation is of decisionmaking power from the designated agency official to others within the agency.[70]

Issues that may arise with the first delegation are addressed under the congressional nondelegation doctrine: Congress may delegate authority if it provides an "intelligible principle" that agency officials must follow and that their actions may be evaluated against.[71] Issues that may arise with the second delegation would be addressed through the principles of the *Chevron* nondelegation doctrine outlined in the article: if the individual designated by Congress makes the decision that fills in a legislative gap, courts should defer to the agency decision under *Chevron*, but if a lower-level agency official provides the interpretation, courts should exercise their interpretive authority to resolve statutory ambiguities.[72]

The article refers to this choice between whether agencies or courts will resolve ambiguities in statutory interpretation as "institutional choice."[73] The *Chevron* nondelegation doctrine would make this institutional choice between the agencies and the courts dependent on "institutional design."[74] Institutional design is a question of who within the agency exercises the interpretive authority to resolve a statutory ambiguity: the individual designated by Congress, who would usually be a high-level agency official, or a lower-level agency official.[75]

The article discusses two "dichotomies" of administrative law on which the Supreme Court relies to make the institutional choice or, in other words, to determine "the most appropriate distribution of interpretive power," between agencies and courts—(1) formal versus informal procedures and (2) general versus particular applicability of agency decisionmaking and rulings.[76] The article

[68] Barron & Kagan, *supra* note 1, at 235-36.

[69] *Id.* at 201.

[70] *Id.*

[71] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-73(2001); Loving v. United States, 517 U.S. 748, 771 (1996); Touby v. United States., 500 U.S. 160, 165 (1991).

[72] Barron & Kagan, *supra* note 1, at 201-02.

[73] *Id.* at 202.

[74] *Id.*

[75] *Id.* at 202, 205.

[76] Barron & Kagan, *supra* note 1, at 202-03.

then introduces a third calculation—the centralized versus decentralized nature of agency action or "institutional design."[77]

As an example of the first dichotomy, formal versus informal procedures, the article compares the major rule issued after notice-and-comment rulemaking in *Chevron* with the tariff classification ruling issued in *Mead* after more "streamlined" processes.[78] Barron and Kagan critique the Court's preference for formal procedures for "fail[ing] to acknowledge the costs" of using formal APA procedures.[79] As an example of the second dichotomy, general versus particular decisionmaking, the rule in *Chevron* applied generally to all "new or modified major stationary sources,"[80] while the *Mead* tariff classification ruling had particular effect in that the tariff classification ruling applied to the "particular transaction" of three-ring binder day planners.[81] The authors note the Supreme Court's suggestion that general agency decisions "should receive greater judicial deference" and remark that agencies have valid reasons to choose between making decisions with either general or particular effects.[82]

Instead of relying on these two dichotomies, Barron and Kagan would examine whether the agency decision was centralized or decentralized, by focusing on the whether the statutory delegatee or a lower-level agency official took responsibility for the agency decision.[83] Agencies would receive *Chevron* deference for resolutions of statutory ambiguity personally made by statutory delegatees.[84] Courts would resolve questions of legislative ambiguities if lower-level agency officials made the agency decision.[85] For example, the *Chevron* rule was issued by a high-level official at the center of the agency hierarchy—the Administrator of the Environmental Protection Agency—and that rule received what became known as *Chevron* deference from the Supreme Court.[86] The initial *Mead* tariff classification ruling was issued by a Customs Service official in one of the 46 port-of-entry offices, in other words, a lower-level agency official, while the two subsequent rulings were issued by the director of the Commercial Rulings Division at Customs Headquarters.[87] The Court held that *Chevron* deference was not applicable to Customs Service tariff classification rulings.[88]

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[77] *Id.* at 203-04, 264.

[78] *Id.* at 202-03.

[79] *Id.* at 203-04.

[80] 42 U.S.C. § 7502.

[81] Barron & Kagan, *supra* note 1, at 202-03; United States v. Mead Corp., 533 U.S. 218, 222 (quoting 19 C.F.R. § 177.9(a)).

[82] Barron & Kagan, *supra* note 1, at 204.

[83] *Id.* at 202-04.

[84] *Id.* at 204.

[85] *Id.*

[86] *Id.* at 202-03.

[87] Barron & Kagan, *supra* note 1, at 202-03, 209-10 n. 32 and 33. The exact titles and positions of the individuals who issued the Customs rulings do not appear to have been discussed in *Mead*. The *Mead* Court stated that "none of the relevant statutes recognizes this [Headquarters-issued] category of rulings as separate or different from others; there is thus no indication that a more potent delegation might have been understood as going to Headquarters even when Headquarters provides developed reasoning, as it did in this instance." *See* United States v. Mead Corp., 533 U.S. 218, 225, 233-34, 238 n.19 (2001).

[88] Barron & Kagan, *supra* note 1, at 202-03; *see id.* at 205.

According to Barron and Kagan, their *Chevron* nondelegation doctrine would have the advantages of political accountability and disciplined agency decisionmaking and would avoid the reported disadvantages of the congressional nondelegation doctrine—excessive centralization and the infeasibility of judicial enforcement.[89] Due to the Court's differing views on when agency decisions should receive *Chevron* deference, the authors "see some potential for the Court to move toward, and even converge on," their *Chevron* nondelegation doctrine.[90]

I. Background

The background section of the article provides an overview of *Chevron* and then discusses the questions that courts and commentators grappled with post-*Chevron* – such as what types of agency decisions (those in formal or informal adjudications, those exempt from notice-and-comment rulemaking procedures) should receive *Chevron* deference.[91] The authors then offer statistics comparing the volume of regulations promulgated with notice-and-comment procedures to agency decisions issued without notice and comment; they state that the "mass of agency action" takes place outside of notice-and-comment procedures.[92]

The authors frame as one of the "principal questions of administrative law" whether (1) courts will accept agency interpretations of ambiguous statutes that appear in forms other than notice-and-comment rulemaking (such as administrative adjudications that do not follow formal APA procedures) or (2) courts will use independent judgment to resolve statutory ambiguities.[93] It would appear that this is a reformulation of the question of "institutional choice" between agencies and courts resolving statutory ambiguities that the authors discussed earlier in the article. Barron and Kagan then discuss *Christensen v. Harris County* and *United States v. Mead Corporation* as cases that address this question.

In *Christensen*, the Supreme Court did not accord *Chevron* deference to an agency interpretation issued in an opinion letter.[94] As the opinion letter lacked the force of law, like other agency "policy statements, agency manuals, and enforcement guidelines," it could only qualify for *Skidmore* deference.[95] In *Mead*, the Supreme Court also held that *Chevron* deference did not apply to the Custom Service tariff classification rulings that purported to be "binding ... until modified or revoked" and that were supposed to represent the agency's official position on a specific transaction.[96] The *Mead* Court reasoned that, in the statute at issue, the "terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."[97] Rather, the Court said that the Customs classification rulings were "best treated like 'interpretations contained in policy statements,

[89] *Id.* at 204.

[90] *Id.* at 205.

[91] *Id.* at 206-07.

[92] *Id.* at 207-08.

[93] *Id.* at 208.

[94] Barron & Kagan, *supra* note 1, at 207-08.

[95] Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[96] Barron & Kagan, *supra* note 1, at 209 (quoting the regulations at issue in *Mead*, 19 C.F.R. §§ 177.8(a), 177.9(a)).

[97] United States v. Mead Corp., 533 U.S. 218, 221, 231-32 (2001).

agency manuals, and enforcement guidelines'"[98] and that such rulings may merit *Skidmore* deference.[99]

The article then discusses the role of congressional intent in the *Mead* majority and dissent and analyzes *Mead* through the lens of the two dichotomies of administrative law the authors outlined earlier: formality of procedures and generality in administrative decisionmaking.[100] In the case when the statute was ambiguous, the Court said that various "indicators" could be used to decide if Congress wanted the agency's decision to have the force of law and if *Chevron* deference was due.[101] Such indicators of congressional intent for the agency's actions to have the force of law include the use of formal procedures, such as notice-and-comment rulemaking and formal adjudication, as well as the general applicability of the agency's action—in other words, that it binds more than the parties to the ruling.[102] The authors view formal procedures as establishing a safe harbor for agency actions to receive *Chevron* deference, although the court reserved the right to grant *Chevron* deference to agency actions taken without formal procedures.[103] *Chevron* deference would appear to be least likely to be granted in particular, as opposed to general, cases.[104] Justice Scalia, dissenting, focused instead on whether, assuming that Congress had not spoken to the question at issue, *Chevron* deference should be granted because the agency's interpretation was "authoritative."[105]

II. Congressional Intent

According to Barron and Kagan, the type of judicial review that should apply to different agency actions and the amount to which courts defer to agency decisions cannot be determined by looking at actual congressional intent, because Congress rarely states what type of judicial deference (e.g., *Chevron*, *Skidmore*) should apply to different types of agency decisions.[106] Instead, the authors suggest a type of "constructive" or "fictional" congressional intent that should apply when determining whether courts should defer to agency decisions under *Chevron*.[107] This constructive congressional intent "should arise from and reflect candid policy judgments" about institutional choice—whether, with regard to different types of agency action, agencies or courts should resolve questions of statutory interpretation and fill in legislative gaps.[108]

[98] *Mead*, 533 U.S. at 234 (quoting Christensen v. Harris County, 529 U.S. at 587).

