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DELIVERING THE GOODS: Herein of
Mead, Delegations, and Authority

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Patrick McKinley Brennan

Abstract

This paper argues, first, that the natural law position, according to which it is the function of human law and political authorities to instantiate certain individual goods and the common good of the political community, does not entail judges' having the power or authority to speak the natural law directly. It goes on to argue, second, that lawmaking power/authority must be delegated by the people or their representatives. It then argues, third, that success in making law depends not just on the exercise of delegated power/authority, but also on the exercise of care and deliberation or, in the article's terms, the achievement and exercise of authoritativeness. Authoritativeness is the gateway by which goods enter, including through human law. The article develops these points by showing their place in *United States v. Mead* (2001). The article was prepared for the January 2009 meeting of the AALS Section on Law and Religion, co-sponsored by the Section on Jewish Law and the Section on Islamic Law.

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**DELIVERING THE GOODS:
Herein of *Mead*, Delegations, and Authority**

Patrick McKinley Brennan¹

“[V]alue not connected by mind to responsible belief is mirage, nothing, vanishing when questioned or sought. And it is this connection, of value and responsible mind, that is law’s distinctive contribution, made prior to political theory and after theory is finished speaking – atheoretical in its concern with the legitimacy of the detail, which cannot be secured by any tracing of power or jurisdiction to a formal source, kingly, legislative, popular, or judicial. Against the fading of the conditions for true deference is what comes from law that pushes toward the personal and toward a context of decisionmaking in which the personal can be recognized. . . . Legislators, line agencies, and coordinating executive agencies, as well as courts, are engaged in this work.”

--Joseph Vining, “Authority and Responsibility:
The Jurisprudence of Deference”

While there no doubt exist instructive parallels between scriptural interpretation and legal (and specifically constitutional) interpretation, caution is in order.² It is not

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clear which is the greater risk – sacralizing the profane or profaning the sacred. Perhaps the greatest risk is in blurring the distinction. We need to distinguish, in order to unite. Adherents of the so-called religions of the book – Christians, Jews, and Muslims -- interpret their scriptures in order to learn what God has spoken to God’s people. In law, by contrast, all comers interpret what others have already said in the name of the law in order to determine how we are now to live. But this gulf, between what God has said and what other humans have already said in the name of the law, can easily be overdrawn. If we distinguish, we can then unite at the right points. In the Catholic tradition, on which I shall draw here, it is understood that doing human law is part of the divine mandate to do and pursue the good and to avoid evil; we interpret in law in order, within certain more or less defined parameters, to give authoritative effect to the divine natural law³ in the life of the political community. Consideration of “delegation” and “authority,” staples of our quotidian legal discourse, will reveal something of how the divine natural law makes its untrumpeted entrance into human law, including through unprepossessing administrative outputs that bear *the force of law*.

I.

Imagine that you make spectacular widgets. Imagine further that the XYZ agency has just published in the Federal Register what it styles there a “regulation” that might –

² See, e.g., JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION (2004). But see Gregory Kalscheur, *Christian Scripture and American Scripture: An Instructive Analogy? Interpreting the Bible and the Constitution*, 21 J. L. & RELIG. 101 (2005) (probing the limits of the parallels).

³ This is not a typographical error or a conceptual confusion. As I shall explain later, the “natural law” is *natural* in the way that we know it, but, as understood in (much of) the Catholic tradition, it is *divine* in its source. With this caveat in mind, I shall sometimes refer to it simply as the natural law.

or might not – render it impossible for you to continue to make your widgets while still showing a profit. What are you to make of this administrative output?

Under the statute to which XYZ points in its statement of the basis and purpose of the “regulation,” XYZ has been delegated power not only to “make rules and regulations” “governing widgets;” the statute further provides that widgets are to be “safe for use by people of all ages.” You believe that any regulation that would in fact render widgets “safe for use by people of all ages” could regulate your business, and perhaps the entire industry of which it is a part, out of existence. The experts whom you have consulted agree with you about the possible economic effects of such regulation. XYZ received public comments on its proposed “regulation” during the period it was deliberating.

Before saying any more, I should flag the danger in this sort of imagining. My concern here is law and how it works, and we do ourselves a grave disservice if, through analysis or reflection or thought experiment, we unwittingly dilute or obscure law’s reality. Law is not an armchair enterprise. What we *do* in law shows some deep down commitments that positivists, legal geometers, and most other jurisprudents miss or deny. Joseph Vining is an exception, for he sees that “Law is evidence of belief far stronger than academic statement and introspection can provide.”⁴

To return, then, to my question: What are you to make of this “regulation?” On the one hand, you will want to know whether XYZ, a potential source of publicly justified coercion, portends to act on the basis of its “regulation” to affect your business, your fortunes, your future. Is XYZ serious about this “regulation?” Will it bother to enforce it? If so, up to what point? Against you? Should you, then, skirt it, evade it, or even deny it, either before the agency or before a court?

⁴ JOSEPH VINING, FROM NEWTON’S SLEEP 5 (1995).

Important though they be, the answers to these questions do not decide everything that is likely at issue for you. You will also want to know whether you should willingly obey this regulation. The existential point, if you will, is that in the face of government outputs such as this “regulation,” there are many possible responses. To be sure, some people think that “obeying” law is just a matter of avoiding unpleasant consequences, but such a view, common though it is, overlooks important evidence, including that we sometimes offer willing obedience, including to law. Will a court of law, in the event this regulation is reviewed, give it effect? If so, what effect? The courts have acknowledged different kinds or degrees of deference.⁵ To these might correspond different kinds or modes of obedience.

To return to my questions: How will you decide what to do? Will you willingly obey, or will you merely comply with, or perhaps evade, XYZ’s “regulation?” The choice is yours, but the worthy -- and the common if underappreciated -- course is to determine whether this agency output bears (what in the literature is called) *the force of law*. Not everything called a “regulation” or even a “law,” though produced by the governing authority in a procedurally proper manner, calls for willing obedience. Civil disobedience is just the extreme case.

How, you ask, will you determine whether XYZ’s regulation carries the force of law? Agencies such as XYZ generate all manner of output, such as rules, orders, letters, interpretations contained in policy statements, agency manuals, enforcement letters, and so forth. None of these comes stamped as bearing, or not bearing, the force of law (and even if one did, this fact would not be dispositive), and only some of these do in fact

⁵ On courts’ and others’ granting “obedience” to agencies’ statements with the force of law, *see, e.g.*, PETER L. STRAUSS, PUBLICATION RULES IN THE RULEMAKING SPECTRUM: ASSURING PROPER RESPECT FOR AN ESSENTIAL ELEMENT 803, 822-23 (2001).

carry “the force of law.” The difference between outputs that carry the force of law and those that do not turns *in part*, I want to suggest, on whether an output bears indicia of true authority or authoritativeness.

