Supreme Court of the United States

Nos. 04–277 and 04–281

National Cable & Telecommunications Association, et al., petitioners
04–277
v.
Brand X Internet Services et al.

Federal Communications Commission and United States, petitioners
04–281
v.
Brand X Internet Services et al.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 27, 2005]

Justice Breyer, concurring.

I join the Court’s opinion because I believe that the Federal Communications Commission’s decision falls within the scope of its statutorily delegated authority—though perhaps just barely. I write separately because I believe it important to point out that Justice Scalia, in my view, has wrongly characterized the Court’s opinion in United States v. Mead Corp., 533 U. S. 218 (2001). He states that the Court held in Mead that “some unspecified degree of formal process” before the agency “was required” for courts to accord the agency’s decision deference under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984). Post, at 12 (dissenting opinion); see also ibid. (formal process is “at least the only safe harbor”).

Justice Scalia has correctly characterized the way in which he, in dissent, characterized the Court’s Mead opin-
Breyer, J., concurring

ion. 533 U. S., at 245–246. But the Court said the opposite. An agency action qualifies for Chevron deference when Congress has explicitly or implicitly delegated to the agency the authority to “fill” a statutory “gap,” including an interpretive gap created through an ambiguity in the language of a statute’s provisions. *Chevron, supra*, at 843–844; *Mead, supra*, at 226–227. The Court said in *Mead* that such delegation “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.” 533 U. S., at 227 (emphasis added). The Court explicitly stated that the absence of notice-and-comment rulemaking did “not decide the case,” for the Court has “sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.” *Id.*, at 231. And the Court repeated that it “has recognized a variety of indicators that Congress would expect Chevron deference.” *Id.*, at 237 (emphasis added).

It is not surprising that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according Chevron deference to an agency’s interpretation of a statute. It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways, including ways that JUSTICE SCALIA mentions. See, e.g., *Mead, supra*, at 231. It is not a sufficient condition because Congress may have intended not to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue. Cf. *General Dynamics Land Systems, Inc. v. Cline*, 540 U. S. 581, 600 (2004) (rejecting agency’s answer to question whether age discrimination law forbids discrimination against the relatively young).
Thus, while I believe JUSTICE SCALIA is right in emphasizing that *Chevron* deference may be appropriate in the absence of formal agency proceedings, *Mead* should not give him cause for concern.