[99] *Mead*, 533 U.S. at 227.

[100] Barron & Kagan, *supra* note 1, at 210-11.

[101] *Id.* at 210.

[102] *Id.* at 210-11.

[103] *Id.* at 211.

[104] *Id.*

[105] *Id.* at 212.

[106] Barron & Kagan, *supra* note 1, at 203, 212.

[107] *Id.* at 203, 212; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989)(discussing *Chevron* and stating that "the quest for 'genuine' legislative intent is probably a wild-goose chase" and that, as a result, rules regarding congressional intent likely "represent[] merely a fictional, presumed intent, and operate[] principally as a background rule of law against which Congress can legislate").

[108] Barron & Kagan, *supra* note 1, at 201-03.

According to the authors, in the *Chevron* decision and the years afterward, *Chevron* deference to agencies was explained and justified through several different theories: (1) the "institutional competencies" theory, which could be viewed as the Court's establishment of "a common law of judicial review responsive to institutional competencies" such as agencies' "accountability and deliberativeness" in interpretive decisionmaking; (2) the statutory theory, which connected deference to agencies with congressional delegation of responsibilities to agencies—ambiguities in statutes could be viewed as congressional delegations to agencies to explain such ambiguities in regulations; and (3) separation of powers principles, which would grant deference to agencies rather than courts for decisions that interpret ambiguous statutes.[109]

Lately, mostly as a result of the influence of Justice Scalia, the predominant theory for granting *Chevron* deference to agencies is the statutory theory.[110] According to the authors, in a law review article, Justice Scalia focused on the statutory theory as a "valid theoretical justification" for *Chevron* deference because the statutory theory connects congressional intent to deference to agency interpretations, even if congressional intent is "presumed."[111]

However, the authors assert that Justice Scalia's emphasis on congressional intent in the statutory theory as the proper justification for *Chevron* backfired with the Court's decision in *Mead*.[112] While the statutory theory concerned a "presumed" or "fictional" congressional intent that when Congress delegated the power of statutory implementation to an agency, that Congress also granted the agency interpretive power, the *Mead* Court's decision focused on actual congressional intent.[113] According to the authors, *Mead*'s emphasis on actual congressional intent reaffirms congressional control over "whether and when *Chevron* deference should operate."[114]

The authors outline and then rebut two opposing constitutional arguments questioning whether Congress has the final say over the operation of *Chevron* deference: (1) "*Chevron* arises from the Constitution because courts must refrain from 'policymaking'" and (2) "*Chevron* violates the Constitution because courts must possess dispositive power over 'legal interpretation.'"[115] With regard to the first argument, the authors state that policymaking and legal interpretation could not be exclusively assigned to the agencies or the courts because they are "intertwined" in areas of statutory ambiguities.[116] With regard to the second argument, despite any constitutional separation of the policymaking and legal interpretation functions, once Congress makes an institutional choice between agencies and courts for the resolution of statutory ambiguities, that congressional choice should lead "other constitutional interpreters," presumably the agencies and courts, to "assume" that that congressional choice "involves the exercise of appropriate authority."[117]

In the context of Congress's lack of specification as to whether *Chevron* should apply, the authors then critique *Mead* as clouding the role of the courts in determining when *Chevron* applies, particularly when Congress does not make the decision (and it most often does not) about

[109] *Id.* at 213. The authors state that this last theory was put forth "occasionally." *Id.* at 213.

[110] *Id.* at 213-14.

[111] *Id.*; Scalia, *supra* note 107, at 516-17.

[112] Barron & Kagan, *supra* note 1, at 213-14.

[113] Barron & Kagan, *supra* note 1, at 214.

[114] *Id.* at 215.

[115] *Id.*

[116] *Id.* at 215.

[117] *Id.*

whether *Chevron* should apply.[118] When Congress has considered the issue, the authors note that Congress has altered *Chevron* deference to grant interpretive power to the courts instead of the agencies.[119] The authors believe that Congress's silence on whether *Chevron* should apply is more attributable to Congress not considering the issue of whether interpretive power should be placed within agencies or courts than congressional agreement with *Chevron* deference to agency interpretations.[120]

Barron and Kagan next discuss a theory about congressional delegations to agencies to make decisions with the "force of law" that would provide the agencies with authority to interpret the law as well.[121] The theory holds that congressional delegations to an agency to take actions that have a binding effect, such as statutory commands to promulgate rules or adjudicate, should be viewed as Congress's allocation of power to the agency, as opposed to the courts, to resolve statutory ambiguities.[122] The authors then proceed to rebut this theory by: (1) stating that Congress may want judicial review of agency resolutions of statutory ambiguities, (2) offering pre-*Chevron* examples of when Congress and the courts separated agencies' ability to make laws from agencies' authority to interpret laws, and (3) proposing and offering examples of the opposite scenario—that Congress may grant an agency the authority to interpret laws without giving the agency the authority to make decisions with the force of law until courts review the agency's decision.[123]

The authors state that whether an agency action has formal procedures and general effect is not relevant to the question of actual congressional intent as to whether and when *Chevron* deference should apply.[124] They point out that Congress allows agencies to forego procedural formalities and choose between issuing general or particular decisions and state that "Congress never has suggested a differential scheme of judicial review."[125] Rather, they assert that the APA's judicial review provision "cuts across all these distinctions," which would appear to include whether the agency acts with procedural formalities or issues a general or particular decision.[126]

Barron and Kagan then use *Mead* as an illustration of their assertion that actual congressional intent is an unreliable means of determining whether *Chevron* deference should apply.[127] They note that "[t]he statute at issue in [*Mead*] contains unusual indicia of legislative intent regarding judicial review of agency decisions" in that the "most natural understanding" of a presumption of correctness for a tariff classification decision would be that the court should defer to the Customs determination regarding a specific statutory term unless the agency's determination was unreasonable under step two of *Chevron*.[128] However, according to the authors, the *Mead* Court did not view this statutory provision in the same way and reached the opposite conclusion of what

[118] *Id.* at 215-16.

[119] *Id.* at 216.

[120] *Id.*

[121] *Id.* at 216-17.

[122] *Id.*

[123] Barron & Kagan, *supra* note 1, at 218-19.

[124] *Id.* at 219-20.

[125] *Id.* at 220.

[126] *Id.* at 220; 5 U.S.C. § 706.

[127] Barron & Kagan, *supra* note 1, at 220.

[128] *Id.*

the statute appeared to require.[129] Therefore, they find that the *Mead* Court's "failure" to examine statutory language "in any sustained or coherent way bodes ill for a method of defining [when *Chevron* deference applies] that focuses on statutory interpretation."[130]

Since the authors view actual congressional intent as an unreliable method of determining whether *Chevron* deference should apply, the authors state that the Court must create a "constructive substitute" for actual congressional intent.[131] Barron and Kagan outline three options for this "constructive substitute" for actual congressional intent: (1) an "appeal to constitutional principles," such as separation of powers; (2) an assumption of congressional self-interest; and (3) an assessment by the courts of "policy judgments based on institutional attributes."[132] The authors believe that the third choice, which focuses on the Court's "own sense of sound administrative policy," is the "only workable approach" with regard to the placement of interpretive power in the hands of the agencies or the courts.[133]

The first option, an appeal to constitutional principles, indicates that Congress decides whether to grant power to resolve statutory ambiguities to the courts or agencies.[134] If Congress does not allocate this authority, the Court would be "force[d]" to look to constitutional principles, which, in turn, lead back to Congress and merely "restate the dilemma."[135] The second option, an examination of implicit congressional intent "reflecting legislative self-interest" or congressional aggrandizement, lacks theoretical and practical support and would be "impossible" to implement as a "scheme of judicial review of interpretive decisions."[136] The third option tracks *Chevron*'s approach—courts would address congressional silence on the matter of judicial review by "focus[ing] on the policy consequences" of allowing agencies or courts to make different kinds of decisions.[137] If Congress has not determined whether agencies or courts should possess interpretive authority, then, under the third option, courts would "assess how and when different institutions promote accountable and considered administrative governance," in other words, political accountability and disciplined agency decisionmaking.[138]

Returning to the formality of procedures and general versus particular applicability dichotomies, Barron and Kagan then assert that the third option underlies the Court's approach in *Mead*.[139] They view congressional intent to grant *Chevron* deference to agency actions that arise out of formal procedures as the Court's "own determination of when agencies should be 'assumed generally' to make better interpretive decisions than [the] courts."[140] They also see the Court's question of whether an agency decision is generally applicable, in that it binds more than the parties to the proceeding, as the Court's determination of when agencies should receive *Chevron*

[129] *Id.*

[130] *Id.* at 221.