To be sure, there is wide agreement in our legal culture that, if an agency is to generate outputs with the force of law, it is a necessary condition that the agency be operating under the benefit of delegated power, variously also called authority or jurisdiction. Like the branches of government that precede them, agencies do not possess such authority until they receive it as a delegation. Agencies receive their delegation not from the people directly, as the branches do, but from the people’s earlier delegates, the constitutionally constituted branches. Furthermore, as we will see, although an agency’s operating under such authority *through formal procedures* will frequently raise a presumption of authoritativeness for the output thus generated, the creation of such an output through such power and procedure is a necessary but not a sufficient condition for such an output to carry the force of law. With exceptions that prove the rule, authoritativeness is also necessary. Though the courts do not say as much in *haec verba*, *United States v. Mead*, a 2001 Supreme Court case decided 8 to 1, came close. *Mead* concerned the basis for deciding how courts should review agency outputs, and, as I hope to show, the case verges on acknowledging the fullness of law’s dependence upon true authority, the authoritative. To the extent *Mead* stops somewhat short, one can register the pull of that illusion that we can yet be governed by laws to be exclusion of rule by men and women.

II.

The question for the invested maker of widgets is of a piece with the one a court will ask in the (unlikely) event the regulation comes in for judicial review, and *Mead* sets the standard as follows: Is this a brute exercise of power by XYZ? Or is it, instead, the product not only of the exercise of delegated power but also of deliberation, of minds that pivot responsibly between the congressionally-enacted statements of law and the real-world concerns for which XYZ is itself charged with making law? Only if it is the latter will it carry the force of law, because only the latter bears the weight of the authority that calls forth willing obedience.

This may seem counterintuitive. In the world as we know it or hear about it, legislation often seems, because it is often said to be, pretty much the whole of law, and we do not officially hold legislation *as a category* to anything like the standard I have just attributed to the courts for review of agency outputs. As Joseph Vining has also observed, however, “legislation is that statement of law which can come into being without deliberation, without debate, without reason, and with no need (and perhaps hope) of justification. To make the point in its strongest form, it could said legislation is lawless behavior, except that by a paradoxical trick we make legislative statements materials which we use in determining what the law is.”⁶ Particular congressionally-generated legislative texts provide proximate starting points for analysis by agencies and courts, but they do so within the context of a web of purposive human self-governance. The bulk of congressional legislation is intended and destined to be given effect,

⁶ See VINING, *supra* note <> at 252-53.

sometimes with the force of law, through the workings of agencies, and agencies are not to be black holes.⁷

[T]he statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the “common law,” and the ultimate guarantees associated with the Constitution.⁸

If legislation is the arbitrary that we allow, we limit it by giving it effect only upon evidence that it has then passed through and been shaped and applied by responsible minds, including in the form of earlier deposits of law. In sum, for an agency output to carry the force of law, what is needed in the end, with exceptions that prove the rule, is evidence of responsible – or, better, authoritative -- mind at work.

I was asked to address what the Catholic tradition can bring to the problematic of “interpretation” in law, and it seems to me that a leading insight the Catholic tradition, broadly conceived (though I recognize that there will be Catholics who disagree, and reasonably so, with what I say), can add to the contemporary discourse is that “interpretation” in law cannot be understood or defended except in the terms with which

⁷ Cf. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (arguing that Schmittian black and grey hole are ordinary, not just extraordinary, features of our administrative state).

⁸ LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 590 (1965).

we measure the rest of the human practical agenda. Believers in a higher law do not (or should not) imagine that human law arrives ready-made; it not a “brooding omnipresence” that descends from on high through a kind of jurisprudential midwifery. When human law occurs, this is because humans have made it as part of their practical agenda. Because our putatively legal artifacts are the product of our moral undertaking, they are liable to moral evaluation and, as a result, to development and correction along moral lines. These legal artifacts are words, and, as a result, the moral evaluation-development-correction of law will take the form of “interpreting,” and perhaps creating more, words. (If our memories were sufficiently good, writing might be unnecessary, but interpretation would still be a necessity). We “interpret” in law in order to determine how we shall live. There are texts to be paid attention to because they were made in aid of our efforts to live well.

In other words, what questions *should* arise under the familiar rubric of “interpretation” in law is a function of the more basic, and I would say primordial, question of what it means to live well and to live well *together*. And that, in turn, in the view of the Catholic (but not exclusive the Catholic) tradition is a question about how to make the natural law effective or, perhaps more perspicuously, to fulfill our obligation to realize our individual and common *goods*, including through human law and authority. The life’s work of giving effect to the natural law, including through law, will require certain acts and qualities of mind, including minds that are willing to create authority and to obey it.

From what I have just claimed, about its being human law’s task to give effect to the natural law, it does not follow, however, that the holder of the judicial office is

necessarily free to do with that office whatsoever he or she reckons is necessary in order to make the natural law effective *hic et nunc*. On the contrary, authority or jurisdiction to make human law awaits assignment or delegation; the natural law does not itself settle who is charged with making it effective for the common good. To be sure, every rational person is under the natural law; everyone must do and pursue the good. However, not every rational person can proceed to make law; the rational person as such does not possess the jurisdiction to order or command others in order to realize the common good, no matter how noble his intentions and motives. Authority must be given or delegated in the form of office, and this is because, I shall argue, the responsibility to ordain things to the common good rests in the first instance with the entire people. It is only the whole people or, at the people's election -- as under the contemporary dispensation -- those whom they have deputed to work on their behalf, who have the jurisdiction to make and enforce law.

But, as I began by saying, even such assignment or delegation of authority *qua* jurisdiction is not enough. Authority must be delegated in the form of office or jurisdiction but, further, authority, in the sense of the authoritative, must be earned through worthy and responsible performance.⁹ True authority -- the authoritative -- is the hard work of responsible minds. Law's appearing, I shall argue, depends on the capacity willingly to obey one or the ones who have authority to order the community toward the common good, and this will best become clear if we bypass the usual myopic focus on the judicial office and attend more broadly to the workings of those who have been assigned the task of making law and of those, like the maker of widgets, who must decide

⁹ I have developed these aspects of this account at greater length in PATRICK MCKINLEY BRENNAN, *Locating Authority in Law*, in PATRICK MCKINLEY BRENNAN (ed.), *CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH* 161-96 (2007).

whether to obey. Again, “[l]aw is evidence of belief far stronger than academic statement and introspection can provide,”¹⁰ and recovery of that evidence depends on attending to more than loosely moored assertions about what the judge should or should not do what in the name of “interpretation.” Notes from the underground of administrative law will deliver instructive “evidence of belief” about how law makes its garden-variety but obedience-inspiring appearance.

III.

