Spurious Interpretation Redux: *Mead* and the Shrinking Domain of Statutory Ambiguity

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INTRODUCTION

[The object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process....]

In skewering the Supreme Court's recent decision in United States v. Mead Corp., Justice Scalia's rhetoric is exceptional. He derides the decision as "one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad." Although Justice Scalia objects to Mead's new and uncertain limits on the applicability of the Chevron doctrine, this Article will focus instead on how Mead employs a
method of interpretation imputing a clear intent to Congress, and authorizes courts to discern statutory meaning without strong deference to an agency’s expert and political interpretation of the statute.

This Article begins by briefly describing the interpretive regime defined by *Chevron*. That regime found in statutory ambiguity an implied delegation of lawmaking power to agencies. The Article then discusses how *Mead* changes that default rule to one delegating principal interpretive lawmaking power to courts in the absence of affirmative evidence of congressional intent to delegate that power to agencies. This shift resulted from an interpretive method that spuriously imputed intent to Congress. Although the *Mead* Court purported to accept the rule of deference dictated by Congress, the Court itself was the source of the imputed intent. This Article concludes by discussing how *Mead*’s interpretive approach is similar to the approach in an important and growing line of Rehnquist Court decisions loading the interpretive dice in favor of results not clearly intended by Congress, and thereby arrogates to the judiciary lawmaking power better exercised by the legislature or the agency.

I. *CHEVRON’S INTERPRETIVE REGIME: AMBIGUITY AND IMPLIED DELEGATION TO AGENCIES AS THE DEFAULT RULE*

Judges identify and promote their political values when they adopt and apply particular methods and canons of statutory interpretation. Moreo-

In *Chevron*, the Court established the following two-step analysis of the legality of an agency’s legal interpretation:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Id.* at 842-43 (citation omitted).

5. *See Cass R. Sunstein, Legal Reasoning and Political Conflict* 168-69 (1996) (“People trying to choose an interpretive method must decide how to allocate power among various groups and institutions—indeed, allocating power is what the choice of an interpretive method *does.*”); *see also id.* at 174 (“[A] system of legal interpretation is inevitably a function of decisions that are, broadly speaking, political in character.”).

Selecting an interpretive methodology thus involves inevitable choices about the institutional allocation of power. If courts give strong deference to agencies’ interpretations of the statutes they administer, that arrangement shifts law elaboration authority away from judges and toward the executive. If courts reject the authority of legislative history, they shift power away from committees and bill sponsors and to-
ver, the consistent use of canons of construction should enable all actors in the process of lawmaking—legislatures, agencies, and courts—to adjust their conduct in ways making the law more transparent, determinate, and predictable.\footnote{Professor Eskridge argued consistent application of the canons of construction: \textit{[M]ight constitute an interpretive regime that both restrains judges and enables the citizenry to predict how those judges will apply ambiguous as well as clear statutes. Not least important, such an interpretive regime could serve democracy values... as legislators and their staffs could predict how different proposed statutory language would be applied.} William N. Eskridge, Jr., \textit{Norms, Empiricism, and Canons in Statutory Interpretation}, 66 U. CHI. L. REV. 671, 679 (1999) (footnote omitted).}

The canon of construction identified in \textit{Chevron}\footnote{This canon is presented \textit{supra} note 4.} has played a critical role in defining the relative roles of legislature, agency, and court in developing the content of public law. The canon clearly recognizes the primacy of the legislature by holding "unambiguously expressed" congressional intent determines the content of law and "must be given effect."\footnote{Chevron, 467 U.S. at 843 n.9.} When a statute is ambiguous, however, \textit{Chevron} located lawmaking primacy in the agency, whose interpretation of law must be upheld by a court unless it is unreasonable.\footnote{Decisions rejecting agency interpretations under the second part of the \textit{Chevron} analysis are quite rare. The Court, however, recently held an agency acted unreasonably in construing an ambiguous statute. \textit{See} Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 484 (2001) ("The statute is in our view ambiguous concerning the manner in which Subpart 1 and Subpart 2 interact with regard to revised ozone standards, and we would defer to the EPA's reasonable resolution of that ambiguity. We cannot defer, however, to the interpretation the EPA has given.") (citations omitted).}