[131] *Id.*

[132] Barron & Kagan, *supra* note 1, at 221-24.

[133] *Id.* at 221.

[134] *Id.* at 222.

[135] *Id.*

[136] *Id.* at 222.

[137] *Id.* at 224.

[138] *Id.*

[139] *Id.* at 224-25.

[140] *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

deference from courts.[141] The authors offer three potential rationales for the Court attributing its own policy judgments on agency actions to congressional intent: (1) highlighting Congress's ability to reverse the Court's judgment, (2) underscoring the "'judicial' nature" of the Court's actions, and (3) obscuring an attempt by the Court to increase its own power.[142] In the next section, Barron and Kagan evaluate the *Mead* Court's policy judgments that were based on institutional attributes.[143]

III. Proceduralism and Generality

The authors examine two views of the *Mead* Court's policy judgments: (1) as "case-by-case inquiry" as to whether *Chevron* deference applies, with unpredictable results, and (2) as a function of the two dichotomies of administrative law—the use of formal or informal procedures and general or particular decisionmaking—with *Chevron* deference granted to "more formal and general forms of decision making."[144]

First, the authors discuss a view of the *Mead* Court's lack of a bright line rule for when *Chevron* deference should apply as a type of "partial reversion" to the pre-*Chevron* era of judicial deference to agency decisionmaking.[145] The authors analogize this view of *Mead* as an after-the-fact balancing decision to the pre-*Chevron* deference era's examination of factors including "the scope and nature of the delegation, the importance and complexity of the interpretive question, the degree of the agency's expertise, and the thoroughness and history."[146] This view of *Mead* as an unstructured or unpredictable case-by-case inquiry into whether *Chevron* deference applies would present problems for agencies and the public in that uncertainty as to *Chevron*'s application would lead agencies to use "excess caution and wasted effort" and impact agencies' decisionmaking processes.[147] However, the authors do not agree with this view of the *Mead* decision.[148]

Next, the authors examine a second view of *Mead* as establishing a structured safe harbor for when *Chevron* deference applies to agency interpretations of ambiguities in statutes.[149] Although the APA permits the use of less formal procedures for certain types of rulemaking and adjudication, if the agency uses notice-and-comment rulemaking procedures or formal adjudication procedures, the court will apply *Chevron* deference.[150] Additionally, the more particular (or less general) an agency's decisions are, the less likely the agency is to retain the "possibility of interpretive control" or receive *Chevron* deference.[151] The authors refer to the

[141] Barron & Kagan, *supra* note 1, at 225.

[142] *Id.* at 225.

[143] Barron & Kagan, *supra* note 1, at 225.

[144] *Id.* at 225-26.

[145] *Id.* at 226.

[146] *Id.*

[147] *Id.* at 227.

[148] *Id.*

[149] *Id.* at 227-28l; *see also* Lubbers, *supra* note 4, at 512 (quoting William S. Jordan et al., *Judicial Review, in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2000-2001, at 78 (Jeffrey S. Lubbers ed., 2002)("[T]he Court created effective safe harbors for the application of *Chevron* deference where an agency makes a legal interpretation in the context of notice-and-comment rulemaking or formal adjudication. The Court, however, left the determination of *Chevron*'s applicability to other agency decisionmaking formats to case-by-case analysis.").

[150] Barron & Kagan, *supra* note 1, at 227-28.

[151] *Id.* at 228.

consequences of choosing formal procedures and general decisionmaking as "judicial channeling"—the agency's discretion in choosing formal or informal procedures for its decisionmaking would be affected by the lesser level of judicial deference that would apply if the agency uses informal procedures.[152]

The authors then evaluate the negative consequences of *Mead*'s "judicial channeling" by returning to a discussion of the two dichotomies of formal versus informal procedures and general versus particular agency actions. With regard to procedural formality, Barron and Kagan explore two arguments in favor of granting *Chevron* deference to agency decisions made using formal procedures that they define as (1) prophylactic and (2) preferential.[153] The first prophylactic, or protective, argument holds that by not granting *Chevron* deference for agencies' use of informal procedures, courts will guarantee that agencies will use formal procedures when required by law.[154] The second preferential argument posits that if agencies use formal procedures, they should receive *Chevron* deference as a benefit for more accountable and deliberative decisionmaking.[155]

The authors find that the arguments in favor of applying *Chevron* deference to agency decisions undertaken using formal procedures do not justify *Mead*, but rather (a) respond to a problem that could be solved by the courts directly examining whether an agency did not follow the proper procedures, (b) encourage the use of formal procedures when they are not mandated or when inappropriate, (c) discount the provisions of the APA that do not require formal procedures, (d) increase the chance that agencies will not delineate their views on a matter before undertaking an enforcement action, (e) fail to recognize the values of informal procedures, and (f) add to the ossification of the rulemaking process because formal procedures "consume significant agency time and resources and thereby inhibit needed regulatory (or ... deregulatory) initiatives."[156] Finally, Barron and Kagan question the inherent value of notice-and-comment procedures, noting that the increased effort that agencies place in their rulemaking proposals may lead agencies to be less responsive to concerns expressed during the rulemaking process and that the notice-and-comment process has become "a forum for competition among interest groups, rather than a means to further the public interest."[157]

Barron and Kagan then discuss *Mead*'s "suggest[ion] that informal agency action should get *Chevron* deference only (though not necessarily) when that action ... formally binds parties outside the proceeding" as an apparent assumption that general agency decisionmaking merits more deference than particular or limited agency decisionmaking.[158] The authors view the *Mead* Court's suggestion about *Chevron* deference for informal agency action as potentially supported by two reasons: that general rules (1) "force[] an agency to engage in more comprehensive analysis" or (2) "show[] a firmer commitment by the agency to the decision."[159] They then appear to rebut the first reason by finding that case-by-case decisionmaking "may reflect a deeply reasoned judgment" that proceeding case-by-case would "promote the sensible development of

[152] Barron & Kagan, *supra* note 1, at 228-29.

[153] *Id.* at 229.

[154] *Id.* at 229.

[155] *Id.* at 229.

[156] *Id.* at 229-31.

[157] *Id.* at 231-32.

[158] *Id.* at 232.

[159] Barron & Kagan, *supra* note 1, at 232-33.

the law" because the issues at hand may be of a "specialized and varying" nature or too novel for a general decision.[160] With regard to the second reason, the authors indicate that case-by-case decisionmaking "shows no more uncertainty" than a court would show if it decided to confine its holding in a particular case to narrower grounds.[161] Barron and Kagan find that *Mead*'s focus on general decisionmaking would lead to "overbroad, premature, or otherwise ill-advised judgments."[162]

Barron and Kagan would discard *Mead*'s emphasis on formal procedures and general decisionmaking because its proposed shift to such decisionmaking could be more time-consuming and expensive and because it may lead to "worse results" that do not take into account the potential for future variances.[163] Instead, they favor their alternative approach, the *Chevron* nondelegation doctrine, in which *Chevron* deference is applicable if the statutory delegatee bears responsibility for and issues the agency's decision.[164]

IV. *Chevron* and Delegation

Barron and Kagan assert that courts should apply *Chevron* deference based on who the agency actors are, rather than how the administrative process (with its formal procedures or generalities) occurred.[165] Presently, courts do not focus on internal agency decisionmaking and internal agency structure, but rather treat decisions from upper and lower-level officials in the same manner.[166] As a result, courts do not have a "doctrine that appropriately responds to and influences critical methods and norms of agency decision making."[167]

Barron and Kagan's *Chevron* nondelegation doctrine would change the *Chevron* focus to the decisionmaking official within the agency, which Barron and Kagan refer to a question of "institutional design."[168] The agency's interpretation would receive *Chevron* deference from the courts, if the statutory delegatee issues the decision under her name.[169] The agency's interpretation would receive *Skidmore* deference from the courts if the statutory delegatee subdelegated her decisionmaking authority to another agency official (other than her close advisors).[170] Thus, under the *Chevron* nondelegation doctrine, the institutional choice between whether agencies or courts should interpret and resolve ambiguous statutes would depend on the question of institutional design.[171]

[160] *Id.* at 233.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 233.
[164] *Id.* at 234.
[165] *Id.* at 234-35.
[166] *Id.*
[167] *Id.* at 235.
[168] *Id.* at 235.
[169] *Id.* at 235-36.
[170] Barron & Kagan, *supra* note 1, at 235-36.
[171] *Id.* at 235.