First, however, some favorite false starts should be catalogued and shelved. Joseph Biden’s tergiversations on the natural law were already signal when he was a mere Senator, but now that he is Vice-President of the United States, they cry out for attention. Back in 1990, the Senator first castigated nominee Robert Bork for rejecting natural law as a basis for judicial action and then, the next season, criticized nominee Clarence Thomas for embracing the same. *The Washington Post* caught the inconsistency, and Senator Biden then explained that there are a good natural law and a bad natural law, and, presumably, judges should be able to act on the basis of the former, but not on the basis of the latter.¹¹ What was really going on is not hard to figure out. A “bad” theory of natural law represents a “code of behavior . . . suggesting that natural law dictates morality to us, instead of leaving matters to individual choice.”¹²

U.S. elected officials are not, however, the only source of confusion concerning what a commitment to natural law entails or invites in terms of the judicial office. When influential Catholic minds speak to the question of the judicial office, the axes being

¹⁰ VINING, *supra* note, <> at 5.

¹¹ See JOHN E. COONS AND PATRICK MCKINLEY BRENNAN, BY NATURE EQUAL 123 (1999).

¹² Sen. Joseph Biden, *Law and Natural Law*, WASHINGTON POST, Sept. 8, 1991.

ground in the not-too-distant background are frequently the flipside of those that concerned the Senator from Delaware. For example, consider this instruction that Francis Cardinal George, OMI, the archbishop of Chicago and currently the President of the United States Conference of Catholic Bishops, and widely regarded as the intellectual leader among American hierarchy, gave in a scholarly lecture at a law school: “In working to create a Catholic culture open to the transcendent truths of faith, . . . Catholic jurists and lawyers, judges and legislators should work to shape a legal system informed by a sense of right and wrong transcendent to political manipulation.”¹³ It would be startling if Cardinal George’s considered judgment were that Catholic (and other?) judges should be utterly free to disregard human law in order to make the natural law (in his idiom, the “right”) effective, but the fact is the Cardinal did lump the judge in there alongside jurists, lawyers, and even legislators, and without so much as a sidelong glance at the constitutional and statutory grants of power to judges, both state and federal. Predictably, this perhaps imprecise peroration was preceded by discussion of same-sex marriage and abortion.

The more common, and arguably more measured, approach among Catholics to the perceived problem of judicial passivity in the face of immoral laws is to criticize “legal positivism.” This criticism has become something of a leitmotif in modern papal teaching. The popes’ repeated objection is that judges are blindly giving effect to positive law without regard to its conformity with natural law or natural right. Pope Benedict XVI, for example, then as Cardinal Ratzinger, sounded this warning:

¹³ Francis George, *OMI, Law and Culture*, 1 AVE MARIA L. REV. 1, 17 (2003).

[J]uridical positivism . . . has taken on the form of the theory of consensus: if reason is no longer able to find the way to metaphysics as the source of law, the State can only refer to the common convictions of its citizens' values, convictions that are reflected in the democratic consensus. Truth does not create consensus, and consensus does not create truth as much as it does a common ordering. The majority determines what must be regarded as true and just. In other words, law is exposed to the whim of the majority, and depends on the awareness of the values of the society at any given moment, which in turn is determined by a multiplicity of factors. This is manifested concretely by the progressive disappearance of the fundamentals of law inspired by the Christian tradition. . . . Because in modern States metaphysics, and with it, Natural Law, seem to be definitely depreciated, there is an ongoing transformation of law, the ulterior steps of which cannot yet be foreseen; the very concept of law is losing its precise definition.¹⁴

Many similar warnings can be found in the more recent teachings of Pope Benedict, and I regard them as true and helpful as far as they go. To my knowledge, no modern papal statement has taken the next step and said *simpliciter* what I would regard as problematic, viz., that judges' jurisdiction is not (justly) limited by human law. And, I hasten to add, further, that I consider it no indictment of modern papal teaching in this area to say that it does not purport to resolve the question whether judges on, say, the U.S. Court of Claims

¹⁴ Joseph Cardinal Ratzinger, "Crises of Law," Address at LUMSA Faculty of Jurisprudence (Nov. 10, 1999).

may sometimes speak the natural law directly, and it strikes me as salutary if such teaching has the effect of inviting people to heighten their consciousness regarding who in the particular regimes they know bears the responsibility for making the natural law effective for the common good.

Though neither had yet converted to the Catholic religion when the exchange occurred, a more precise analysis comes in Mortimer Adler's criticism of Robert Bork for denying that U.S. judges are entitled (let alone obligated) to speak the natural law directly. By "speak the natural law directly," I mean the following: to speak in the name of and with the force of human law and of the governing authority what the natural law requires, even if that requirement does not have a basis in extant human law. Bork denies, while Adler insists, that our judges should be allowed thus to speak the natural law directly. But if, as I think, Adler was right that Bork was wrong to claim that our judges should *never* speak the natural law directly, Adler was in turn wrong to insist that judges must *always* be able to speak the natural law directly. Both Adler and Bork lose sight of the crucial question, viz., what jurisdiction the people have committed to the judge.¹⁵ Wanting to put the question to bed once and for all, Justice Scalia goes one step farther when he says, no doubt facetiously, "God applies the natural law."¹⁶

If asked for the truth of the matter, I am confident Justice Scalia would confess that, on the Catholic view (which he holds to be true), God promulgates the natural law and it falls to us, not to the Almighty, freely to implement it in our living. The question we are pursuing now is what exactly the judge's particular contribution is to be, and, at

¹⁵ See RUSSELL HITTINGER, *FIRST GRACE* 80-87 (2003).

¹⁶ Antonin Scalia, Assoc. Justice, Supreme Court of the United States, *The Common Christian Good*, Speech at the Gregorian University Symposium: Left, Right, and the Common Good (May 2, 1996) (on file with author).

this point, what I wish merely to report that it is the view of most Catholic theorists that judges and other public officials do not receive from the natural law itself the authority to enforce the natural law; it is the view of most Catholic theorists that such jurisdiction must be conferred by another source. John Locke (not a Catholic) was of the view that in the state of nature every man had a right and duty to enforce the natural law, but the Catholic tradition, both before and after Locke¹⁷, has gravitated toward the requirement of a positive assignment of ruling authority, either by God or by the people.¹⁸

God made David king and gave him regal responsibilities, and today, when not even the most zealous advocates of American exceptionalism would imagine that God set down the metes and bounds of the Article III judicial power, the respective judicial powers of the fifty states (and, presumably, the states that God foreknows will be admitted to the Union in future), and -- one must not forget -- the adjudicatory powers of the varied range of administrative agencies, legislative courts, territorial courts, and courts martial, we are remitted to the people and their respective constituent acts. As Robert George explains,

If we see that natural law does not dictate an answer to the question of its own enforcement, it is clear that authority to enforce the natural law may reasonably be vested primarily, or even virtually exclusively, with the legislature; or, alternatively, a significant measure of such authority may be granted to the judiciary as a check on legislative power. The question whether to vest courts with the power of constitutional judicial review at

¹⁷ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ch. vii, sec. 91 (1689).

