INTERNAL AGENCY REVIEW, AUTHORITATIVENESS, AND *MEAD*

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Introduction

On June 27, 2012, two drilling vessels operated by the energy company Royal Dutch Shell ("Shell") left port in Seattle, Washington, headed for one of the world's most extreme ocean environments.[1] The vessels, the *Noble Discoverer* and the *Kulluk* conical drilling unit, were bound for the Chukchi and Beaufort Seas in the Arctic Ocean off the north and northeast coasts of Alaska,

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[1] Press Release, Royal Dutch Shell, Shell Drill Rigs Depart for Alaska Waters (June 27, 2012), http://www.shell.us/home/content/usa/aboutshell/projectslocations/alaska/events_news/06272012_rig.html.

where Shell had hoped to drill ten exploratory oil wells by the end of 2013.[2] However, the company suffered a series of well-publicized setbacks in 2012, including "serious accidents" involving both drill ships.[3] In the wake of these accidents the Justice Department initiated urgent review of Shell's Arctic drilling program,[4] and Shell ultimately decided to delay its drilling until after 2013.[5] Nonetheless, Shell's long-term goal is to tap Arctic reserves believed to contain billions of barrels of oil, which could support production of over 1.5 million barrels per day.[6] The drilling program marks the first exploratory offshore drilling in the region in decades.[7] Harsh conditions, and the thick seasonal sea ice in particular, make offshore drilling in the Chukchi and Beaufort a more risky venture than drilling in the Gulf of Mexico.[8] However, these seas, while remote and challenging, are also biologically rich and culturally significant. For example, they are home to a population of bowhead whales that are hunted annually for subsistence by native Alaskans.[9] The Arctic is also particularly sensitive to climate change; ironically, "[t]he shrinking Arctic ice cap is one of the key drivers of increased interest in Arctic offshore oil and gas," as it opens up more areas for study and potential drilling.[10]

As the drill rigs headed north, environmental and native groups mounted a complex, multi-pronged legal challenge to prevent drilling from being conducted without (in the challengers' view) adequate study, safeguards, and pollution controls.[11] One of the challenges was to the Clean Air Act ("CAA") permits issued for the *Kulluk* and *Discoverer* by the EPA.[12] Shortly after the

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[2] Laura J. Nelson, *Shell Reduces its Arctic Drilling Ambitions as Delays Continue*, L.A. Times, Aug. 1, 2012, http://www.latimes.com/news/nation/nationnow/la-na-nn-shell-revises-arctic-drilling-operations-20120731,0,2674854.story.

[3] John M. Broder, *With 2 Ships Damaged, Shell Suspends Arctic Drilling*, N.Y. Times, Feb. 27, 2013, http://www.nytimes.com/2013/02/28/business/energy-environment/shell-suspends-arctic-drilling-for-2013.html.

[4] *See, e.g.*, John M. Broder & Clifford Krauss, *Interior Dept. Expedites Review of Arctic Drilling After Accidents*, N.Y. Times, Jan. 8, 2013, http://www.nytimes.com/2013/01/09/us/arctic-drilling-to-be-reviewed-in-light-of-accidents.html.

[5] Broder, *supra* note 3.

[6] *See* U.S. Geological Survey, Circular 1370, An Evaluation of the Science Needs to Inform Decisions on Outer Continental Shelf Energy Development in the Chukchi and Beaufort Seas, Alaska 24, 33 (2011), *available at* http://pubs.usgs.gov/circ/1370/pdf/circ1370.pdf (noting a development scenario in which the Beaufort Sea produces nearly 1.2 million barrels of oil per day and drilling in the Chukchi Sea produces nearly 0.6 million barrels of oil per day).

[7] *See* Nelson, *supra* note 2.

[8] *See, e.g.*, U.S. Geological Survey, *supra* note 6, at 219 ("Development in the Arctic is challenging and complex because of the many unknowns and because of the inherent risks of working in frontier and relatively pristine environments."); U.S. Dep't of Interior, Mineral Mgmt. Serv., Alaska OCS Region, Final Environmental Impact Statement, Chukchi Sea Planning Area Oil and Gas Lease Sale 193 and Seismic Surveying Activities in the Chukchi Sea, at ES-4 (2007) [hereinafter Chukchi FEIS] (estimating likelihood of large oil spill occurring and entering offshore waters in Chukchi in the range of 33 to 51 percent).

[9] *See, e.g.*, John R. Brandon & Paul R. Wade, *Assessment of the Bering-Chukchi-Beaufort Seas Stock of Bowhead Whales Using Bayesian Model Averaging*, 8 J. Cetacean Res. Mgmt. 225, 225 (2006).

[10] *See* U.S. Geological Survey, *supra* note 6, at 13.

[11] *See, e.g.*, Petition for Review, Alaska Wilderness League v. U.S. EPA, No. 12-71506 (9th Cir. May 16, 2012) [hereinafter *Kulluk* Petition].

[12] *See id.*

permits were finally issued, environmental and native groups filed suit in the Ninth Circuit.[13] This legal challenge pits the groups against the Obama Administration, which has supported Arctic drilling efforts as part of President Obama's "all of the above" energy strategy.[14]

The prospect of Arctic drilling has been politically and emotionally charged, but the associated legal issues are technical and complex. In particular, the legal challenge to the CAA permits centers on fine-grained statutory interpretations adopted by Region 10 of the EPA concerning what the Act requires.[15] EPA's internal appellate body, the Environmental Appeals Board ("EAB"), approved permits for both vessels after lengthy briefing, and therefore one may think that the statutory interpretations in the Arctic permits should receive deference from a court under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[16] However, EAB's decision falls within the murky realm of the Supreme Court's subsequent exposition of the doctrine of administrative deference in *United States v. Mead Corp*.[17] *Mead* held that agency interpretations merit *Chevron* deference only when the agency has spoken with "the force of law."[18] In the case of Shell's CAA permits, however, EAB did not exercise *de novo* review in its proceedings.[19] Instead, EAB approved the permits under a deferential, "clear error" standard of review of the permitting actor (Region 10).[20]

This Article labels an agency's review of a subordinate actor's actions or decisions as "internal agency review." Many, if not all, agencies with delegated interpretive authority engage in this type of review. However, the Arctic case raises a novel question: does the agency's deferential approval of statutory interpretations put forth by a subordinate merit *Chevron* deference? In rejecting environmental groups' Petition for Review, the Ninth Circuit implied — with very little reasoning in support — that it did.[21] This Article argues to the contrary and uses the example of the Arctic drilling litigation as a framework for arguing that *Chevron* deference should only be afforded to "authoritative" decisions: that is, unqualified interpretations adopted by an agency as a whole, not merely one of its parts.

Scholarly discussion of how to apply the Court's analysis in *Mead* has generally focused on the question of whether and to what extent the fairness and breadth of an agency's process should factor into the deference afforded to

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[13] *Id.*
[14] *See* John M. Broder & Clifford Krauss, *New and Frozen Frontier Awaits Offshore Oil Drilling*, N.Y. TIMES, May 23, 2012, http://www.nytimes.com/2012/05/24/science/earth/shell-arctic-ocean-drilling-stands-to-open-new-oil-frontier.html?pagewanted=all.
[15] *See generally Kulluk* Petition, *supra* note 11.
[16] 467 U.S. 837 (1984).
[17] 533 U.S. 218 (2001).
[18] *Id.* at 226–27.
[19] *See, e.g.*, In re: Shell Offshore, Inc., OCS Permit No. R10OCS030000, slip op. at 9 (EAB Mar. 30, 2012) [hereinafter *Kulluk* Order].
[20] *Id.*
[21] Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. EPA, 704 F.3d 743, 749–50 (9th Cir. 2012).

informal agency decisions.[22] Less attention has been paid to exploring the requirements concerning the *outcome* of the agency's decision-making, i.e., the nature of the interpretation itself. In order to shed light on this issue, this Article explores a particular interpretive context: an agency's official review of interpretations promulgated by other actors, either inside or outside the agency. In the context of the Arctic drilling litigation, EPA conducted an internal review of interpretations promulgated by a regional office.[23] Although the agency as a whole undoubtedly has the power to issue interpretations meriting *Chevron* deference, it is likely that a single regional office of the agency, acting entirely on its own, lacks this power.[24] Therefore, the involvement of a decision-making body purporting to represent the agency as a whole seems to make a difference. Nonetheless, the precise extent to which deference should hinge on "the position in the agency hierarchy of the person assuming responsibility for the administrative decision" remains unclear.[25] Internal agency review therefore implicates the problem of the allocation of power (in this case, interpretive power) within agencies, an issue that is only beginning to gain sustained scholarly attention.[26]

The discussion of internal agency review focuses on the question of authoritativeness: the extent to which a decision represents the uniform and unequivocal view of the agency. Specific proposals to ensure authoritativeness have been aired before. Perhaps most notably, shortly after *Mead* came down, David J. Barron and Elena Kagan argued that deference[27] should only be afforded to actions taken by "the statutory delegatee — the officer to whom the agency's organic statute has granted authority over a given administrative action."[28] This individual (in EPA's case, the EPA Administrator) could not receive deference for decisions by lower agency actors to whom the delegatee has "subdelegated" authority.[29] Rather, the delegatee must sign off personally on the interpretation "prior to its final issuance" but after affording a meaningful

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[22] *See, e.g.*, Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2031 (2011) ("In United States v. Mead Corp., the Court focused on whether the interpretive method promotes the same sort of 'fairness and deliberation' as do procedures like notice-and-comment rulemaking or formal adjudication and whether it 'bespeak[s] the legislative type of activity that would naturally bind more than the parties to the ruling.'"); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720 (2007); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1019–20 (2005).

[23] *See REDOIL*, 704 F.3d at 746.

[24] *See, e.g.*, Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1067 (9th Cir. 2003) (holding that an interpretation in a "particular permitting context" office is not eligible for deference even when the interpretation was supported as the position of the agency); Maiwand v. Gonzales, 501 F.3d 101, 104 (2d Cir. 2007) (noting that interpretations are only eligible for *Chevron* deference if authoritative).

[25] David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 (2001).

[26] *See, e.g.*, Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011).

[27] When this Article refers simply to "deference," the meaning is "*Chevron* deference." When referring to the other type of deference courts give to agency interpretations — so-called *Skidmore* deference — this Article will do so explicitly.

[28] Barron & Kagan, *supra* note 25, at 237.

[29] *See id.*

review "by the delegatee or her close advisors."[30] Given that more than a decade has passed since *Mead*, it appears unlikely that the Supreme Court would fundamentally rethink the doctrine in the way Barron and Kagan propose (though presumably at least one current member of the Court would be in favor of such an interpretation!).

This Article takes a related, but less radical, approach. It does not suggest that the delegatee must personally sign off on agency decisions, or that her close advisors must review every decision. However, it argues that some actor or body representing the agency as a whole must unreservedly adopt the decision. In addition to being faithful to the logic of *Chevron* and *Mead*, this approach would encourage high-level deliberation, increase political accountability, and promote uniformity and clarity of agency policy. The benefits of this approach should outweigh the harm caused by any decrease in administrative efficiency or flexibility, which would be minor.

This Article proceeds as follows: Part I briefly outlines *Chevron* deference and the confusion created by the Supreme Court's decision in *Mead*. Part II discusses the litigation over permits issued to Shell's drill ships in the Arctic, and the Ninth Circuit's decision to afford deference to EPA's deferential review of interpretations promulgated by a regional office. Part III revisits *Mead* and describes two types of failures to promulgate an interpretation with the force of law: process failure and outcome failure. Part IV describes what is meant by an internal agency review and provides the example of review of permit decisions by EPA's Environmental Appeals Board. Part V argues, based on *Mead* and other Supreme Court precedent, that to avoid outcome failure and be eligible for *Chevron* deference an interpretation must be authoritative and therefore must meet three requirements: uniformity across the agency and over time; definiteness; and binding effect on future parties. Finally, the Article describes why deferential internal agency review does not meet any of these three requirements, and, accordingly, why EPA's deferential internal review of permits should not receive *Chevron* deference.

