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## Substantially Deferring to Revenue Rulings After Mead

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## Substantially Deferring to Revenue Rulings After *Mead*

### I. INTRODUCTION

Death and taxes—these, according to the modern quip, are the only two certainties in life. While the necessity of paying taxes will remain a constant in life, the amount, when, to whom, or for what period one pays is far from certain.<sup>1</sup> The questions arising from the Internal Revenue Code and Internal Revenue Service (IRS) regulations may be almost as constant as the fact that the number of people who live will die. In an effort to clarify various uncertainties in the tax code and accompanying regulations for the benefit of the public and IRS personnel, the IRS began issuing revenue rulings, which interpret various complex and ambiguous issues of tax law.<sup>2</sup> Traditionally, courts granted revenue rulings considerable deference. Two of the Supreme Court’s recent decisions regarding deference to administrative interpretations of law, however, call into question the level of deference courts should accord revenue rulings.

Charged with the important responsibility of overseeing the revenue of the United States,<sup>3</sup> the IRS has employed various means

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1. See, e.g., MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 3.01 (rev. 2d ed. 2003) (explaining that the complexities of the Tax Code require “[t]axpayers and others” to seek guidance from the IRS and detailing the various ways in which the IRS provides clarifications of the Internal Revenue Code).

2. See, e.g., *id.* ¶ 3.03; Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 845–46 (1992) (citing Rev. Rul. 2, 1953-1 C.B. 484); see also *infra* Part II.

3. The importance of revenue gathering for the United States can hardly be overstated and is found paramount in the powers given to Congress under the Constitution. See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . .”); *id.* amend. XVI; see also Shu-Yi Oei, *Rethinking the Jurisdiction of Bankruptcy Courts over Post-Confirmation Federal Tax Liabilities: Towards a New Jurisprudence of 11 U.S.C. § 505*, 19 AKRON TAX J. 49, 65 (2004) (noting the great importance of the federal tax system). The Articles of Confederation’s lack of power (or insufficient power) over taxation was an important reason behind the Constitutional Convention and formation of our current Constitution. See generally ROGER H. BROWN, *REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION* (1993); E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790* (1961). The IRS has had charge of the fiscal needs

to administer its exponentially growing duty.<sup>4</sup> Revenue rulings are a primary means by which the IRS administers the tax laws of the United States,<sup>5</sup> being an efficient way for the IRS to pronounce official interpretations of “the internal revenue laws and related statutes, treaties, and regulations.”<sup>6</sup>

Because of the IRS’s important duty and the official nature of revenue rulings, many courts historically gave these IRS legal interpretations considerable deference,<sup>7</sup> especially after *Chevron*

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of the United States since 1862. *See* SALTZMAN, *supra* note 1, ¶ 1.01[2]. Although its duties from the Civil War until the beginning of the twentieth century were minor in comparison to contemporary responsibilities, beginning in 1913 and with the enactment of the Sixteenth Amendment to the Constitution, the IRS increased in responsibility and complexity to meet the various needs of the country and to fulfill its obligation as administrator of the United States’ revenue. *See id.*

4. *See* SALTZMAN, *supra* note 1, ¶ 1.07 (summarizing the many ways in which the IRS performs its duties as an administrative body, including rule making, adjudication, and informal actions such as tests, inspections, claims processing, negotiations, and informal advice).

5. *See* *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir. 1998) (explaining that revenue rulings are one of four ways in which the IRS interprets the tax code); 26 C.F.R. § 601.601(d)(2)(iii) (2005) (stating the purposes of revenue rulings as “promot[ing] correct and uniform application of the tax laws . . . assist[ing] taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures”); SALTZMAN, *supra* note 1, ¶ 3.03[1] (explaining that revenue rulings are the official form for IRS pronouncements made “whenever appropriate in the interest of sound tax administration” (quoting 26 C.F.R. § 601.201(a)(1))).

6. Rev. Proc. 89-14, 1989-1 C.B. 814; *see also* *Galler, supra* note 2, at 842 (explaining that revenue rulings are a “frequent[] and expeditious[]” way for the IRS to interpret the revenue laws).

7. *See, e.g.,* *Amato v. W. Union Int’l, Inc.*, 773 F.2d 1402, 1411 (2d Cir. 1985) (citing various cases dating back to 1979 for the proposition that revenue rulings were entitled to great deference and carried “the force of legal precedents”); *Carle Found. v. United States*, 611 F.2d 1192, 1195 (7th Cir. 1979) (giving rulings weight); *Comm’r v. O. Liquidating Corp.*, 292 F.2d 225, 230–31 (3d Cir. 1961) (giving revenue rulings great weight to the point of being dispositive); *see also* John V. Coverdale, *Chevron’s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings after Mead*, 55 ADMIN. L. REV. 39, 79–80 (2003) (arguing against granting revenue rulings *Chevron* deference, but nonetheless conceding that a few cases before *Chevron* and “virtually all the courts” after “moved toward giving revenue rulings significant deference”). *But see* Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1062 (1995) (stating that almost every federal circuit had “issued contradictory opinions regarding the weight of revenue rulings,” and noting that the tax courts have neither historically nor contemporarily given revenue rulings any weight whatsoever).

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*U.S.A., Inc. v. Natural Resources Defense Council*.<sup>8</sup> The Supreme Court's recent decisions in *Christensen v. Harris County*<sup>9</sup> and *United States v. Mead Corp.*,<sup>10</sup> however, potentially eliminate any actual deference previously accorded these IRS pronouncements.<sup>11</sup> The language in these cases potentially indicates that courts should accord revenue rulings mere respect under *Skidmore v. Swift Co.*<sup>12</sup> *Skidmore's* respect is not, however, actual deference.

Courts have long given deference to administrative agency interpretations of law,<sup>13</sup> including revenue rulings, because of the

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8. 467 U.S. 837 (1984).

9. 529 U.S. 576 (2000).

10. 533 U.S. 218 (2001).

11. See Coverdale, *supra* note 7, at 89–91 (arguing that after the Court's decisions in *Christensen* and *Mead*, revenue rulings are entitled only to *Skidmore* deference, that is, only the deference warranted by the rulings' persuasiveness); see also *infra*, Part IV.A.

12. 323 U.S. 134 (1944).

13. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1, at 108–09 (1994) (listing a line of cases such as *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), that date back to the beginning of the last century and deal with deference to agency pronouncements); Ronald J. Krotoszynski, *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 736 (2002) (explaining that for decades before the Court's decision in *Chevron*, which was decided in 1984, courts gave deference to agency interpretations of law (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (laying the foundation for deferring to agencies because of agency expertise, among other things))).

Throughout, this Comment uses the terms “interpretation of law” and “application of law” interchangeably to refer to administrative agencies' interpretation law given specific facts and issues confronting the agency and to the practice of setting and defining administrative policy. In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court reaffirmed that pure interpretations of law or statutory construction remain the province of courts, and no deference results from agency interpretations of pure issues of law. *Id.* at 447–48 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” (quoting *Chevron*, 467 U.S. at 843 n.9 (citations omitted))). However, deference does arise from agency applications of law, which involve interpretation, or from agency pronouncements of policy through like situations:

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like “well-founded fear” which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling “any gap left, implicitly or explicitly, by Congress,” the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.

complexity of regulatory schemes, the expertise developed in administrative bodies, and the congressional desire to invest agencies with the authority and duty of administering the law.<sup>14</sup> The standards by which to judge that deference and when that deference is warranted have changed over time.<sup>15</sup> In *Chevron U.S.A., Inc. v. Natural Resource Defense Council*, however, the Supreme Court made this stance toward administrative interpretations of law uniform—courts must defer to administrative agencies’ interpretations of law when the statute is ambiguous and the interpretation is reasonable.<sup>16</sup> Under this approach, most courts granted revenue rulings substantial deference,<sup>17</sup> even though revenue rulings are less formal than traditional Administrative Procedure Act (APA) procedures for rulemaking.<sup>18</sup>

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*Id.* at 448 (citations omitted) (explaining *Chevron*, 467 U.S. at 843).

14. *See, e.g., Skidmore*, 323 U.S. 134; *see also Chevron*, 467 U.S. at 844 (explaining various reasons for according deference to revenue rulings, but specifying congressional intent to invest administrative agencies with authority to make policy decisions); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Corn Prods. Co. v. Comm’r*, 350 U.S. 46, 52–53 (1955) (giving deference to an interpretation that had lasted three congressional reenactments); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 42 (1995) (explaining that before the Court’s *Chevron* decision and “[u]nder traditional deference doctrine, the weight courts gave to agency interpretations depended on many factors, including: the perceived expertise of the agency, the technical complexity of the subject matter, the consistency with which the agency had maintained the view expressed in the rule being considered, and the amount of time that passed between the enactment of the statute and the promulgation of the rule that interpreted it”) (collecting various cases).

15. *See infra* Part III.

16. 467 U.S. at 842–44, 865–66; *see also Coverdale*, *supra* note 14, at 42–43 (explaining that *Chevron* altered the basis for deference, a basis that rests on uniform characteristics, i.e., policymaking authority invested in administrative agencies).

17. *See infra* Part III.

18. *See, e.g., 5 U.S.C. § 553(b)* (2000). Rulemaking under the APA generally requires formal procedures such as notice-and-comment rulemaking or adjudications. Notice-and-comment procedures, for example, require proposed rules be published in the Federal Register and include various notices describing the rule, the place where “public rule making proceedings” will take place, the authority for the rule, and a general description. *Id.* Once notice is given, agencies then give the public an opportunity to participate in the rulemaking process:

[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

*Id.* § 553(c).

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The Supreme Court recently altered course, however, concerning when *Chevron* deference is due to administrative interpretations of law. In *Christensen v. Harris County*<sup>19</sup> and *United States v. Mead Corp.*,<sup>20</sup> the Court limited *Chevron* by requiring that the legal interpretation for which one seeks *Chevron*-level deference “carry the force of law.”<sup>21</sup> While the Court did not clearly explain what it meant by “carry the force of law,” it did point to three ways in which an agency interpretation of law may receive substantial *Chevron*-level deference. The Supreme Court explained that delegation, and therefore authority, may arise “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.”<sup>22</sup> Thus, arguably more informal interpretations of law by an administrative agency—that is, those interpretations that do not follow from formal agency rulemaking—are no longer entitled to *Chevron* deference because they do not carry the force of law.<sup>23</sup> In both *Christensen* and *Mead* the Court explained, nonetheless, that when a more informal pronouncement by an agency fails to receive *Chevron* deference, it may still warrant deference under *Skidmore*,<sup>24</sup> which grants deference to an agency interpretation to the degree that a court finds the pronouncement persuasive.<sup>25</sup>

On its face, this recent general development has obfuscated the degree of deference that revenue rulings receive.<sup>26</sup> Although *Mead* did not directly deal with the level of deference to give revenue rulings, lower courts have, in applying *Mead*, granted revenue rulings

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19. 529 U.S. 576 (2000).

20. 533 U.S. 218 (2001).

21. *Id.* at 221, 226–27; *Christensen*, 529 U.S. at 587.

22. *Mead*, 533 U.S. at 227.

23. See Krotoszynski, *supra* note 13, at 737 (explaining the import of *Christensen* and *Mead* as looking to the formality of the agency pronouncement); see also *infra* Part III.

24. *Mead*, 533 U.S. at 234–35; *Christensen*, 529 U.S. at 587 (noting that “interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*”).

25. *Mead*, 533 U.S. at 235 (explaining that more informal interpretations receive “respect proportional to [their] ‘power to persuade’”); see also *infra* Part III.

26. See Coverdale, *supra* note 7, at 89–91 (arguing that after *Mead*, revenue rulings are only entitled to deference according to their persuasiveness); cf. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting) (explaining that the majority’s opinion in *Mead* works a fundamental change in the law concerning deference to administrative interpretations of law).

only *Skidmore's* persuasive deference. In essence, after *Mead* lower courts have robbed revenue rulings of the actual and substantial deference they deserve by giving these pronouncements mere *Skidmore* respect.<sup>27</sup> While courts may find rulings persuasive, they do not “defer” to them.

Robbing revenue rulings of any claim to actual deference will diminish the IRS's ability to inform taxpayers and IRS personnel of the law and ultimately to set IRS policy and ensure voluntary compliance with revenue laws. While courts may use the term “deference” when examining revenue rulings, courts can now simply conduct their own interpretation of the law under the guise of *Skidmore* respect. Such judicial discretion prevents the IRS from slowly crafting its policy through interpretations of the law that Congress has tasked it with administering. More importantly, the IRS can no longer authoritatively explain difficult issues of tax law. The practical effect of *Christensen* and *Mead* is that courts have become the real interpreters of tax law, and revenue rulings have become the IRS's hope, its aspiration. The result is a weakened administrative body responsible for the revenue of the United States. Additionally, weakening the deference accorded revenue rulings undermines a primary goal of the United States' tax laws, a goal that revenue rulings are designed to advance—*voluntary* compliance.<sup>28</sup>

27. See *infra* Part IV; see also Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 179 (2002).

28. See 26 C.F.R. § 601.601(d)(2)(iii) (2005) (stating that the purpose behind revenue rulings is to “assist taxpayers in attaining maximum voluntary compliance”). Voluntary compliance is an essential aspect of the success of the tax system of the United States. See, e.g., H.R. REP. NO. 94-658, at 7 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2897, 2902 (Tax Reform Act of 1976). Congress specifically noted that

[f]or decades, the tax system of the United States has been envied by other nations of the world. It collects . . . billion[s] in revenues each year . . . with relatively little administrative burden and in a manner that has not prevented steady economic growth over most of the postwar period. This success is based on a high degree of voluntary compliance with the tax laws since only a small percentage of tax returns are audited each year, and voluntary compliance depends on taxpayers' understanding the relevant tax laws and forms and believing that others are also paying their fair share of the overall tax burden. It is essential for the nation's political and economic stability that the tax system be both simple and equitable, characteristics which are, of course, also desirable for their own sake.