Characteristics That Would Trigger *Chevron* Deference

According to Barron and Kagan, the relevant "institutional design characteristics that should trigger *Chevron* deference" are: (1) the decisionmaker's identity, (2) the mode of the decision, and (3) the timing of the decision.[172] Thus, to receive *Chevron* deference under the authors' proposed *Chevron* nondelgation doctrine: (1) the decisionmaker must be the statutory delegatee, (2) the decision must be formally adopted by statutory delegatee after a meaningful review by the delegatee or her close advisors, and (3) the delegatee's decision to adopt an agency interpretation must occur before the issuance of the agency decision.[173]

Decisionmaker's Identity

With regard to the decisionmaker's identity, the authors believe that policy considerations justify limiting *Chevron* deference to only decisions made by the statutory delegatee, as opposed to a lower-level agency official.[174] The authors would allocate *Chevron* deference in this manner even though most agency statutes allow for subdelegations and "the vast majority of agency action taken outside of notice-and-comment or good-cause rulemaking or formal adjudicative processes" is issued via these lower-level agency officials.[175] They provide two reasons for focusing on the statutory delegatee: (1) that individual will likely be an upper level policy official who's "participation in administrative action will promote ... accountable and disciplined policymaking" and (2) the individual will be an "easily identifiable actor."[176]

Mode of the Decision

With regard to the mode of the decision, the statutory delegatee's decision can receive *Chevron* deference if the interpretation (1) is authored by the delegatee or is adopted and issued under her name and (2) is adopted by the delegatee after a meaningful review by the delegatee or her close advisors.[177] Barron and Kagan note that meaningful review would most likely occur any time an agency issues a decision under the name of an upper-level official, but make this review requirement explicit to ensure that the statutory delegatee is substantively involved, in order to "promote[] sound administration."[178]

However, in a point that would appear to undercut their argument, the authors do not limit meaningful review to review by the statutory delegatee only, but rather include review by "members of the delegatee's immediate staff" and "members of other offices with general supervisory responsibility."[179] The authors allow for these "senior advisors" to conduct the required meaningful review due to the "extensive responsibilities and time commitments of most

[172] *Id.* at 236.

[173] *Id.* at 236-40. As discussed earlier in the text, the authors define the "statutory delegatee" as "the officer to whom the agency's organic statute has granted authority over a given administrative action." *Id.* at 237.

[174] *Id.* at 238.

[175] *Id.* at 237-38.

[176] *Id.* at 238.

[177] Barron & Kagan, *supra* note 1, at 238-39.

[178] *Id.* at 239.

[179] *Id.*

statutory delegatees."[180] Barron and Kagan believe that there is "a sizable distinction between" the delegatee's use of senior advisors and the subdelegation of authority to a lower-level agency official.[181] The authors assert that the involvement of senior advisors would not undermine their arguments about political accountability or disciplined policymaking because the delegatee "operates less as a person than an office," with a small and loyal staff that performs many functions for the delegatee and has interests that usually coincide with the delegatee.[182] The authors analogize the statutory delegatee's staff to congressional staff. With regard to the congressional nondelegation doctrine, "[n]o one would say that the existence of legislative staffs undermines the doctrine; no one would say that congressmen's decisions do not remain congressmen's decisions in a way that matters."[183]

Timing of the Decision

With regard to the timing of the decision, the delegatee's decision to adopt an agency interpretation must occur before the agency issues its interpretation in final form.[184] The statutory delegatee cannot ratify the final agency decision after its issuance, such as in litigation.[185]

The Normative Case—A Comparison of the Congressional and *Chevron* Nondelegation Doctrines

After providing their assessment of these institutional design characteristics, the authors make a normative case for their *Chevron* nondelegation doctrine by comparing it with the congressional nondelegation doctrine. The authors state that the congressional nondelegation doctrine also "focus[es] on the identity of the decision maker"—in that case, Congress—and that both doctrines are concerned with the delegation of decisionmaking power.[186] According to Barron and Kagan, the two bases for the congressional nondelegation doctrine are (1) political accountability and (2) the "discipline of administrative action" (agency behavior) or, in other words, the coordinated or disciplined consideration and implementation of agency policy.[187] The authors assert that their *Chevron* nondelegation doctrine also would emphasize these "values of accountable and disciplined decision making."[188] The authors view these values as underlying both *Chevron* and *Mead*.[189]

Political Accountability

With regard to political accountability, Barron and Kagan argue that agencies are only politically accountable to the public, and thus capable of meriting *Chevron* deference for their decisions, if

[180] *Id.*

[181] *Id.* at 240.

[182] *Id.* at 245.

[183] *Id.*

[184] *Id.* at 240.

[185] *Id.*

[186] Barron & Kagan, *supra* note 1, at 241, 246.

[187] *Id.* at 242, 244.

[188] *Id.* at 241.

[189] *Id.*

high-level officials are involved in decisionmaking.[190] The authors list ways in which high-level agency officials are more politically accountable because their decisions are more responsive and transparent: statutory delegatees are usually appointed by the President and confirmed by the Senate, statutory delegatees are subject to presidential and congressional oversight, and statutory delegatees are publicly visible in that they are covered by the press and "attended to" by interested or regulated parties.[191] Barron and Kagan also provide another rationale for using identifiable agency actors who may not be presidential appointees—transparency. Identifying the agency officials with final responsibility for an agency interpretation offsets agencies' attempts to "diffuse and cloak responsibility" and will lead such officials to pay more attention to the politics and the public when making decisions.[192]

Discipline of Agency Action

With regard to the discipline of agency action, the *Chevron* nondelegation doctrine's application of judicial deference to only decisions made by the statutory delegatee would result in centralized decisionmaking as well as more thoroughly considered agency decisions and enhanced coherence in the consideration of agency policy.[193] The authors believe that meaningful review by the statutory delegatee will place "greater significance" on work performed at the lower levels in the agency, cause lower-level agency employees to be more prepared, and result in improved agency actions due to increased deliberation and consideration.[194] Barron and Kagan also believe that upper-level agency review leads to consistency or coherence in agency actions because such review would ensure agency decisions do not deviate from agency policies.[195] Deference based on meaningful review and decisionmaking by top agency officials would also "promote the integration of diverse agency actions into a coordinated stream of policy aimed at achieving set objectives."[196]

After comparing their *Chevron* nondelegation doctrine to the congressional nondelegation doctrine, Barron and Kagan next outline two arguments against the congressional nondelegation doctrine. Viewing these arguments as two potential arguments against their own *Chevron* nondelegation doctrine, they rebut each assertion: (1) the nondelegation doctrine centralizes decisiomaking authority and (2) courts are unable to enforce the nondelegation doctrine.[197]

Centralization

An argument against the centralization of decisionmaking authority is that it is impracticable in the congressional nondelegation doctrine context because Congress cannot decide all matters itself, and if it did, "its decisions often would reflect deficient knowledge and experience."[198] But when centralization of decisionmaking authority is examined in the *Chevron* nondelegation

[190] *Id.* at 242-43.

[191] *Id.*

[192] *Id.* at 243-44.

[193] *Id.* at 244.

[194] Barron & Kagan, *supra* note 1, at 244.

[195] *Id.* at 244-45.

[196] *Id.* at 245.

[197] *Id.* at 246-57.