¹⁸ See, e.g., HEINRICH ROMMEN THE STATE IN CATHOLIC THOUGHT 428-76 (1955).

all, and, if so, what the scope of that power should be, is in important ways underdetermined by reason. As such, it is a matter to be resolved prudently by the type of authoritative choice among morally acceptable options¹⁹

It falls to the people to create offices to assist them in their responsibility to live as the natural law requires.

The claim so far, then, is that any authority on the part of a public official, including a “judge,” to act directly upon the basis of the natural law – in, say, interpreting or even refusing effect to a provision of human law -- depends for its legitimacy upon a grant by the people. This seems to be the position taken by most of the most serious contemporary Catholic defenders of the natural law position in jurisprudence, including Professor George, and it should be welcome by those who are fond, as most today are, of democracy.

IV.

There has, however, been some weighty pushback of a sort that will make a start in answering our next question, viz., whether the people *should* confer on the judge some authority to speak the natural law directly. Such resistance appears, for example, in Father Joseph Koterski’s reply to Robert George’s thesis quoted above, and in exploring this we will see *why* Catholic theorists tend to deny, as they do, that the natural law confers jurisdiction for its own communal enforcement. Fr. Koterski grants that the

¹⁹ Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2279 (2000).

natural law “allows for quite diverse forms of government and for different ways of vesting the various powers that properly belong to civil authority – including our own practice of the separation of powers into different branches” He then continues:

If I have understood him correctly, [Professor George] holds that the natural law does not decide the question of where any power of statutory review should be located. Thus, Professor George contends that we should require an express constitutional provision for the judiciary to use substantive justice known by natural law as the standard for judgment; otherwise, they should limit themselves to procedural fairness.²⁰

To this interpretation of George (which may exaggerate George’s requirement that the provision be “express,” but I leave that aside for now), Koterski responds that he finds it “questionable to hold that there is no natural law warrant for judges especially to employ insights about substantive questions of justice to overturn legislation that violates natural law principles.”²¹ And it is at this point that Koterski offers his alternative theory, which I quote at length, almost in its entirety:

Authority, it seems to me, in any of its forms, is a matter of witnessing to truths that are earlier, higher, or logically prior to itself, and using powers responsibly for that purpose. Civil authority will invariably bring itself into contempt by excessively activist judicial legislation, but civil

²⁰ Joseph W. Koterski, S.J., Response, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2297, 2298 (2000).

²¹ *Id.* at. 2298.

authority can also fail by defect. It can do so, for instance in the scenario of judges who will not assert themselves to halt injustice that embodied in legislation, whether by the will of an activist legislature or by a legislature whipped into action by a media-induced frenzy in the populace. . . .

Put another way, I think that we dare not restrict questions of substantive justice known by way of the natural law to the realm of politics and legislation – we dare not do so because of what natural law requires. We must rather insist that the natural law requires that all three powers of government (whether these powers are separated as in our system or combined in some other form of government) need to call to mind and to act according to substantive justice and not just procedural fairness.

Professor George has argued that there is nothing about the natural law that gives this role to the judicial branch, so long as some branch of government has the role. Yet I do not see that the natural law allows any branch (within a polity whose powers are separated into distinct branches) to be excused from this function.²²

To which I would respond, yes and no -- and this on the basis of what this “natural law,” of which we have been speaking, is and requires.²³

²² *Id.* at 2298-99.

²³ Here I advance an understanding of the natural law that is different from the one Professor George defends, but I do not believe that the difference matters to the present question about the who has public authority to make the natural law effective for the common good.

In his book *The Great Rehearsal: The Story of the Making and Ratifying of the Constitution of the United States*, Carl Van Doren tells the story of the disturbed New Englander who objected to the two-year senatorial term proposed by the Constitutional Convention on the ground that a one-year term was “a dictate of the law of nature; spring comes once a year, and so should a batch of new senators.”²⁴ We laugh, but at what? This is the heart of the matter, and unclogging it means banishing the accumulated rationalist images according to which the natural law is some sort of “ghostly Internal Revenue Code in all its magnificent detail written in the heavens.”²⁵ Answering the question what role the judge should have vis-à-vis the natural law depends in part on what the natural law is, and, on the view I am proposing, the question turns out to be what role the judge should have in implementing human *goods*.

On the traditional Catholic understanding, the divine natural law is an ordinance of reason instilled in the human intellect by God as part of his providential ruling of the universe, and the first precept of that law (which is divine in its origin but held naturally in our human minds) is that “the good is to be done and pursued and evil avoided.” This is that natural law – that *goods* are to be done, non-goods are not to be done; all else that can be said in the name of the natural law is just so many intermediate and, ultimately, particular judgments of what is good and, therefore, to be done. What is good for humans is the achievement of their end, that is, their happiness, and there are countless steps along the way – the daily tasks of friendship, the deeds of healthy eating, the labors of learning, the delights and duties of reproduction and rearing, and so forth. Discerning

²⁴ Quoted in JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 302 (2d ed. 1988).

²⁵ STEVEN SMITH, *LAW’S QUANDARY* 47 (2004).

among and realizing these exigencies (e.g., nourishment) and possibilities (e.g., reproduction) are the work of a lifetime.²⁶

To succeed in the daily task of pursuing and doing what concretely will realize the component parts of human happiness requires, further, the creation and maintenance of a social order, one requirement of which is human law. One can even say that the social order and a viable system of human law are a requirement of the natural law. Without them, other individual and common goods cannot be achieved, except *per accidens*. I say “other” because the social order and positive law are themselves goods -- if, but only if, they contribute to humans’ achieving their other basic goods such as nourishment, shelter, the conditions of sociability, family life, and so forth.

The previous two paragraphs amount to just the thinnest of skeletal outlines of a natural law theory, but it is enough to begin to indicate why to speak (as Father Koterski does repeatedly) of “what the natural law requires” cannot but, at this level, invite misunderstanding.²⁷ The unbending requirement that the good be done and pursued and non-good avoided does not entail that the people we refer to as “judges” must have the jurisdiction to speak the natural law directly. Under perfectly conceivable circumstances, a system of human law can be a good exactly by *not* allowing judges to speak the natural law directly. Koterski denies “that the natural law allows any branch (within a polity whose powers are separated into distinct branches) to be excused from this function” of (as I would say) speaking the natural law directly, but this denial gets things backwards. “[T]he natural law” tells us that the good is to be done and pursued; it

²⁶ For a more elaborate but still compendious account of the natural law (with ample citations to the classic statements), see Patrick McKinley Brennan, *Persons, Participating, and “Higher Law,”* __ PEPP. L. REV. __ (2008) (symposium issue).

²⁷ This is especially so because I suspect, though I have not confirmed, that Fr. Koterski would agree with this outline.

does not – because it cannot – tell us that it is *necessarily* a good to give judges the power to speak the natural law directly.