*Id.*

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Contrary to the lower deference courts and commentators have accorded these pronouncements after *Mead*,<sup>29</sup> revenue rulings ought to receive substantial and actual deference. Rather than mere *Skidmore* respect, revenue rulings deserve *Chevron* deference under a category of procedures *Mead* contemplated as providing sufficient indicia that Congress delegated authority to the agency. Revenue rulings provide precisely the type of fair and deliberate process sufficient to warrant substantial deference after *Mead*.

Part II details what revenue rulings are and the function they serve. Part III explains the lengthy legal background of court deference to administrative interpretations of law and specifically court deference to revenue rulings. Part IV argues for substantial deference to revenue rulings. Rather than a mere search for congressional intent, *Mead's* inquiry, at base, requires a sufficiently fair and deliberate procedure in issuing agency interpretations of law to warrant *Chevron* deference. While the outer limits of which procedures qualify for heightened deference remain uncertain, revenue rulings provide the type of formal, fair, and deliberate procedure *Mead* requires for courts to grant substantial deference. Part V offers a brief conclusion.

## II. REVENUE RULINGS

Revenue rulings are an essential and regular means for the IRS to interpret, explain, and clarify the revenue code and its regulations,<sup>30</sup> even if some courts struggle with the deference the rulings deserve.<sup>31</sup>

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29. See *infra* Part III.E.

30. See 26 C.F.R. § 601.601(d)(2)(i)(a) (“A Revenue Ruling is an official interpretation by the Service that has been published in the Internal Revenue Bulletin.”); Rev. Proc. 89-14, 1989-1 C.B. 814; Galler, *supra* note 2, at 842 (“[T]he IRS may promulgate revenue rulings frequently and expeditiously. These pronouncements play a vital role in statutory administration . . .”).

31. See *Fed. Nat. Mortg. Ass’n v. United States*, 379 F.3d 1303, 1308 (Fed. Cir. 2004) (noting that the amount of deference to give revenue rulings is an open question); *Ammex, Inc. v. United States*, 367 F.3d 530, 535 (6th Cir. 2004) (questioning whether revenue rulings are entitled to *Chevron* deference). See also *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219–20 (2001) (declining to decide whether revenue rulings are entitled to deference); *Davis v. United States*, 495 U.S. 472, 485 (1990) (giving some deference but not deciding how much). Compare *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 173, 181 (6th Cir. 2003) (holding that revenue rulings do not deserve *Chevron* deference after *Mead* and *Christensen*), with *IHC Health Plans, Inc. v. Comm’r*, 325 F.3d 1188, 1194 (10th Cir.



Generally, the IRS interprets the tax code and, sometimes, its own regulations in “one of four ways,”<sup>32</sup> which are “(1) regulations issued pursuant to a specific directive from Congress, (2) regulations issued under the IRS’s general authority to interpret the tax laws, (3) revenue rulings, and (4) private letter rulings.”<sup>33</sup> Each of these methods operates under slightly different congressional authority, issues under different processes, and warrants different standards of deference.<sup>34</sup>

The most formal interpretation or issuance from the IRS appears as a “regulation[] issued pursuant to a specific directive.”<sup>35</sup> Throughout the tax code, Congress has inserted various “specific congressional instructions regarding rulemaking.”<sup>36</sup> Under these specific directives, the IRS issues regulations to guide the administration of the tax code. These specific regulations issue with full notice-and-comment procedures as required for rule making under the Administrative Procedures Act.<sup>37</sup> Courts generally give

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2003) (stating that the court does give deference to revenue rulings, but not stating to what degree).

32. *Limited, Inc. v. Comm’r*, 286 F.3d 324, 337 (6th Cir. 2002) (citing *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir. 1998)).

33. *Bankers Life & Cas. Co.*, 142 F.3d at 978.

34. *See id.* at 978 (“Each of these categories often receives different deference from the courts.”). *See generally* Coverdale, *supra* note 7, at 39 (arguing that after *Mead* and *Christensen* these should receive different deference standards); Coverdale, *supra* note 14, at 35 (arguing that even under *Chevron*, the various IRS legal interpretations should receive differing levels of deference); Galler, *supra* note 2, at 844 (arguing that revenue rulings should receive no deference, as distinguished from specific or even general authority regulations).

35. *Bankers Life & Cas. Co.*, 142 F.3d at 978; *see also* Coverdale, *supra* note 7, at 66–76.

36. *Bankers Life & Cas. Co.*, 142 F.3d at 978. Professor Coverdale surmises that [t]he Internal Revenue Code contains more than 1000 specific grants of regulatory authority. Many of these concern procedural matters such as the manner of making various elections open to taxpayers. More than 250 others authorize the Secretary of the Treasury to prescribe appropriate regulations to achieve the purposes of specific provisions, or to prevent avoidance of certain statutory provisions. A sizeable number authorize the Secretary to establish tax policy in areas where Congress was unable or unwilling to establish policy by statute.

Coverdale, *supra* note 7, at 66.

37. *Bankers Life & Cas. Co.*, 142 F.3d at 978; Coverdale, *supra* note 7, at 67; Galler, *supra* note 2, at 842; *see also* 5 U.S.C. § 553(b) (2000). The Administrative Procedure Act provides the following:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or

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these regulations complete deference unless they are unreasonable, arbitrary, or capricious.<sup>38</sup>

The IRS also issues regulations under a general grant of authority by Congress.<sup>39</sup> Congress has provided that the IRS has authority to issue regulations pursuant to its power to “prescribe all needful rules and regulations.”<sup>40</sup> Unlike specific regulations, these general directive regulations do not necessarily require full notice and comment for issuance, although the IRS generally follows such formal APA processes.<sup>41</sup> General regulations usually receive a high level of deference, akin to specific regulations, although the exact amount of deference accorded them is not firmly established.<sup>42</sup>

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otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

*Id.*

38. Before *Mead*, there was a push for providing *Chevron* deference to these regulations. See Coverdale, *supra* note 14 at 53. Even after *Mead* and *Christensen*, courts are likely to give regulations under a specific congressional directive full *Chevron* deference, as they clearly carry the force of law. See Coverdale, *supra* note 7, at 77–78 (explaining that courts generally gave *Chevron* deference during the *Chevron* era and arguing under *Mead* they should have *Chevron* deference as well); Coverdale, *supra* note 14, at 53.

39. See *Bankers Life & Cas. Co.*, 142 F.3d at 978; Coverdale, *supra* note 7, at 65–68.

40. I.R.C. § 7805(a) (West 2004); see also Coverdale, *supra* note 7, at 67.

(a) Authorization.—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

I.R.C. § 7805(a).

41. Coverdale, *supra* note 7, at 67 (“The Treasury claims that it is not required to use notice-and-comment procedure for promulgating general authority regulations because they qualify for the interpretive rule exception of section 553(b)(A) of the Administrative Procedure Act. Nonetheless, the Treasury uses notice and comment for all final general authority regulations. They are published in the Federal Register and subsequently codified in the Code of Federal Regulations.” (citing Receipt of Multiple Notices With Respect to Incorrect Taxpayer Identification Numbers, 67 Fed. Reg. 44,579, 44,580-81 (proposed July 3, 2002))); see also *Bankers Life & Cas. Co.*, 142 F.3d at 978 (citing *First Chi. NBD Corp. v. Comm’r*, 135 F.3d 457 (7th Cir. 1998)).

42. Coverdale, *supra* note 7, at 75–76 (suggesting that under “classic tax deference standards” courts would defer to these general authority regulations, even if court inquiries

Additionally, the IRS issues letter rulings to private parties. While specific and general directives, as well as revenue rulings, have general applicability to a variety of parties, “letter rulings apply only to the parties who specifically request them.”<sup>43</sup> These letter rulings may not be used as precedent by either courts or the IRS and receive little or no deference.<sup>44</sup>

If the four IRS formats were viewed in a continuum, revenue rulings would be positioned between general authority regulations and letter rulings, though revenue rulings are much more akin to general regulations.<sup>45</sup> While revenue rulings “do not have the force and effect of Treasury Department regulations,”<sup>46</sup> they are “an official interpretation by the Service which has been published in the Internal Revenue Bulletin.”<sup>47</sup> Additionally, they “provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.”<sup>48</sup> Thus, revenue rulings are “authoritative and binding on the IRS.”<sup>49</sup> Though not regulations, these rulings “seem similar to regulations” and often provide the IRS’s official stance and interpretation of the law that it has been assigned to administer.<sup>50</sup>

Basically, revenue rulings are legal interpretations of the tax code—that is, the sole concern of revenue rulings is legal interpretation or exposition of tax laws.<sup>51</sup> Revenue rulings “are

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were more searching, but arguing that under *Christensen* and *Mead*, general authority regulations should not receive full *Chevron* deference).

43. *Bankers Life & Cas. Co.*, 142 F.3d at 978.

44. 26 C.F.R. § 301.6110-7(b) (2004) (“A written determination may not be used or cited as precedent . . .”); SALTZMAN, *supra* note 1, ¶ 3.03[1] (“[A] letter ruling’s legal conclusions are statutorily prohibited from being used as precedent.”); *see also Bankers Life & Cas. Co.*, 142 F.3d at 978.

45. *Limited, Inc. v. Comm’r*, 286 F.3d 324, 337 (6th Cir. 2002) (“Revenue rulings do not apply as broadly as regulations, nor as narrowly as private letter rulings.”); *Bankers Life & Cas. Co.*, 142 F.3d at 978 (“In the middle, between letter rulings and specific authority regulations, are general authority regulations and revenue rulings.”).

46. Rev. Proc. 89-14, 1989-1 C.B. 814.

47. 26 C.F.R. §601.201(a)(6) (2002); *see also* Rev. Proc. 89-14, 1989-1 C.B. 814; SALTZMAN, *supra* note 1, ¶ 3.03[1].

48. Rev. Proc. 89-14, 1989-1 C.B. 814; SALTZMAN, *supra* note 1, ¶ 3.03[1].

49. *Limited, Inc.*, 286 F.3d at 337 (citing *Bankers Life & Cas. Co.*, 142 F.3d at 978).

50. SALTZMAN, *supra* note 1, ¶ 3.03[1].

51. Rev. Proc. 89-14, 1989-1 C.B. 814. Revenue rulings are defined as “an official interpretation by the Service of the internal revenue *laws* and related *statutes, treaties, and regulations.*” *Id.* (emphasis added). Also, Revenue Procedure 89-14, 6.01(4) explains that the

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typically the IRS's response to a hypothetical situation."<sup>52</sup> The IRS considers how the law applies to hypothetical facts or situations and produces a reasoned judgment concerning the proper outcome.<sup>53</sup> In these rulings the IRS usually provides "a simplified set of facts, . . . summarize[s] the applicable legal provisions, . . . set[s] forth the holdings of leading cases" and "present[s] the Internal Revenue Service's position on how the law applies to the facts."<sup>54</sup> These "[r]evenue rulings arise from various sources, including rulings to taxpayers, technical advice to district offices, court decisions, suggestions from tax practitioner groups, publications, etc."<sup>55</sup>

The issuance of revenue rulings is highly centralized, involving various levels of review. Only the national office issues revenue rulings.<sup>56</sup> The Association Chief Counsel and Assistant Commissioner "are responsible for the preparation and appropriate referral for publication of revenue rulings reflecting interpretations of substantive tax law."<sup>57</sup> Specifically, "[t]he Internal Revenue Service Office of Associate Chief Counsel (Technical) drafts Revenue Rulings" after which various officers review each ruling until the Chief Counsel, Commissioner, and Treasury Department review and approve of them.<sup>58</sup> Ultimately, the "same level of the IRS and the

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*Cumulative Bulletin*, in which revenue rulings appear, answers "substantive tax law[]" issues except "[d]etermination[] of fact rather than interpretations of law." Rev. Proc. 89-14, 1989-1 C.B. 814; see also SALTZMAN, *supra* note 1, ¶ 3.03[1] (stating that revenue rulings explain "how the tax law applies to a specific set of facts").

52. *Limited, Inc.*, 286 F.3d at 337.

53. See *Bankers Life & Cas. Co.*, 142 F.3d at 978; SALTZMAN, *supra* note 1, ¶ 3.03[2].

54. Coverdale, *supra* note 7, at 70.

55. Rev. Proc. 89-14, 1989-1 C.B. 814; see also SALTZMAN, *supra* note 1, ¶ 3.03[2]; Galler, *supra* note 2, at 845.

56. 26 CFR §601.201(a)(6).

57. Rev. Proc. 89-14, 1989-1 C.B. 814.

58. Coverdale, *supra* note 14, at 79 (citing MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 3.03[2][a] (2d ed. 1991)); Galler, *supra* note 2, at 847-48 & nn.44-45). Saltzman explains the basic process for issuing revenue rulings:

1. A project is assigned to an attorney in the appropriate Division in the office of the Associate Chief Counsel (Technical).
2. After research, a draft ruling is prepared in the prescribed format, along with a Background Information Note (BIN).
3. The draft is given an in-depth review at the Branch level. This review can be performed by the Branch Chief, the Senior Technical Advisor, or the Assistant to the Branch Chief.