[198] *Id.* at 246-47.

doctrine context, it has different effects than the congressional nondelegation doctrine for two reasons. First, the *Chevron* nondelegation doctrine does not prevent internal delegations, but rather affects the type of deference (*Chevron* or *Skidmore*) that such delegations are afforded by courts.[199] Second, high-level agency officials can more easily comply with a nondelegation doctrine than can Congress, while at the same time "leaving most of the effort associated with policymaking in the bureaucracy."[200]

In other words, while the nondelegation doctrine would place a greater burden on Congress to take actions or "do nothing" due to the constitutional requirements for legislative action, Barron and Kagan argue that under the *Chevron* nondelegation doctrine it is more feasible for the delegatee to monitor the agency.[201] The authors point to the agency's more limited decisions and functions, the delegatee's ability as a single administrator or a board or commission to act "with greater expedition," and the delegatee's choice of various processes to meet the *Chevron* nondelegation doctrine's requirement for meaningful review of agency action.[202]

Additionally, Barron and Kagan argue that centralization of decisionmaking authority would not "diminish[] the quality of agency decisionmaking by subordinating the knowledge, experience, and professionalism of lower-level employees."[203] The authors acknowledge that agency decisionmaking may become more political as a result of increased political accountability, but find that the benefits of centralization outweigh agencies' bureaucratic qualities—"excesses of tradition and inertia" that may "blind them to new and beneficial policy approaches."[204] The authors also view their *Chevron* nondelegation doctrine as a method of deference that would encourage exchanges between upper and lower-level agency perspectives because statutory delegatees will still rely on lower-level agency employees to provide options for agency policies and decisions.[205]

Even if the *Chevron* nondelegation doctrine's centralization of decisionmaking authority did "suppress expertise in a way more hazardous than [the authors] acknowledge," they find that their approach would be "self-limiting."[206] By "self-limiting," the authors mean that the agency's need to issue timely decisions and the burdens imposed by conducting upper-level review would preclude all agency decisions from undergoing such review.[207] The authors conclude that the *Chevron* nondelegation doctrine's centralizing effects will impact cases "for which judicial deference seems most important," which likely involve agency expertise.[208]

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[199] *Id.* at 247.

[200] *Id.*

[201] *Id.* at 247-48.

[202] *Id.*

[203] Barron & Kagan, *supra* note 1, at 247-49.

[204] *Id.* Some of these agency qualities include "their size and scope, their strong institutional cultures, their attachment to past practice, the complexity of the issues they decide, the distribution of information within them, the interests of their permanent employees in avoiding political influence, and the existence of long-term relationships between employees and outside parties." *Id.* at 249.

[205] *Id.* at 249.

[206] *Id.* at 250.

[207] *Id.*

[208] *Id.*

Feasibility of Judicial Enforcement

The argument against the congressional nondelegation doctrine, in terms of feasibility of judicial enforcement, is that courts "cannot distinguish in a principled way between permissible and impermissible delegations" and, as a result, should not apply the doctrine.[209] However, the authors assert that the *Chevron* nondelegation doctrine could be more effectively implemented than its congressional counterpart for two reasons.[210] First, courts can mandate that the statutory delegatee formally adopt the agency's action by publishing the decision and its rationale as her own interpretation.[211] The authors state that courts can enforce this requirement by checking for the delegatee's name on the agency's decision and "all its supporting materials."[212] Second, courts would not need to enforce the meaningful review requirement because the authors believe it is "self-enforcing."[213]

Barron and Kagan acknowledge that court enforcement of the meaningful review requirement would present difficulties and would appear to cause courts to (1) evaluate the quality of the delegatee's meaningful review without measurable standards of what would constitute a sufficient review or (2) avoid enforcement of the meaningful review requirement altogether, which could lead statutory delegatees to rubberstamp agency interpretations.[214] However, the authors find that institutional and political incentives will ensure that the statutory delegatee does not rubberstamp the agency's action, but rather conducts the required meaningful review.[215]

The authors believe that the statutory delegatee would be more likely to fail to rubberstamp the agency's decision than adopt the interpretation after conducting a meaningful review.[216] One of the reasons they offer for this proposition is that the statutory delegatee's "sense of professional responsibility" may counsel her against indiscriminately adopting agency interpretations.[217] Another reason that the statutory delegatee would choose not to adopt an agency interpretation is that a subdelegatee's decision may still be upheld by a court, albeit without *Chevron* deference.[218] Additionally, the statutory delegatee would face political risks if she formally adopted an "ill-considered, aberrant, or unpopular decision," such as criticism from the President, Congress, interest groups, or the media, because adoption would make it more difficult for the delegatee to deny involvement in the interpretation's issuance.[219] Finally, different branches of an agency may pressure the statutory delegatee not to formally adopt an interpretation that then would receive *Chevron* deference from the courts without meeting the meaningful review requirement.[220] In this last scenario, internal divisions of the agency may either not want to follow the processes

[209] *Id.*

[210] *Id.* at 251.

[211] *Id.*

[212] *Id.* The authors compare their proposed enforcement of the formal adoption requirement to the courts' enforcement of the APA requirement that the final decisionmaker in an administrative adjudication adopt the decision and its statement of "findings and conclusions, and the reasons or basis therefore." *Id.* at 251-52.

[213] Barron & Kagan, *supra* note 1, at 252.

[214] *Id.*

[215] *Id.* at 251-52.

[216] *Id.* at 253.

[217] *Id.* at 252.

[218] *Id.* at 253.

[219] *Id.* at 253-55.

[220] *Id.* at 255.

necessary to receive *Chevron* deference or may want to distance their own division from the agency's interpretation in later litigation.[221]

The authors then discuss how the courts should address attempts by statutory delegatees to rubberstamp agency decisions.[222] If a court finds that the statutory delegatee "consistently has approved low-level decisions without providing for their review," the court should withhold *Chevron* deference.[223] However, the authors believe that the courts should not "investigat[e] and dissect[] an agency's decision-making processes with respect to particular decisions."[224] The authors attempt to strike a balance between protecting the *Chevron* nondelegation doctrine from "claims of wholesale evasion" and a case-by-case review of decisionmaking by the courts.[225]

In sum, the *Chevron* nondelegation doctrine would be a standard that would make a court's grant of *Chevron* deference contingent on the meaningful review of and the responsibility assumed for agency decisionmaking by a high-level agency official.[226] Courts would not need to intensively review the "internal agency decision-making processes" in each case but could rather depend on political and institutional incentives to enforce the *Chevron* nondelegation doctrine.[227] The authors argue that *courts* would shape agency decisionmaking by relying on and recognizing the nonlegal (the political and institutional) attributes that impact agency decisionmaking.[228]

V. *Mead* and Delegation

The authors then apply their *Chevron* nondelegation doctrine to *Mead* and note that both the majority and dissenting opinions discuss the position of the agency's internal decisionmaker.[229] The majority opinion examines the decentralized nature of the 46 Customs offices and their ability to tariff classification rulings.[230] However, the majority opinion takes the opposite approach of what the *Chevron* nondelegation doctrine would suggest, as it "strongly indicates that formal decisions issued by diverse, low-level officials are more worthy of deference than informal decisions of a single high-level official."[231] The dissenting opinion seems to find this result "quite absurd," as "decisions specifically committed to ... high-level officers," such as a Secretary of a department, would not receive *Chevron* deference but "decisions by an administrative law judge" would receive *Chevron* deference.[232]

The dissent would instead grant *Chevron* deference to "authoritative" agency interpretations, where the authoritativeness of an agency decision depends on the subsequent defense of the

[221] *Id.*

[222] *Id.* at 255-56.

[223] Barron & Kagan, *supra* note 1, at 255.

[224] *Id.* at 256.

[225] *Id.* at 255-56.

[226] *Id.* at 256.

[227] *Id.*

[228] *Id.* at 256-57.

[229] *Id.* at 257.

[230] *Id.* at 257-58.

[231] *Id.* at 258.