Please permit me to belabor this point that is so often misunderstood. Implicit in any claim regarding what the natural law “requires” must be a promissory note to demonstrate on demand, to a reasonable standard of proof, that doing or instantiating the good requires this particular arrangement. The natural law is not anything more (or less) than the (divine) command that the good alone is to be done and pursued and its opposite avoided. The precept that “the good be done and pursued” does not, so to speak, make the mistake of assuming that all government actors should be positioned to act coercively on its behalf; frequently enough, more than one arrangement can get the job done. The question of whether it would be good for judges here and now, or here in the foreseeable future, to speak the natural law directly is a question of relatively particular fact that is to be resolved based on a prudential judgment of the relevant data. Yes, everyone must be engaged in the business of making the natural law effective, but this project may favor – or even require – that some people be entrusted with, and others not be entrusted with, the jurisdiction to speak the natural law directly for the sake of the common good.

To put the point I have been developing another way, human law is not only a need of the natural law; we can also say that it is derived from the natural law. Following St. Thomas Aquinas, one can distinguish two ways by which human law is derived from the natural law.²⁸ The first is by way of conclusions from premises; for example, the conclusion that one should not kill an innocent follows directly from the precept that goods – including this innocent person’s – are to be pursued. The second way is by what

²⁸ ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II 95.2 c (Fathers of the English Dominican Province trans., 1947) (1265).

Aquinas calls *determinatio*, which means something like specification; in this way, something left underdetermined by the natural law itself is given specific form. To take a familiar example, traffic laws will be necessary when transportation becomes abundant and concentrated, but from the necessity for traffic laws nothing follows about on which side of the road people should drive. Likewise and more generally, a system of human law is necessary, and providing such a system requires personnel to create and enforce it, but this project does not necessarily require that those who pass judgment under human law have the authority to speak the natural law directly. Aquinas underlines that “those things that are derived in the second way, have no other force than that of human law.”²⁹

For the foregoing reasons, then, I deny that the natural law necessarily requires that everyone in authority in a system of separated powers be given the jurisdiction to speak the natural law directly. The natural law does not *ex proprio vigore* assign jurisdiction to judges, because the natural law as such is powerless to say, so to speak, whether their speaking the natural law directly is a good. But there remains the further question whether in general or in particular cases it will be prudent for the people (or their representatives) to assign judges such power.

V.

In the process of making the claim that I have been arguing against, Fr. Koterski introduces an essential, enriching theme concerning the nature of authority. Specifically, he insists that true authority “witness[es] to truths that are earlier, higher, or logically prior to itself.”³⁰ Apart from certain introductory statements, the discussion so far has

²⁹ *Id.*

³⁰ Koterski, *supra* note <> at 2298.

deliberately treated “authority” as merely the power or jurisdiction perfunctorily to say what the law is. But given human law’s essential relationship to the good, it should be plain enough that “to say what the law is” – law’s appearing – is not simply a lapidary function of (delegated) power. There is nothing perfunctory about it, for it depends, with exceptions that prove the rule, upon the appearance of what is authoritative. The authoritative? In this age of Hooper, game theory, Max Weber, bureaucracy, Jerry Mashaw’s law of conservation of administrative discretion³¹, and textualism rampant (I do not say regnant), an insistence upon the authoritative may seem quixotic, wishful, revisionist, or benighted. What I wish to suggest, however, is that the courts and the agencies first, and then some among the commentators second, have refused to sell true authority – the authoritative – short, at least in the main. There is no surprise that mischief sometimes slips in, even at the highest levels, but the quest to keep it out is what is truly impressive.

The fight is fought on many fields, but in an especially revealing way in the relationship between courts and agencies. Lodged within an intractable debate about how to conceptualize, compartmentalize, or categorize the possible or required postures of courts vis-a-vis agency outputs (e.g., on “questions of law,” “questions of fact,” or “mixed questions”), the *insistence upon* the authoritative is as palpable as it is anywhere on the field of law. On the surface, all judicial review of agency action is governed by statutes and their uncontroversial judicial glosses. Absent overriding language in an agency’s organic statute, the statute that presumptively governs is section 706 of the

³¹ Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-98 (1985).

Administrative Procedure Act (1946).³² Anyone possessed of even a glancing familiarity with modern American administrative law, however, knows that that statute has only a nominal and superficial influence on the actual practice of judicial review, more in some connections than others. Even in the face of statutes that claim in terms to decide what review is adequate, the courts uncontroversially answer the question for themselves.³³

Overarchingly,

the scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the major architects and guarantors of the integrity of the judicial system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which the unity and coherence are built.³⁴

The availability of adequate judicial review is axiomatic for the legitimacy of the administrative state, and the courts are the determiners of adequacy. But what *is* “adequate?”

One unsung possibility would be for a reviewing court to substitute its judgment for an agency’s if it should appear to the court to be prudent to do so. The inefficiencies of such an approach are obvious, but there other reasons no one defends it. The principal

³² “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” Administrative Procedure Act, 5 U.S.C. § 706 (1993). Not leaving things there, section 706 then proceeds to lay out six (what we would call, though the statute itself does not) standards of review, which continue to get cited all the time as a matter of course.

³³ See U.S. v. Mead Corp., 533 U.S. 218, 241-42 (Scalia, J., dissenting) (discussing the ways in which Supreme Court opinions, including *Chevron*, ignore the APA’s standard of review provisions).

³⁴ JAFFE, *supra* note <> at 589.

reason is that although, according to the U.S. Constitution, “All legislative Powers herein granted shall be vested in a Congress of the United States,”³⁵ and although the official view remains that “[the] power of the legislative, being derived from the people by a positive voluntary grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands,”³⁶ it is not seriously contested today that our Congress creates agencies and delegates to them the power or authority sometimes to make law-like-things.³⁷ An overt conflict with the terms of the Constitution is avoided, without slipping into the silliness of a jurisprudence of “law-like-things,” by acknowledging, as the Court did in *Mead*, that agencies sometimes generate outputs that carry “the force of law.” Such “outputs” (as I have referred to them) would not carry the force of law if courts were free to disregard them at will; conversely, if they do not carry the force of law, on what basis would courts not be free to disregard them? But what is it for an output to carry the force of law such that a court *should* defer to it and others *should* obey it?

Reserving the possibility of invalidation upon judicial review (with all that that means about where law really *is*), we can say that Congress makes “laws” by following

³⁵ U.S. CONST. art. I, § 1.

³⁶ *Indus. Union Dep’t. v. American Petroleum Indus.*, 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring) (quoting JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* (1690)).