Treasury Department” that reviews “Treasury regulations” also writes and reviews revenue rulings.<sup>59</sup>

The current practice of publishing revenue rulings came “in response to criticism from Congress and private practitioners.”<sup>60</sup> Critics had argued that by not publishing revenue rulings, the IRS bred “favoritism,” “protected . . . influence,” and disadvantaged taxpayers who entered into disputes with the IRS.<sup>61</sup> Thus, in 1953, the IRS instituted a policy of publishing these rulings. They originally had three purposes: to “inform field personnel of precedents or guiding positions,” to “provide a permanent, indexed reference to IRS positions,” and to “enable the public to review interagency communications that the IRS uses as precedents or guides.”<sup>62</sup> Currently, the IRS publishes revenue rulings for the purpose of

promot[ing] correct and uniform application of the tax laws by Internal Revenue Service employees and . . . assist[ing] taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers.<sup>63</sup>

Ultimately, revenue rulings are official, though more informal, legal interpretations by the IRS. They provide the IRS’s official stance on interpretations of the Internal Revenue Code and IRS

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4. The ruling is reviewed by the Associate Chief Counsel (Litigation) to determine whether the position is consistent with the Service’s litigating position in pending cases.

5. The ruling is scheduled for Assistant Counsel Review, where it undergoes its strongest scrutiny.

6. The ruling is simultaneously reviewed by the Associate Chief Counsel (Technical) and the Chief Counsel and receives approval.

7. The proposed ruling is simultaneously reviewed by the Commissioner and by the Treasury.

8. The ruling is published in the Internal Revenue Bulletin.

SALTZMAN, *supra* note 1, ¶ 3.03[2][a].

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

60. *Galler*, *supra* note 2, at 845 (citing Norman A. Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1, 37 (1954)).

61. *Id.*

62. *Id.* at 845–46 (citing Rev. Rul. 2, 1953-1 C.B. 484).

63. 26 C.F.R. § 601.601(d)(2)(iii) (1987); *see also* *Galler*, *supra* note 2, at 846.

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regulations. Additionally, the format of these rulings allows the IRS to issue them expeditiously and efficiently for the benefit of the Service and taxpayers. While they result from various layers of review, they are not burdened by the time consuming nature of more formal rulemaking procedures.

## III. DEFERENCE TO ADMINISTRATIVE AGENCY APPLICATIONS OF LAW AND SPECIFICALLY TO IRS REVENUE RULINGS

The deference that courts give agency legal interpretations has evolved over the last few decades. Prior to the Supreme Court's pronouncement in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the amount of deference a court gave an agency's legal interpretation varied depending on the statute the agency was interpreting.<sup>64</sup> In *Chevron*, the Court announced a general position on deferring to an agency's legal interpretation—when confronted with an ambiguous or silent statute on a particular issue, courts should defer to an agency's reasonable interpretation of the statute the agency administers.<sup>65</sup> Only fifteen years after *Chevron*, the Court altered its stance yet again in *Christensen v. Harris County*<sup>66</sup> and *United States v. Mead, Corp.*<sup>67</sup> by allowing courts to give *Chevron*-level deference to agency interpretations *only* when Congress intended agency interpretations to have the force of law.

Although the deference courts gave IRS revenue rulings increased or decreased somewhat with the ebb and flow of deference afforded agencies, courts typically erred on the side of giving revenue rulings substantial deference. The Court's decisions in *Christensen* and *Mead*, however, threaten the traditional deference accorded revenue rulings by changing the baseline requirements for substantial deference. Although the Supreme Court has not specified what level of deference revenue rulings merit, lower courts and commentators have generally found that while revenue rulings do not qualify for *Chevron* deference, they may qualify for *Skidmore's* respect. Under

64. See DAVIS & PIERCE, *supra* note 13, § 3.1, at 107–09 (explaining the inadequate state of the law before the Court's decision in *Chevron*); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

65. 467 U.S. 837, 842–43 (1984).

66. 529 U.S. 576 (2000).

67. 533 U.S. 218 (2001).

*Skidmore* courts attribute deference to agency interpretations of law to the extent that the interpretation is persuasive.<sup>68</sup> The amount of deference courts should attribute to revenue rulings under *Skidmore*, however, remains vague and uncertain, and essentially robs them of actual deference.

Part A lays out the deference courts gave revenue rulings in the pre-*Chevron* era. Part B explains the *Chevron* case and the deference generally afforded administrative agency applications of law under it, followed by a short explanation of the deference revenue rulings received under *Chevron*. Part C details the Court's recent pronouncements in *Christensen* and *Mead* and the resurrection of *Skidmore*. Part D outlines the deference that courts of appeals and district courts have afforded revenue rulings after *Christensen* and *Mead*. Ultimately, the Court has made several alterations in how, when, and to what degree courts defer to administrative interpretations of law on particular issues—trends that have guided the amount of deference courts generally afforded revenue rulings. In the end, the Court's recent decisions, as lower courts have applied them, have facially robbed revenue rulings of any actual deference they may have once enjoyed.

#### A. Pre-Chevron Treatment of Revenue Rulings

Prior to the Court's pronouncement of general deference to administrative interpretations of law in *Chevron*, courts accorded various degrees of deference to revenue rulings. During this era, almost every federal circuit had "issued contradictory opinions regarding the weight of revenue rulings."<sup>69</sup> Some decisions attributed great weight to revenue rulings as dispositive to the determination of the case.<sup>70</sup> In other decisions, courts merely accorded revenue rulings "weight" and thus closely examined those rulings.<sup>71</sup> Some courts simply relied on revenue rulings as a means to

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68. *Mead*, 533 U.S. at 235; see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

69. Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1062 (1995).

70. See, e.g., *Comm'r v. O. Liquidating Corp.*, 292 F.2d 225, 230-31 (3d Cir. 1961).

71. See, e.g., *Carle Found. v. United States*, 611 F.2d 1192, 1195 (7th Cir. 1979).

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assist in the interpretation of the relevant statutory provision.<sup>72</sup> Other courts attributed no weight to revenue rulings.<sup>73</sup> The Tax Court, in particular, has consistently stated that revenue rulings deserve no deference from courts as they merely represent the litigating position of the IRS.<sup>74</sup>

Ultimately, court deference to revenue rulings before the *Chevron* era was inconsistent at best.<sup>75</sup> Part of the problem arose from the nature of revenue rulings—they are the official, yet informal, application of tax law provided by the agency charged with the enforcement and administration of taxes. While the level of deference courts attributed revenue rulings remained somewhat uncertain, a trend emerged after the Court's opinion in *Chevron*

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72. See, e.g., *Xerox Corp. v. United States*, 656 F.2d 659, 671 n.20 (Ct. Cl. 1981) (explaining that revenue rulings are not binding but do influence the course of a decision).

73. See, e.g., *Stubbs, Overbeck & Assocs., v. United States*, 445 F.2d 1142, 1146–47 (5th Cir. 1971) (explaining that revenue rulings are merely the opinions of a lawyer and therefore have the same influence as any opinion by a lawyer); *Miller v. Comm'r*, 327 F.2d 846, 850 (2d Cir. 1964); *Kaiser v. United States*, 262 F.2d 367, 370 (7th Cir. 1958) (citing *United States v. Bennett*, 186 F.2d 407, 410 (5th Cir. 1951) (suggesting that revenue rulings represent only the opinion of a lawyer)).

74. *Galler*, *supra* note 70, at 1037–39 & n.57 (collecting cases).

75. After reviewing the historical practice of according revenue rulings various deference levels, some commentators have concluded that courts merely used revenue rulings alternatively between the “decision-making and decision-justifying functions of judging.” See Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 643 (1996). Essentially, deference as a judicial doctrine was an “inherently indeterminate and manipulable doctrine,” and therefore courts could use or not use rulings in a variety of ways “to justify decisions reached on the basis” of other factors. *Id.* at 658–59 (discussing the theories of Sidney A. Shapiro, Richard E. Levy, and Richard J. Pierce, Jr.); see also Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110 (1995). Yet other scholars have argued that courts were fairly consistent in not attributing deference to revenue rulings before the Court's decision in *Chevron*. These scholars, however, merely looked at the position of the Tax Court, *Galler*, *supra* note 2, at 849–50, and later changed course to suggest that the level of deference accorded revenue rulings has been far from consistent or clear during this time. See *Galler*, *supra* note 70, at 1062 & n.124 (citing the same precedent in an earlier article but coming to the conclusion that rather than suggesting consistency, the cases before *Chevron* generally suggest inconsistency, contradiction, or ambiguity). See also Caron, *supra*, for a rather scathing attack on Professor *Galler*'s conclusions concerning the consistency of courts' deference to revenue rulings. Professor Caron explains that the real reason for the differing positions on deference arises from the way in which courts use deference as a judicial tool as opposed to an actual doctrine. See Caron, *supra*.



under which courts typically deferred to revenue rulings to a substantial degree.

### B. Chevron

Prior to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>76</sup> courts accorded deference to administrative agencies primarily on a statute by statute basis<sup>77</sup> and generally only when it was clear from the statute or legislative history “that Congress intended to grant the agency broad authority to make policy.”<sup>78</sup> The Supreme Court’s opinion in *Chevron* revolutionized the deference standard<sup>79</sup> and stated clearly that courts should defer to agency interpretations of the agency’s governing statute when that statute is ambiguous or silent on a particular issue and when the agency’s construction of the governing statute is reasonable.<sup>80</sup> In other words, courts should not substitute their own interpretation for an agency’s unless the agency’s interpretation was unreasonable or arbitrary or capricious.<sup>81</sup> While some courts after *Chevron* treated revenue rulings with less deference than that accorded to other agency pronouncements under *Chevron*, most courts concluded that revenue rulings were entitled to actual and substantial deference as official interpretations by the IRS.

#### 1. The decision

In *Chevron*, the Supreme Court reversed the U.S. Court of Appeals for the D.C. Circuit and provided a general stance of deference to agency pronouncements that interpret the statute that

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76. 467 U.S. 837 (1984).

77. See Scalia, *supra* note 64, at 516; DAVIS & PIERCE, *supra* note 13, § 3.1, at 107–09.

78. Coverdale, *supra* note 7, at 42–43 (citing *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130–31 (1944)); see also Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106 (1944).

79. See DAVIS & PIERCE, *supra* note 13, § 3.2 (explaining that *Chevron* marked a change from prior practice and “is one of the most important decisions in the history of administrative law”); see also Krotoszynski, *supra* note 13, at 739 (arguing that *Chevron* “relied upon a novel theory of implied delegation, rather than agency expertise”); Scalia, *supra* note 64, at 512 (stating that *Chevron* is perhaps the “most important [decision] in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*”).

80. *Chevron*, 467 U.S. at 843–44.

81. *Id.*

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the agency is tasked with administering.<sup>82</sup> According to the Court, “[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that definition.”<sup>83</sup>

To assist lower courts in the future, the Court provided a two-step analysis for deciding when a court should give deference to an agency’s interpretation “of the statute which it administers.”<sup>84</sup> First, a court must determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>85</sup> If the court determines that the statute is “silent or ambiguous with respect to the specific issue,” the court must, second, determine “whether the agency’s answer is based on a permissible construction of the statute.”<sup>86</sup>

The crux of the Supreme Court’s decision rests on the idea that “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress.”<sup>87</sup> Because gap-filling, in essence, represents

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82. *Id.* at 842–45.

83. *Id.* at 842.

84. *Id.* *Chevron*’s analysis is affectionately referred to as the “two-step.” See DAVIS & PIERCE, *supra* note 13, at § 3.2, at 109–12; Coverdale, *supra* note 7, at 42 (explaining that Kenneth Starr dubbed the *Chevron* analysis the “*Chevron* ‘two-step’” (citing Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 287–88 (1986))).

85. *Chevron*, 467 U.S. at 842–43.

86. *Id.* at 843. The Court noted that this is completely different from the normal judicial function: “If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.” *Id.*

87. *Id.*; see also Krotoszynski, *supra* note 13, at 742 (explaining that the thrust and importance of the *Chevron* decision was that it “relocated the basis for judicial deference from expertise to an implied delegation of lawmaking power”). Gaps left for administrative agencies to fill, according to the Court, develop either “implicitly or explicitly.” *Chevron*, 467 U.S. at 843. When Congress explicitly leaves “a gap for the agency to fill, there is an express delegation of authority to the agency” to explain the statute through regulation. *Id.* at 843–44. Such explicit authority means that the agency’s interpretation by regulation receives “controlling weight” that cannot be set aside by a court unless “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844. Cases in which the gap left for the agency is implicit require a slightly different standard: when Congress’s delegation is implicit, courts must defer to an administrative agency’s interpretation of the statute so long as the interpretation is reasonable. *Id.*

congressional delegation to an agency to make policy, courts should respect the authority of agencies in this unique role and merely review agency interpretations to ensure that they are not unreasonable, arbitrary, or capricious. This view of an agency's role led the Court to set forth a general stance of deference toward an administrative agency's interpretation of the statute entrusted to that agency. When a statute is ambiguous on an issue, courts merely consider whether the agency's interpretation was arbitrary or capricious if Congress explicitly delegated authority,<sup>88</sup> or reasonable if Congress implicitly delegated power to the agency.<sup>89</sup> Ultimately, *Chevron* represented a great equalization—rather than looking from statute to statute for signs of whether or how much deference is justified, courts should merely determine whether the statute is ambiguous and whether the agency reasonably resolved the issue.