I. *Chevron*, and *Mead*'s Force of Law Requirement

Chevron deference is one of the core judicial doctrines in administrative law. The doctrine, announced by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, holds that an agency should receive deference for a reasonable interpretation of the statute it is charged with implementing, when the statute is ambiguous on a point of law.[31] *Chevron* is grounded in a theory of congressional intent to delegate interpretive authority to agencies which have special expertise on the statutory subject matter and are more politically accountable than courts.[32] Courts weighing the applicability of

[30] *Id.* at 237–40.
[31] 467 U.S. 837, 842–43 (1984).
[32] *See id.* at 865 ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views

the *Chevron* doctrine in a particular case must engage in a two-step analysis.[33] At the first step, the court determines whether the statute is ambiguous or "silent" on the interpretive question, or conversely if the statute "directly addresses" the question.[34] If the statute speaks clearly, *Chevron* deference is inappropriate, and the court must adopt the statute's plain and unambiguous meaning.[35] If the statute is ambiguous, the court moves to the second analytic step, which is to determine whether the agency's interpretation is reasonable.[36]

United States v. Mead Corp. introduced an additional step into the *Chevron* framework.[37] This addition has been called "*Chevron* step zero" because it amounts to a threshold requirement for consideration of an agency interpretation under the two-step *Chevron* framework.[38] The Court stated in *Mead*: "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[39] *Mead* thus imposes two related requirements: (1) Congress delegated rulemaking authority; and (2) the agency interpretation was promulgated in the exercise of its rulemaking authority.[40] Thus, an agency may have rulemaking authority but fail the *Mead* test because the interpretation was not promulgated in exercise of this authority.[41]

Mead held that "ruling letters" issued by the United States Customs Service do not carry the force of law necessary for *Chevron* deference.[42] The agency's ruling letters classified and set tariff rates for imports according to the Harmonized Tariff Schedule of the United States.[43] However, the Court denied deference to an interpretation in a ruling letter after it concluded that Congress did not delegate the authority to issue such letters with the force of law.[44] This conclusion was based on several considerations. First, although the Customs Service possessed statutory authority to issue rules and regulations, including "regulations establishing procedures for the issuance of binding rulings," the statutory terms gave no positive indication that Congress intended such rulings to have the force of law.[45] Second, the Court strongly suggested that to have the force of law, a legislative activity should "bind more than the parties to the

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of wise policy to inform its judgments."); *see also* United States v. Mead Corp., 533 U.S. 218, 227 (2001); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001).

[33] *Chevron*, 467 U.S. at 842–43.

[34] *Id*. at 843.

[35] *Id.* at 842–43.

[36] *Id*. at 843.

[37] 533 U.S. at 226–27.

[38] *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

[39] *Mead*, 533 U.S. at 226–27.

[40] *See id.*

[41] *See, e.g.*, Kornman & Assocs., Inc. v. United States, 527 F.3d 443, 454 (5th Cir. 2008).

[42] *Mead*, 533 U.S. at 234.

[43] *Id*. at 221–22.

[44] *Id*. at 226–27.

[45] *Id*. at 231–32 (internal quotation marks omitted).

ruling."[46] Mere precedential value is insufficient for deference if the rule does not have this legally binding effect.[47] Third, the Court was persuaded that the agency did not seem to have "a lawmaking pretense in mind" because it did not promulgate the rulings through notice-and-comment procedures prescribed by the Administrative Procedure Act ("APA").[48] On this point, the Court also considered the sheer volume of ruling letters produced each year (about 10,000) and the diffusion of agency authority (46 of the agency's "scattered offices" were authorized to produce the letters).[49]

Mead provides that, when Congress has expressly delegated to an agency the authority to create rules binding on future parties (through either rulemaking processes or through adjudication), congressional intent to delegate interpretive authority to the agency is manifest as well.[50] However, in cases where express delegation is absent, or where it is unclear whether the agency exercised its authority, courts must ask whether Congress would have intended for an exercise of agency authority to carry the force of law.[51] These cases involving "implicit delegation" are the most vexing for courts applying *Mead*.

Courts of appeals have been conflicted as to which factors to use in identifying implicit congressional delegation.[52] Some courts have held that the binding effect of a pronouncement is paramount, while others have emphasized deliberativeness, public participation, and other procedural safeguards.[53] Still others have emphasized factors outside the agency's direct control, like statutory complexity.[54] This trend has led some academic commentators and Supreme Court justices to opine that the state of the *Chevron* doctrine has been "muddled" by *Mead*.[55]

II. Arctic Offshore Drilling Litigation

The Beaufort and Chukchi Seas, part of the Arctic Ocean, lie off the northeastern and northern coasts of Alaska, respectively. The seas provide rich feeding grounds that are host to a wide array of marine life, including several

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[46] *Id.* at 232.
[47] *See id.*
[48] *Id.* at 233.
[49] *Id.* at 233–34.
[50] *Id.* at 229; *see also* Sunstein, *supra* note 38, at 221–22.
[51] *Mead*, 533 U.S. at 229 ("[I]t can . . . be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . .").
[52] *See* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443, 1457–74 (2005).
[53] *See id.* and accompanying references.
[54] *See id.* at 1459; *see also* Barnhart v. Walton, 535 U.S. 212, 225 (2002); Cmty. Health Ctr. v. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002).
[55] *See* Schultz Bressman, *supra* note 52, at 1475; Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1014 n.8 (2005) (Scalia, J., dissenting).

species of whales.[56] Many native communities live on the north coast, and members of these communities generally depend on marine life for their livelihoods.[57] For example, the annual bowhead whale hunt is an important subsistence activity for communities along the Chukchi Sea.[58] The seas are frozen for much of the year (in the case of the Beaufort Shelf, around nine months of the year),[59] and sea ice is a "dominant feature" of the environment.[60] Although the seabeds are thought to contain many millions of barrels of oil, conditions are such that these coastal waters were once considered "untouchable."[61]

A. Background to Drilling Efforts

Despite the challenges outlined above, Shell Oil has spent seven years and around $4 billion in a bid to drill in the waters of the Chukchi and Beaufort.[62] Shell commissioned two vessels with plans to begin drilling in the Arctic as early as 2012.[63] Shell sent the *Kulluk* to the Beaufort Sea, while the *Noble Discoverer* ("*Discoverer*") was headed to the Chukchi.[64] The Obama administration, in an apparent attempt to demonstrate its willingness to allow new domestic drilling as part of an "all of the above" energy strategy, has helped clear the path for Shell's drilling to move forward.[65]

However, Shell's bid continues to be rife with controversy and criticism from native and environmental groups, particularly given recent setbacks.[66] The probability of a major oil spill in the pristine Arctic waters has been a major point of contention, and some key actors, including the head of the U.S. Coast Guard, have claimed that the government and Shell are not prepared to adequately handle a spill given the region's harsh conditions, particularly the unpredictability of the sea ice.[67] The federal government's oil spill commission released a report in April 2012 that assigned the grade of "C" to efforts by government and industry to prepare for a spill in the Arctic.[68] Shell's efforts

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[56] Nat'l Oceanic and Atmospheric Admin., Draft Environmental Impact Statement, Effects of Oil and Gas Activities in the Arctic Ocean, at 3-51 to 3-129 (Dec. 2011) [hereinafter Arctic DEIS].
[57] *See* Chukchi FEIS, *supra* note 8, at III-103.
[58] *Id.*
[59] *See* Arctic DEIS, *supra* note 56, at 3–6.
[60] *Id.* at 3–5.
[61] Broder & Krauss, *supra* note 14.
[62] *Id.*
[63] *See id.*
[64] *See* Press Release, Royal Dutch Shell, Shell Begins Drilling in Beaufort Sea (Oct. 3, 2012), http://www.shell.us/aboutshell/projects-locations/alaska/events-news/10032012-announcement.html; Press Release, Royal Dutch Shell, Shell begins drilling in the Chukchi Sea (Sept. 9, 2012), http://www.shell.us/aboutshell/projects-locations/alaska/events-news/09082012-spud.html.
[65] *See* Broder & Krauss, *supra* note 14.
[66] *See id.*
[67] *Id.*; Complaint at 23–24, Alaska Wilderness League v. U.S. Dep't of the Interior, No. 1:12-cv-00010-RRB (D. Alaska July 10, 2012), *available at* http://earthjustice.org/sites/default/files/Arcticoilspillplan.complaint7.10.12.pdf.
[68] *See* Nat'l Comm'n on the Deepwater Horizon Oil Spill & Offshore Drilling, Assessing Progress: Implementing the Recommendations of the National Oil Spill Commission 2

have also been criticized on the ground that the drill ships and their support vessels will emit large amounts of pollutants like carbon monoxide and nitrogen dioxide into the air, as well as carbon pollution that could accelerate the effects of global warming in the Arctic.[69]

Arctic offshore drilling has become an increasingly important issue for the Obama administration. The U.S. Department of Interior plans to offer new leases in "targeted areas" in the Chukchi and the Beaufort Seas, in addition to potential sales in the Cook Inlet Planning Area in south central Alaska.[70] In the coming years the unique Alaskan marine ecosystem is likely to be a focal point of U.S. offshore drilling efforts, along with the Gulf of Mexico.[71] Therefore, the resolution of legal issues in the challenges to Shell's planned drilling, which include important issues of statutory interpretation, could have broader legal and political implications for drilling plans arising from future lease sales.

B. Permit Litigation

To proceed with drilling plans, Shell was required under the federal Clean Air Act ("CAA") and Alaska state law to obtain a consolidated air pollution permit ("*Kulluk* Permit") for the *Kulluk*.[72] The *Kulluk* Permit was granted by Region 10 of the EPA on October 21, 2011, and environmental groups petitioned EPA's Environmental Appeals Board ("EAB") for review.[73] For the *Noble Discoverer*, Shell was also required to obtain Prevention of Significant Deterioration ("PSD") permits ("*Discoverer* Permits") under the CAA.[74] The *Discoverer* Permits were initially granted by EPA Region 10 in 2010,[75] but EAB remanded the Permits to the Region, which subsequently reissued them.[76] Environmental groups petitioned EAB for review.[77]

The petitions alleged a number of deficiencies that implicated the agency's statutory interpretations.[78] For example, Petitioners argued that Region 10 unlawfully excluded the area within 500 meters of the ships from the statute's

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(Apr. 17, 2012), *available at* http://oscaction.org/wp-content/uploads/OSCA-Assessment-report.pdf.

[69] *See* Press Release, Earthjustice, Arctic Oil Drilling to Pump Pollution into Pristine Skies (May 16, 2012), http://earthjustice.org/news/press/2012/arctic-oil-drilling-to-pump-pollution-into-pristine-skies.

[70] Press Release, U.S. Dep't of the Interior, Next Five-Year Strategy Includes Frontier Areas in the Alaska Arctic (June 28, 2012), http://www.doi.gov/news/pressreleases/Interior-Finalizes-Plan-to-Make-All-Highest-Resource-Areas-in-the-US-Offshore-Available-for-Oil-and-Gas-Leasing.cfm.

[71] *See id.*

[72] *Kulluk* Order, *supra* note 19, at 4 n.3.

[73] *Id.* at 1, 4.

[74] In re: Shell Gulf of Mexico, Inc. & Shell Offshore, Inc., OCS Permit Nos. R10OCS/PSD-AK-09-01, R10OCS/PSD-AK-2010-01, slip op., at 1 (EAB Jan. 12, 2012) [hereinafter *Discoverer* Order].

[75] *Id.*

[76] *Id.* at 6.

[77] *Id.* at 4.