³⁷ Justice Scalia maintains that “Strictly speaking, there is *no* acceptable delegation of legislative power.” *Mistretta v. U.S.*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting). Justice Stevens, however, maintains that “The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is ‘legislative’ but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not ‘legislative power.’ Despite the fact that there is language in our opinions that supports the Court’s articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’” *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 488 (Stevens, J., concurring). *Mead* goes further, of course, inasmuch as it acknowledges that it is not just “rules” that can carry the force of law.

the procedures set out in the Constitution, viz., bicameralism and presentment. There is, however, no such bright-line rule for determining when agency outputs bear the force of law. Even when an agency has received and used a delegation to make outputs, not every procedurally-proper agency output will in fact carry the force of law. This is the dispositive question, and in 2001, in the *Mead* case, the Court restated it and refined the answer. Justice Souter's complex opinion for eight members of the Court admits of multiple readings, but there is no question but that, as Justice Scalia's dissent observed, the Court was intentionally trying to put judicial review of administrative outputs on a new footing. In Justice Scalia's own words: "Today's opinion makes an avulsive change in judicial review of federal administrative action."³⁸

The proximate background to *Mead* was the Court's much-discussed decision in *Chevron v. U.S.A. v. Natural Resources Council, Inc.*, in 1984. The *Chevron* Court started from the uncontroversial premise that, when "Congress has spoken to the precise question at issue," that is, when "the intent of Congress is clear," then "that is the end of the matter." From there, the Court went on to reason that, on the one hand, "[i]f 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," but, on the other hand, "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." In either case, that of explicit or implicit delegation, *Chevron* required courts to defer to agencies' "permissible construction of the statute." *Chevron* thus spoke clearly in terms of delegation, both explicit and implicit. Thomas Merrill and Kristin Hickman summarized the achievement of *Chevron* as follows:

³⁸ *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

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 delegated interpretative authority to an agency, but also when Congress is silent or leaves an ambiguity in a statute 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 these implied delegations as equivalent to express delegations.³⁹

Justice Scalia, also blandly, summarized the doctrinal situation in his dissent in *Mead*: “When, said *Chevron*, Congress leaves an ambiguity in a statute that is to be administered by an administrative agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved.”

It was the achievement of *Mead*, as Justice Scalia observed by way of criticism, to return the focus from the question of whether to statute is ambiguous to the question of whether (and if so, what) power Congress has delegated: “What previously was a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary.”⁴⁰ The *Mead* Court was insistent that the issue was whether Congress intentionally delegated authority to

³⁹ Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 833-34 (2001).

⁴⁰ *Mead*, 533 U.S. at 239.

speaking with the force of law when making policy judgments based on the statute(s) it is charged with administering. In addition to cases of *explicit* delegation thus to speak with the force of law, the Court explained,

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 the particular result."⁴¹

The focal issue, then, is delegation of authority, not the presence of ambiguity. But the focal issue is not the only one, for Fr. Koterski's point returns when the Court takes up the question of what will count as sufficient evidence of such implicit delegation.

In the period leading up to *Mead*, there had been considerable debate in the literature about the justification for *Chevron* deference. The best theory, in part because it found the most support in the Court's own opinions, was that *Chevron* was justified on the basis of an *assumed* congressional intent. According to this theory, "[d]eference is mandatory because Congress has commanded it. The command is only implicit – presumed rather than explicit – but it is a command all the same."⁴² The stage for putting *Chevron* on a new foundation began to be set, as one sees in retrospect, in 2000. First, in

⁴¹ *Id.* at 229 (quoting *Chevron*). The opinion continues: "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 chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable."

⁴² Merrill & Hickman, *supra* note <> at 870-71. This article is cited by the Court in *Mead*, at 230 n. 11.

FDA v. Brown & Williamson, Justice O'Connor, in a five-to-four decision (from which Justice Breyer wrote the dissent), noted that sometimes there may be reason to conclude that a statutory ambiguity is not intended by Congress as an implicit delegation.⁴³

Second, in a another case decided in 2000, Justice Breyer in dissent identified “circumstances in which Chevron-type deference is inapplicable,” viz., those “where one has doubt that Congress actually intended to delegate interpretive authority to the agency (an ‘ambiguity’ that *Chevron* does not presumptively leave to agency resolution).”⁴⁴ The assumption of implicit delegation through ambiguity was on the rocks.

A year later, by which time Justice Breyer was in a newly-formed, eight-member majority, the Court was no longer willing to treat ambiguity as raising a presumption of implicit delegation. The *Mead* Court takes its stand upon an across-the-board insistence of evidence of affirmative delegation. Noting that “we have recognized a good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process or rulemaking or adjudication that produces regulations or rulings for which deference is claimed,” the Court proceeded to explain “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that *should underlie a pronouncement of such force*” (emphasis added). The provision or use of relative formality of administrative procedure is not, however, a necessary condition for making an output bearing the force of law. “We have sometimes found reasons for . . . deference even when no such administrative formality was required and none was afforded.” In the Supreme Court case that the *Mead* Court cites for this

⁴³ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

⁴⁴ *Christensen v. Harris County*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting).

proposition, *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, the relevant agency official, the Comptroller General, whose ruling the Court agreed should receive deference, had reached “‘deliberative conclusions.’”⁴⁵

The first achievement of *Mead*, then, is to require evidence of an affirmative delegation of power to make outputs carrying the force of law.⁴⁶ The second achievement, though less obvious, was to raise up “fairness and deliberation” as a normative for whether an output has the force of law. The Court treats the provision of formality as signaling a delegation of power to make outputs carrying the force of law; however, *by not requiring the provision of formality before finding the delegation of authority to make such outputs*, the Court quietly made the “fairness and deliberation that should underlie a pronouncement of law” its touchstone. Refusing to elide formality with law-making power, the Court struck a quiet blow at formalism.

If this development was subtle, it was clear enough to vex those who would like a closer identification between formal procedures and the capacity to make outputs carrying the force of law. For example, Thomas Merrill has commented wryly that “[f]or whatever reason, the [*Mead*] Court acknowledged that whether Congress has prescribed formal procedures is neither a necessary nor sufficient condition of finding the relevant

⁴⁵ *Mead*, 533 U.S. at 231 n.13 (quoting *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995)).

⁴⁶ For the reasons why it can be difficult to ascertain whether Congress has made such a delegation, see Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 469 (2002) (arguing, *inter alia*, that the convention for such grants changed between the New Deal period and the modern period). Still, Merrill concludes that “[o]n the whole, ‘the *Mead* doctrine’ is a sound development. *Mead* clarifies that *Chevron* rests on congressional intent, and correctly concludes from this that *Chevron* applies only when Congress has given some signal that the agency, rather than the court, is to be the primary interpreter of statutory ambiguity. The decision also correctly concludes that the relevant signal of Congress’s intent in this regard is a delegation of power to act with the force of law. By linking *Chevron* and congressional intent, *Mead* helps achieve reconciliation between *Chevron* and the judicial review provisions of the APA. Indeed, by insisting that the agency gets strong deference only when it acts within the scope of delegated power to act with the force of law, and not otherwise, *Mead* goes part way toward restoring an aspect of the nondelegation doctrine” Thomas W. Merrill, *The Mead Doctrine*, 54 ADMIN. L. REV. 807, 833 (2002).

delegation; it is at most a factor positively correlated with the likelihood that such a delegation has occurred.”⁴⁷ The “reason” that Merrill does not mention is not far to find. The passage from *Mead* on which Merrill is commenting is not *just* about whether a delegation has been made; it is, in terms, about whether deference is *in fact* due to particular administrative outputs: “the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication [but], . . . the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference where no administrative formality was required and none was afforded.”⁴⁸ The “reason,” then, that formality is not sufficient is that it is not even necessary: what is necessary (though not sufficient) is deliberation and fairness, what “*should* underlie a pronouncement of law.” What one commentator says derisively of *Mead*, I commend: “agency procedure is crucial for strong deference analysis except where it is not.”⁴⁹

VI.

