

Russell L. Weaver

*The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*

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Abstract by Carl Tugberk

Eighteen years after the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, Russell L. Weaver discusses the doctrine established by the holding and the problems created by two of the Court's recent decisions regarding deference to administrative interpretations. Specifically, the law on this matter has changed in two respects as a result of the decisions in *United States v. Mead Corp.* and *Christensen v. Harris County*. First, these cases establish dual deference standards. The first standard is "actual deference" in which administrative interpretations are judged under *Chevron* and must be accepted by courts if there is no clear congressional intent and the interpretations are "reasonable." The other standard, created by the Court's decision in *Skidmore v. Swift & Co.*, allows courts to independently evaluate statutory provisions and judge administrative interpretations based on their persuasiveness. The second problem is that courts must focus on congressional intent in order to determine the appropriate standard to apply. Weaver points out that *Chevron* deference only applies when Congress intends to allow an agency to interpret with the "force of law." Under any other circumstance, the *Skidmore* deference should be utilized.

Weaver contends that the result of *Mead* and *Christensen* has been a departure from the Court's prior interpretations of *Chevron*, creating several problems. First, he believes that dual deference standards are unrealistic in the sense that it is uncertain if the courts even use two standards and if it is beneficial to use them. In addition, Weaver argues that the focus on congressional intent is misguided because the intent to give agency interpretations the "force of law" is never explicitly articulated and implicit indications are rare. Consequently, Weaver believes that courts are distracted from the more important issues of determining when and why deference should be given to agency interpretations. Lastly, he suggests that even if the dual deference standard were desirable, the current standards established by *Mead* and *Christensen*, coupled with the inability of an agency to overturn a judicial interpretation, create an unsatisfactory regulatory process. Specifically, the current law creates incentives for litigation, deprives regulated entities of needed administrative guidance, disallows agencies the power to interpret their regulatory schemes, and encourages agencies to engage in undesirable behavior. Weaver concludes that the dual deference standards and the focus on congressional intent should no longer be the law.