The default rule of \textit{Chevron}, therefore, is that Congress delegated to the agency the authority to resolve any statutory ambiguity because, relative to the court, the agency is in a preferred position to make the unresolved policy decision.\footnote{See Thomas W. Merrill & Kristin E. Hickman, \textit{Chevron's Domain}, 89 GEO. L.J. 833, 861 (2001) (citations omitted), where the authors stated: \textit{One reason for preferring agency interpretations, which is alluded to by \textit{Chevron} itself, is that agencies are more politically accountable than are courts. Choosing between two or more permissible interpretations of a statute is a political act, involving the exercise of discretion in channeling the coercive powers of the state in one di-}
tion to the agency was express or implied, intended or unintended, the delegation is a consequence of the statute's ambiguity. Chevron's assignment of lawmaking power was based on the Court's view that the agency is appropriately responsive to political judgment and Congress would be assumed to have intended agency decision making, rather than judicial decision making, when implementation of a statute necessitated a determinate statutory meaning.

11. The Court made this point explicitly in Chevron, when it stated:
If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 843-44 (footnotes omitted). The Court further stated:
Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

12. See id. at 865-66 (citation omitted), where the Court stated:

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

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."
In sum, Chevron's interpretive regime defined a background rule yielding agencies significant lawmaking power in the absence of unambiguously expressed legislative intent.

II. MEAD AND THE IMPUTATION OF LEGISLATIVE INTENT: A NARROWED SCOPE FOR CHEVRON DEFERENCE

The Court's decision in Mead redefines the default rule for determining when the Chevron interpretive regime will apply. The redefinition is accomplished by the Court's imputation of legislative intent. The Court concludes statutory silence regarding delegation to the agency of implied decision making authority means Congress intended an agency is not to be accorded Chevron deference in its interpretive decisions. Chevron, of course, indicated the same rule of deference should apply regardless of whether the delegation is express or implied. Indeed, in accounting for Chevron's significance, commentators focused on how Chevron worked a "fundamental" shift in administrative law by eliminating the distinction in degrees of deference drawn in earlier U.S. Supreme Court decisions between exercises of expressly or impliedly delegated authority.

Id. (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

13. The limits on the scope of Chevron deference newly defined by Mead were not wholly surprising given the Court's decision the previous term in, Christensen v. Harris County, 529 U.S. 576 (2000). There, the Court indicated that the scope of Chevron's applicability was uncertain, but failed to identify a rationale for the inapplicability of Chevron, relying instead on ipse dixit to reject the agency's request for deference: [W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference. . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in Skidmore, but only to the extent that those interpretations have the "power to persuade." Id. at 587 (citations omitted). Only Justice Souter, the author of the Court's opinion in Mead appeared to foretell Mead's analytic approach. Justice Souter concurred in Christensen, stating Chevron deference would have followed if the agency's decision had been adopted through informal rulemaking. See id. at 589. In that form, the agency decision would have met both of the Mead requirements that are identified and discussed infra.

14. See supra note 11 and accompanying text.

15. See Merrill & Hickman, supra note 10, at 833-34 (footnotes omitted), in which the authors stated:

Chevron expanded the sphere of mandatory deference through one simple shift in doctrine: It posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering. The Court in Chevron blandly referred to such gaps and ambiguities as "implied" delegations of interpretative authority and treated
Justice David Souter’s decision in *Mead* twice alludes to the distinction in types of delegations the legal significance of which were eliminated by *Chevron* and thereby indicates full, *Chevron*-type deference will continue to apply in any case of an express delegation. He first signals this result when he offers a narrowed restatement of the rule of *Chevron* deference, focusing on express delegations:

When Congress has “explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,” and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.16

Justice Souter provides a second indication when he presents his argument regarding the background expectation of congressional intent about judicial deference, which focuses only on instances of implied delegation.17 It is in these cases of implied delegation that the *Mead* Court limits the applicability of *Chevron* deference. Such deference will be accorded to agency decisions only when a court concludes that Congress “expect[ed]” *Chevron*-type deference based on “statutory circumstances:”

[I]t can still 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, even one about which “Congress did not actually have an intent” as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s cho-

these implied delegations as equivalent to express delegations. *Chevron*’s equation of gaps and ambiguities with express delegations turned the doctrine of mandatory deference, formerly an isolated pocket of administrative law doctrine, into a ubiquitous formula governing court-agency relations. With this one small doctrinal shift, the Court effected a fundamental transformation in the relationship between courts and agencies under administrative law. See also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 512, 516 (reaching similar conclusion about *Chevron*’s change in the law of deference).