[78] *Kulluk* Order, *supra* note 19, at 1–2.

definition of "ambient air."[79] After extensive briefing on both the *Kulluk* Permit and *Discoverer* Permits, EAB denied both petitions for review in lengthy opinions.[80] EAB's review of the air permits was conducted according to the procedures of Part 124 of EPA's regulations ("Part 124 adjudications").[81] As will be shown below, this review was an informal adjudication.[82] Nonetheless, the level of detail and thoroughness of analysis in these opinions is not readily distinguishable from EAB review as part of formal adjudications required by statute.[83]

Environmental and native groups appealed EAB's decision to deny review to the Ninth Circuit Court of Appeals.[84] Under Ninth Circuit precedent, individual permit decisions by a regional agency office should not receive *Chevron* deference.[85] Both EPA and Shell claimed that EAB's written decision denying review of regionally-issued permits merited *Chevron* deference because it presented the full agency's detailed and comprehensive analysis of the issues of statutory interpretation raised by the petitioner groups.[86] Their case was bolstered by the fact that at least two courts of appeals, including the Ninth Circuit, had previously afforded *Chevron* deference to EAB decisions promulgated through informal adjudication.[87] However, both of these cases pre-date *Mead* and were not subject to what the Ninth Circuit has described as "the limitations that *Mead* placed on the breadth of *Chevron*."[88]

Therefore, the issue before the Ninth Circuit was whether EAB decisions through Part 124 adjudications should be afforded *Chevron* deference in the same manner as EAB decisions promulgated through formal adjudication, for example, in cases of enforcement actions. Given the trial-like protections afforded by EAB, including extensive briefing, it was clear that EAB's denial of the petitions to review the *Kulluk* and *Discoverer* permits did not suffer from a failure to provide adequate process. That is, EAB used a "relatively formal administrative procedure tending to foster the fairness and deliberation that

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[79] *See Discoverer* Order, *supra* note 74, at 56; 42 U.S.C. § 7409 (2006); Petition for Review Submitted by Native Village of Point Hope et al. at 28, *In re: Shell Gulf*, OCS Permit Nos. R10OCS/PSD-AK-09-01, R10OCS/PSD-AK-2010-01 (Oct. 24, 2011).
[80] *Kulluk* Order, *supra* note 19, at 5; *Discoverer* Order, *supra* note 74, at 11.
[81] *See* 40 C.F.R. § 124.19 (2000); ENVTL. APPEALS BD., EPA, PRACTICE MANUAL 35 (Sept. 2010), *available at* http://www.epa.gov/eab/pmanual.pdf.
[82] *See infra* notes 93–100 and accompanying text.
[83] *See generally Kulluk* Order, *supra* note 19 (100 pages long); *Discoverer* Order, *supra* note 74 (75 pages long); In re: Lowell Vos Feedlot, No. CWA-07-2007-0078, 2011 WL 1824673 (EAB May 9, 2011) (final decision in appeal of decision by Administrative Law Judge through formal adjudication, presented in similar form and level of detail as permit review denials).
[84] *See Kulluk* Petition, *supra* note 11.
[85] *See* Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1067 (9th Cir. 2003); High Sierra Hikers Ass'n. v. Blackwell, 390 F.3d 630, 648 (9th Cir. 2004).
[86] Brief of Respondent EPA, at 17–21, REDOIL v. EPA, 704 F.3d 743 (9th Cir. 2012) (No. 12-70518), 2012 WL 1864659; Brief of Respondent-Intervenors Shell Gulf of Mexico Inc. and Shell Offshore Inc. at 20–29, *REDOIL*, 704 F.3d 743 (No. 12-70518), 2012 WL 1943748.
[87] *See* Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999); Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40 (2d Cir. 1993).
[88] *See* Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1013 (9th Cir. 2006).

should underlie a pronouncement" with the force of law.[89] A key issue raised in the litigation was whether EAB's internal review of the Region 10 permits failed the *Mead* standard because of the deferential standard of review it employed.

Unfortunately, the Ninth Circuit entirely missed the opportunity to clarify this issue in its opinion denying the Petition to Review the *Discoverer* permits. Instead, it added another "muddle" to the confusing array of lower court opinions applying *Mead*.[90] The court first noted (correctly) that "Congress explicitly granted to the EPA the authority to promulgate regulations and grant air permits for activities on the OCS."[91] That is, Congress delegated interpretive authority to the agency. However, the court then held that the EAB proceeding was a formal adjudication and therefore merited deference.[92]

1. The Ninth Circuit's Confusion Over "Formal Adjudication"

One of the problems with the current doctrine surrounding *Mead* is that courts and agencies give talismanic importance to the use of two forms of decision-making to which courts usually grant deference: notice-and-comment rulemaking and formal adjudication.[93] To paraphrase Barron and Kagan, courts focus on the "how" of decision-making rather than the "who."[94]

The Ninth Circuit's labeling of Part 124 adjudications as formal adjudications was an example of this focus. Unfortunately, it was also incorrect. The court apparently confused the two possible meanings of the word "formal" within the adjudication context. The court relied on the colloquial definition of "formal" as "strict" or "extensive," and by consequence the court held that EAB's process was formal because it "included multiple rounds of public notice and comment, various petitions for administrative review, and two reasoned EAB decisions upholding the air permits at issue."[95] However, "formal adjudication" is a statutory term of art. By defining "formal" according to the colloquial meaning of the term, the court ignored the vast weight of authority holding that "formal adjudication" refers specifically to those adjudications that are subject to sections 556 and 557 of the APA.[96] Adjudications are subject

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[89] United States v. Mead, 533 U.S. 218, 230 (2001).
[90] *See generally* Schultz Bressman, *supra* note 52.
[91] *REDOIL*, 704 F.3d at 749.
[92] *Id.*
[93] Barron & Kagan, *supra* note 25, at 227–28.
[94] *Id.* at 204.
[95] *REDOIL*, 704 F.3d at 749.
[96] *See, e.g.*, Walls v. United States, 582 F.3d 1358, 1377 (Fed. Cir. 2009) ("[A]n agency adjudication is deemed formal under the APA, and subject to the requirements of §§ 556 and 557, only when the agency's authorizing statute requires a hearing with trial-type procedures."); In re Gartside, 203 F.3d 1305, 1314 (Fed. Cir. 2000) (stating technical definition of "formal" as "subject to sections 556 and 557 of the APA"); City of W. Chi., Ill. v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 644 (7th Cir. 1983) ("Formal adjudications are those *required by statute* to be conducted through on-the-record proceedings.") (emphasis added); Oiciyapi Fed. Credit Union v. Nat'l Credit Union Admin., 936 F.2d 1007, 1010 (8th Cir. 1991) (suggesting that formal adjudications are "subject to §§ 556 and 557"); Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1479 (D.C. Cir. 1989) (noting that there are specific provisions of the APA governing formal adjudica-

to these sections when they are required by statute to be determined by a hearing on the record[97] (although this exact wording is not always required).[98] The CAA provisions at issue involved no such requirement,[99] none of the parties (including EPA) argued that they did, and EAB used a less comprehensive process than it does for formal adjudications.[100] EAB's process in reviewing the permits was not a formal adjudication subject to sections 556 and 557 of the APA. By calling EAB's process "formal" for *Chevron* purposes when it was not, the court elided the crucial *Chevron* issue of presumed Congressional intent.

Nonetheless, for the reasons explained below, this Article argues that EAB's process would not have merited deference *even if* it had been a formal adjudication. EAB's deferential review of permits is insufficiently authoritative for *Chevron* to apply.

2. *EPA's Deferential Review*

Under EPA's regulations, EAB may grant petitions to review permits on policy grounds at its own discretion, and it may review permit actions under a *de novo* standard in order to set agency-wide precedent. However, in most cases EAB's practice is to deny petitions for review unless the petitioner demonstrates that the permitting authority committed a clear error of law or fact.[101]

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tion); City of Arlington, Tex. v. Fed. Commc'ns Comm'n, 668 F.3d 229, 241 (5th Cir. 2012), *cert. granted in part*, 133 S. Ct. 421 (2012) *and cert. granted in part*, 133 S. Ct. 524 (2012) (same); Mary Holper, *Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1259 n.109 (2011) ("Formal adjudications, which are governed by 5 U.S.C. §§ 554, 556, and 557, are mandated when the statute requires a hearing to be 'on the record after opportunity for an agency hearing.'"); Merrill & Hickman, *supra* note 32, at 885 ("[F]ormal adjudications must comply with the hearing requirements of sections 556 and 557 of the APA[.]"); Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 548 (2007) ("Under the APA, formal adjudications are governed by §§ 556 and 557."); William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 255 (2009) ("Congress provided in §§ 554, 556, and 557 for procedures that have come to be known as trial-like formal adjudications."); *see also* Izaak Walton League of Am. v. Marsh, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981) ("Informal adjudication is a residual category including all agency actions that are not rulemaking and that *need not* be conducted through 'on the record' hearings.") (emphasis added).

[97] 5 U.S.C. § 554(a) (2012) ("This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [with exceptions]."); *id.* §§ 556(a), 557(a).

[98] *See, e.g.*, Steadman v. S.E.C., 450 U.S. 91, 96 n.13 (1981).

[99] *See* 42 U.S.C. § 7475 (2006).

[100] *Compare* 40 C.F.R. § 124.19 (2000) (detailing process for permit approval appeals), *with* 40 C.F.R. § 22 (containing much more elaborate procedures for administrative assessments of civil penalties and the revocation/termination or suspension of permits).

[101] *See, e.g.*, In re: MHA Nation Clean Fuels Refinery, Permit No. ND-0030988, 2012 WL 2586961, at *4 (EAB June 28, 2012) ("Ordinarily, the Board will not review an NPDES permit decision unless the permit conditions at issue are based on 'a finding of fact or conclusion of law which is clearly erroneous.'").

The "clear error" standard is a deferential one, which merely requires the permitting actor to put forward a "permissible interpretation."[102]

EAB denied the petitions to review the alleged deficiencies in statutory interpretation in both the *Kulluk* and *Discoverer* permits under the clear error standard.[103] Thus, EAB held that the petitioners "failed to demonstrate that the Region clearly erred" on questions of statutory interpretation.[104] Moreover, EAB's orders denying review did not appear to anticipate that a reviewing court might need to grapple with the question of whether *Chevron* deference should be accorded to its analysis.[105] Thus, it is unclear to what extent the Board agreed with and adopted statutory interpretations put forth by the Region. For example, on the question of the *Kulluk*'s CAA operating permits, EAB stated:

> The Board *agrees* with the Region that its interpretation *more fully comports with the structure and language of the CAA* and the implementing regulations, and *rejects REDOIL Petitioners' assertion that the statutory language is so plain that there is no ambiguity* about whether Congress intended to impose increment provisions on temporary minor sources where the state implementation plan does not otherwise impose increment requirements on such sources.[106]

As this quote demonstrates, EAB was trying to have it both ways. On the one hand, the Board implied that the Region's interpretation is *better* than the Petitioners'. Moreover, the Board appeared to definitively adopt the position that the statute is not unambiguous. However, the Board fell short of stating that the Region's interpretation was required or was the "best" available interpretation of the statute.

Elsewhere the Board appeared to take a stronger position. For example, discussing a sub-issue relating to whether the *Kulluk* is a major or a minor source for purposes of a PSD permit, the Board stated that it "agrees with the Region that Congress established specific thresholds to determine when a source would be considered major for purposes of PSD review."[107] Nonetheless, the heading under which this statement is contained emphasized that its holding was simply that "The Region Did Not Clearly Err" on the question at issue.[108] Therefore, the Board was not reviewing under a *de novo* standard.

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[102] Gulf of Mexico, Inc., Shell Offshore, Inc. (Frontier Discovery Drilling Unit), OCS Permit Nos. R10OCS/PSD-AK-09-01, R10OCS/PSD-AK-2010-01, 2010 WL 5478647, at *2–*3 (EAB Dec. 30, 2010).
[103] *See Kulluk* Order, *supra* note 19, at 100.
[104] *Id.* at 9.
[105] *See generally id.; see also Discoverer* Order, *supra* note 74.
[106] *Kulluk* Order, *supra* note 19, at 52 (emphases added).
[107] *Id.* at 20–21 n.18.
[108] *Id.* at 20.

C. Reviewing EPA's Review

There are four possible ways for courts to evaluate whether EAB's review of permits under a "clear error" standard merits *Chevron* deference on questions of statutory interpretation.

The first option is to grant deference to all of the Region's interpretive choices, under the theory that these choices have been vetted by EAB to a sufficient extent under the "clear error" standard, and that the Region is best situated because of its expertise to make these interpretive decisions. However, this approach is unsatisfying because it essentially reduces EAB's role to irrelevance. The regional office was calling the shots, even though it could not speak for the agency as a whole nor ensure that other parts of the agency (i.e., other regions) would not adopt differing interpretations. Under *Mead*, this approach is unacceptable because Congress delegated interpretive authority to the agency as a whole, not to actors within the agency.