Underlying the Supreme Court's decision in *Chevron* is an understanding of the proper roles of agencies and courts and a respect for the separation of powers. Thus, *Chevron* demands that judges "respect the legitimate policy choices made by" those who are politically accountable—agencies.<sup>90</sup> While questions still remained after the Court's decision,<sup>91</sup> *Chevron* marked a shift toward generally

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88. *Chevron*, 467 U.S. at 842–43.

89. *Id.*

90. *Id.* at 866. Justice Stevens observed the following:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Id.* at 865–66.

91. While *Chevron* set forth a policy of deference, many aspects of the Court's holding created avenues to avoid applying full *Chevron* deference. The most obvious is that complete deference is warranted only when Congress has not directly spoken to the issue. As Justice Scalia intimated, one of the largest battles over *Chevron* deference is rooted in whether a statute is ambiguous. See Scalia, *supra* note 64, at 520–21. Depending on the tools of statutory construction that one uses to interpret the statute, judges may find statutes ambiguous just as easily as unambiguous. *Id.* One of Justice Scalia's main concerns rests on the judiciary employing tools of statutory construction that diverge from those employed in strictly

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deferring to reasonable agency interpretations of ambiguous statutory issues.

2. *Revenue rulings under Chevron*

After *Chevron*, courts for the most part deferred to revenue rulings on ambiguous issues arising from the tax code. Although the practice of substantially deferring to revenue rulings followed the general trend established by *Chevron*, courts did not necessarily attribute such deference to *Chevron* or strictly follow *Chevron*'s dictates. Many courts merely worked with preexisting precedent concerning revenue rulings. These courts almost always deferred to the revenue rulings, but they did not necessarily state that *Chevron* controlled the inquiry.<sup>92</sup> This trend, in some ways, created a dual line

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construing a statute. That is, Justice Scalia sees immense danger in judges using legislative history to impeach the plain meaning of a statute. A judge may use legislative history to determine that a statute is not ambiguous, or is ambiguous, depending on whether the judge wants to provide or not provide deference to the agency. *Id.* Generally, Justice Scalia sees the evil of legislative history in allowing judges to find ambiguity more often, especially when the statute is fairly plain on its face. *Id.* at 521.

Another issue arising from *Chevron* was which formats encapsulating an administrative agency's interpretation warranted deference and which did not. Compare DAVIS & PIERCE, *supra* note 13, § 3.5 at 119 (arguing that *Chevron* should only apply to legislative rules and adjudications and not "less formal formats" (citing Robert Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1 (1990))), with *United States v. Mead Corp.*, 533 U.S. 218, 252 (2001) (Scalia, J., dissenting) (explaining that *Chevron* deference does not rest on the formality of the pronouncements, and relying on *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 263 (1995), in which the Court unanimously decided to defer to a private letter ruling because "it set forth the official position of the Comptroller of the Currency"), and *Mead*, 533 U.S. at 230–31 (stating that while *Chevron* deference has generally gone to regulations derived from notice-and-comment procedures, it has also gone to informal pronouncements as well).

92. The prime example of this arose in the Second Circuit. In a series of cases, courts merely cited existing precedent that gave revenue rulings substantial weight—no discussion of *Chevron* occurred specifically or as a guiding principle. Many of the cases cited by the Second Circuit were decided prior to the Court's decision in *Chevron*. See *Weisbart v. U.S. Dep't of Treasury*, 222 F.3d 93, 98 (2d Cir. 2000), which cited *Texasgulf, Inc. v. Comm'r*, 172 F.3d 209, 217 (2d Cir. 1999), which looked to *Gillespie v. United States*, 23 F.3d 36, 39 (2d Cir. 1994), which looked to *Salomon, Inc. v. United States*, 976 F.3d 837, 841 (2d Cir. 1992), and *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1411 (2d Cir. 1985) (citing cases from 1982 and 1979 for the proposition that revenue rulings were entitled to great deference and carried "the force of legal precedents").

of authority<sup>93</sup>—courts might look to *Chevron* or to preexisting authority.<sup>94</sup> Whether they looked to *Chevron* or their own precedent, most courts still gave *Chevron*-like deference to revenue rulings during this period.

When firmly confronted with how much deference to accord revenue rulings, most courts in the *Chevron* era determined that they should substantially defer to the rulings. Almost every circuit to consider the matter gave heightened deference to revenue rulings.<sup>95</sup> Some courts emphasized the fact that revenue rulings were the embodiment of the IRS's official position—holding that they receive “great deference,” carry the force of law, and would not be overturned unless “unreasonable or inconsistent with the Internal Revenue Code.”<sup>96</sup> Other courts gave considerable weight to rulings and would provide deference unless the ruling conflicted with the

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93. See Coverdale, *supra* note 7, at 77 (explaining that during the *Chevron* era there were two lines of authority that courts might look to, *Chevron* and “classic tax deference standards”).

94. One possible reason lower courts avoided a discussion of *Chevron* in determining the deference owed to revenue rulings is the Supreme Court's complicity in avoiding the issue in two post-*Chevron* opinions. In *Davis v. United States*, the Court explained that “an agency's interpretations and practices [receive] considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.” 495 U.S. 472, 484 (1990); see also *Telecom USA, Inc. v. United States*, 192 F.3d 1068, 1073 (D.C. Cir. 1999) (explaining that “*Davis* did not . . . address how [its] standard compared to the relatively high level of deference applicable to agency interpretations of ambiguous statutes under *Chevron*”). Instead of looking to *Chevron* in determining the relevant deference, the Court mentioned that “the Service's interpretive rulings do not have the force and effect of regulations,” *Davis*, 495 U.S. at 484, but found it “sufficient to decide th[e] case [on the basis] that the Service's longstanding interpretation is both consistent with the statutory language and fully implements Congress' apparent purpose in adopting it.” *Id.* at 485. Similarly, and with less discussion or care, the Court in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), neutrally stated that “[e]ven if [revenue rulings] were entitled to deference, neither of the rulings goes to the narrow question presented here.” *Id.* at 518 n.9. Thus the Court merely compounded the issue and, by omission, provided several ways in *Davis* to give deference to revenue rulings while leaving the question unanswered.

95. See, e.g., *Weisbart v. U.S. Dep't of Treasury*, 222 F.3d 93, 98 (2d Cir. 2000); *Telecom USA, Inc. v. United States*, 192 F.3d 1068, 1072–73 (D.C. Cir. 1999); *Bankers Life and Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir. 1998); *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1145 (3d Cir. 1993); *Foil v. Comm'r*, 920 F.2d 1196, 1201 (5th Cir. 1990).

96. *Weisbart*, 222 F.3d at 98 (citing *Texasgulf, Inc. v. Comm'r*, 172 F.3d 209, 217 (2d Cir. 1999); *Gillespie v. United States*, 23 F.3d 36, 39 (2d Cir. 1994).

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statute, the legislative history, or was otherwise unreasonable.<sup>97</sup> These courts essentially provided a level of deference similar to that in *Chevron*, even though they may have looked to legislative history to determine whether a ruling was inconsistent with law.

On the other hand, a few courts gave revenue rulings the “lowest level of deference.”<sup>98</sup> Here rulings were accorded “respectful consideration.”<sup>99</sup> Lastly, certain courts presumed that revenue rulings warranted a level of deference but refrained from deciding the exact amount.<sup>100</sup> Ultimately, however, “the Supreme Court and virtually all of the circuits . . . indicated that revenue rulings [were] entitled to some degree of deference” during the *Chevron* era.<sup>101</sup> While the decisions that attributed great deference to revenue rulings resembled the same deference standard articulated in *Chevron*,<sup>102</sup> certain formulations in these decisions differed from a strict *Chevron* analysis.

### C. Christensen and Mead

The Supreme Court decided *Chevron* in 1984, arguably altering the course of how, or when, courts should defer to administrative agencies. Between 2000 and 2001, the Court changed direction yet again in two decisions, *Christensen v. Harris County*<sup>103</sup> and *United States v. Mead Corp.*<sup>104</sup> While the implications of the Court’s decisions in these two cases may not yet be entirely clear, the decisions clearly mark a rather stark shift in the Court’s position on

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97. See, e.g., *Gillis*, 4 F.3d at 1145; *Kimberley-Clark Tissue Co. v. United States*, 1997 WL 127986, at \*5 (E.D. Pa. 1997).

98. *Bankers Life*, 142 F.3d at 978 (citing *First Chicago NBD Corp. v. Comm’r*, 135 F.3d 457, 459 (7th Cir. 1998) for the understanding that “revenue rulings deserve ‘some weight,’ and are ‘entitled to respectful consideration, but not to the deference that the *Chevron* doctrine requires in its domain” (citations omitted)).

99. *Id.*

100. See, e.g., *Telecom USA, Inc. v. United States*, 192 F.3d 1068, 1073–74 (D.C. Cir. 1999) (“We need not announce a precise calibration here . . . [U]tilizing even a minimal level of deference . . . is sufficient to decide this case.”).

101. *Id.* at 1073 & n.4.

102. Compare *supra* notes 95–97 and accompanying text, with *supra* notes 98–101 and accompanying text.

103. 529 U.S. 576 (2000).

104. 533 U.S. 218 (2001).

when and how to defer to administrative interpretations.<sup>105</sup> Consequently, *Christensen* and *Mead* have ostensibly resulted in yet another change in the treatment that revenue rulings receive from courts.

Courts generally deferred to revenue rulings under *Chevron* as long as the rulings were reasonable. After *Christensen* and *Mead*, however, courts have minimized, if not eliminated, the level of deference accorded revenue rulings. Facially, these recent decisions replace actual deference with mere respect, essentially removing any actual deference accorded revenue rulings. In the wake of these decisions, courts and commentators have generally concluded that rulings deserve some deference—*Skidmore* deference. This deference standard, however, leaves revenue rulings in a state of flux and arguably without any real deference.

### 1. *The decisions*

Beginning with *Christensen v. Harris County*, the Court intimated a change in course concerning when *Chevron* deference applied to an administrative agency's interpretation of law.<sup>106</sup> In *Christensen*, the Supreme Court considered whether Harris County could require "its employees to schedule time off in order to reduce the amount of accrued compensatory time."<sup>107</sup> *Christensen* and the United States asked the Court to defer to a Department of Labor opinion letter, "which [took] the position that an employer may compel the use of compensatory time only if the employee ha[d] agreed in advance to such a practice."<sup>108</sup> The Court interpreted the governing statute, concluded that the Fair Labor Standards Act

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105. See *Weaver*, *supra* note 27, at 174; see also *Coverdale*, *supra* note 7, at 40 (stating that *Christensen* and *Mead* "revolutionized court deference to agency readings of statutes and of their own regulations").

106. See *Christensen*, 529 U.S. at 587; see also *Weaver*, *supra* note 27, at 173–74.

107. *Christensen*, 529 U.S. at 587. Under the Fair Labor Standards Act (FLSA), if "employees do use their accumulated compensatory time, the employer is obligated to pay cash compensation under certain circumstances." *Id.* at 578. To stave off such potential consequences, "Harris County adopted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time." *Id.* The case arose out of a dispute over whether this policy is appropriate under the FLSA. *Id.*

108. *Id.* at 586.

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“does not prohibit compelled use of compensatory time,”<sup>109</sup> and refused to defer to the opinion letter.

The Court reasoned that the opinion letter did not carry the force of law and therefore did not deserve full *Chevron* deference, even though the letter was eligible for a lesser degree of deference.<sup>110</sup> The Court noted that the opinion letter at issue was “not . . . arrived at after . . . a formal adjudication or notice-and-comment rulemaking.”<sup>111</sup> Rather, as the Court explained, “Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”<sup>112</sup> The Court noted that opinion letters and more informal formats, which carry an agency’s statutory interpretation on an issue, “are ‘entitled to respect’ under our decision in *Skidmore*.”<sup>113</sup> With an eye still focused on the format of the agency’s issuance, the Court emphasized that *Chevron* does apply to agency regulations.<sup>114</sup> While the winds of change were clear in *Christensen*, the exact implications of the Court’s decision were not entirely apparent.<sup>115</sup>

The Supreme Court further elaborated upon the implications of its decision in *Christensen* a year later in *United States v. Mead Corp.*<sup>116</sup> In *Mead*, the Court considered whether courts owed deference to a tariff-classification ruling letter that classified Mead’s day planners as bound diaries subject to tariff, as opposed to articles classified as “other” and therefore exempt from tariff.<sup>117</sup> The Court concluded that the classification ruling letter did not warrant *Chevron* deference because no indication existed that “Congress intended such a ruling to carry the force of law.”<sup>118</sup> Instead, the

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109. *Id.*

110. *Id.* at 587.

111. *Id.*

112. *Id.*

113. *Id.*; see also Krotoszynski, *supra* note 13, at 747 (emphasizing that the key to *Christensen* and *Mead* is the formality or informality of the pronouncement).

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

115. Krotoszynski, *supra* note 13, at 746–47 (arguing that while *Christensen* intimated a change in focus, the result was only completed in *Mead*).

116. 533 U.S. 218 (2001).

117. *Id.* at 221–24.

119. *Id.* at 221.