17. See id. at 229 (citations omitted), where the Court states: This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.” Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still 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, even one about which “Congress did not actually have an intent” as to a particular result.
This reading of congressional intent is actually more elaborate than it might appear, because the Court’s reference to “an agency’s exercise of its generally conferred authority” carries a particular meaning. This meaning, expressed in the Court’s statement of its holding, implicates the procedures employed by the agency in reaching the decision at issue. In the Court’s view, Congress should be understood to have intended Chevron review in instances of an implied delegation only when the agency has been delegated relevant decision making authority and reached its decision through a decision making process giving the decision procedural legitimacy.19

The interpretive default rule defined by Mead is striking in two respects. First, the Court’s position that it is simply and properly following the intent of the legislature rings hollow: on its face, the imputation of intent is too far-reaching and the interpretive result is spurious.20 Can we reasonably believe Congress intended varied levels of deference should be accorded to administrative decisions on the basis of the indeterminate, inconsistent, and ambiguous factors weighed by the Court in deciding Congress did not intend to accord Chevron deference to the Customs Service in its customs rulings? The factors considered by the Court range from delegation of rulemaking authority, to the regime of judicial review of the Customs

18. Id. (citations omitted).
19. The Court’s holding was as follows:
We hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Id. at 226-27.

20. See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1194-95 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), where the authors stated that:
The principle of institutional settlement, . . . obviously, forbids a court to substitute its own ideas for what the legislature has duly enacted. What the legislature has thus enacted should not be frustrated or defeated. What it has not thus enacted should be declared to be law, if at all, only upon the court’s independent responsibility and not upon a pretense of legislative responsibility.

Id. See also Frank E. Horack Jr., The Disintegration of Statutory Construction, 24 Ind. L.J. 335, 345 (1949) (“Numerous other rules of presumption [in statutory construction] serve the function of shifting policy determination from the legislature to the court.”).
Service’s classifications, to the agency’s practice in issuing its classifications, to the number of such classifications.\(^1\)

Second, the *Mead* rule fundamentally shifts the default rule from one in which congressional silence related to an implied delegation yielded *Chevron* deference to the agency to one in which congressional silence results in a delegation of lawmaking primacy to the courts, which are to give an agency interpretation only as much deference as it has power to persuade the court. At least two flaws of this redefined presumption of nondelegation to agencies are apparent. First, by establishing a new background rule for understanding legislative action, *Mead* shifted the context for understanding congressional action. The retroactive application of this new interpretive regime to statutes enacted prior to the Court’s decision in *Mead* can only be understood to unsettle the expectations of the legislature, assuming that they understand the background presumptions at all.\(^2\)

More significantly, *Mead* is flawed because its presumptive implied delegation of interpretive authority to courts rather than agencies will mean statutory law will be more often decided by courts than by democratically responsive decision makers. When applicable, broad *Chevron* deference is,

\(^{21}\) See *Mead*, 533 U.S. at 232-34. Justice Scalia argued it was the difficulty of making just this sort of conclusion about legislative intent regarding implied delegations to agencies that led to the broad application of the *Chevron* standard in the first place. See Scalia, *supra* note 15, at 516 ("*Chevron*, however, if it is to be believed, replaced this statute-by statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."). Two courts applied this *Mead* test and, after considering the various factors suggestive of congressional intent determined that Congress intended *Chevron* deference to apply. See Fed. Election Comm’n v. Nat’l Rifle Ass’n of Am., 254 F.3d 173, 186 (D.C. Cir. 2001) (finding *Chevron* deference is applicable to Federal Election Commission regulation of the National Rifle Association); Fontana v. Caldera, 160 F. Supp. 2d 122, 128 (D.D.C. 2001) (holding *Chevron* deference applies for decisions of the Army Board for Correction of Military Records in interpreting its regulations and statutes).

\(^{22}\) The Court’s shifting background rules for understanding the meaning of congressional action have led to Professors Eskridge and Frickey criticism of the Court’s “bait and switch” approach to statutory interpretation:

[Two recent] decisions surely came as a surprise to Congress. Indeed, there is a “bait and switch” feature to [these] cases . . . when Congress enacted the statutes in question, the constitutionality of the state-infringing provisions was clear and Congress could not have anticipated the *Gregory* rule; nor could a reasonable observer have predicted the expansion of *Gregory* in [the second case]. When the Court’s practice induces Congress to behave in a certain way and the Court then switches the rules, Congress justifiably feels taken.