[232] *Id.*

agency's interpretation in litigation.[233] The authors argue that such after-the-fact ratification of an agency decision would not "substitute for predecision participation in advancing the values of accountability and consideration in agency decisionmaking."[234] Rather, postdecisional ratification would (1) almost always occur, (2) be unlikely to influence the agency's interpretation, (3) make it harder to change an agency's decision due to greater resistance in the agency or a decline in employee morale, and (4) result in greater "procedural costs and litigation risks."[235] The authors find that the dissent's apparent focus on agency structure also does not meet the *Chevron* nondelegation test they set forward.[236]

Barron and Kagan then outline how *Mead* would have been decided under the *Chevron* nondelegation doctrine. Although they "concede[] there is some uncertainty about who this decisionmaker is," they would attribute the statutory delegation to the head of Customs.[237] As the Customs Commissioner did not issue the tariff classification ruling or adopt it after a meaningful review, the agency's decision lacks "the necessary high-level input to qualify the ruling for *Chevron* deference."[238] The authors state that the decision "still may qualify for *Skidmore* deference."[239]

As the authors acknowledge, their *Chevron* nondelegation doctrine "would preclude most rulings" of the ""numerous" and "mundane" kind issued in *Mead* from receiving *Chevron* deference. [240] Some of these rulings could warrant *Chevron* deference if the statutory delegatee chose to become involved or addressed the issue after it was referred to her attention.[241] Barron and Kagan indicate such involvement by the statutory delegatee may occur if the issue (1) "is especially nettlesome or sensitive," (2) impacts several areas of the agency, (3) "calls for a creative decision-making process," or (4) merits her involvement in order to receive *Chevron* deference from a court under the *Chevron* nondelegation doctrine.[242] Barron and Kagan's approach would apply regardless of the two traditional administrative law dichotomies—the use of formal or informal procedures and the general or particular applicability of the decision.[243] However, agency actions would still need to comport with required APA procedures in order to be valid agency actions and receive *Chevron* deference.[244]

VI. Conclusion

Barron and Kagan conclude that the Court's present focus on formal procedures and general decisionmaking, rather than promoting political accountability and disciplined agency action,

[233] *Id.*

[234] Barron & Kagan, *supra* note 1, at 259.

[235] *Id.*

[236] *Id.* at 260.

[237] *Id.* at 261.

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.* at 262.

[242] *Id.*

[243] *Id.*

[244] *Id.* at 263.

actually "threatens to increase the ossification and inflexibility of the agency process."[245] Further, the Court denies *Chevron* deference to agency interpretations that "properly should reside in agency hands," as opposed to the Court's, and grants deference to agency interpretations that "should be subject to independent scrutiny."[246] The authors believe that their *Chevron* nondelegation doctrine approach would promote accountability and disciplined agency decisionmaking without succumbing to the congressional nondelegation doctrine's flaws of overcentralization and the inability to be judicially enforced.[247] Barron and Kagan believe that "[a]ny full understanding of the agency process must take into account ... institutional elements" such as the distribution of authority between different divisions of the agency, budgetary resources, and the agency's relationship with the President.[248]

Commentary on and Critiques of the *Chevron* Nondelegation Doctrine

This section explores select discussions and citations of Barron and Kagan's article. The article has been cited 80 times according to a search on LexisNexis: twice by courts, 77 times in law reviews and journals, and two times in an amicus brief for *Cuomo v. Clearing House Association* filed on behalf of several Members of the House of Representatives.[249] The article has been referred to as an example of the "voluminous normative literature on how courts should allocate interpretive authority between themselves and administrative agencies."[250] The article's focus on the decisionmaker's identity as one trigger for *Chevron* deference has been called "a significant departure from, and extension of," the Court's decisions in *Chevron* and *Mead*.[251] The piece also has been cited along with other literature for the proposition that "presumptions of congressional intent are simply judicially created proxies or fictions."[252] Two of the most substantive discussions of *Chevron's Nondelegation Doctrine* evaluate it as one of several proposals that would alter the Court's current application of *Chevron* and *Mead*.

[245] Barron & Kagan, *supra* note 1, at 264.

[246] *Id.*

[247] *Id.*

[248] *Id.* at 265.

[249] 557 U.S. __ (2009).

[250] Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1042 n.23 (2006).

[251] Ashley S. Miller, *Kagan's Environmental Record Scant, but Administrative Law Views Could Limit Deference to Environmental Regulators*, Sive Paget & Riesel P.C. (May 13, 2010, 1:20PM), http://blog.sprlaw.com/2010/05/kagans-environmental-record-scant-but-administrative-law-views-could-limit-deference-to-regulators/.

[252] Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 786 n.157 (2007); Barron & Kagan, *supra* note 1, at 203 ("Given the difficulty of determining actual congressional intent, some version of constructive—or perhaps more frankly said, fictional—intent must operate in judicial efforts to delineate the scope of *Chevron*.... we aver that this construction should arise from and reflect candid policy judgments, of the kind evident in *Chevron* itself, about the allocation of interpretive authority between administrators and judges with respect to various kinds of agency action.").

Scholarship

A 2003 law review article by University of Chicago law professor Adrian Vermeule called Barron and Kagan's proposal "notable" and "a potentially important reframing of the *Mead* Court's project."[253] However, Vermeule finds that "the normative case for the [*Chevron* nondelegation doctrine] is undertheorized."[254] He believes that the *Chevron* nondelegation doctrine presents the same "conundrums" as the congressional nondelegation doctrine because it "appeals to the same norm of political accountability."[255] Specifically, Vermeule takes issue with the very notions that the authors assert the *Chevron* nondelegation is designed to promote—political accountability and disciplined policymaking.[256]

With regard to political accountability, he says that "ordinary" (presumably congressional) politics is viewed as sufficiently accountable to allow for the use of policy tools other than delegation, and so he does not see the need for a special *Chevron* nondelegation rule in the agency context.[257] Vermeule states that "legislators and agency heads may be held accountable for the very decision to make the delegation," and indeed, Barron and Kagan discuss an instance where both the Secretary of Labor and the Administrator of the Occupational, Safety, and Health Administration (OSHA), which is located in the Department of Labor, responded to "a firestorm of protest from individuals, companies, members of Congress, and even the White House" that was generated by a legal interpretation in a letter signed by a lower-level OSHA employee. [258] Vermeule also finds no empirical support for Barron and Kagan's claim that agency decisions issued by low-level employees are less transparent than "substantive policy decisions"—those presumably issued by high-level agency officials under Barron and Kagan's theory.

Vermeule addresses the *Chevron* nondelegation doctrine's promotion of disciplined agency policymaking in the context of judicial enforceability. He asserts that agency heads will easily skirt the *Chevron* nondelegation doctrine by delegating decisionmaking authority but continuing to retain legal authority.[259] He finds that courts will be unable to determine when the agency head has rubberstamped a lower-level official's decision and, as a result, the agency will receive *Chevron* deference for those delegated decisions.[260] Noting that Barron and Kagan acknowledge this potential for rubberstamping by agency officials, but that they believe agency heads choose "to avoid nominal responsibility" for decisions of lower-level officials rather than receive *Chevron* deference, Vermeule finds that Barron and Kagan "undermin[e] the significance of their own proposal."[261] That is, if *Chevron* deference for agency interpretations is not desirable, then why are the authors concerned with providing a substitute for *Mead*?[262] Yet if *Chevron* deference

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[253] Adrian Vermeule, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 359 (2003).

[254] *Id.*

[255] *Id. But see* Barron & Kagan, *supra* note 1, at 246-57 ("[O]ur proposal to reformulate *Chevron* as a kind of internal nondelegation doctrine would not fall prey to the same concerns" of excessive centralization of decisionmaking authority and the inability to be enforced by the courts.").

[256] Vermeule, *supra* note 253, at 359.

[257] *Id.*

[258] *Id.*; Barron & Kagan, *supra* note 1, at 253-54.

[259] Vermeule, *supra* note 253, at 360.