Better to understand the way in which the Court clarified the centrality of deliberation and fairness, another important achievement of *Mead* needs to be introduced into the discussion. In the wake of *Chevron* and until *Christensen*, it had appeared that deference was now to be an all-or-nothing phenomenon. Although deference based

⁴⁷ *Id.* at 815.

⁴⁸ *Mead*, 533 U.S. at 230-31 (discussed by Merrill, *supra* note <> at 815).

⁴⁹ Richard W. Murphy, *Judicial Deference*, 66 OHIO ST. L.J. 1013, 1056 (2005). According to Justice Breyer, reinforcing the message of *Mead*, *Mead* does not require “some unspecified degree of formal process” to trigger *Chevron* deference. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv.* 545 U.S. 967, 1003 (2005) (Breyer, J., concurring).

solely on outputs' power to persuade (proportional deference, as opposed to *Chevron's* strong or complete deference), a doctrine associated above all with Justice Jackson's majority opinion in *Skidmore v. Swift & Co.*, as *Chevron* occupied the territory deference came to be seen as a scalar quantity. *Skidmore* was never overruled, though, and in *Christensen*, the Court explicitly revived the possibility of *Skidmore* deference, prompting a dissent from Justice Scalia in which he argued that "*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations authoritative effect." In *Mead* the Court because systematic about the question it had resolved in favor of *Skidmore* in *Christensen*: it framed and faced "a choice about the best way to deal with an inescapable feature of the body of congressional legislation authorizing administrative action." Having held that *Skidmore* deference was alive and well as a possible congressionally-mandated judicial response to agency outputs, the *Mead* Court continued: "Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference."

Without making the *Mead* opinion clearer or more emphatic than it is, what I would suggest is that the Court's willingness to find evidence of explicit delegation of authority to make outputs carrying the force of law *even where no formal procedures have been provided or used* offers a clue about what the Court is really after. The Court's resistance to the sufficiency of the provision and subsequent use of formality – the *pro*

tanto rejection of formalism – has deep jurisprudential springs.⁵⁰ On the one hand, a congressional intent to delegate is required, and for this formality can often serve as a proxy. On the other, and this is the Koterski point, there is an insistence that deference be conditioned upon not *just* exercises in delegated power, but also, and across the board, upon the fairness and deliberation “that *should* underlie a pronouncement of law.” Here we have a normative theory of lawmaking. To produce something carrying the force of law, something calling for strong deference or obedience, is to exercise delegated power with fairness and deliberation, not merely to go through the form of prescribed procedures.⁵¹

To highlight the significance of this, consider Justice Scalia’s opposing view. In addition to rejecting the possibility of *Skidmore* deference, Justice Scalia also rejects the Court’s insistence that the agency have done more than merely resolve a statutory ambiguity in a way that is minimally reasonable or permissible. Whereas, as we have seen, the Court insists upon evidence of fairness and deliberation (sometimes in the form of the proxy of formal procedures), Justice Scalia is satisfied if the agency output is “authoritative,” and by that he means that it “is truly the agency’s considered view,” not just “the opinions of some underlings.” For Justice Scalia, it is enough that the output represent “the official position of the agency,” “the judgment of central agency

⁵⁰ I would not wish, however, to downplay the extent to which the proxy of formality suffices: “There are scores of pre-*Mead* cases that illustrate that notice and comment rulemaking is not a necessary prerequisite to Chevron deference. The Court has consistently applied *Chevron* deference to statutory interpretations adopted in formal adjudications, and it has often conferred Chevron deference on agency interpretations adopted in less formal instruments like orders issued in informal adjudications and interpretive rules. Justice Breyer is mistaken, however, in his assertion [in *Brand-X*] that the Court has ever decided any case in which it has held, or even suggested, that an agency’s use of formal rulemaking is insufficient to require a court to apply *Chevron* deference. There is no Supreme Court opinion that supports that assertion.” RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE, 32-33 (2009 Supplement).

⁵¹ For examples of the Courts of Appeals focusing on the requirement of “deliberation and fairness,” see *U.S. v. Able Time, Inc.*, 545 F. 3d 824, 836 (9th Cir. 2008); *Fellner v. Tri-Union Seafood, LLC*, 539 F. 3d 237, 245 (3d Cir. 2008); *Alaska Dept. Health & Human Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F. 3d 931, 939 (9th Cir. 2005).

management.” By all of this Justice Scalia does not mean the product of apparent “fairness and deliberation.” Rather than concentrate on what went into creating the output, Justice Scalia is “satisfied”⁵² if, when said output has been attacked in court, the agency has decided to defend it there. As the Court has pointed out, however, this means that what is receiving deference is not the output and the quality of its making but, strangely, the brief in court.⁵³

Admittedly, Justice Scalia is nominally on the side of authority and even of the “authoritative.” On his preferred position, a reasonable agency interpretation and application of an ambiguous statutory provision must be “sustained so long as it represent[s] the agency’s authoritative interpretation.” And the ““authoritativeness”” of an agency interpretation,” Justice Scalia continues,

does not turn on upon whether it has been enunciated by someone who is actually employed by the agency. It must represent the judgment of central agency management, approved at the highest levels. . . . [I]t is a line that focuses on the right question: . . . whether it is truly the agency’s considered view, or just the opinions of some underlings, that are at issue.⁵⁴

For Justice Scalia, “authoritativeness” is the talisman, and it is present when the agency output “represents the official position of the agency.”⁵⁵ But again, the agency can make

⁵² *Mead*, 533 U.S. at 258 n. 6 (Scalia, J., dissenting).

⁵³ *Id.* at 238 n. 19.

⁵⁴ *Id.* at 259 n. 6 (Scalia, J., dissenting).

⁵⁵ *Id.* at 557 (Scalia, J., dissenting).

something its “official position,” thereby rendering its output authoritative, by defending the same when attacked court. What was not authoritative in its origins and production can *become* authoritative by being defended in litigation.⁵⁶ For Justice Scalia, authoritative means official.