The second approach is to grant EAB deference for its dispositions, i.e., its decisions to uphold statutory interpretations put forth by the Region. Thus, if EAB has held that the Region did not clearly err as to a question of law, a reviewing court should defer to EAB's decision that the Region's approach is acceptable. However, under *Chevron* and *Mead*, deference is due to *interpretations*, not *decisions*.[109] Moreover, this approach does not differ as a practical matter from the first approach and amounts to affording deference to the Region's interpretations rather than the agency's.

The third approach is to afford deference to EAB's interpretations when it appears the Board intends them to be binding on the whole agency. This approach would essentially bring an analysis similar to the Supreme Court's decision in *Nat'l Cable & Telecommunications Association v. Brand X Internet Services*[110] inside the agency walls. *Brand X* held: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[111] Thus, *Brand X* requires reviewing courts to examine whether a prior court's interpretation actually adopted an authoritative and singular interpretation of a statute.[112] In the context of internal agency review, a reviewing court would need to examine whether the agency has held that a statute leaves no room for lower bodies inside and outside the agency to exercise discretion.

This approach, while perhaps more theoretically satisfying than the first or second approaches (because deference would be given to the agency's interpretation, not the Region's), is also problematic. For one thing, as demonstrated

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[109] *See, e.g.*, United States v. Mead, 533 U.S. 218, 226–27 (2001) (espousing the principle that agencies claim deference for interpretations).
[110] 545 U.S. 967 (2005).
[111] *Id.* at 982.
[112] *See id.*

above, agencies are frequently unclear — and hedge their bets — regarding whether a particular interpretation is required. Agency decisions are often highly fact-intensive and involve areas of expertise, and for courts to sift through, for example, a 100-page EAB decision to determine where the agency meant to be authoritative and where it meant to be deferential would be inefficient and fraught with the potential for error. Finally, and most importantly, where an agency appears to be using a deferential standard of review — or, as in the case of EAB's Arctic drilling decisions, explicitly says so — the agency has already committed itself to issue its holdings based on this standard. Thus, to analogize to the judicial context, if a court reaches Step Two of the *Chevron* analysis — reviewing for reasonableness — the court cannot then hold that the statute is unambiguous. Similarly, if an agency states that it is reviewing only for reasonableness, the agency may not receive deference when its language suggests (in dicta) that the statute is unambiguous.

The fourth approach is to hold that when a decision does not set policy for the whole agency, *Chevron* deference is always inappropriate. This Article argues that this approach is both the most faithful to the theory of congressional delegation espoused by *Chevron* and *Mead* and also makes for the best policy.

One important point to note is that EAB's decisions on the Arctic permits left open the possibility for internal inconsistency within the agency. In merely holding that the Region did not "clearly err" in its approach to the *Kulluk* and *Discoverer* permits, the Board did not adopt the Region's interpretations agency-wide. Other EPA regions may be free to exercise their discretion to approve permits that espouse interpretations that differ from Region 10's. Nor are the agency's interpretations definite, as EAB did not purport to identify the best readings of the statute. The "clear error" standard does not require EAB to utilize its expertise in the subtle task of choosing between different but reasonable interpretations. Unless the Region made an obvious mistake, the Board is required to approve the permits. Finally, EAB's approval of individual permits does not bind future permit parties, nor does the "clear error" standard objectively signal EAB's intent to bind the agency as a whole. To the contrary, EAB intentionally passed up the opportunity to set binding precedent. If EAB felt that an important interpretive issue was at stake, it could have exercised its prerogative to review the permit terms *de novo* based on "[a]n exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review."[113] In this event, the various regional offices would be legally compelled to follow the interpretation, and EAB itself would be bound to follow its own precedent, or to overrule it. This should be sufficient to constitute an exercise of binding interpretive authority. As will be explained below, these attributes of the interpretations indicate that EAB's decisions lacked the "force of law" under *Mead*.

[113] 40 C.F.R. § 124.19(a)(2) (2000).

III. Two Types of *Mead* Failures

This Article posits that there are two distinct ways in which an interpretation can fail *Mead*'s force of law test: process failure and outcome failure. A process failure occurs when an agency does not arrive at an interpretation through a sufficiently robust internal process to ensure that the agency has exercised its expertise and/or ensured political accountability.[114] For example, the Seventh Circuit in *Krzalic v. Republic Title Co.* held that an agency's announcement of an interpretation in the Federal Register, without any public process preceding it, was insufficiently formal and deliberative to merit *Chevron* deference.[115] By contrast, an outcome failure occurs when the interpretation is not the *type* of agency pronouncement that indicates an exercise of congressionally delegated interpretive authority. For example, agency orders that do not bind more than the parties to the order frequently do not receive deference.[116] If an outcome failure occurs, the interpretation fails *Mead* regardless of how much procedure the agency employed.[117] Both process and outcome failures are, in effect, proof that an agency with delegated authority nonetheless did not have a "lawmaking pretense in mind"[118] with regard to a particular interpretation.

The Custom Service's ruling letters in *Mead* suffered from both process and outcome failures, but the latter appeared more essential to the holding. The process failure consisted not merely of the absence of formal adjudication or notice-and-comment rulemaking in the promulgation of the letters; the Court was also troubled by the proliferation and decentralization of the letters.[119] The volume of ruling letters produced by the agency each year indicated that the agency could not have given careful thought and consideration to each letter.[120] The decentralized character of the dissemination of the letters was a process failure because the full knowledge and experience of the agency would not be brought to bear on interpretations issued by one isolated agency office.[121] The larger problem with the ruling letters, however, was that they did not bind other parties: a problem of outcome rather than process.[122]

The criteria for determining whether a process or outcome failure exists are different. The criteria for evaluating an agency's process are generally stan-

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[114] *See* Krzalic v. Republic Title Co., 314 F.3d 875, 881 (7th Cir. 2002).
[115] *Id.*
[116] Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1067 (9th Cir. 2003) (rejecting deference for permitting decision that did not bind other parties).
[117] *See id.* at 1067; Schultz Bressman, *supra* note 52, at 1462 (noting that permitting decision in *Wilderness Soc'y* occurred after relatively formal procedure).
[118] *Mead*, 533 U.S. at 233.
[119] *See id.* ("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."); *see also id.* at 230 (stating that principles of "fairness and deliberation" should underlie pronouncements with the force of law).
[120] *See id.* at 233.
[121] *See id.*
[122] *See id.*; *cf.* Sunstein, *supra* note 38, at 223 ("[A]s a statutory matter, formal procedures are emphatically not a necessary condition for the force of law.").

dards-based. This feature of the analysis flows directly from *Mead*. (No wonder *Mead* is one of the opinions most hated by Justice Scalia, a staunch advocate for rules over standards.)[123] The *Mead* Court could have laid down a straightforward rule for necessary process: any interpretation not promulgated through formal rulemaking, notice-and-comment rulemaking, or formal adjudication is not owed deference. But the Court clearly recognized circumstances in which adjudications not accompanied with formal process may nonetheless receive deference.[124] Therefore, lower courts must decide on a case-by-case basis whether Congress would have "intended" the agency to receive deference for interpretations promulgated through a certain type of informal adjudication.

By contrast, the criterion for evaluating an agency's outcome — the nature of the interpretation — appears more rule-like: whether the interpretation binds more than the parties to the decision.[125] However, the Court noted cryptically that "precedential value alone does not add up to *Chevron* entitlement.".[126] Unfortunately, *Mead* did not provide much other guidance about what interpretive outcomes merit deference. Thus, the search for apparently clear rules and principles has devolved into a more discretionary, standards-based analysis of what constitutes an adjudicative rule with the "force of law."[127]

Specifically, there are two potential definitions of force of law, one objective and the other subjective. The objective definition is that an interpretation has the force of law only if future parties are *legally compelled* to follow the decision.[128] This is the sense in which traffic laws are binding on drivers, and in which a Supreme Court decision is binding on lower courts. (Note that at least one scholar has argued that agency adjudications can virtually *never* be binding in this way.)[129] The subjective definition is that an interpretation may be binding if an agency *intends* to bind itself in similar circumstances, as when an agency head issues an order legally binding on only one party but with the intention that other parties will follow the same rule.[130] Under the subjective definition, regulated parties may still have the impression that an agency's prior interpretations will be *functionally* binding, if the agency demonstrates its com-

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[123] *See* Barnhart v. Walton, 535 U.S. 212, 227 (2002) (Scalia, J., concurring) (criticizing the indefiniteness of the *Mead* standard). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
[124] *Mead*, 533 U.S. at 231.
[125] *Id.* at 232.
[126] *Id.*
[127] *Cf.* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590 (1988) (remarking how "hard-edged, yes-or-no crystalline rules" can become "discretion-laden, post hoc muddy rules," and vice-versa).
[128] *See* Sunstein, *supra* note 38, at 222 (defining "force of law" as either "binding on private parties in the sense that those who act in violation of the decision face immediate sanctions" or legally binding on the agency itself).
[129] *See* Murphy, *supra* note 22, at 1042 ("Because agency 'precedents' do not bind later agency decision-making in any serious way, they do not possess the same potential as judicial precedents to create generally applicable and binding law.").
[130] *See, e.g.*, Pharm. Research & Mfrs. of Am. v. Thompson, 362 F.3d 817, 822 (D.C. Cir. 2004). Agency statements of policy may be another example of this type of pronouncement. *See* Schultz Bressman, *supra* note 52, at 1459.

mitment to previous interpretations.[131] The difference between the objective and subjective definitions is that only under the objective definition are parties (including the agency) *compelled* to follow an interpretation. Interpretations binding under the objective definition obviously qualify for *Chevron*, but it is not clear the extent to which interpretations binding under the subjective definition qualify.

Once again, the Supreme Court is the primary source of confusion as to when the subjective definition may apply. The Court's emphasis in *Mead* on a binding effect on other parties supports the objective definition as a requirement,[132] but its decision in *Barnhart v. Walton* did not even use the phrase "force of law" and instead emphasized a number of other factors, including the agency's consistency over time,[133] which serves as an indication of its intention to bind itself to one interpretation. The upshot is that despite *Mead*'s emphasis on binding effect, lower courts often conduct the *Chevron* analysis without even considering this factor.[134]

This Article uses the lens of internal agency review procedures to formulate a more concrete test for when agency decisions have the force of law and therefore avoid outcome failure under *Mead*. It further argues that interpretations promulgated through procedures for internal agency review should not receive *Chevron* deference if the agency employed a deferential standard to uphold another actor's interpretation.

IV. Internal Agency Review

What this Article terms "internal agency review" occurs when an agency body reviews an interpretation by a subordinate actor inside or outside the agency. "Internal" merely means that the review takes place within the agency and not in the courts.

An example of internal review of an interpretation from an actor *outside* the agency is when an agency reviews state actions for consistency with a federal statutory mandate. For example, in *Pharmaceutical Research & Manufacturers of America v. Thompson*, the D.C. Circuit afforded *Chevron* deference to an interpretation adopted by the Secretary of the U.S. Department of Health and Human Services ("HHS") in approving a state's Medicaid plan.[135] The Secretary's interpretation was an informal adjudication because it was not promul-

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[131] *See* Murphy, *supra* note 22, at 1041–42 ("[A]n 'interpretation' of an agency organic statute adopted through formal adjudication acquires whatever prospective force it might possess not because it writes a new 'law' that binds regulated parties, regulators, and courts, but rather because a sensible regulated party should expect that the agency will likely stick to this interpretation in later cases.").
[132] *Mead*, 533 U.S. at 232.
[133] *Barnhart*, 535 U.S. at 222.
[134] *See* Schultz Bressman, *supra* note 52, at 1459; *see also, e.g.*, Alaska Dep't of Health & Social Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931, 938–39 (9th Cir. 2005).
[135] 362 F.3d at 821–22.

gated through notice-and-comment rulemaking or formal adjudication.[136] Nonetheless, the D.C. Circuit, applying *Mead*, found express Congressional delegation of interpretative authority because the organic statute delegated approval power to the Secretary.[137]

An example of internal review of an actor *within* an agency is the appeal of certain permit decisions to EAB, including the decisions for the *Kulluk* and *Discoverer* drill ships described above.[138] Like EPA, many agencies have one or more internal appellate bodies, such as the Justice Department's Board of Immigration Appeals ("BIA") and Health and Human Services' Departmental Appeals Board ("DAB").