Eskridge & Frickey, *supra* note 6, at 85 (footnote omitted). The Court’s regime of *Chevron* deference would have been understood by Congress to apply since 1984. The Court’s analysis in *Mead* included consideration of the intent of statutory amendments enacted in 1993. See *Mead*, 533 U.S. at 223, 234.
of course, only triggered when Congress itself has not dictated a particular statutory meaning. The problematic effect of *Mead* is that when a statute is ambiguous and accordingly in need of interpretation to determine the content of law, the court rather than the more democratically responsive agency will have ultimate decision making power. Justice Scalia argues, moreover, that *Mead*'s rule of deference will result in ossification of statutory law, because once a court exercising the primary lawmaking authority recognized by *Mead* determines the meaning of a statute, that meaning can be changed only by amendment of the statute.\(^{23}\) To the extent Justice Souter's intent-based scope of *Chevron* doctrine applicability can avoid this problem,\(^{24}\) the Court's attribution of congressional intent becomes even less believable. It seems fanciful Congress would have intended different standards of judicial review would apply and the statute would have different meanings, based on the procedures pursued by the agency at the time it defined its interpretation of the statute.\(^{25}\)

In sum, the Court's interpretive turn in *Mead* can be seen only as spurious interpretation because the Court's analysis goes so far in imputing intent to Congress that the whole enterprise can only be seen as fictitious. There was, to be sure, fiction in defining the default rule in *Chevron*; however, this imputation of intent accomplished by the *Chevron* doctrine is far less objectionable for two reasons. First, the imputation of intent accepted a delegation to agencies rather than to the courts for the primary authority to resolve a statute's ambiguities. *Chevron* was accordingly not self-serving in its understanding of congressional intent. Second, the legal actor to whom lawmaking authority is attributed by *Chevron* is the politically accountable decision maker, rather than the nonpolitically responsive courts.\(^{26}\)

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24. Recall Justice Souter was the only Justice in *Christensen* (see discussion supra note 13 and accompanying text) to express the opinion that the agency might be able to have a court approve its interpretation of the statute if it proceeded by notice-and-comment rulemaking, rather than by an informal letter. *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Souter, J., concurring) ("I join the opinion of the Court on the assumption that it does not foreclose a reading of the Fair Labor Standards Act of 1938 that allows the Secretary of Labor to issue regulations limiting forced use.").
25. *Cf. Mead*, 533 U.S. at 244 (Scalia, J., dissenting), stating:
   Is it likely—or indeed even plausible—that Congress meant, when such an agency chooses rulemaking, to accord the administrators of that agency, *and their successors*, the flexibility of interpreting the ambiguous statute now one way, and later another; but, when such an agency chooses case-by-case administration, to eliminate all future agency discretion by having that same ambiguity resolved authoritatively (and forever) by the courts?
26. *Cf. Horack Jr.*, supra note 20, at 342-43, in which the author makes the following
III. MEAD AND PRESUMPTIVE STATUTORY MEANING

In assessing the significance of Mead's imputation of legislative intent, one should not understand the case as an exceptional effort to rein in the scope of application of the Chevron doctrine. Rather, the case is yet another important example of the Rehnquist Court's unwillingness to conclude that a statute's meaning is ambiguous, due to the Court's own imputation of clear meaning or intent. Considered in this light, the case shows that the Court is continuing a decisive move away from deference to agency interpretations based on a spurious claim of yielding to clear statutory meaning or legislative intent.

Two other decisions by the Court during its 2000 term provide important examples of how the Court has come to restrain administrative discretion by constraining the scope of statutory ambiguity through rules of presumption. In Solid Waste Agency of Northern Cook County (SWANCC) v.

Rules of interpretation in the nature of presumptions . . . are fictional rules of interpretation and frequently lead to results exactly opposite those which legislatures intend. At best they are judicial standards requiring a particular form of legislative expression. As such, they are within limits defensible. Every system of government depends upon the ability of society to require of its people certain formalities as prerequisite to legal consequence. It is not too much to require this of the agencies of government as well. Formalities, however, become intolerable when they no longer reflect the normal expectations of the society for which they were constructed.