Court held that courts should accord such agency pronouncements *Skidmore* deference only.<sup>119</sup>

The Court's holding fundamentally altered how and when courts should give *Chevron* deference to an agency declaration.<sup>120</sup> Before *Mead*, courts gave *Chevron* deference to an administrative interpretation that "represented the *authoritative* position of the agency" regardless of the format or formality of the pronouncement so long as the two-part test was satisfied.<sup>121</sup> After *Mead*, *Chevron*-type deference is arguably appropriate only when a court determines that Congress intended the agency's pronouncement to "carry the force of law."<sup>122</sup> Adding another layer to the *Chevron* analysis, the Court now seems to require two new determinations before *Chevron* deference applies: an "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when [(1)] it appears that Congress delegated authority to the agency generally to make rules that carry the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the existence of that authority."<sup>123</sup>

The Court did note a few ways to determine whether Congress intended that an agency's pronouncements carry the force of law. First, the Court emphasized that formal rulemaking procedures under the Administrative Procedure Act indicate congressional intent to delegate authority to the agency and, thus, carry the force of law.<sup>124</sup> Notice-and-comment rulemaking, however, is not the only indicia of *Chevron* deference.<sup>125</sup> Agencies may show Congress's delegation of authority "in a variety of ways, as by an agency's power

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119. *Id.*

120. *Id.* at 245–46 (Scalia, J., dissenting); *see also* Coverdale, *supra* note 7, at 40 (noting that *Christensen* and *Mead* "revolutionized" administrative law). *But see* Krotoszynski, *supra* note 13, at 755 (arguing that *Christensen* and *Mead* merely ratify *Chevron*'s departure from past practice).

121. *Mead*, 533 U.S. at 243, 245–46 (Scalia, J., dissenting). *But see* DAVIS & PIERCE, *supra* note 13, § 3.5. Admittedly, this is a fairly contentious issue. However, a unanimous court agrees with one point—the Court has granted *Chevron* deference to both pronouncements arising from notice-and-comment procedures as well as less formal procedures.

122. *Mead*, 533 U.S. at 221.

123. *Id.* at 226–27; *see also id.* at 239, 245 (Scalia, J., dissenting) (emphasizing this as the two-part test the Court set down in its decision).

124. *Id.* at 230.

125. *Id.* at 230–31.

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to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”<sup>126</sup>

While the Court did not specifically address what may qualify for “comparable congressional intent,” it left the possibility of qualifying for *Chevron* deference through a means other than formal APA procedures. In point of fact, the Court reemphasized its discussion of explicit and implicit delegation under *Chevron*. That is, while Congress may expressly delegate authority to an agency to speak with the force of law, it may also leave a gap in the statute, which Congress implicitly intends for the administrative agency to fill.<sup>127</sup> Thus when “it is apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to speak with the force of law when it addresses ambiguity in the statute or fills space in the enacted law, . . . a reviewing court” may not dismiss or reject the agency’s interpretation as it exercises its “generally conferred authority.”<sup>128</sup>

Acknowledging that other procedures may qualify for *Chevron*-level deference, the Court also explained that “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”<sup>129</sup> The Court thus intimates that full APA procedures are not necessary, although a

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126. *Id.* at 227. Justice Breyer recently emphasized this aspect of *Mead* in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (Breyer, J., concurring).

127. *Id.* at 229. The Supreme Court noted that “in *Chevron* [the Court] recognized that Congress not only engages in express delegation of specific interpretative authority, but that ‘[s]ometimes the legislative delegation to an agency on a particular question is implicit.’” *Id.* (citing *Chevron*, 467 U.S. at 844).

128. *Id.* The Supreme Court recognized that Congress may intend the agency to speak with the force of law even when “‘Congress did not actually have an intent’ as to a particular result.” *Id.* When Congress has implicitly delegated authority to an agency to speak with the force of law, courts may not reject an agency interpretation “simply because the agency’s chosen resolution seems unwise, ‘but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.’” *Id.* (quoting *Chevron*, 467 U.S. at 842–46). Thus the Court reemphasized and upheld its holding in *Chevron*.

129. *Id.* at 230. The Court stated that “the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.” *Id.* at 230 & n.12; *see also* Krotoszynski, *supra* note 13, at 737 (arguing that *Christensen* and *Mead* rest on a distinction between formal and informal pronouncements).

certain indicia of formality is expected. Even when an agency pronouncement lacks the force of law and therefore lacks *Chevron* deference, however, that pronouncement is still afforded some deference.<sup>130</sup> The Court explained that another level of deference is appropriate for announcements that do not carry the force of law, such as opinion letters.<sup>131</sup> Accordingly, the Court looked to an early Supreme Court decision—*Skidmore v. Swift & Co.*<sup>132</sup>

## 2. Resurrecting Skidmore

In *Mead*, the Supreme Court explained that “*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form.”<sup>133</sup> In *Skidmore*,<sup>134</sup> the Court held that administrative interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>135</sup> Accordingly, the level of deference given to such rulings or interpretations “will depend upon the thoroughness evident in [their] considerations, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those

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130. *Id.* at 234–35.

131. *Id.*

132. 323 U.S. 134 (1944). The Supreme Court in *Mead* actually structures its opinion to intimate that the baseline for deference to administrative applications of law on an issue is *Skidmore*’s invocation of respect, and anything more, i.e., *Chevron* deference, is the exception to the rule. *See Mead*, 533 U.S. at 227–30. The Court does this by beginning its discussion of deference by looking to the basis for *Skidmore* and what has followed. *See id.* at 227–28. Then, and only then, does it turn to *Chevron*. *See id.* at 229.

133. 533 U.S. at 234.

134. The Court decided *Skidmore* long before the modern era of the administrative state. *See Skidmore v. Swift & Co.*, which was decided in 1944. 323 U.S. 134. In *Skidmore*, the Court confronted whether workers, such as firemen, who spent much of their time waiting in the service of their employer, should be entitled to count time waiting toward overtime pay under the Fair Labor Standards Act. *Id.* at 135–36. In deciding how best to proceed, the Court considered the amount of deference owed to the FLSA Administrator’s interpretation of law, which appeared in an Interpretive Bulletin. *Id.* at 137–38. No statutory provision explained the amount of deference due to the Administrator’s determinations, even though the Administrator was charged with various duties and powers “to inform himself of conditions” in employment. *Id.* at 139, 137. While the Administrator’s determination was an interpretation of the Act, it was not conclusive or binding. It was “not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law” or any other formal proceeding. *Id.* at 139.

135. *Id.* at 140.

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factors which give it power to persuade, if lacking power to control.”<sup>136</sup> The reasons to accord agencies this deference rest on the fact that the agency’s “policies are made in pursuance of official duty” and based on “more specialized experience and broader investigations and information” than judges typically have.<sup>137</sup> Additionally, these interpretations typically “determine the policy which will guide [the agency’s] enforcement” of the statute.<sup>138</sup> By resurrecting *Skidmore*, the Supreme Court may have substantially altered the course of attributing deference to administrative applications of law on an issue.

In sum, after *Mead* essentially two levels of deference exist<sup>139</sup>—an agency pronouncement either carries the force of law and therefore engenders *Chevron* deference,<sup>140</sup> or does not carry the force of law and garners only *Skidmore* deference. According to the Supreme Court, *Skidmore* deference means that an interpretation may “at least seek a respect proportional to its ‘power to persuade.’”<sup>141</sup> One may claim *Skidmore* deference when *Chevron* is inapplicable, when the “regulatory scheme is highly detailed,” and when the administrative agency “can bring the benefit of specialized experience to bear on the subtle questions” raised in the case.<sup>142</sup> The purpose behind providing *Skidmore* deference is that agencies have “specialized experience” and have greater availability to investigate and obtain information. Furthermore, there is great value in “uniformity in . . . administrative and judicial understandings of what national law requires.”<sup>143</sup>

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136. *Id.*

137. *Id.* at 139.

138. *Id.* at 139–40.

139. See Weaver, *supra* note 27, at 173–74 (arguing that *Mead* and *Christensen* “articulate[d] dual deference standards,” with “[s]ome administrative interpretations . . . judged under *Chevron*” and “[o]ther[s] judged under *Skidmore*”); Krotoszynski, *supra* note 13, at 749–51 (arguing two deference standards exist after *Mead*: expertise under *Skidmore* and delegation under *Chevron* and *Mead*).

140. Professor Weaver argues that this is “actual deference.” See Weaver, *supra* note 27, at 174.

141. *Skidmore*, 533 U.S. at 235.

142. *Id.*

143. *Id.* at 234; see also Krotoszynski, *supra* note 13, at 739–40 (arguing that *Skidmore* rests on expertise).

*D. Current Lower Court Treatment of Revenue Rulings*

*Christensen* and *Mead* facially upset previous positions on whether revenue rulings receive *Chevron* deference and generally obfuscate the issue of deference. While not all circuit or district courts had decided that revenue rulings warranted *Chevron* deference, several courts had basically reached that conclusion.<sup>144</sup> However, after the Court's recent pronouncements, most courts' previous decisions on the issue were called into question.<sup>145</sup> Now, instead of granting *Chevron* or *Chevron*-like deference, courts have determined that revenue rulings merit only *Skidmore* deference.

Most courts that have directly addressed the issue have decided that revenue rulings are not entitled to *Chevron* deference, as they do not "carry the force of law."<sup>146</sup> In concluding that revenue rulings do not warrant *Chevron* deference, courts have looked to a couple of factors. The tariff rulings in *Mead*, according to one court, are analogous to revenue rulings. *Mead*'s conclusion that tariff rulings receive only *Skidmore* deference therefore apply equally to revenue rulings.<sup>147</sup> Other courts rested their conclusion on the fact that

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144. See *supra* notes 96–98 and accompanying text.

145. See, e.g., *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 180 (6th Cir. 2003) ("[R]ecent Supreme Court decisions limiting the *Chevron* doctrine have called our earlier cases into question."), *cert. denied*, 125 S. Ct. 37 (2004); *Fortis, Inc. v. United States*, No. 03 Civ. 5137(JGK), 2004 WL 2085528, at \*10–11 (S.D.N.Y. Sept. 16, 2004) (explaining that *Christensen* and *Mead* cast "some doubt as to whether revenue rulings are necessarily entitled to [*Chevron*] deference"); *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984, 998 (N.D. Ohio 2004) (same).

146. See, e.g., *O'Shaughnessy v. Comm'r*, 332 F.3d 1125, 1130 (8th Cir. 2004); *Aeroquip-Vickers, Inc.*, 347 F.3d at 181 ("[W]e conclude that Revenue Ruling[s] should not be accorded *Chevron* deference."); *Omohundro v. United States*, 300 F.3d 1065, 1068 (9th Cir. 2002); *Del Commercial Props., Inc. v. Comm'r*, 251 F.3d 210, 214 (2001) ("We accord these [revenue] rulings *Skidmore* deference . . ."); *Am. Bankers Ins. Group, Inc. v. United States*, 308 F. Supp. 2d 1360, 1371–72 (S.D. Fla. 2004) *rev'd*, 408 F.3d 1328 (2005); *Office Max, Inc.*, 309 F. Supp. 2d at 998 ("[T]his Court will not accord *Chevron* deference to revenue ruling[s] . . ."); see also *Ammex, Inc. v. United States*, 367 F.3d 530, 535 (2004) (not resolving whether *Chevron* applies to revenue rulings, but explaining that "obviously some level of deference to the agency ruling is due," and according the ruling *Skidmore* deference).

147. See, e.g., *Omohundro*, 300 F.3d at 1068 ("*Mead* involved a Customs Service tariff ruling, which is closely akin to an IRS revenue ruling. Given that the two types of agency rulings are analogous, we are required to apply *Mead*'s standard of review to an IRS revenue ruling."). There are major differences between these types of rulings, differences the court did not apparently consider. For current purposes, the most glaring difference is the procedure and structure for issuing the pronouncements. See *infra* notes 221–227 and accompanying text.

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revenue rulings are informal, and “the IRS does not claim for revenue rulings ‘the force and effect of Treasury Department regulations.’”<sup>148</sup>

While these courts have not accorded revenue rulings *Chevron* deference, they have held that revenue rulings are entitled to *Skidmore* deference.<sup>149</sup> In explaining the deference given revenue rulings under *Skidmore*, these courts have employed the general verbal formulation for determining the deference due to more informal interpretations of law: the “level of deference” depends “on the Ruling’s ‘power to persuade,’ i.e., the validity and thoroughness of its reasoning and its consistency with earlier and later pronouncements.”<sup>150</sup>

In the process of determining the deference accorded a ruling, however, some courts have walked through the *Skidmore* factors in a consistent, though unique way. Courts have looked into whether, in the ruling, the “IRS’s reasoning [was] valid,” and then whether the ruling was “consistent with later IRS pronouncements.”<sup>151</sup> Other courts checked that the “interpretation [was] supported by the legislative history of the statute.”<sup>152</sup> While their analysis is consistent with *Skidmore*’s formulation, these courts have not so much looked to persuasiveness as the end goal, as the Supreme Court and several lower courts have,<sup>153</sup> but have acted as a check on the administrative agency—not to state what is right or wrong but to ensure that the agency’s actions are consistent with the law.<sup>154</sup>

Ultimately, from the initiation of deference to agency interpretations of law on an issue until today, the Court has taken a long and winding road, especially since its decision in *Chevron*. Revenue rulings, to some extent, have followed the ebb and flow of the Court’s tide of decisions. For most of this journey, courts have given revenue rulings substantial deference. The Court’s recent cases

148. *Aeropquip-Vickers, Inc.*, 347 F.3d at 181.