Internal agency review creates the potential for the agency to employ a deferential standard of review. This issue is not raised by other forms of informal adjudication where the agency does not review a subordinate actor's decision but rather proposes its own interpretation. For example, the ruling letters discussed in *Mead* were not deferential. They contained a Customs Service interpretation classifying day planners sold by Mead Corporation.[139] The Service unambiguously adopted the view that the day planners were subject to the tariff on "diaries, notebooks, and address books, bound."[140]

By contrast, internal agency review allows agencies to determine what level of deference to pay to a subordinate actor's interpretation. In the absence of clear statutory language to the contrary, agencies may review interpretations with deference. For example, consider the statutory mandate implicated in *Pharmaceutical Research*, which required the Secretary of HHS to approve individual states' Medicaid plans.[141] The D.C. Circuit construed this statutory provision to be an "express delegation of interpretive authority" under *Mead* because the Secretary was "charged with ensuring that each state plan complies with a vast network of specific statutory requirements."[142] However, nothing in the provision seemingly required the Secretary to ensure interpretive consistency across all states.[143] That is, the Secretary could presumably have approved two different state plans that amounted to two different interpretations of the Medicaid statute, provided that each interpretation was reasonable.

Some agencies require a higher standard of review for conclusions of law. For example, the Equal Employment Opportunity Commission decides appeals on issues of law in a final action by the agency under a *de novo* standard,[144] as does the Medicare Appeals Council.[145] And the DAB typically reviews an Administrative Law Judge's ("ALJ") conclusions of law under an "erroneous"

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[136] *Id.*
[137] *Id.*
[138] *See* 40 C.F.R. § 124.19 (2000).
[139] United States v. Mead, 533 U.S. 218, 225 (2001).
[140] *Id.* at 224–25.
[141] *See* 42 U.S.C. § 1396 (1984); *Pharm. Research*, 362 F.3d at 822.
[142] *Pharm. Research*, 362 F.3d at 822.
[143] *See* 42 U.S.C. § 1396.
[144] 29 C.F.R. § 1614.405 (2012).
[145] 42 C.F.R. § 423.2100 (2012).

standard, which is essentially *de novo* review.[146] Also, some agencies forbid a higher standard of review for appellate review of questions of fact in adjudicative decisions. For example, the BIA "will not engage in *de novo* review of findings of fact determined by an immigration judge."[147]

However, many agencies do not compel a particular standard of review based on the type of case or decision in the way that the judicial system does. In some cases, agencies may explicitly suggest a particular standard of review but give the reviewing actor the discretion to deviate from it. EPA's decision to review permit applications under Part 124 of its regulations takes this form, setting "clearly erroneous" as a default but leaving the door open for a higher standard when important matters of policy are at stake.[148] Likewise, the BIA's regulations state that the Board "*may* review questions of law . . . de novo."[149] Of course, the reviewing actor can further constrain itself through precedential opinions and guidance. Thus, despite its regulatory discretion, in practice the BIA typically binds itself to the *de novo* standard for questions of law.[150]

In other cases, internal review bodies have wide discretion to set their own standard of review on an *ad hoc* basis. For example, the Board of Contract Appeals for the U.S. Government Accountability Office ("GAO") has lengthy rules of procedure but no specified standards of review.[151] The same is true for the Board of Veteran Appeals.[152] In some cases the reviewing actor may be the agency head herself, exercising extensive discretion. For example, the Director of the Consumer Financial Protection Bureau is authorized to review adjudicative decisions "to the extent necessary or desirable."[153]

The Third Circuit's decision in *Armstrong v. Commodity Futures Trading Commission* provides an example of an agency review body exercising deferential review under an *ad hoc* standard.[154] In *Armstrong*, the Commission summarily affirmed an ALJ opinion as "substantially correct."[155] The court held that this result left open "questions about which specific findings or conclusions by the ALJ were incorrect."[156] Because the result left "guesswork regarding what the agency has adopted," it did not "permit intelligent appellate review."[157] The court remanded the decision back to the agency.[158]

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[146] *See, e.g.*, 42 C.F.R. § 1005.21 (2012).
[147] 8 C.F.R. § 1003.1(d)(3)(i) (2012).
[148] 40 C.F.R. § 124.19 (2000).
[149] 8 C.F.R. § 1003.1(d)(3)(ii) (2012) (emphasis added).
[150] *See, e.g.*, In re Ramon Ghellere Espindola, A099 805 862 - BOS, 2012 WL 6641802, at *1 (BIA Dec. 4, 2012).
[151] U.S. Gov't Accountability Office, Rules of Procedure of the Government Accountability Office Contract Appeals Board (2008), *available at* http://www.gao.gov/cabrulesjun2008.pdf.
[152] 38 C.F.R. § 19.7 (2012) (showing no specified standard of review).
[153] 12 C.F.R. § 1081.405 (2012).
[154] *See* 12 F.3d 401 (3d Cir. 1993).
[155] *Id.* at 404.
[156] *Id.*
[157] *Id.*
[158] *Id.*

In sum, some agencies review decisions involving questions of law under a *de novo* standard, but many retain the flexibility to employ a less stringent standard. Some agencies formally constrain what standard of review may be used through agency regulations or guidance documents. But unlike the federal courts, there are not firmly entrenched norms across agencies governing what standards should apply in particular types of cases. At most there is a general preference toward reviewing issues of law under a *de novo* standard, as demonstrated by the regulations of agencies such as the Department of Health and Human Services and the Department of Justice. But a substantial number of agencies simply do not include any guidance over how to review questions of law, including statutory interpretations.

The question raised here is: how should courts review an agency decision that itself gives deference to the interpretation of a subordinate actor? Does an interpretation produced in this circumstance sufficiently implicate the agency's expertise and political accountability, as contemplated by *Chevron* and *Mead*?[159]

A. Identifying De Novo *v. Deferential Review*

Unless required by statute, an agency can use the standard of its own choosing when reviewing an interpretation and need not specify what standard it employs.[160] For purposes of analysis under *Mead*, however, agency standards of review may be divided into two categories: *de novo* and deferential review. The *de novo* standard is evident when an agency reviews as if it were reaching the question for the first time, without affording any discretion to the actor being reviewed.[161] Deferential review is when an agency reviews an interpretation with some form of deference, such as clear error or abuse of discretion.[162]

When an agency does not make clear what standard of review it employs, it is still fairly easy to evaluate whether the agency's standard is more like *de novo* or deferential review. The key question determining if the standard of review is like *de novo* review is whether the agency has denied the actor being reviewed any discretion to choose a path other than what the agency would have chosen were it in the actor's position. Thus, when an agency holds that a particular interpretation is unlawful and in doing so adopts an alternative interpretation, the equivalent of *de novo* review has occurred.[163] For example, the Ninth Circuit's decision in *Alaska Department of Health & Social Services v.*

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[159] *See supra* Part II.
[160] *See, e.g.*, 5 U.S.C. §§ 554, 556, 557 (providing APA's requirements for formal adjudication, which do not mention standard of review for questions of law); Ronald J. Krotoszynski, Jr., *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 Admin. L. Rev. 1057, 1058 (2004) (noting that APA does not prescribe procedures for informal adjudications).
[161] *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 Lewis & Clark L. Rev. 233, 246 (2009).
[162] *See id.* at 243–47.
[163] *See Alaska Dep't of Health*, 424 F.3d at 938–40 (9th Cir. 2005).

Centers for Medicare & Medicaid Services concerned the HHS Secretary's rejection of a state Medicaid plan amendment.[164] In rejecting the plan, the Secretary adopted a differing interpretation of the statutory terms "economy" and "efficiency."[165] By independently imposing the agency's own interpretation of "economy" and "efficiency," the Secretary did not leave the state with any discretion to adopt an inconsistent interpretation.[166] (Note that this discussion leaves open the possibility that the agency in this case could also have merited deference for *approving* the state's interpretation had the agency made clear that it was setting policy.)

An agency's rejection of an interpretation should always be considered equivalent to *de novo* review, because in rejecting interpretation "X," the agency always implicitly adopts the alternative interpretation "Not-X."[167] The agency makes a statement that X is not a possible interpretation of the statute, and this is in itself a definite interpretation with respect to X.

By contrast, a deferential standard of review does not require an agency to state its own final interpretation. Thus, if in *Alaska Dep't of Health* the agency had approved the state's plan as espousing a permissible interpretation of "economy" and "efficiency" but not the *only* permissible interpretation, the agency would not have been approaching the statutory question independently but rather through a deferential view of another actor's interpretation.

B. Example of Deferential Review: EPA's Permit Review Adjudications

EPA's Environmental Appeals Board conducts informal adjudications in the case of appeals of final permit decisions.[168] EAB has jurisdiction over appeals of permits issued under the Hazardous and Solid Waste Amendments to the Resource Conservation Recovery Act ("RCRA"), the National Pollutant Discharge Elimination System ("NPDES") program of the Clean Water Act, the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act, and the Underground Injection Control ("UIC") program of the Safe Drinking Water Act.[169] Appeals of permit decisions under Part 124 of EPA's regulations do not have the same level of process as formal adjudications conducted by EPA.[170] Nonetheless, Part 124 adjudications provide a fairly robust legal process and may be trial-like with substantial briefing on both sides and the possibility of motions and oral argument.[171] The decision to deny review of

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[164] *Id.* at 934.
[165] *Id.* at 940.
[166] *See id.*
[167] That is, the agency can say, "We're not sure exactly what the precise interpretation is (or we don't want to prescribe one at this point), but we know that it *definitely* isn't *that* one, X." This is definitive and authoritative because any future party will know with certainty that X falls outside of the acceptable range of interpretations, and the agency as a whole will be committed as a practical matter to this position.
[168] *See* 40 C.F.R. § 124.19 (2000); PRACTICE MANUAL, *supra* note 81, at 35–52.
[169] *See* 40 C.F.R. § 124.19; PRACTICE MANUAL, *supra* note 81, at 35.
[170] *Compare* 40 C.F.R. § 124.19 (permit appeals), *with* 40 C.F.R. § 22 (formal adjudications).
[171] *See, e.g.*, Environmental Appeals Board, EPA, Docket, Shell Offshore, Inc. and Shell Gulf of Mexico Inc. (CONSOLIDATED), http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/77355bee1a

a permit decision may occur after lengthy briefing and take the form of a detailed EAB opinion that demonstrates a level of thorough analysis comparable to opinions issued by EAB after formal adjudication.[172] Nonetheless, because permit appeal decisions do not require a hearing on the record, Part 124 adjudications are informal.[173]

EAB has no required standard of review when deciding whether to grant review of a permit decision.[174] The agency may "decide on its own initiative to review any condition" of any permit decision within 30 days of the decision.[175] However, pursuant to EPA's exhortation to review sparingly, EAB does not frequently exercise this power.[176] Most EAB permit review decisions occur in response to a petition from an interested party,[177] which must show that the permit condition in question is based on:

> (A) A finding of fact or conclusion of law that is clearly erroneous, or
> (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.[178]

Clearly, EAB may elect to review a question of law *de novo* if it represents, for example, "an important policy consideration."[179] However, EAB usually binds itself to the deferential "clearly erroneous" standard.[180] As applied to statutory interpretation, the clear error standard means that a permit decision need not adopt the best interpretation of a statute for EAB to deny

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[172] *See, e.g.*, *id.*; MHA Nation Clean Fuels Refinery, Permit No. ND-0030988, 2012 WL 2586961 (EAB June 28, 2012) (detailed EAB decision under Part 124); Lowell Vos Feedlot, No. CWA-07-2007-0078, 2011 WL 1824673 (EAB May 9, 2011).