27. Understood in this manner, Justice Scalia's cri de coeur regarding Mead's fundamental shift in administrative law, see supra note 3 and accompanying text, can only be understood as disingenuous. Because Justice Scalia typically concludes that a statute has a clear meaning, relying when necessary on the imputation of statutory meaning, see infra notes 36-40 and accompanying text (discussing Justice Scalia's opinion for the Court in Whitman v. Am. Trucking Assn's, Inc., 531 U.S. 457 (2001)), he is less likely to reach the second step of the Chevron analysis; the step at which strong deference is present. See supra note 8. This point has been well stated in a recent article:

Justice Scalia has taken the position that it is appropriate for courts to take policy considerations into account as part of the ordinary tools of statutory construction deployed at step one. The upshot of this position is that Justice Scalia invokes Chevron more consistently than other Justices, but also ends up deferring to agency views less than other Justices. In Justice Scalia's hands, Chevron has the paradoxical result of diluting, rather than strengthening, the practice of deference to executive understandings of law.

Merrill & Hickman, supra note 10, at 860 (footnotes omitted). Indeed, Justice Scalia made much the same comment about his application of Chevron deference. See Scalia, supra note 15, at 521:

One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for Chevron deference exists. It is thus relatively rare that Chevron will require me to accept an interpretation which, though reasonable, I would not personally adopt.
United States Army Corps of Engineers, the Supreme Court held, when it enacted the Clean Water Act, Congress did not delegate to the Corps of Engineers the authority to regulate the filling of "other waters." The Corps supported the legality of its view of the Act's jurisdictional scope by its claim that the statute was ambiguous in defining its jurisdictional reach, and that the Court, therefore, had to defer to the Corps' regulation under Chevron. The Court held, however, that the meaning of the statute's text was plainly contrary to the Corps' position, and even an ambiguous text would not have resulted in deference on this question. The Court held the Corps could not rely upon an inferential delegation of discretionary power to the agency, but instead had to show clear statutory authority for its exercise of jurisdiction. For the Rehnquist Court, therefore, statutory ambiguity was no longer the sufficient basis for the Corps' assertion of regulatory authority that it had been in Riverside Bayview Homes. The Court's

31. See SWANCC, 531 U.S. at 172. Indeed, the Court itself had found the definition of "navigable waters" to be ambiguous in, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), and deferred to the Corps' exercise of regulatory jurisdiction over wetlands adjacent to navigable waters. See Riverside Bayview Homes, 474 U.S. at 131.
32. The SWANCC Court accordingly assumed the applicability of Chevron and then explained why, in its view, Chevron deference was unwarranted. Because the "Migratory Bird Rule" was an interpretation of the statute that had not been adopted following notice-and-comment rulemaking the Court might have held that Chevron deference was inapplicable. See SWANCC, 531 U.S. at 163-64, 164 n.11.
33. The SWANCC Court stated:
These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. See, e.g., Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44 (1994), ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States...to plan the development and use...of land and water resources...." 33 U.S.C. § 1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.
Id. at 174 (citation omitted).
demand for a clear statement of regulatory authority in the Clean Water Act is quite important because it responds to an agency request for *Chevron* deference with a rule of construction shifting the burden to the agency to come forward with an express delegation of authority from Congress to support its jurisdiction, rather than mere ambiguity.\(^3\)4 The Court's use of this clear statement rule allowed the Court to disregard strong evidence of legislative intent and purpose supporting the exercise of jurisdiction over 'other waters' and to nullify the Corps' long-standing interpretation of the [Clean Water Act].\(^3\)5

Another recent decision similarly limiting the scope of statutory ambiguity is *Whitman v. American Trucking Ass'ns, Inc.*\(^3\)6 There, Justice Scalia, writing for the court, concluded the Clean Air Act (CAA) barred the Environmental Protection Agency (EPA) from considering costs in defining the National Ambient Air Quality Standards (NAAQS): "The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA.\(^3\)7 The Court's decision that the statute was unambiguous followed from its application of a clear statement rule similar to the one applied in *SWANCC*. The *American Trucking* Court initially stated, before it would recognize that the statute authorized the EPA to consider costs in defining the NAAQS, "respondents must show a textual commitment of authority to the EPA to consider costs [and] that textual commitment must

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\(^3\)4 In a recent article, I describe how this clear statement rule can be traced to two important, recent cases rejecting agency calls for *Chevron* deference. In both *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), "the Court employed a similar clear statement rule requiring the expressly affirmative grant of regulatory authority to foreclose the Corps' exercise of nontraditional regulatory jurisdiction." Healy, *supra* note 28, at 10,935, 10,940.