149. See, e.g., *Aeropquip-Vickers, Inc.*, 347 F.3d at 181; *O’Shaughnessy*, 332 F.3d at 1130; *Omobundro*, 300 F.3d at 1068; *U.S. Freightways Corp. v. Comm’r*, 270 F.3d 1137, 1142 (7th Cir. 2001); *Del Commercial Props., Inc.*, 251 F.3d at 214; *Am. Express Co. v. United States*, 262 F.3d 1376, 1383 (Fed. Cir. 2001); *Office Max, Inc.*, 309 F. Supp. 2d at 998.

150. *Office Max, Inc.*, 309 F. Supp. 2d at 998.

151. *Omobundro*, 300 F.3d at 1068.

152. *Id.*

153. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

154. Cf. *Weaver*, *supra* note 27, at 187.

on their face, however, rob any actual deference that rulings have traditionally received by merely providing them with respect.<sup>155</sup>

155. Another avenue of deference has both confused courts and given an alternate route for according revenue rulings substantial deference. Only two months before deciding *Mead*, the Court issued its decision in *United States v. Cleveland Indians Baseball Co.* 532 U.S. 200 (2001). In *Cleveland Indians Baseball Co.*, the Court faced the question of what level of deference it should give the IRS's revenue rulings. The Supreme Court determined, however, that it "need not decide whether Revenue Rulings themselves are entitled to deference." *Id.* at 220. Because the rulings at issue merely "reflect[ed] the agency's longstanding interpretation of its own regulations," they were entitled to substantial court deference. *Id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). Reaffirming prior precedent, the Court explained that "regulations and interpretations" that have continued for many years "without substantial change, applying to unamended or substantially reenacted statutes" have essentially gained Congress's approval and therefore "have the effect of law." *Id.* (citing *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991)). Here, the agency had consistently interpreted "its own 61-year-old regulation implementing a 62-year-old statute." *Id.* In the end, the Court left open the question of deference to revenue rulings, while suggesting other avenues down which IRS interpretations within revenue rulings may receive deference.

Many courts have infused the *Cleveland Indians Baseball Co.* decision into their determination of whether a ruling requires deference after *Mead*. Specifically, some courts have looked for long-standing interpretations as the lynchpin for gauging the deference owed to revenue rulings. *See, e.g.*, *Ammex, Inc. v. United States*, 367 F.3d 530, 535 (2004); *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 182 (6th Cir. 2003). When the interpretation is not long-standing, or even if not as long-standing as the ruling in *Cleveland Indians Baseball Co.*, courts simply deny that deference is due. *O'Shaughnessy v. Comm'r*, 332 F.3d 1125, 1130 (8th Cir. 2004) (acknowledging that revenue rulings are entitled to *Skidmore* deference, but that the Supreme Court has not addressed the deference due revenue rulings, and since the revenue ruling at issue "does not reflect a similarly longstanding or consistent interpretation of an 'unamended or substantially reenacted statute,'" no deference is due). This approach is mistaken.

In *Cleveland Indians Baseball Co.*, the Court reinvigorated two principles aside from the *Mead* analysis. Specifically, the Court relied on a line of cases springing from *Bowles v. Seminole Rock & Sand Co.* 325 U.S. 410 (1945). This line of cases states that an agency's "longstanding interpretation of its own regulations" warrants deference. *Cleveland Indians Baseball Co.*, 532 U.S. at 220; *see Thomas Jefferson Univ.*, 512 U.S. at 512. Professor Coverdale seems to suggest that the Court in *Cleveland Indians Baseball Co.* did not as clearly as it would seem reaffirm the principle that courts "must give substantial deference to an agency's interpretation of its own regulations," which relied on *Thomas Jefferson Univ.*, 512 U.S. at 512. *See Coverdale, supra* note 7, at 90-91 (arguing that although the Court in *Cleveland Indians* did cite to *Thomas Jefferson Univ.*, it did not invoke *Seminole Rock* in concluding as it did). Although he agrees that the Court invoked the specter of this line of cases, he argues ultimately that the Court did not rest on *Seminole Rock*. One interesting aspect of Professor Coverdale's argument that the Court did not look to *Seminole Rock* is that he includes no discussion of how it is that by citing *Thomas Jefferson Univ.* the Court avoided this line of precedent. While the Court, admittedly, did not cite *Seminole Rock*, it did tap into the line of cases that are built on *Seminole Rock*'s foundation. *See Thomas Jefferson Univ.*, 512 U.S. at 512. There are numerous occasions in which the Court may use the reasoning or authority of an "initial" case without citing that case, although it does cite cases that have continued to

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However, while courts have taken certain cues from the Court's *Mead* opinion, revenue rulings should receive substantial deference under a proper understanding of *Mead* as requiring an adequate procedure for issuing agency pronouncements.

IV. ACCORDING SUBSTANTIAL DEFERENCE TO  
REVENUE RULINGS AFTER *MEAD*

Revenue rulings have, with notable exceptions,<sup>156</sup> obtained substantial judicial deference throughout the course of the Supreme Court's evolving administrative deference jurisprudence.<sup>157</sup> However, the Court's unclear opinion in *Mead*,<sup>158</sup> which purported to clarify when *Chevron* deference is warranted, has potentially eliminated the substantial deference courts should accord revenue rulings. The *Mead* Court appears to require an enigmatic search for congressional intent to give an agency the power to speak with the force of law,

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reaffirm prior reasoning. It is unclear how the lack of a case name in an opinion means that other cases cited for the same proposition somehow avoid bringing the original case into play. Nonetheless, when an agency interprets its own regulation, such an interpretation receives "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (citing *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150–51 (1991)).

Alternatively, the Court looked to a series of cases under which "regulations and interpretations" that have continued for long periods of time without change and that relate to a statute that Congress has "amended" or essentially "reenacted" are treated as having "congressional approval and . . . the effect of law." *Cleveland Indians Baseball Co.*, 532 U.S. at 220 (citing *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991)).

While agency interpretations of its own regulations and the existence of long-standing interpretations provide distinct grounds for providing substantial deference to a revenue ruling, under these two principles courts do not necessarily defer to revenue ruling. They defer to the interpretations themselves. Thus, it may be a little disingenuous to say that a court defers to the revenue ruling under these analyses. Neither of these principles rest on the format in which the agency's interpretation appears. Rather, each principle rests on solid principles for deferring to the interpretation itself, rather than the format, as would be the case if the inquiry consisted of determining whether the format of an interpretation signified the force of law. However, because revenue rulings frequently give form to these types of interpretations, these principles provide for two distinct means by which courts should defer to an agency's interpretation unless the interpretation is unreasonable.

156. See *supra* notes 75, 98–100 and accompanying text.

157. See *supra* notes 70–71, 95–97 and accompanying text.

158. See 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, 347 (2003) ("[M]istakes are traceable to the flaws, fallacies, and confusions of the *Mead* decision itself. The blame for the *Mead* muddle, then, lies with the Supreme Court.").



and an indication it has used that power before an agency interpretation may receive substantial deference. Employing this unclear standard, courts have determined that revenue rulings do not warrant *Chevron* deference.<sup>159</sup> Instead, courts have held that revenue rulings may receive *Skidmore*'s respect,<sup>160</sup> which is ultimately not deference at all.<sup>161</sup>

Although after *Mead* courts and commentators have generally concluded revenue rulings deserve only *Skidmore* deference,<sup>162</sup> these rulings should receive *Chevron* deference because they perfectly satisfy the type of procedure the Court considered "some other indication" that an agency interpretation should receive substantial deference. The inherent limits of and policies underlying revenue rulings further support giving them *Chevron*-level deference.

Part A explains how courts applying *Skidmore*-type deference to revenue rulings rob them of any deference they generally received prior to *Mead* and still deserve. This Part also explains how courts have resisted removing deference from revenue rulings and illustrates the strain caused by attempting to ignore these IRS pronouncements. Part B argues that revenue rulings deserve *Chevron* deference after *Mead* because they result from a process that is sufficiently formal to deserve deference.

#### A. Stripping Revenue Rulings of Any Deference with *Skidmore*

Almost uniformly, courts have concluded that revenue rulings warrant only *Skidmore* deference after *Mead*.<sup>163</sup> Looking to *Mead*'s statements concerning congressional intent, courts have denied *Chevron* deference to these less formal but official applications of revenue law. By giving revenue rulings only *Skidmore* deference, courts do not merely ratchet down the level of deference these announcements once received, they remove deference entirely. While only providing *Skidmore* respect to revenue rulings, courts have at the same time resisted the basic effect of giving rulings no deference whatever. They have thus struck an interesting middle ground that

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159. See *supra* note 146 and accompanying text.

160. See *supra* note 149 and accompanying text.

161. See *infra* notes 167–70 and accompanying text.

162. See *supra* note 149; see also Weaver, *supra* note 27, at 89–90.

163. See *supra* note 149.

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illustrates the problem of providing mere respect but also resolves the issue improperly.

*Skidmore*, as explained in *Mead* and employed by certain courts, is nothing more than a truism, an empty, hollow pronouncement that courts ought to follow expert reasoning that is persuasive. Justice Scalia, dissenting in *Mead*, briefly and rightly observed that “Justice Jackson’s eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.”<sup>164</sup> In *Mead*, the Court, after explaining that *Chevron* did nothing to alter the existence and continued force of *Skidmore*, emphasized that an interpretation that did not qualify for *Chevron* deference may “at least seek a respect proportional to its ‘power to persuade.’”<sup>165</sup> In other words, an interpretation by an administrative agency “may surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.”<sup>166</sup>

While the Court identified characteristics that should engender respect, the emphasis on persuasiveness and merit of reasoning *is not deference at all*; rather, it is a means of finding support for one’s own conclusion. Following the guides, as they are laid out in *Mead*, does not ask or require a court to “defer” to an agency’s interpretation.<sup>167</sup> Rather, the inquiry merely approves of courts looking to an expert’s reasoning, or ability to explain an area of law in such a way so as to fit it within existing law. To illustrate, consider the plethora of law review articles that are logical, thorough, well-reasoned, that mesh well with prior interpretations, and carry various other indicia of weight—everything this Article does not. When a court cites to such

164. *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

165. *Id.* at 235.

166. *Id.*

167. See, e.g., Richard W. Murphy, *A “New” Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretative Freedom*, 56 ADMIN. L. REV. 1, 3 & n.9 (2004) (stating that *Skidmore* “leaves the courts themselves in charge of determining (and adopting) the best available statutory meaning” (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 856 (2001))); Weaver, *supra* note 27, at 179 (“*Chevron* tells reviewing courts to be prepared to give ‘actual deference’ to agency interpretations . . . . By contrast, *Skidmore* tells courts that they should make the interpretative decision, and that they need only ‘consider’ an agency interpretation and give it the weight it deserves based on its persuasiveness.”).

articles, no one calls it deference, or even deferring to the author. Quite the contrary, such a move may call down claims of judges abdicating their duty to say what the law is.<sup>168</sup> Looking to an expert's reasoned opinion on the law, no matter how well it harmonizes with prior law, does not equal deference if what a court seeks is persuasiveness in its own conclusion.

When courts of appeals, for example, decide a case, they may not merely look to controlling precedent, but may, in many cases, examine lower court opinions or positions. And, many times, courts of appeals may adopt or employ the reasoning of the lower courts in coming to a conclusion. This is not deference—courts of appeals do not defer to lower courts, although they may look for persuasiveness or clarity of various arguments. Additionally, courts may survey other circuits or districts, other states or forums, but this too is not deference<sup>169</sup>—it is judges considering well reasoned views in deriving the proper result.

Essentially, courts under *Skidmore* simply perform their own investigation into the meaning of the statute at issue. They look only to the agency's interpretation to determine whether it may persuade them otherwise—of course carrying all the indicia of persuasiveness, such as its reasoning, the expositor's expertise, etc.<sup>170</sup> Even if a court were to change course, or confirm its own reasoning through examination of the agency's interpretation, this type of inquiry is not an attempt to determine whether to defer to the agency—it is the court's own independent examination, guided by expert assistance.

Perhaps recognizing this dilemma, a few courts have recently given revenue rulings *Skidmore's* respect by name, while also resisting the implications of granting nothing to these

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168. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). A fine line exists in the administrative field between deferring to agency interpretations of law and abdicating judicial responsibilities, especially after *Chevron*. See DAVIS & PIERCE, *supra* note 13, § 3.3, at 114–15 (addressing the friction between *Marbury* and *Chevron*). Professor Murphy argues that the Court's decision in *Mead* exacerbates this dilemma. See generally Murphy, *supra* note 167.

169. See *Am. Bankers Ins. Group, Inc. v. United States*, 308 F. Supp. 2d 1360, 1371 (S.D. Fla. 2004) (acknowledging that decisions from another circuit are not binding but persuasive), *rev'd*, 408 F.3d 1328 (2005). While the court noted the likeness between *Skidmore's* persuasiveness and nonbinding circuit persuasiveness, it did not couch the inquiry as one of deference. It merely looked at whether the reasoning persuaded one way or another. This suggests that there is an elimination of “deference” outside *Chevron*.

170. Weaver, *supra* note 27, at 174.

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interpretations. These courts have, in lieu of simply looking for persuasiveness, attempted to provide a more deferential stance toward these rulings. In the D.C. Circuit, for example, one opinion merely states that the court “find[s] them persuasive” given the language of the statute at issue and Supreme Court precedent.<sup>171</sup> The court then moves on to other aspects of the decision.<sup>172</sup> By treating the ruling so cursorily, the court avoids the danger of *Skidmore*—that courts will supplant an agency’s view on the issue with their own interpretation of law.