[173] *See* Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320-01 (Feb. 13, 1992) (creating EAB and describing how permit appeals were previously decided at sole discretion of EPA Administrator, not through a hearing); Anna L. Wolgast et al., *The United States' Environmental Adjudication Tribunal*, 3 J. Court Innovation 185, 190 (2010) ("EPA has adopted less formal procedures [compared with Part 22 adjudications] at 40 C.F.R. Part 124 that govern the agency's decisions to issue, modify, or revoke permits under the environmental protection statutes administered by the EPA."); Natural Res. Def. Council v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002) (stating in the context of NPDES permits that Part 124 adjudications form part of an "informal agency adjudication process").

[174] *See* 40 C.F.R. § 124.19(a).

[175] *See* 40 C.F.R. §124.19(p).

[176] *See, e.g.*, *MHA Nation*, 2012 WL 2586961, at *4.

[177] Petitions for review may only be filed by individuals who participated in the permitting process. 40 C.F.R.§ 124.19(a). However, if review is granted by EAB, any party may submit a brief. 40 C.F.R. § 124.19(e).

[178] 40 C.F.R. § 124.19(a)(4).

[179] *See id.*

[180] *See, e.g.*, Arcelormittal Cleveland Inc., No. 3ID00003*OD, 2012 WL 2521644, at *2 (EAB June 26, 2012) (stating that the Board will grant review under either of the two standards from 40 C.F.R. § 124.19(a) but that the Board would consider the petition in question only under the "clearly erroneous" standard); *MHA Nation*, 2012 WL 2586961, at *4 ("Ordinarily, the Board will not review an NPDES permit decision unless the permit conditions at issue are based on 'a finding of fact or conclusion of law which is clearly erroneous.'").

review.[181] Thus, EAB's clear error standard may function analogously to the *Chevron* framework by allowing permitting authorities to fill in ambiguities in the statute so long as the interpretation is a reasonable one.[182]

V. Reviewing Deferential Review

How should a court review an agency's acceptance of a subordinate actor's interpretation under a deferential standard of review? Answering this question requires a more general theory of judicial deference to agency interpretations. The argument advanced here is that deference should only be afforded to *authoritative* interpretations, which represent the unequivocal position of the whole agency.

A. Authoritativeness as Agency-Wide Policy

This Part elaborates on the concept of agency authoritativeness as a requirement for deference. It begins by explaining how the requirement follows from the logic of Supreme Court precedent. It then briefly explains how authoritativeness advances the pragmatic justifications of the *Chevron* doctrine. Finally, it argues that an authoritative interpretation need not be promulgated or approved by a specific actor such as an agency head or statutory delegatee.

1. Supreme Court Precedent

A requirement that an interpretation must be agency-wide policy helps to make sense of the Supreme Court's sometimes varied approach to deference. This proposition will be supported by examining reasoning in two cases: *Mead*, and a little-noted prior opinion, *Martin v. Occupational Safety and Health Review Commission*. These cases strongly suggest that the Court believes that Congress would not intend for interpretive authority to be delegated to an actor which lacks the authority to speak for the agency as a whole.

United States v. Mead Corporation: In his dissent in *Mead*, Justice Scalia argued that *Chevron* deference should be afforded when an agency's interpretation is "authoritative."[183] He defined an authoritative interpretation as one that "represents the official position of the agency," even when taken in anticipation of litigation.[184] Thus, Justice Scalia would have afforded deference to the ruling letter at issue in *Mead* because the Solicitor General and the General Counsel of the Department of Treasury affirmed that the ruling letter was "the official position of the Customs Service."[185] Nonetheless, it has been suggested that the justices supporting *Mead* also viewed the authoritativeness of an

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[181] *See* In re: Deseret Power Elec. Coop., PSD Permit No. PSD-OU-0002-04.00, 2008 WL 5572891, at *18 (EAB Nov. 13, 2008).
[182] *See id.*
[183] United States v. Mead, 533 U.S. 218, 256–57 (2001) (Scalia, J., dissenting).
[184] *Id.* at 257, 258 n.6.
[185] *Id.* at 258.

agency interpretation as critical to *Chevron* Step Zero, but that they merely had a different idea of what "authoritative" meant.[186] For the majority in *Mead*, authoritative interpretations are those "authorized" by express or implied Congressional delegation and promulgated pursuant to this authority.[187] For Justice Scalia, "authoritative" merely meant that the agency has adopted the interpretation in some official manner.[188] Nonetheless, even the majority in *Mead* hinted that an interpretation must represent the official position of an agency when it stated that "[a]ny 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."[189]

Correspondingly, courts of appeal generally require that an interpretation have precedential value within the agency in order to merit *Chevron* deference, with some courts explicitly stating that the mere possibility of intra-agency conflict is unacceptable.[190] Thus, under the logic of *Mead*, the official nature of an interpretation, in the sense that the interpretation applies to the agency as a whole, should be considered a necessary condition for deference, though not a sufficient one.

Martin v. Occupational Safety and Health Review Commission: In this case predating *Mead* by a decade, the Supreme Court provided an important analysis of the relationship between standards of review and interpretive deference. *Martin* concerned a unique statutory delegation under the Occupational Safety and Health Act of 1970[191] ("OSH Act").[192] The OSH Act divided important administrative responsibilities between two actors: the Secretary of Labor and the Occupational Safety and Health Review Commission, an independent commission not under the Secretary's authority.[193] The Secretary

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[186] *See* Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 824 (2007) ("[Justices] Souter and Breyer share with Scalia an understanding that 'authoritative' interpretations merit judicial deference; they differ over the circumstances in which they are willing to find an authoritative interpretation.").

[187] *Mead*, 533 U.S. at 226–27.

[188] *Id.* at 244 (Scalia, J., dissenting) (suggesting that when decisions "required to be made personally by a Cabinet Secretary" result in the promulgation of an interpretation through informal adjudication, the resulting interpretation is necessarily authoritative).

[189] *Id.* at 233.

[190] *See, e.g.*, Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1366–67 (Fed. Cir. 2005) (noting the importance of the fact that an interpretation "represents an agency-wide position"); Lin v. U.S. Dep't of Justice, 416 F.3d 184, 191 (2d Cir. 2005) ("There is, in sum, no reason to believe that an [Immigration Judge's] summarily affirmed decision contains the sort of authoritative and considered statutory construction that *Chevron* deference was designed to honor."); Miranda Alvarado v. Gonzales, 449 F.3d 915, 922 (9th Cir. 2006) (supporting holding that Immigration Judge's summarily affirmed decision did not merit *Chevron* deference by reasoning that "another IJ could reach the opposite conclusion without violating any *established* agency position") (emphasis added); Quinchia v. U.S. Att'y Gen., 552 F.3d 1255, 1258 (11th Cir. 2008) (joining the Second and Ninth Circuits); *see also* The Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1068 (9th Cir. 2003), *amended on reh'g en banc in part* 360 F.3d 1374 (9th Cir. 2004) (denying *Chevron* deference to permit interpretation that would not bind agency "to permit a similar activity" in the future).

[191] 29 U.S.C. § 651 (1970).

[192] Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 147 (1991).

[193] *Id.*

was assigned the "responsibility for setting and enforcing workplace health and safety standards," including the ability to issue citations for violations of the standards.[194] Meanwhile, the Commission was given authority to carry out adjudications in the event that a citation issued by the Secretary was contested.[195] The question presented in *Martin* was: when the Secretary and Commission gave conflicting interpretations of a regulation under the OSH Act, to which administrative actor's interpretation should reviewing courts defer?[196]

Martin concerned deference to an administrative interpretation of a regulation, not a statute, and therefore *Chevron* deference was not directly implicated. However, the deference given by courts to an agency's reasonable interpretation of a regulation is the same or stronger than the deference given to an agency's reasonable statutory interpretation.[197] Moreover, the same "legal fiction" of congressional delegation of interpretive authority is implicated in the regulatory context as in the statutory context.[198] Therefore, the Court's analysis in *Martin* is relevant to *Chevron* and *Mead*.

Martin held that the Secretary and the Commission could not *both* have the power to issue authoritative interpretations of the OSH Act regulations, and that the interpretive power was more suitably vested with the Secretary, who promulgated the regulations.[199] The reasons given by the Court for giving interpretive authority to the Secretary are not important for present purposes. What is important are the consequences the Court viewed as flowing from its holding that the Commission did not have the power to render authoritative interpretations of the regulations. *Martin* stated that "the more plausible inference" from the structure of administrative authority provided by the OSH Act is that "Congress intended to delegate to the Commission the type of non-policy-making adjudicatory powers typically exercised by a *court* in the agency-review context."[200] Therefore, the Court held that the Commission was required to review the Secretary's interpretations deferentially, "for consistency with the regulatory language and for reasonableness."[201] Evidently, this is not a *de novo* standard of review. It is more like "clear error" or *Chevron* deference itself.

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[194] *Id*.
[195] *Id.* at 147–48.
[196] *Id.* at 150.
[197] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997); *see also, e.g.*, Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 55 (2000).
[198] *See, e.g.*, Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1457 (2011) ("[C]ourts invoking [a] pragmatic rationale for Seminole Rock generally deploy — either implicitly or explicitly — a legal fiction about congressional intent analogous to the legal fiction used to justify *Chevron*: the presumption that when Congress delegated the agency the authority to make rules with the force of law, it implicitly delegated to the agency the authority to clarify those rules with subsequent (reasonable) interpretations that should themselves be treated by courts as authoritative.").
[199] *Martin*, 449 U.S. at 152.
[200] *Id*. at 154 (emphasis in original).
[201] *Id*. at 154–55.

In sum, *Martin* implicitly recognized that a deferential standard of review and the exercise of authoritative interpretive power are incompatible.[202] If upholding interpretations under a deferential standard were an exercise of such power, then the Supreme Court would not have allowed the Commission to exercise this standard of review as to the Secretary's interpretations. Otherwise, it would not have resolved the dual-authority problem that the Court held was intolerable. *Martin* suggests that deferential review of another actor's interpretation does not result in an authoritative interpretation by the reviewing actor.

2. Why Authoritativeness?

The Court's precedents provide compelling support for a legal argument that courts applying *Mead* should require that *Chevron*-worthy decisions are authoritative in the sense of representing an agency-wide policy. But this approach also best serves the justifications for *Chevron* deference more generally. For example, authoritative interpretations are likely to be advanced by actors who are more politically accountable than actors outside the agency or who only represent part of the agency. Moreover, decisions that apply to the full agency are likely to be viewed as more legitimate by regulated entities. This approach strikes a proper balance between preserving administrative flexibility while avoiding the danger of arbitrariness.

Actors representing the agency will also likely have expertise concerning the general administration of the statute in light of the mission and policies of the organization. Such actors can survey the effects that a particular interpretation will have on the full breadth of the agency's activity, rather than only one aspect of it. This consideration also explains why authoritativeness advances the goal of what one scholar calls "flexible agency administration — continuous policy experimentation under the direction of agency administrators."[203] Experimentation is best served by incentivizing the agency to commit to a particular interpretation as precedent that will be "tested" through application to the full agency and those under its regulatory supervision.[204] If the interpretation fails this test the agency can revisit it. Finally, authoritativeness encourages agency-wide uniformity and helps to establish clarity and predictability for regulated entities.

Further elucidation of the potential drawbacks and advantages of the concept of authoritativeness advanced in this Article are explored below, in Part V.D. But this brief discussion should establish that the argument for authoritativeness is not simply based on case law.

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[202] *See id*. at 152–55.
[203] Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. Rev. 1271, 1279 (2008).
[204] *See* Barron & Kagan, *supra* note 25, at 249 ("The ideal . . . is neither pure centralization, in which high-level actors execute directives for ministerial application, nor pure decentralization, in which lower-level actors decide matters autonomously.").