[260] *Id.*

[261] *Id.*

[262] *Id.*

for agency interpretations is desirable enough that agency officials would rubberstamp lower-level decisions in contravention of the *Chevron* nondelegation doctrine, then review of those decisions by the courts would be "just as costly and unmanageable a judicial inquiry as the excessively refined *Mead* inquiry it is designed to replace."[263]

A later 2006 law review article by Amy Wildermuth commented on both *Chevron's Nondelegation Doctrine* and Vermeule's assessment of it.[264] Wildermuth finds Vermeule's "most important critique" of Barron and Kagan's article to be that the *Chevron* nondelegation doctrine may lead to rubberstamping by the statutory delegatee of decisions made by lower-level agency officials, thus "circumventing the requirement of personal responsibility for the larger benefit afforded by triggering *Chevron* deference."[265] Wildermuth then discusses Barron and Kagan's proposed solution to address this "bad behavior,"[266] the denial of *Chevron* deference in cases where there has been a "wholesale evasion" of the statutory delegatee's required conduct of a meaningful review of the agency action prior to formally adopting it as her own.[267] Wildermuth finds that their solution "would not require much in terms of a court's resources," as it "sets the bar very high."[268] However, she posits that their solution "suffers from its simplicity" in that statutory delegatees could easily "create what appears to be more review in order to avoid a finding of misbehavior," such as a system where the agency head signed a particular number of opinion letters each day instead of adopting a significant number of opinion letters in a short time.[269]

Another law review article[270] briefly compares Barron and Kagan's article with her other 2001 law review article, *Presidential Administration*.[271] The authors of that law review view her *Chevron's Nondelegation Doctrine* article as "retracting" the limitation that she had argued for in *Presidential Administration*. In *Presidential Administration*, she would apply *Chevron* deference to "issues for which there has been significant White House input."[272] In *Chevron's Nondelegation Doctrine*, the authors view her as asserting "a much broader application for *Chevron*," as she and Barron would apply "*Chevron* to any interpretation adopted by an agency head appointed by the President."[273]

[263] *Id.*

[264] Amy J. Wildermuth, *Symposium: The Jurisprudence of Justice Stevens: Panel III: Administrative Law/Statutory Interpretation: Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1901-02 (2006).

[265] *Id.* at 1901.

[266] *Id.*

[267] Barron & Kagan, *supra* note 1, at 256.

[268] Wildermuth, *supra* note 264, at 1902.

[269] *Id.*

[270] 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. REV. 1083 (2008).

[271] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[272] Eskridge & Baer, *supra* note 270, at 1175 n. 292.

[273] *Id.*

Legal Blogs

There does not appear to be much analysis of *Chevron's Nondelegation Doctrine* on legal blogs. One posting on *The Volokh Conspiracy*, which is generally viewed as a libertarian or conservative blog, called Barron and Kagan's approach "one that shares some commonalities with Justice Scalia's approach to *Chevron* deference questions—but also one that is in tension with principles underlying the Court's recent (and, in [the author's view], generally sensible) administrative law jurisprudence."[274] A subsequent posting by the same author further explained that he viewed Barron and Kagan's theory as sharing some of the same concerns as Justice Scalia regarding separation of powers: "The desire to have policy-laden questions of statutory interpretation made by politically accountable officials rather than judges."[275] The author views the rest of the present Court as "ground[ing] *Chevron* deference in Congressional intent, and [as] more process oriented."[276]

Another posting on an environmental law firm's blog discussed the possible effects of Barron and Kagan's approach, if it were to be adopted by the Supreme Court: (1) a "strengthen[ing of] the presumption that a head administrator's decision, based on legitimate exercise of their authority, is sound"; (2) a "weaken[ing of] the authority of lower agency officials, holding them to a higher standard"; (3) an "increase [in] the administrative workload for higher-level decisionmakers in the agency"; and (4) "the beneficial effect of reducing the potential for ad-hoc decisionmaking at lower levels within an agency, when clear interpretations have not been provided from higher officials."[277] The change proposed by Barron and Kagan would be significant, the author argues, since "the vast majority of agency action" that is presently issued by lower-level agency officials would potentially be "second-guess[ed]" by courts under the *Skidmore* deference standard.[278]

Additional Considerations

Vacancies in the Statutory Delegatee Position

It is worth noting that while the *Chevron* nondelegation doctrine addresses the levels of deference that decisions issued by high- and lower-level agency officials may be granted, Barron and Kagan do not address how their doctrine would respond to a vacancy in the position of the statutory delegatee or the level of deference that a court may grant to an officer who is acting as the head of an agency in a temporary capacity (for example, pursuant to the Vacancies Reform Act of 1998). The ability of an agency to receive *Chevron* deference may differ in the case of a vacancy in a position filled by a single statutory delegatee, to which the Vacancies Act would apply, as opposed to vacancies on multi-member boards or commissions, to which the Vacancies Act does

[274] Jonathan H. Adler, *Kagan's Scholarship*, The Volokh Conspiracy (May 10, 2010, 8:31AM), http://volokh.com/2010/05/10/kagans-scholarship/.

[275] Jonathan H. Adler, *Kagan's Scholarship*, The Volokh Conspiracy (May 10, 2010, comment 3, 11:17AM), http://volokh.com/2010/05/10/kagans-scholarship/.

[276] *Id.*

[277] Ashley S. Miller, *Kagan's Environmental Record Scant, but Administrative Law Views Could Limit Deference to Environmental Regulators*, Sive Paget & Riesel P.C. (May 13, 2010, 1:20PM), http://blog.sprlaw.com/2010/05/kagans-environmental-record-scant-but-administrative-law-views-could-limit-deference-to-regulators/.

[278] *Id.* (quoting Barron & Kagan, *supra* note 1, at 237).

not apply and which typically require a quorum and simple majority of members to issue binding decisions.[279]

A vacancy in an advice and consent position, such as the head of a single administrator agency, may be filled temporarily by an acting official. Under Barron and Kagan's *Chevron* nondelegation doctrine, one argument for such an official receiving *Chevron* deference for her decisions would be that the temporary official could presumably perform the same functions as the statutory delegatee (formally adopting an agency decision after meaningful review). Another potential argument for granting *Chevron* deference to such temporary officials under the *Chevron* nondelegation doctrine would be that there are a limited number of individuals that could be appointed pursuant to the Vacancies Act. These individuals are "higher level officers," some of whom have gone through the confirmation process for their position, and they are authorized to perform the functions and duties of the office, albeit temporarily. A potential argument for denying *Chevron* deference under the *Chevron* nondelegation doctrine and potentially granting only *Skidmore* deference is that acting official would only serve in the position of the statutory delegatee for the limited time of the appointment.

Vacancies on multi-member boards that result in the lack of a quorum generally would prevent the agency from issuing binding decisions at the board or commission level. For example, the Federal Election Commission (FEC), which has six commissioners, had five vacancies for approximately a six-month period in 2008, and, as a result, lacked a quorum.[280] These vacancies prevented the agency from issuing advisory opinions and beginning audits of political committees. The FEC was also unable to move forward on enforcement matters because each

[279] The Vacancies Reform Act of 1998 (Vacancies Act) altered the statutory mechanism designed to preserve and protect the Senate's constitutional role in the confirmation process. 5 U.S.C. §§ 3345-49d. The original version of the Vacancies Act was enacted in 1868 (15 Stat. 158 (1868)) and the legislative roots of such provisions can be traced back to a 1795 enactment limiting the time a temporary assignee could hold office to six months (1 Stat. 415. (1795)). The Vacancies Act provides the exclusive means for authorizing the temporary filling of advice and consent positions unless otherwise expressly provided in law, or unless the President exercises his authority under the Recess Appointments Clause. 5 U.S.C. § 3347 declares that §§ 3345-46 are the exclusive means for authorizing the temporary filling of advice and consent positions unless: (1) Congress expressly provides by law that the President, a court, or the head of an executive department may designate an officer or employee to temporarily perform the functions or duties of a specific office; or (2) Congress designates by law a particular officer or employee to temporarily serve; or (3) the President exercises his recess appointment power pursuant to article II, sec. 2, cl. 3 of the Constitution. The Act establishes which individuals may be designated by the President to temporarily perform the duties and functions of vacant office and the length of time a designee may serve.

Under the Vacancies Act, the President has only three options when an advice and consent position in any executive agency becomes vacant as a result of death, resignation, or other inability of an officer to perform the functions and duties of the office. 5 U.S.C. § 3345(a). The President may: (1) allow the first assistant to the office of such an officer to assume the functions and duties of the office; (2) direct a person "who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate," to perform the functions and duties of the office; or (3) select any officer or employee of the subject agency who has been with that agency for at least 90 days of the 365 days preceding the vacancy and is at least at the minimum GS-15 grade level. 5 U.S.C. §§ 3345(a)(1)-(3). Pursuant to 5 U.S.C. § 3345(b)(1), a person may not temporarily serve if that person did not, in the previous 365 days, serve as a first assistant, or was first assistant for less than 90 days, and the President submits a nomination of that person to the Senate. A person who is serving in an acting capacity may temporarily hold such office for 210 days beginning on the date the vacancy occurs, 5 U.S.C § 3346, though there are exceptions under which the 210 day period may be suspended thereby extending an acting officer's time in office. *Id.* This footnote was written by Vivian Chu, Legislative Attorney, CRS.

[280] Matthew Mosk, *Vacancies on FEC Filled As 5 Win Senate Approval*, Wash. Post (June 25, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/06/24/AR2008062401328.html.

stage of an enforcement matter (reason to believe, investigation, probable cause, and conciliation) requires the votes of four Commissioners.