Additionally, other courts have created an interesting deference test under *Skidmore* specifically for revenue rulings. These courts look to whether the ruling is valid, consistent, and in accordance with the legislative history.<sup>173</sup> This type of analysis, rather than providing an independent judicial inquiry, simply facially tries to ensure the agency acted correctly. These attempts to give rulings actual deference, instead of mere respect, illustrate the tension that emanates from trying to remove deference from these statements by the IRS as it administers the United States’ revenue scheme. While these courts have the right idea in mind, they have misstepped early in the deference dance. Rather than mere *Skidmore* respect, revenue rulings deserve substantial deference after *Mead*.

*B. Substantially Deferring to Revenue Rulings After Mead*

While *Mead* ostensibly clarified when courts accord *Chevron* deference to an agency’s statutory interpretation on a particular issue, the Court’s decision is far from clear.<sup>174</sup> The opinion is replete with talismanic phrases such as “force and effect of law.”<sup>175</sup> These phrases do not provide adequate guidance as to what courts should use in determining which administrative applications of a statute warrant the heightened *Chevron* deference.<sup>176</sup>

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171. *Del Commercial Props., Inc. v. Comm’r*, 251 F.3d 210, 214 (D.C. Cir. 2001).

172. *See id.*

173. *See supra* notes 152–53 and accompanying text.

174. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 470 (2002) (“Unfortunately, *Mead* provides incomplete guidance about how courts should undertake this inquiry.”).

175. *See Mead*, 533 U.S. 218 *passim*.

176. *Weaver*, *supra* note 27, at 175; *see also infra* note 180.

In the wake of *Mead*, various courts and commentators have looked specifically to the legislative history or other similar indicia of congressional desire to give an administrative issuance the force and effect of law.<sup>177</sup> While valiant, these attempts alone strike in the wrong direction and create additional confusion.<sup>178</sup> Rarely does Congress specifically provide that an administrative issuance carry the force of law,<sup>179</sup> and, more to the point, *Mead* does not rest on congressional specificity alone. Rather *Mead*, at base, explains that *Chevron* deference is due when an administrative issuance is the result of a satisfactory, rather formal, fair, and deliberate procedure.<sup>180</sup> Indeed, the proper view of *Mead*, as looking for an appropriate procedure to bestow *Chevron* deference on an agency pronouncement, suggests that revenue rulings deserve substantial deference. Revenue rulings result from precisely the procedure the Court in *Mead* considered “some other indication” that an interpretation deserves substantial deference.<sup>181</sup> Moreover, the limits and policies underlying revenue rulings support granting these pronouncements substantial deference.

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177. See Merrill & Watts, *supra* note 174 (explaining the novelty and importance of what Congress understands to carry the “force of law” and examining the history of Congress’s expression of intent); Weaver, *supra* note 27 (suggesting that the test is a hunt for congressional intent, though disagreeing with the propriety of such a test.); see also Fed. Nat’l Mortgage Ass’n. v. United States, 379 F.3d 1303, 1307–08 (Fed. Cir. 2004) (noting that “the issue is . . . whether Congress intended for the IRS” to promulgate the issuance at hand).

178. Weaver, *supra* note 27, at 175. Professor Weaver aptly observes the difficulties with this approach:

Congressional intent, to the extent that it can be reliably ascertained, is *highly relevant* to the question of whether courts should defer. But, Congress *never* explicitly states that agency interpretations should be given the “force of law” if articulated in particular formats, and it rarely gives implicit indications of its intent. As a result, by focusing on whether Congress intended to delegate “authority to the agency generally to make rules carrying the force of law,” a question which is particularly difficult to answer or satisfactorily resolve, the Court diverts itself from more fundamental questions about why, and when, deference ought to be given.

*Id.*

179. *Id.*

180. See Professor Cass Sunstein’s recent article on this issue for a similar conclusion. Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. \*5 (forthcoming 2006) (“The ‘force of law’ test is a crude way of determining whether *Chevron* deference is appropriate, and it introduces far too much complexity into the deference issue. The Court is apparently seeking to allow *Chevron* deference only or mostly when agency decisions have followed procedures that guarantee a kind of deliberation and reflectiveness.”).

181. *Mead*, 533 U.S. at 227.

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*I. Mead: in search of a reliable process*

While the Court talks in terms of what Congress “contemplate[d],”<sup>182</sup> “thought,”<sup>183</sup> or “delegated,”<sup>184</sup> *Mead* stands for the assurance that when an administrative issuance results from careful, deliberate, and formal procedures, courts should grant such an issuance *Chevron* deference. The *Mead* Court is clearly concerned with “congressional intent” or “congressional delegation,”<sup>185</sup> though not in the way some believe. True, the Court examined the authority that the agency had and spoke in terms of Congress’s bestowal of power, but it was ultimately concerned with the formality of the procedure that produced the agency’s interpretation.

Although the Court speaks of agency authority, it indicates that general authority accompanying formal procedures qualifies for *Chevron*-level deference. As an initial step, the Court looked to the congressional delegation of authority to the agency.<sup>186</sup> While the Court purported to look at the “congressional delegation [of] authority to Customs to issue classification rulings with the force of law,”<sup>187</sup> it did not restrict its analysis of this congressional authority to statements from Congress as to any specific form of pronouncement. In fact, the court looked to the larger grant of power to Customs.<sup>188</sup> And while the Court found a minor indication that Congress at least contemplated the use of Custom’s rulings at issue in *Mead*,<sup>189</sup> the structure of independent review over these classifications ultimately ran counter to the type of process for which *Chevron* deference is reserved.<sup>190</sup> Ultimately, the analysis in *Mead* does not require specific indications of authority so much as a

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182. *Id.* at 230.

183. *Id.* at 231.

184. *Id.* at 226–27 *passim*.

185. *Id.* *passim*.

186. *See id.* at 232–33.

187. *Id.* at 231–32.

188. *Id.* at 232 (“[I]t is true that the general rulemaking power conferred on Customs authorizes some regulation with the force of law, or ‘legal norms.’”).

189. *Id.* (“It is true as well that Congress had classification rulings in mind when it explicitly authorized, in a parenthetical, the issuance of ‘regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned.’”).

190. *Id.* at 232–33.

general grant of power to the agency. The Court's real focus is on procedures.

The Court does flatly state that *Chevron* deference is warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law."<sup>191</sup> However, it goes on to explain that the way in which to determine whether there is a congressional delegation rests on the procedure the agency employed in issuing its interpretation, and not simply the congressional record.<sup>192</sup> Specifically, the Court equates congressional intent with process: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."<sup>193</sup> Furthermore, the Court explained the basis for its ruling as resting on the conclusion that tariff classifications did not have to derive from sufficient authority nor appropriate procedures.<sup>194</sup> Although the Court looked to the authority that the agency had, it was concerned ultimately with the procedure that produced the pronouncement for which deference was requested.

The Court made its intent to focus on procedure in determining congressional delegation even more explicit when discussing the reasons for denying *Chevron* deference to the tariff ruling at issue. There, the Court examined the statute and looked for any statements of congressional intent.<sup>195</sup> Determining that a grant of general authority is a sufficient bare minimum, the Court then looked at the process giving rise to the tariff rulings delivered by the Customs

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191. *Id.* at 226–27.

192. *Id.* at 227; *see also id.* at 231 (suggesting two basic elements to look at, "[t]he authorization for classification rulings, and Customs's practice in making them").

193. *Id.* at 227. Again illustrating the connection between procedure and the intent that merits *Chevron* deference, the Court explained that it has "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229.

194. *Id.* at 231 ("The *authorization* for classification rulings, and Custom's *practice* in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here." (emphasis added)).

195. *See id.* at 231–32.

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Service.<sup>196</sup> Specifically, the Court found that the rulings did not go through any notice-and-comment or other comparable procedure. Moreover, the Customs rulings did not have any precedential value—that is, their “binding character as a ruling stops short of third parties.”<sup>197</sup> Lastly, the Court looked to the nature of these rulings and the fact that they issue from a variety of offices around the country and at a record pace: “to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year.”<sup>198</sup> Thus the process for issuing these classifications is not the type that ensures a reliable practice, with the proper “fairness and deliberation,” for which *Chevron* deference is warranted.<sup>199</sup>

In explaining how to determine when substantial deference is due, the Court listed three ways in which to show congressional delegation through procedure: 1) “adjudication,” 2) “notice-and-comment rulemaking,” or (3) “some other indication of comparable congressional intent.”<sup>200</sup> While ostensibly speaking of intent, the third category listed by the Court clearly contemplates a search for procedure. Using the Court’s own tools of construction, one understands that the most general term or phrase in a list is confined by the more specific terms or phrases.<sup>201</sup> Thus, the Court’s focus on adjudication and notice-and-comment rulemaking suggests that the third category that will illustrate Congress’ intent to delegate authority to the agency and thereby grant *Chevron* deference is also a procedure or process. This conclusion is in accordance with the

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196. *Id.* at 233 (turning to the process itself, the Court explained that “[i]t is difficult, in fact, to see in the agency *practice* itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these” (emphasis added)).

197. *Id.* at 233.

198. *Id.*

199. *See id.* at 230.

200. *Id.* at 227.

201. *See* Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate, 537 U.S. 371 (2003) (“[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))).



Court's overall concern with procedure, evident throughout the *Mead* opinion, to determine when *Chevron* deference is due.

Although the Court indicated various procedures that do not warrant *Chevron* deference, including one that allows for issuances from forty-six different offices, it did not specifically set down the type of appropriate procedure that would qualify as "some other indication of congressional intent." The Court remained focused on adjudication and notice-and-comment rulemaking throughout its opinion in *Mead*,<sup>202</sup> but did not limit the possible procedures through which agency pronouncements could receive *Chevron*'s deference. By including a category of potential procedures other than adjudication or notice-and-comment rulemaking in its list of ways to determine *Chevron* deference, the Court contemplated other processes for obtaining substantial deference.<sup>203</sup> Openly the Court acknowledged that it had granted *Chevron* deference to cases that do not fall within the APA's procedures or even procedures rising to that level of formality.<sup>204</sup> "The fact that the tariff classification [in *Mead*] was not a product of such formal process does not alone . . . bar the application of *Chevron*."<sup>205</sup>

The real issue then is what types of procedures the Court contemplated as warranting *Chevron*-level deference absent adjudication or notice-and-comment rule making. As the Court never clearly expressed exactly what procedures fall within this third category, the procedures the Court considered insufficient shed light on this question. Clearly the Court's anxiety over a practice under which forty-six different offices issue rulings bespeaks a concern for a centralized process with adequate supervision from higher authorities.<sup>206</sup> The Court also noted in *Christensen* that it had

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202. See *Mead*, 533 U.S. at 227 (stating that there are various ways of showing delegation of authority, such as "adjudication or notice-and-comment rulemaking"); *id.* at 229 ("[A] very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudications that produces regulations or rulings"); *id.* at 230-31 & 230 n.12 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.").

203. See *id.* at 227.

204. See *id.* at 230-31 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57, 263 (1995)).

205. *Id.* at 231.

206. See *id.* at 233.

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concerns with pronouncements that were not issued through a structured procedure at all. Thus, mere “policy statements, agency manuals, and enforcement guidelines . . . do not warrant *Chevron*-style deference.”<sup>207</sup> Ultimately the Court did note that “relatively formal administrative procedure[s] tending to foster the fairness of deliberation that should underlie a pronouncement of such force” are the type of procedures that warrant *Chevron*’s deference.<sup>208</sup>

In a notable case after *Mead*, the Court also indicated that on top of formal, fair, and deliberate procedures other considerations underlying a statutory scheme support providing *Chevron* deference. In *Barnhart v. Walton*,<sup>209</sup> the Court affirmed that less formal procedures may still result in formats that deserve substantial deference.<sup>210</sup> More to the point, the Court examined a variety of factors that argued in favor of providing substantial *Chevron*-level deference to an agency interpretation.<sup>211</sup> This focus on additional factors suggests that if an interpretation that results from rather formal, fair, and deliberate procedures and is accompanied by other important factors, *Chevron* deference is due. Revenue rulings, in contrast to the tariffs in *Mead*, clearly derive from sufficient procedures to warrant substantial deference after *Mead* and are supported by various considerations that make *Chevron* deference appropriate.

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207. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995)). While the Court’s look in *Christensen* to *Reno* raises an argument that the Court really only reserves *Chevron* for formal APA procedures, the Court’s inclusion of another category of procedures clearly counters such a stance. See *Reno*, 515 U.S. at 61 (suggesting that guidelines less than “the rigors of the Administrative Procedur[e] Act” do not merit *Chevron* deference).

208. *Mead*, 533 U.S. at 230.

209. 535 U.S. 212 (2002).

210. *Id.* at 221.

211. *Id.* at 222 (noting “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the 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 [as] indicat[ing] that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue”). The Court’s focus on a variety of factors does not suggest that those are the factors that should play into every analysis so much as an indicator that a variety of considerations argue for or against providing *Chevron*-level deference. Justice Breyer’s recent concurrence seems to concentrate on the multitude of ways in which to show substantial deference is warranted. See *Nat’l Cable & Telecomms. Ass’n. v. Brand X Internet Servs.*, 545 U.S. (2005) (Breyer, J., concurring) (noting “delegation ‘may be shown in a variety of ways’”).