3. Whose Authority?

As discussed in the Introduction, David Barron and Elena Kagan have proposed a requirement that agency heads personally review and sign off on agency interpretations for deference to be afforded.[205] This Article does not argue for that view. First, it is likely to be inefficient. It would require agency heads and their staff to delve into complex statutory and regulatory schemes, diverting time and energy toward technical, legal matters that could be spent on policy and management. Second, this approach could discourage subdelegation of administrative functions. While it is true that the statutory delegatee is generally the most politically accountable actor in an agency, political accountability is not everything.[206]

There are sound policy reasons why the statutory delegatee may want to vest interpretive authority with other reviewing actors, such as appellate review bodies. These actors tend to be career employees who are more likely to have a long view of the agency's mission and practices. In the adjudicative context, they are more likely to have experience with internal precedents, and the specialized nature of their role will breed familiarity with the relevant legal materials. Recall that political accountability is only one of the principle justifications of the *Chevron* doctrine; expertise is another. Nonetheless, high-level actors engaging in internal review are likely to be somewhat politically accountable — certainly more accountable than lower-level actors — because of their proximity to policymaking actors. In the case of EPA's appeals board, the members are designated by the Administrator and are thereby accountable to the Administrator.[207] Moreover, the concept of political accountability does not imply that Congress delegated agencies with the authority to make *entirely* political decisions. Otherwise there would be no point in courts reviewing agency decisions — at least some of them — at all.

Finally, the most salient reason for rejecting the suggestion that the statutory delegatee should sign off on interpretations to make them *Chevron*-worthy is that this would be a fairly radical departure to a *Mead* framework which, despite inconsistencies and controversy, is fairly well entrenched. By contrast, the more modest idea suggested here — that interpretations must represent the full agency's view — fits the pattern and logic of existing precedent.

B. Specific Requirements for Authoritativeness

This Part outlines more specific outcome-based requirements for interpretations intended to apply to the agency as a whole. It then applies these requirements to the case of deferential internal agency review.

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[205] *See generally id.*
[206] *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 690 (2007).
[207] 40 C.F.R. § 1.25(e) (2012).

At a general level, *Mead* requires that an agency exercise the "force of law" for *Chevron* deference to apply. Rejections of deference at *Chevron* Step Zero typically concern process failures: the agency did not employ procedures sufficiently robust to support an implication that Congress would have intended for resulting interpretations promulgated to have interpretive authority.[208] However, the outcome produced by the agency — the nature of its interpretation, independent of the process used by the agency to arrive at the interpretation — is an equally essential component to the deference analysis. Analysis of outcome failures has been muddled and generally lacks a clear framework. Nonetheless, it is clear that a *Chevron*-worthy interpretation promulgated by the agency must be an "exercise of" its delegated interpretive authority.[209] That is, the process must demonstrate that the agency had a "lawmaking pretense in mind," and the outcome must have the force of law.[210]

To flesh out the general requirement that the interpretation must represent the view of the entire agency, case law and common sense suggest that there should be three specific requirements for determining whether an interpretation has authoritative force of law: a uniformity requirement, a definiteness requirement, and a generality requirement. An interpretation that meets these three requirements should be eligible for deference under *Mead*, provided that the interpretation manifests no procedural deficiencies (i.e., lack of deliberation, process, explanation, etc.).

1. Uniformity Requirement

The uniformity requirement concerns an agency's consistency. As explained below, an agency's position should be consistent in two dimensions: across the agency and over time.

a. Uniformity Across the Agency

An interpretation must be promulgated by an agency actor with the power to speak for the agency, and the interpretation must be adopted by the agency as policy. This is a requirement of horizontal uniformity, which was discussed above as the basic requirement that the decision-making actor be speaking for the agency.

The Supreme Court's 1991 decision in *Martin* reinforces the importance of horizontal uniformity. *Martin*, as discussed above, held that Congress would not have intended for the two co-equal bodies (the Secretary of Labor and the Commission) charged with enforcing the OSH Act to each have the power to issue authoritative interpretations of agency regulations meriting deference.[211] *Martin*'s logic naturally extends to the principle that Congress could not have intended for two co-equal actors *within* an agency — neither of which speaks

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[208] *See, e.g.*, Krzalic v. Republic Title Co., 314 F.3d 875, 881 (7th Cir. 2002).
[209] *See* United States v. Mead, 533 U.S. 218, 226–27 (2001).
[210] *See id.* at 232–33.
[211] *See* Martin v. Occupational Safety & Health Review Comm'n, 449 U.S. 144, 147–52 (1991).

for the agency as a whole — to each be able to promulgate competing authoritative interpretations. The question is not whether there are conflicting interpretations within the agency, the question is whether there *could* be such conflicting interpretations, each having the same degree of authority. The mere possibility of a conflict is inconsistent with the agency's ultimate authoritativeness, which must be univocal. This position has been implicitly recognized in some courts of appeal.[212] Therefore, unless the interpretation *necessarily* applies to the agency as a whole, deference should be withheld.

b. Uniformity Over Time

Another aspect of the uniformity requirement is that an interpretation should be sufficiently uniform over time.[213] An agency should not receive deference when its position wildly seesaws within or between presidential administrations.[214] The importance of some degree of consistency of an agency's interpretations aligns with a general emphasis on the importance of deliberative, non-capricious action.[215] On the other hand, an agency should be able to change its position and still receive deference.[216] What the consistency requirement appears to come down to is that an agency cannot be erratic.[217] To take an extreme example, an agency should not be able to completely reverse an interpretation several times within a single presidential administration. However, the case law concerning agency consistency remains unsettled,[218] and for present purposes this Article merely notes the desirability of some minimum consistency requirement without elaborating on its precise features.

2. Definiteness Requirement

The second requirement is that an interpretation be definite. *Chevron* deference is afforded when an agency fills in a "gap" or otherwise resolves an ambiguity in a statute.[219] However, if an interpretation merely fills in part of the gap or replaces one open-ended interpretation with another, deference is not

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[212] *See, e.g.*, Miranda Alvarado v. Gonzales, 449 F.3d 915, 922 (9th Cir. 2006); Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1366–67 (Fed. Cir. 2005).
[213] *See generally* Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995 (2005); *see also, e.g.*, Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").
[214] *See, e.g.*, I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) ("An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years.").
[215] *See* Dotan, *supra* note 213, at 109–18.
[216] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone.").
[217] *See Cardoza-Fonseca*, 480 U.S. at 467 (stating that agency had proposed taking three different positions over time).
[218] *See, e.g.* Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., concurring) ("[O]nce it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference.").
[219] *Chevron*, 467 U.S. at 843–44.

warranted. If *Chevron* is based on a presumption that Congress has made an agency the "primary interpreter" of the statutes it implements,[220] deference should not be afforded when the agency does not play this role by committing itself to a definitive interpretation.

It is rare for courts to deny *Chevron* deference on the grounds that an interpretation is insufficiently definite, and this is probably because agencies infrequently ask for deference for indefinite interpretations. However, in *Estrada-Espinoza v. Mukasey*, the Ninth Circuit denied *Chevron* deference to a Board of Immigration Appeals ("BIA") decision "in which the BIA described a 'guide' to help identify offenses which constitute 'sexual abuse of a minor.'"[221] The BIA possessed express congressional authority to interpret the statute through formal adjudications, and yet the Ninth Circuit implicitly held that the BIA did not exercise this authority in its decision, promulgated through formal adjudication.[222] The problem, the court held, was the "imprecision" of the BIA's "advisory guideline," which failed to "particularize the meaning" of the statute.[223]

Similarly, in *Mei v. Ashcroft*, the Seventh Circuit, in an opinion by Judge Posner, stated that a general definition of "crime involving moral turpitude" could not merit *Chevron* deference.[224] The BIA's interpretation "merely parrot[ed] the standard criminal-law definition," without "deploying any insights that it might have obtained from adjudicating immigration cases."[225] Thus, to give *Chevron* deference to BIA's general definition would have "no practical significance."[226] However, Judge Posner suggested that where BIA has applied its general definition to particular circumstances, i.e., "the Board's classification of particular crimes as involving moral turpitude," deference is appropriate.[227] That is, deference is appropriate when the agency definitively defines one particular crime involving moral turpitude, even if the agency has not defined *every* such crime.[228] Indeed, this is a paradigmatic case of interpretation-by-adjudication, in which an agency says, in effect, "A is clearly one example of X, and there are certainly other examples of X, but these examples will not conflict with viewing A as X."[229]

In contrast with those cases of indefiniteness, the Supreme Court's decision in *I.N.S. v. Aguirre-Aguirre*[230] concerned an agency interpretation that con-

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[220] *See* Merrill & Hickman, *supra* note 32, at 878.
[221] *See* 546 F.3d 1147, 1157 (9th Cir. 2008) (en banc) (quoting In re Rodriguez-Rodriguez, 22 I. &N. Dec. 991, 996 (BIA 1999)), *overruled on other grounds by* United States v. Aquila-Montes 655 F.3d 915 (9th Cir. 2011) (per curiam), *as recognized by* United States v. Wolf Child, 699 F.3d 1082, 1098 n.8 (9th Cir. 2012).
[222] *See id.* at 1156–57.
[223] *Id.* at 1157 (internal citation omitted).
[224] Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004).
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *See id.*
[229] *See* I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (quoting I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987)).
[230] *See generally id.*

sisted of a flexible but binding standard. Once again a BIA decision was at issue.[231] The BIA interpreted the statutory phrase "serious nonpolitical crime" to require "weighing 'the political nature' of an act against its 'common-law' or 'criminal' character."[232] However, the Ninth Circuit held that the agency was required to consider a number of other factors, at least with regard to the case at hand.[233] Although the balancing test employed by BIA was a somewhat open-ended standard, permitting ambiguity, the Supreme Court held that the Ninth Circuit erred in failing to give *Chevron* deference to BIA's interpretation.[234] As Justice Scalia later wrote, "The BIA's formulation of a test to apply the statutory standard in individual cases and its application of that test in respondent's case were precisely the sort of agency actions that merited judicial deference."[235] If the agency's standard is clear and reasonable, reviewing courts may not add additional factors to consider on a case-by-case basis.

The salient difference between the agency interpretations at issue in *I.N.S. v. Aguirre-Aguirre* and *Estrada-Espinoza* is that in the former case, the agency adopted a standard that it intended to apply to future cases, while in the latter case, the agency refused to bind itself to a particular congressional definition. Therefore, to be definite, the agency's interpretation must be clearly singular, not admitting contradictory interpretations either in the present *or the future* (unless the agency consciously reverses itself). However, the interpretation may retain flexibility, including ambiguous terms that remain to be fleshed out in future decisions.

3. Generality Requirement

Whether or not an interpretation applies to third parties should also be considered an essential requirement for deference.[236] In rejecting deference for the ruling letters in *Mead*, the Court took into account that "a letter's binding character as a ruling stops short of third parties."[237] Binding effect is a central component in the "force of law."[238]

Cass Sunstein has argued that "an agency decision may be taken to have the 'force of law' when it is binding on private parties in the sense that those who act in violation of the decision face immediate sanctions," or when "the agency is legally bound by it."[239] But Lisa Schultz Bressman has argued that "force of law" merely requires "binding effect" *or* "practical adherence,"

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[231] *Id.* at 418.
[232] *See id.* at 423–24.
[233] *See* Aguirre-Aguirre v. I.N.S., 121 F.3d 521, 524 (9th Cir. 1997); Negusie v. Holder, 555 U.S. 511, 533 (2009) (Scalia, J., concurring) (discussing the *Chevron* implications of *Aguirre-Aguirre*).
[234] *Aguirre-Aguirre*, 526 U.S. at 425.
[235] *Negusie*, 555 U.S. at 533–34.
[236] *See, e.g.*, United States v. Mead, 533 U.S. 218, 233 (2001); *see also* Murphy, *supra* note 22, at 1013 ("[A]n agency's statutory construction properly can enjoy the force of law only where the agency has committed to applying its construction consistently across time and parties.").
[237] *Id.*
[238] *See id.*
[239] Sunstein, *supra* note 38, at 222 (emphasis omitted).

which includes "longstanding" effect or temporal consistency.[240] The difficult question raised by both Sunstein's proposal and Schultz Bressman's proposal is to either extent the agency must be bound by an interpretation in the case of being "legally bound" or demonstrating "practical adherence."

Decisions by an agency head through informal adjudication are an illustration of the problem. If the Secretary of Health and Human Services adopts an interpretation in an adjudicative order rejecting a state's amendment to its Medicaid plan, the Secretary has not legally bound herself in the sense that she is forbidden from adopting a different interpretation later.[241] Moreover, if the Secretary is adopting the interpretation for the first time, it may be difficult to demonstrate "practical adherence."