In another example, the operations of the five member National Labor Relations Board (NLRB) were impacted in a 27-month period spanning from 2008 to 2010 due to the vacancies in three of the five seats.[281] Before the Board's membership was reduced from four to three members, the Board delegated its authority to a three-member group.[282] The recess appointment of one of the three members then expired, and the Board only had two members who, the Board argued, constituted a quorum of the three member group; these two members decided almost 600 cases.[283] In *New Process Steel, L.P. v NLRB*, the Supreme Court said that while it was neither "insensitive to the Board's understandable desire to keep its doors open despite vacancies," nor "unaware of the costs that delay imposes on the litigants," the proper reading of the Board's quorum requirements and the delegation clause "requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board."[284]

One result of such vacancies may be that all agency decisions issued by lower-level employees at multi-member boards or commissions during this time would be eligible for *Skidmore* deference. One potential way to avoid such a scenario would be to allow *Chevron* deference for agency decisions issued by other upper level individuals, who would include, according to Barron and Kagan, senior advisors to the statutory delegatees, such as chiefs of staff or special assistants, as well as officials with supervisory authority, such as the agency general counsel.[285] Yet enabling senior advisors or supervisory officials to issue decisions that could receive *Chevron* deference while the board or commission itself could not issue binding decisions, would seem counterintuitive, as such officials may be less politically accountable.

Involvement of the Public in the Decisionmaking Process

The *Chevron* nondelegation doctrine would appear to take the focus away from an agency's use of formal procedures that involve the public in the process, such as notice-and-comment rulemaking, in favor of a shift to the political accountability of the statutory delegatee after-the-fact for agency decisions that have already been issued. In one sense, this shift could arguably make the agency as a whole less responsive to the public and more reliant on its own expertise since the majority of agency decisions would be issued by lower-level officials.[286] Additionally, if the statutory delegatee repeatedly declines to formally adopt agency interpretations as her own, the decisions that the statutory delegatee does adopt may be limited in scope and/or effect, as the statutory delegatee may avoid taking responsibility for controversial decisions. This shift also could raise the question of the beneficial value of assigning *Chevron* deference to decisions issued following formal procedures (although this arguably leads to the ossification of the

[281] New Process Steel, L.P. v. National Labor Relations Board, No. 08-1457, slip op. at 3 (U.S. June 17, 2010); 560 U.S. __ (2010), http://www.supremecourt.gov/opinions/09pdf/08-1457.pdf.

[282] Slip op. at 2.

[283] Slip op. at 2-3.

[284] Slip op. at 13-14.

[285] Barron & Kagan, *supra* note 1, at 239.

[286] *But see id.* at 231-32 (stating that "[t]he more courts have required agencies to give detailed notice of proposed regulatory action to interest groups, the more pressure agencies have felt to complete the bulk of their work prior to the onset of the rulemaking process ... [and] the less flexibility they show during rulemaking to respond to the concerns of the affected parties").

rulemaking process) as opposed to granting *Chevron* deference based on the decisionmaker's identity under the *Chevron* nondelegation doctrine.[287] Would an agency be more accountable to the public when it has solicited input prior to a binding decision or when the statutory delegatee or her close advisors have conducted their own meaningful review and are called before the White House or Congress to justify their decision after the fact?

Agency or Court as the Decisionmaker

The Court is arguably the decisionmaker under *Skidmore*, "independently interpret[ing] the statute[] with the agency's interpretation as one factor among many that will affect [the court's] conclusion."[288] Barron and Kagan's theory applying *Chevron* deference, in which the agency is arguably the decisionmaker, only to agency actions formally adopted after meaningful review by the statutory delegatee would arguably result in a major reformulation of the Court's jurisprudence regarding which agency actions receive *Chevron* deference.[289] However, their theory arguably allows for the agency, rather than the courts, to control when it remains the decisionmaker under *Chevron* if the statutory delegatee meets the tests they set forth. This would appear to be the case if only courts do not undertake a case-by-case review of when the statutory delegatee has conducted a seemingly standardless meaningful review prior to formally adopting an agency decision. For example, a court could find that the delegatee has not undertaken an adequate review and instead consider the agency's interpretation under *Skidmore*'s less deferential standard.

"Mass of Agency Action" Receiving *Skidmore* Deference

One possible implication of the "mass of agency action[s]" issued by lower-level employees only potentially receiving *Skidmore* deference could be that the courts may decide more cases without deferring to the agency's interpretation.[290] This could theoretically lead to more uncertainty among regulated parties and the agency as to how much deference courts will accord particular decisions.[291] An increase in the number of court decisions on agency decisions by lower-level officials that could potentially receive *Skidmore* deference could occur at the same time that the courts potentially lessen their scrutiny of high-level agency decisions if, as Barron and Kagan argue, courts should only act to address rubberstamping if the statutory delegatee has always failed to conduct a meaningful review of the agency's action.[292]

[287] *See id.* at 230-31.

[288] Lubbers, *supra* note 4, at 520 (citing Michael Herz, ch. 5.05, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 130-31 (John F. Duffy & Michael Herz eds. 2005)). Some commentators argue that *Skidmore* deference "really isn't a 'deference' doctrine at all because courts often defer only if they happen to agree with the agency's views." Kathryn A. Watts, *Judicial Review*, i*n* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 200-2009, at 91 (Jeffrey S. Lubbers, ed., 2010).

[289] *See* Lubbers, *supra* note 4, at 520 (citing Herz, *supra* note 288).

[290] Barron & Kagan, *supra* note 1, at 207-08.

[291] *Id.* at 261.

[292] *Id.* at 255-56.

Interim Final Rules

Another potential issue of the *Chevron* nondelegation doctrine concerns the timing of the decision. As the delegatee's decision to adopt an agency interpretation must occur before the agency issues its interpretation in final form, this may raise a question of what level of deference a statutory delegatee's adoption of an "interim final rule," which is issued pursuant to a good cause finding but without notice and comment, would receive.[293] Barron and Kagan state that the statutory delegatee cannot ratify the final agency decision after its issuance.[294] Interim final rules have binding effect if validly promulgated, although agencies may modify such rules to take into account post-promulgation comments from the public.

Additional Specificity in Congressional Delegations to Agencies

Although Congress is a more democratic and politically accountable institution than an administrative agency, it may decide to delegate its legislative power to an executive branch agency for a variety of reasons, for example: (1) Efficiency—Congress may decide that it would take too long to draft a bill with all of the particulars required for a program or rule or that agencies may be better equipped to resolve issues or address changing needs that arise with implementation of a law; (2) Expertise—Congress may not necessarily have the specialized or technical expertise that the agency would have at its disposal; (3) Ability to modify the law—Congress can overturn agency rulemakings and make other changes to the law if it does not agree with the agency's actions taken pursuant to the delegation; (4) Transfer of responsibility and potential for blame—Congress may decide that politically difficult, unpopular, or untenable decisions are better left to an agency; and (5) Inability to Reach Consensus—Congress may experience greater difficulty in achieving consensus among its Members than would an agency headed by a single administrator or a multi-member board or commission.[295]

Congress may decide against delegating interpretive authority to agencies for myriad reasons: (1) agencies may give greater attention to special interests because these groups may be more organized than the general public, particularly in the notice-and-comment rulemaking process; (2) agencies may affect the marketplace or act in ways that may be viewed as attempts to retain or increase their power; and (3) required rules and procedures may make agency action slow and inefficient. If Congress decides to delegate its legislative authority to an agency to interpret a statute, Congress can control the delegation of such authority by writing broad or narrow statutes, eliminating procedural requirements, and maintaining a supervisory role over the power it has given to the agencies.

If the *Chevron* nondelegation doctrine were adopted, its emphasis on granting *Chevron* deference to high-level agency decisions, which the statutory delegatee has adopted as her own after a meaningful review, could potentially lead Congress to become more specific in its delegations, to ensure that the voluminous amount of agency decisionmaking that occurs at the lower levels of an agency also receives *Chevron* deference. For example, rather than delegate a decision that requires input from the Food and Drug Administration's Center for Drug Evaluation and Research

[293] *Id.* at 240.

[294] *Id.*

[295] *See, e.g.*, Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036-37 (2006).

(CDER) to the Secretary of Health and Human Services, Congress could consider delegating authority to the Commissioner of Food and Drugs, or even the head of CDER.

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