*2. Revenue rulings: proper authority and a reliable process*

As official pronouncements of the Internal Revenue Service, revenue rulings result from a “relatively formal administrative procedure” and therefore warrant substantial deference after *Mead*. A wide variety of reasons suggest that revenue rulings are the type of administrative pronouncement that deserves *Chevron* deference, including the following principles: Congress gave the IRS the type of authority suggesting such deference is warranted; Congress has provided indications that it considers these rulings significant and authoritative; revenue rulings derive from the necessary type of formal, fair, and deliberate procedure; the policies underlying these rulings argue in favor of giving them deference; and their inherent limits support such deference.

As seemingly required under *Mead*, Congress clearly gave the IRS considerable authority to administer the revenue scheme of the United States. Not only does the Service have specific congressional directives under which it issues regulations,<sup>212</sup> but it also has general authority and power to “prescribe all needful rules and regulations,”<sup>213</sup> with which it issues general directive regulations and revenue rulings.<sup>214</sup> At least for some of these IRS pronouncements, Congress intends them to have the force of law. While there may be no direct or explicit statement by Congress that revenue rulings should carry the force of law, these statements by the IRS do follow from the general authority given to the Service.<sup>215</sup>

Additionally, there is some indication that revenue rulings do carry the force of law in the eyes of Congress. Specifically, Congress has provided that “any failure to make a reasonable attempt to comply with” IRS revenue rulings and regulations will result in added penalties for underpayment.<sup>216</sup> Thus, not only does the IRS

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212. *See supra* notes 35–38 and accompanying text.

213. I.R.C. § 7805(a) (West 2004); *see also* Coverdale, *supra* note 7, at 67.

214. *See supra* notes 39–42 and accompanying text.

215. *See supra* note 40 and accompanying text.

216. I.R.C. § 6662(b)(1) & (c) (West 2004); *see also* Coverdale, *supra* note 7, at 71–72 (discussing how “careless, reckless, or intentional” disregard of a revenue ruling may expose a taxpayer to a penalty”). I.R.C. § 6662 states the following:

(a) Imposition of penalty. If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount

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employ its generally conferred authority in issuing revenue rulings, but Congress has specifically considered the use of such rulings in the United States' revenue scheme.<sup>217</sup> The inclusion of rulings in a congressional penalty provision further supports the force of these rulings. Professors Merrill and Watts have recently shown that early congressional inclusion of administrative pronouncements in penalty provisions conveyed the intent that these announcements carry the force of law.<sup>218</sup> Arguably, then, revenue rulings are precisely the type of issuances Congress contemplated as having the force of law. Ultimately, Congress has delegated sufficient authority to the IRS to

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equal to 20 percent of the portion of the underpayment to which this section applies.

(b) Portion of underpayment to which section applies. This section shall apply to the portion of any underpayment which is attributable to 1 or more of the following:

(1) Negligence or disregard of rules or regulations.

. . . .

(c) Negligence. For purposes of this section, the term 'negligence' includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term 'disregard' includes any careless, reckless, or intentional disregard.

*Id.* § 6662(a)–(c).

217. Congress's provision for penalties under I.R.C. § 6662 is a much stronger statement of intent for rulings to carry the force of law than that which the Court considered in *Mead* for tariff classifications. In *Mead*, the Court found indications that Congress contemplated the use of tariff classifications, and this conclusion counseled, in some respect, for providing deference. *See Mead*, 533 U.S. at 232. There Congress had considered these rulings in a parenthetical dealing with the "issuance of 'regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned.'" *Id.* (citing 19 U.S.C. § 1502(a) (2000)). Congress explicitly in section 6662 provided for penalties for anyone who disregards rulings. I.R.C. § 6662(b)(1). Moreover, rulings in this section are placed on the same level as IRS regulations, which typically go through notice-and-comment procedures. *See id.*

218. *See* Merrill & Watts, *supra* note 174, at 472. Merrill and Watts suggest that

[a]lthough the language of most rulemaking grants is facially ambiguous, we argue in this Article that these grants were not ambiguous during the formative years of the modern administrative state—up to and beyond the enactment of the Administrative Procedure Act (APA) in 1946. Throughout the Progressive and New Deal eras, Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force of law as opposed to mere housekeeping rules. That convention was simple and easy to apply in most cases: If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction—for example, a civil or criminal penalty; loss of a permit, license, or benefits; or other adverse legal consequences—then the grant conferred power to make rules with the force of law.

*Id.* While this discussion is intriguing, this Comment ultimately argues for a slightly different emphasis or analysis under *Mead*, one that does not look solely to congressional intent (or even verbal formulations).

issue revenue rulings for these rulings to receive substantial deference, even though no specific statement declares they should or do carry the force of law.<sup>219</sup> Revenue rulings also have resulted from sufficient procedures to warrant heightened deference.

In addition to arising out of the IRS's sufficient authority to issue revenue rulings, these pronouncements also result from the type of procedure contemplated by the Court in *Mead* when it stated that *Chevron* deference was warranted for announcements that have "some other indication of a comparable congressional intent."<sup>220</sup> The IRS does not issue revenue rulings by notice-and-comment rulemaking or adjudication.<sup>221</sup> Revenue rulings do arise, however, from a formal, fair, and deliberate procedure that is centralized in the IRS and Treasury Department. Revenue rulings result from a standard process, circulated through the same individuals within the IRS and Treasury Department,<sup>222</sup> "demonstrating that a 'central board or office' accords a great 'degree of . . . care' to their issuance."<sup>223</sup> Moreover, while the rulings may derive from various divisions, they all arise from the same office, the office of the Associate Chief Counsel (Technical).<sup>224</sup> These rulings are then sent through various review procedures for in-depth analysis by either "the Branch Chief, the Senior Technical Advisor, or the Assistant to the Branch Chief," then by "the Associate Chief Counsel (Litigation)" and by "the Assistant Counsel."<sup>225</sup> The revenue rulings are "reviewed by the Associate Chief Counsel (Technical) and the Chief Counsel," after which both "the Commissioner and . . . the Treasury" review the rulings before they are finally published in the Internal Revenue Bulletin.<sup>226</sup> This type of structured and multilayered procedure stands in stark contrast to the type of

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219. See *supra* note 186–193 and accompanying text. As the earlier discussion proves, the administrative agency must have some authority, or indication of authority, for *Chevron* deference to apply. Of course, the analysis does not end with the authority provided to the agency.

220. *Mead*, 533 U.S. at 227.

221. See *supra* notes 46–47, 58 and accompanying text.

222. See *supra* notes 56–58 and accompanying text.

223. *Ammex, Inc. v. United States*, 367 F.3d 530, 535 (6th Cir. 2004) (citing *Mead*, 533 U.S. at 228, 236).

224. See *supra* note 58 and accompanying text.

225. SALTZMAN, *supra* note 1, ¶ 3.03[2][a].

226. *Id.*

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issuances that concerned the Court in *Mead*, issuances that emanated from forty-six different offices at a rate of about 10,000 a year.<sup>227</sup>

The procedure for issuing revenue rulings provides both the “fairness and deliberation” that the Court looked for in determining which processes gave rise to *Chevron* deference.<sup>228</sup> Principally, this fairness occurs from the nature of the revenue ruling: it is essentially a request from a party or parties involved in a transaction for the Service’s position on the Tax Code’s application to a factual scenario.<sup>229</sup> Fairness inheres in the dialogue arising out of the public request for clarity. Additionally, the process involves precisely the type of deliberation necessary to warrant deference. The procedure includes having these issues of law applied to factual scenarios initially reviewed by an attorney, and reviewed again at almost every level of the Service and Treasury Department.<sup>230</sup> Rulings do not result from the same type of process, or lack thereof, as mere “policy statements, agency manuals, [or] enforcement guidelines,”<sup>231</sup> which do not require any formal process for formation or review. While the revenue ruling process does not involve the same type of comment or evidence gathering procedure as notice-and-comment rulemaking or adjudication, the process does involve a fair opportunity for members of the public, or even special interest groups, to influence the ruling process.

In addition to having a rather formal and thorough formation process, revenue rulings also deserve *Chevron* deference because of the policies underlying their use and because of their inherent limits. The procedure for issuing revenue rulings provides precisely the

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227. See *Mead Corp.*, 533 U.S. at 233 (“Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency’s 46 scattered offices is simply self-refuting.”).

228. *Id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”); see also Coverdale, *supra* note 7, at 89–90 (arguing that revenue rulings deserve only *Skidmore* respect after *Mead* but also contending that rulings should “rank high on the scale of *Skidmore* deference because of the great care put into their preparation”). While Professor Coverdale ultimately comes to what this Comment argues is the wrong conclusion, his appreciation for the procedure and process of issuing revenue rulings and the unique deference they deserve is well founded.

229. See *supra* notes 51–55 and accompanying text.

230. See *supra* note 58.

231. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

compromise between “fairness and deliberation” and reality. While the Court in *Mead* was obviously concerned with the formality of proceedings,<sup>232</sup> it also remained sympathetic and understanding to the realities of administering a regulatory scheme. Had the Court desired to confine *Chevron* deference to APA procedures, it would have simply limited its grant of heightened deference to notice-and-comment rulemaking and adjudication.<sup>233</sup> However, the Court expanded the types of procedures that may qualify for substantial deference by both listing another category and also by acknowledging the Court’s own grant of *Chevron* deference in cases involving procedures other than those under the APA.<sup>234</sup>

The Court’s openness to other procedures derives from an understanding of the realities of administrative agencies. For a highly involved regulatory scheme, like the ones in which the Court is likely to find pronouncements carrying *Chevron*’s deference, agencies have a variety of procedures available for administering their responsibility. While certain means of administering a scheme naturally foster more fairness and deliberation, realities such as time constraints require a compromise. For example, notice-and-comment practices are “cumbersome, time consuming, and expensive procedure[s].”<sup>235</sup> Such a process creates an unrealistic time frame to respond to requests from the public on how the revenue laws apply to specific factual scenarios at a specific time. Thus, the Service has instituted revenue rulings, which allow the IRS to respond to these complicated issues fairly quickly, but with the time and attention necessary to carry substantial deference.

One of the major purposes behind revenue rulings—voluntary compliance—also counsels in favor of granting these rulings substantial deference. Compliance with the revenue laws is one of

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232. See *Mead*, 533 U.S. at 227 (talking of APA procedures as qualifying for signs of congressional intent and therefore *Chevron* deference); *id.* at 229 (speaking of a good indicator of congressional delegation as “the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed”); *id.* at 230 (stating that the common recipient of *Chevron* deference in the Court’s jurisprudence has been issuances derived from notice-and-comment rulemaking or formal adjudication).

233. The only two APA procedures mentioned in *Mead* are notice-and-comment rulemaking and adjudication. Furthermore, these two procedures are potentially the only types of real “lawmaking” available under the APA.

234. See *Mead*, 533 U.S. at 227; *id.* at 230–31.

235. See Coverdale, *supra* note 7, at 86.

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the main reasons the IRS issues revenue rulings.<sup>236</sup> Compliance, in turn, is probably among the most essential means behind the smooth operation of the United States' revenue laws.<sup>237</sup> Providing revenue rulings with only *Skidmore's* respect would substantially defeat the purpose and importance of these pronouncements. Public reliance on these applications of revenue law to factual scenarios rests on the idea that they represent the official position of the IRS, and any transaction taken on that announcement is protected. Revenue rulings are designed to address these concerns specifically.<sup>238</sup> Not only are they the official position of the IRS, but they also bind the IRS and form precedent for others involved in similar factual scenarios.<sup>239</sup> If courts do not give these rulings the deference they deserve, the undergirding foundation for compliance with these pronouncements will collapse. Parties will increasingly challenge the IRS's position and attempt to persuade the courts that their position is better. Without deference, the IRS, as well as other parties, will be forced to rely on the luck of litigation. Ultimately, mere respect threatens to eliminate one major means for the agency to set and protect its policies, an area that has been consistently afforded great deference.

Lastly, the limits placed on revenue rulings argue for granting them substantial deference. IRS pronouncements embodied in revenue rulings do not touch on broad areas or cover expansive issues. Rather, these rulings are limited to the factual scenarios posed to the IRS on specific issues confronting the Revenue Code or its regulations at that time.<sup>240</sup> Thus, the IRS's use of revenue rulings is constrained by the public need for information and guidance on specific issues of tax law. The formal process that gives rise to revenue rulings combined with the regulatory need for faster responses to tough issues and the need for voluntary compliance suggest that revenue rulings should receive substantial deference after *Mead*.

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236. See *supra* note 63 and accompanying quote.

237. See *supra* note 28 (concerning the importance of voluntary compliance).

238. See *supra* notes 47–50 and accompanying text.

239. See *id.*

240. See *supra* notes 52–55 and accompanying text.



## V. CONCLUSION

Ultimately, *Mead* did nothing to remove the substantial deference that revenue rulings deserve from courts. Many courts have viewed the Court's discussion in *Mead* as requiring some rigid notion of congressional intent that an agency's pronouncements carry the force of law. *Mead's* focus does not, however, rest solely on such congressional intent. Rather, after *Mead*, courts ought to look for indications of Congress's delegation of power to administrative agencies, acknowledging that general grants of power may be sufficient to satisfy *Mead*. In addition, courts should examine the procedure for issuing the pronouncements for which deference is claimed. Fairly formal, fair, and deliberate procedures under a general grant of authority deserve *Chevron's* heightened deference.

Revenue rulings derive from exactly the authority and procedures that warrant substantial deference. Congress has given power to the IRS to prescribe all needful things, and, moreover, has indicated that it considers rulings to have authority. More importantly, the procedures by which the Service issues rulings are precisely the fair, deliberate, and rather formal procedures the Court indicated warranted heightened deference.

*Ryan C. Morris*