A solution to the problem is to require binding effect on future parties, and in cases where the future party is the agency itself, the agency's intent to bind itself must be objectively and unambiguously clear.[242] The objective standard for an agency's intent to bind itself is akin to a court issuing a holding in a published opinion that it intends to bind itself to in the future, even though the court may in fact later overrule its earlier holding. The agency cannot simply declare its intent without any evidence to support it. The best evidence would likely be the formality of the procedures used to arrive at the interpretation, which demonstrate the agency's commitment. For example, when the Secretary in *Alaska Department of Health* rejected the state's Medicaid amendment, it appeared evident that the Secretary did not intend to limit the interpretive principle to that particular state.[243] The agency's binding intent was illuminated in large part by the formality of procedures employed by the agency.[244] In general, heightened standards of process should be essential for deference in cases that do not create sanctions for future parties who violate the rule of decision, such as informal internal agency review proceedings.[245]

C. Deferential Internal Agency Review Lacks "Force of Law"

In view of the requirements above, when an agency approves an interpretation under a deferential standard of review, the interpretation is not authoritative and lacks the force of law. First, the agency's approval does not make the interpretation uniform across the agency. The very purpose of deferential re-

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[240] *See* Schultz Bressman, *supra* note 52, at 1488.

[241] Although the lack of consistency could certainly be grounds for a court to find that the Secretary has acted capriciously, *see* 5 U.S.C. § 706(2)(A) (2006), this is not the same as being forbidden from adopting an interpretation.

[242] *See* Murphy, *supra* note 22, at 1073 (advising courts to "extend strong deference to an agency's 'pure' construction of a statute it administers so long as the agency can provide objective evidence that the construction has or will be generally applied").

[243] *See* Alaska Dep't of Health & Social Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931, 939–40 (9th Cir. 2005).

[244] *See id.* at 937 (stating how Administrator promulgated interpretation in a "reasoned opinion" after state had opportunity for briefing and hearing at a lower level).

[245] These heightened standards not only ensure that the agency makes a considered and well-informed decision with the benefit of outside input, but also that the agency will be committed to that interpretation in the future because of its "cost." *See* Murphy, *supra* note 22, at 1071.

view is not to formally adopt an interpretation but to leave space for other parties to choose a different approach. In other words, the agency has not taken a uniform position. Nor would the interpretation be definite. The agency has not chosen a particular interpretation but merely held that a subordinate actor's interpretation is permissible or reasonable on one occasion. Finally, the agency has not generally bound itself to the interpretation in the future. In holding that one interpretation is permissible, nothing prevents the agency from ultimately adopting another reasonable interpretation. Therefore, *Chevron* deference should not be afforded to the outcome of an internal agency review unless the agency has adopted the interpretation under a *de novo* standard of review or its equivalent.

D. Pragmatic Objections and Responses

A convincing argument against giving *Chevron* deference to interpretations produced through deferential internal review must do more than argue from case law and the legal fiction of congressional intent.[246] Policy judgments — particularly concerning institutional capacities — lie at the heart of the *Chevron* doctrine.[247] Several policy objections might be made to a rule that denies judicial deference in such cases as EAB's review of the Arctic drillship permits.

First, it could be argued that affording deference only to authoritative interpretations as described above is inefficient. It creates incentives for high-level actors to engage in more searching review more of the time, leading to wasted resources.

Second, it could be argued that high-level *de novo* review is at best unnecessary and at worst injurious to the goal of producing the most reasoned decisions. This is because lower-level actors, such as regional offices, may have the most technical expertise concerning the applicability of relevant statutory terms. For example, in EPA's case, it seems reasonable to think that the regional office charged with permitting for Arctic drilling would be in the best position to know the permitting requirements, particularly as against EAB, a reviewing body that is not charged with implementing statutory provisions. Under this argument, a deferential standard of review is like an intra-agency *Chevron* doctrine, which takes advantage of the expertise of the implementing actors while ensuring that these actors do not go too far afield from the plain text and meaning of the statute.

Third, it could be argued that having the agency merely sign off on a subordinate's interpretation without formally adopting it would optimize the policymaking process. It would allow for experimentation and flexibility at lower levels of the agency, without forcing the agency to commit to an interpre-

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[246] For an argument that the search for congressional intent is unreliable and that courts should simply fashion *Chevron* doctrine to best accord with sound policy judgments about institutional capacities, subject to being overruled by Congress, see Barron & Kagan, *supra* note 25, at 212–25.
[247] *See id*; *see also* Criddle, *supra* note 203.

tation simply in order to gain *Chevron* deference. This argument could even concede that the reviewing actor would be required to resolve contradictory decisions by lower-level actors in order to gain deference. It would hold that except for intra-agency interpretations that conflict *in actuality*, the agency should receive deference for an interpretation by a non-authoritative actor that was reviewed by the agency under a deferential standard. The reviewing actor in this scenario would be analogous to the U.S. Supreme Court, allowing issues to percolate at lower levels but stepping in to resolve splits and egregiously incorrect decisions.

Fourth, it could be objected that denying deference in situations like EAB's deferential review could have the perverse incentive of leading agencies to abandon higher-level review entirely. The incentive could be particularly strong where the agency is reviewing a formal adjudication, where the interpretation of an IJ or ALJ could qualify for deference without review.[248] Each of these objections will be addressed in turn.

On the efficiency objection, there are at least two responses. First, if an agency actor is already reviewing a subordinate's decision, it does not seem onerous to require that the actor itself reach some definite legal conclusion on questions of statutory interpretation as a condition for deference. For example, in the case of EAB's review of Shell's permits, EAB provided lengthy and detailed feedback addressing the statutory questions. The failure to produce a definite interpretation was most likely due to EAB's unexplained hesitance to go beyond the "clear error" standard, rather than the inconvenience or inefficiency of delving into the statute. Second, in cases where the reviewing actor agrees with the decision, it should be acceptable for the reviewing actor to simply and briefly adopt the findings and reasoning of the decision. That is, after conducting a meaningful review of the decision, it should be sufficient to state something to the effect of: "After careful review, we wholly adopt the legal conclusions of the [subordinate actor]." However, a court could still reject deference if it had reason to doubt that meaningful review actually took place.[249]

The second objection was that a kind of intra-agency *Chevron* review would produce better decision-making outcomes because it would prioritize the expertise of the actors actually responsible for implementing a statute. There are multiple responses to this argument. First, there is already a form of deference that is specifically tailored to recognize this type of direct, practical exper-

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[248] The law on the extent to which such lower-level actors may receive *Chevron* deference for decisions conducted through formal adjudication is unsettled. *Compare, e.g.*, Olson v. Fed. Mine Safety & Health Review Comm'n, 381 F.3d 1007, 1014 (10th Cir. 2004) (denying *Chevron* deference for ALJ decision that was not subject to higher-level review because the decision was not binding precedent absent review), *with* Fla. Med. Ctr. of Clearwater, Inc. v. Sebelius, 614 F.3d 1276, 1280–81 (11th Cir. 2010) (affording *Chevron* deference to ALJ decision that was not subject to higher-level review).

[249] *Cf.* Barron & Kagan, *supra* note 25, at 252–53 (stating that a requirement of high-level review would likely be "self-enforcing").

tise: *Skidmore* deference.[250] If a court is persuaded that such expertise is likely present, it may grant *Skidmore* deference, rendering *Chevron* unnecessary. Second, any gain in expertise on particular statutory questions is likely to be offset by the potential for the loss of legal or policy uniformity within the agency that more stringent oversight by a high-lever actor provides. Third, higher-level actors are likely to have their own, broader statutory and policy expertise gained through reviewing decisions in other circumstances. Finally, this approach devalues one of the central justifications for giving *Chevron* deference in the first place: the political accountability of the agency. Actors with authority to set policy for the agency as a whole will undoubtedly have closer ties and/or supervision from the agency head and other policy-making actors. Therefore, it makes sense to condition deference on authoritativeness.

On the third objection: deferential internal review may allow for more flexibility and experimentation at lower levels of the agency, but only at the cost of sacrificing the virtues of having a single actor declare what the law is: uniformity, predictability, and clarity for regulated entities and others. Once again *Skidmore* deference seems to strike the appropriate balance in recognizing purely technical expertise while reserving the incentive of *Chevron* deference for decisions considered and adopted at a higher level. Moreover, this objection is so technocratic in character that it loses sight of the potential unfairness to the litigant challenging an agency decision in court. In particular, giving two layers of deference for a non-authoritative actor's interpretation may deprive litigants of the protection against arbitrariness that is promised by the APA.[251]

The final objection — that agencies might simply abandon high-level review in the hope of gaining deference directly for decisions by lower-level administrative judges — has a simple reply: courts should not give deference to these lower-level actors unless they, too, are speaking for the full agency. Some courts already recognize this principle, even where the agency has conducted formal adjudication.[252] If a judge or panel of judges decides a case in a way that sets agency-wide precedent moving forward, this could be sufficient for deference. But the decision of a single judge acting unilaterally should not be sufficient. If deference were never provided to decisions of non-authoritative actors, the purported incentive at issue here would not exist. Also, while agencies surely desire *Chevron* to apply whenever possible, it is hard to imag-

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[250] *Skidmore* provides that agencies should receive deference for decisions "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

[251] *See* Gersen & Vermeule, *supra* note 206, at 689 (explaining how the APA provides that "courts are to decide all relevant questions of law"). *See also generally* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003). *Chevron* itself undermines this principle to some extent, but the second layer of deference arguably crosses the line into a near-complete abdication of judicial review.

[252] *See* Miranda Alvarado v. Gonzales, 449 F.3d 915, 922 (9th Cir. 2006); *Olson*, 381 F.3d at 1014; *see also* Merrill & Hickman, *supra* note 32, at 908 (discussing how "initial decisions by ALJs . . . often are not treated as binding precedent by the agency itself.").

ine that they are so Machiavellian as to eschew high-level review simply to avoid committing to interpretations.

In addition to the advantages mentioned above, there is an additional advantage to a strong "authoritativeness" requirement as laid out in this Article: it would help simplify the notoriously convoluted *Mead* doctrine. The proposal is that, for *Chevron* deference to apply, agency interpretations must be adopted by the full agency in a manner that satisfies the authorativeness requirements of uniformity, definiteness, and generality, as well as the (fairly) well-entrenched requirement of procedures that facilitate reasoned deliberation. This framework would be relatively predictable and easy for courts to apply. It would produce greater clarity for courts and litigants than the currently "muddled" and scattershot application of *Mead*. It would not require a wholesale shift in approach; instead, it would reform the doctrine around its fuzzy edges by focusing on a more stringent examination of the authoritativeness of decisional *outcomes*, in addition to process-based considerations.

Conclusion

This Article has proposed a way to simplify and clarify the *Mead* doctrine by focusing on the question of internal agency review, one of the areas where the doctrine has invited ambiguity. This ambiguity is evident in the Ninth Circuit's confused opinion that addresses whether *Mead* applies to EPA's deferential review interpretations contained in permits issued by a regional office (Region 10) for Arctic drill ships. Internal agency review occurs when an agency reviews an interpretation promulgated by a subordinate actor either inside or outside the agency. Because agencies are typically viewed as monolithic actors, little attention has been paid to the question of how courts should evaluate interpretations that fall in the gray area between the agency's position and the position of some other actor without the congressionally delegated authority to craft rules. This Article suggests that merely approving another actor's interpretation through internal review procedures — even formal procedures — is insufficient for *Chevron* deference. Rather, a decisionmaker with the delegated authority to speak for the entire agency must demonstrate, explicitly or implicitly, that it is adopting an interpretation. It must do so in a way that fulfills the specific requirements of uniformity, definiteness, and generality. These requirements are not satisfied when an agency reviews a subordinate's interpretation using any type of deferential standard. For this reason, EAB's review of the permits for the *Kulluk* and *Discoverer* drill ships did not result in authoritative interpretations with the force of law.

In sum, while scholarship has increasingly recognized that agencies are a "they," not an "it," courts applying *Mead* should ensure that the agency is speaking univocally and authoritatively. Attention to authoritativeness should become a central feature of the doctrine as it develops in the courts.