\(^3\)5 Healy, *supra* note 28, at 10,940. I argued in that article:
Such an activist use of a clear statement rule is contrary to the spirit of *Chevron*, which recognized that administrative agencies were better placed than courts to make political decisions arising in the implementation of statutes. The Court should not be devising rules of construction that enable courts to declare particularized implementation decisions unlawful because they were not authorized in sufficiently clear terms.
Such rules effectively limit the scope of *Chevron* deference.

*Id.* In this respect, the default rule defined by Justice Souter in *Mead* does not seem as objectionable as *SWANCC*'s clear statement rule, because Justice Souter would be expected to consider evidence of legislative intent beyond the statute's text in deciding whether Congress intended *Chevron* deference to apply.

\(^3\)6 531 U.S. 457 (2001).

\(^3\)7 *Id.* at 471 (footnote omitted).
be a clear one.”\textsuperscript{38} In the Court’s colorful view, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”\textsuperscript{39} Later, the Court again declined to conclude the CAA’s language was ambiguous in determining whether EPA had authority to consider costs: “we find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards.”\textsuperscript{40} In the Court’s view, Congress could be understood to have delegated in the CAA particular aspects of administrative discretion to the EPA only if there had been an explicit and clear delegation, rather than statutory ambiguity. This more exacting default rule, of course, turned on the Court’s own view that, in the particular statutory context, Congress can be expected to have spoken clearly to accomplish the delegation.

Notably, Justice Breyer disagreed with this aspect of the Court’s decision. He rejected the Court’s use of presumptions in giving a clear meaning to the statutory text and urged instead that, in the absence of a statute barring an agency’s consideration of costs, the agency should have discretion to consider costs in implementing the statute:

In order better to achieve regulatory goals—for example, to allocate resources so that they save more lives or produce a cleaner environment—regulators must often take account of all of a proposed regulation’s adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.\textsuperscript{41}

\textsuperscript{38} Id. at 468 (citation omitted).

\textsuperscript{39} Id. (citing MCI Telecomms., 512 U.S. at 231, and Brown & Williamson Tobacco, Corp., 529 U.S. at 159-60). The Court, of course, decides itself whether an elephant is present and whether a mousehole is its hiding place.

\textsuperscript{40} Id. (citation omitted). The Court continued to express its opinion that only clearly stated text, rather than an ambiguous one, could be read as a delegation to EPA of discretion to consider costs:

Even if we were to concede those premises, we still would not conclude that one of the unenumerated factors that the agency can consider in developing and applying the criteria is cost of implementation. That factor is both so indirectly related to public health and so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in §§ 108 and 109 had Congress meant it to be considered. Yet while those provisions describe in detail how the health effects of pollutants in the ambient air are to be calculated and given effect, see § 108(a)(2), they say not a word about costs.

\textsuperscript{41} Id. at 490 (Breyer, J., concurring).
Justice Breyer, however, considered the CAA’s “legislative history and alternative sources of statutory flexibility” and, relying on these additional indicia of expressed congressional intent, came to the same conclusion as the majority—that, in enacting the CAA, Congress clearly intended to bar the EPA from considering costs in defining the NAAQS. Under Justice Breyer’s approach, the agency would have the decisionmaking authority regarding the consideration of the costs of regulations when there was no clear evidence of congressional intent to bar its consideration of that factor.

In sum, through its application of rules of interpretation, the U.S. Supreme Court has placed important limitations on the domain of statutory ambiguity. *Mead* takes that same approach and thereby limits the scope of application of the *Chevron* doctrine.

### CONCLUSION

To be sure, *Mead* is important for the limits that it imposes on the applicability of *Chevron* deference. The case is also important because it continues the provocative use by the Rehnquist Court of an interpretive regime imputing a clear intent to Congress, and identifies a meaning of the statute with a limited consideration of the agency’s expert and political interpretation.

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42. *See Am. Trucking*, 531 U.S. at 490-96 (finding economic costs cannot be used by the EPA in setting air quality standards).