In sum, both sides acknowledge, at least nominally, the need for authority -- an accomplishment that neither side imagines to be a scalar quantity. Furthermore, the Court, but not Justice Scalia, has made the authoritativeness inquiry turn on deliberateness and fairness, for which formal procedures can sometimes serve as a proxy. Moreover, the Court has been willing to pay a reasonably high price to fine-tune the analysis as it has. Not only by looking for indicia of deliberateness, which will tend to be more demanding than looking to see whether the agency has, say, made a notice-and-comment rule or signed a litigation brief, but also in insisting, again *pace* Justice Scalia, that sometimes when *Chevron* deference is not called for, because the above criteria have not been met, *Skidmore*'s intermediate level of deference will be called for. Epistemic deference of the *Skidmore* sort makes good sense; even though the agency did not set out to make law, its decision will be given effect to the extent of its power to persuade. It is hard to argue with the persuasive.

What *Mead* adds is that “even” when the agency sets out to make law and does so in a formally authorized way, whether its output will be given the force of law depends upon something further. To be sure, in the overwhelming number of cases, formality will serve as sufficient proxy for deliberation and fairness, but this must not obscure the fact

⁵⁶ *Id.* at 259 n. 6 (Scalia, J., dissenting). The Court itself has not always lived by the rule of *Mead*. See *Beck v. Pace International Union*, 127 S.Ct. 2310 (2007) (unanimously deferring to an agency statutory interpretation adopted only in an amicus brief).

that deliberation and fairness are the aim, if not always directly the test, and they can be found where formality is altogether missing.

Mead has been criticized for being “perfectionist.”⁵⁷ The Court’s opinion, though, was itself clear about at least some of the necessary *imperfections* it countenanced. The *Mead* Court was not under any illusions about whether courts can always ascertain Congress’s intent, even on the decisive question of whether there has been a delegation of power to make outputs bearing the force of law. Living in the face of the nondelegation doctrine, Congress has reasons not to trumpet its intentional delegations of power to make outputs bearing the force of law! The Court forthrightly acknowledged that its own position would sometimes deliver only a second-best, but at least not a third- or fourth-best:

We think, in sum, that Justice Scalia’s efforts to simplify ultimately run afoul of Congress’s indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it. Without being at odds with congressional intent much of the time, we believe that judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*⁵⁸

⁵⁷ Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 356 (2003). See also Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

⁵⁸ *Mead*, 533 U.S. at 238. One commentator has argued that under *Mead*, “courts must draw increasingly fine distinctions using impossibly vague standards. If courts are able to draw such fine distinctions, they will then, presumably with some frequency, issue binding statutory interpretations that usurp clearly delegated agency lawmaking authority.” William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 42 ADMIN. L. REV., 719, 719-20 (2002). However, this conclusion is a non sequitur; the delegation inquiry, though necessarily fraught with the risk of error, is exactly an attempt not to usurp, and to the extent “lawmaking authority” has been “clearly [sic] delegated,” the risk of error should approach zero.

Evan Criddle has argued that, by “highlight[ing],” and expecting lower courts to highlight, “the concerns that a reasonable legislator might consider when deciding whether to delegate interpretive authority to an agency,” in order to determine whether a delegation has in fact been made, the *Mead* Court rendered the requirement of a delegation a “fiction.”⁵⁹ On the contrary, however, this is simply a piece of realism about, and an inference from, how and on what basis delegations of power to make outputs bearing the force of law usually get made. When the delegation inquiry becomes empirically intractable, *Mead* acknowledges that evidence of the conditions of deliberation will sometimes be enough.

This focus on the concerns of a reasonable legislator, furthermore, acknowledges that the delegation inquiry was always about something else as well – not merely the intentional transfer of power, but also the creation of the conditions for generating the authoritative. Though Criddle is, I submit, wrong to treat the delegation inquiry as a fiction, he is right that it also works “as a heuristic for highlighting the concerns that a reasonable legislator might consider when deciding whether to delegate interpretive authority to an administrative agency.”⁶⁰ Sometimes Congress will “deem it necessary or desirable to shift policy formulation to cheaper, more flexible, and more informal processes,”⁶¹ and *Mead* directs courts to look for evidence of delegation, but not necessarily of formality, as a necessary but not a sufficient condition of giving strong

⁵⁹ Evan Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1304 (2008); see also David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203-05 (2001).

⁶⁰ Criddle, *supra* note <> at 1304.

⁶¹ John Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 944 (2004). *Mead* recognizes “that idiosyncratic statutory circumstances may, at times, suggest a legislative preference for deferential review of less formal agency action.” *Id.* at 940.

(*Chevron*) deference to agency outputs. What is additionally needful is that evidence of deliberateness and fairness.

The clarification of this additional requirement, which I have described as the second achievement of *Mead*, has long been lodged elsewhere in administrative law, in the requirement known as “hard look” review.⁶² Some commentators and judges have taken the view, and not without reason, that hard look review is a different species of review than the one required by *Chevron* and *Mead*. However, *to the extent* that *Mead* is understood as demanding evidence of careful, deliberate reasoning, the difference disappears. As one commentator explained several years before *Mead* was decided:

The essence of hard look review is careful examination of an agency’s reasoning process, and the conclusions that the agency has drawn in reasoning from the underlying statute are certainly an important element of that examination.⁶³

While some commentators may still prefer to keep sharp the distinction between statutory/outcome review (what they regard as the *Chevron* question) and process review

⁶² See *Motor Vehicles Manufacturers of the United States v. State Farm Mutual Automobile Insurance*, 463 U.S. 29 (1983).

⁶³ Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev., 1253, 1273 (arguing for an equivalence between “hard look” and *Chevron*’s “step two”). “In short, to the extent (if any) that a court is prepared to take the policy wisdom of an agency’s decision into account during judicial review, that consideration ought to occur in conjunction with either conventional statutory construction or the reasoned decisionmaking standard, instead of being spun off into a doctrinal ‘test’ of its own.” *Id.* at 1294. Accord *PIERCE*, *supra* note <, at 31-32 (“[U]nexplained inconsistency can be the basis for judicial rejection of step two of *Chevron*, or what amounts to the same thing, through the application of the arbitrary and capricious test announced in *State Farm* . . .”).

(what they regard as the “hard look” question)⁶⁴, it is at least arguable that *Mead* subsumes these questions within its assertion of what “should” go into a statement carrying the force of law: deliberateness and fairness, the necessary conditions of what I have called *the authoritative*.

VII.

In the intricacies and imperfections of administrative law, far from the headlines of constitutional law and interpretation, an important story is being told about what is necessary if law is to appear. The doctrine I have been trying to tease out of the opinion in *Mead* confirms the judicial practice – that “evidence of belief far stronger than academic statement and introspection can provide -- that Joseph Vining described in the following terms, a decade before *Mead* was decided:

Before deferring, courts certainly look for expertise – which may itself be an evidently genuine and independent concern with the subject matter – or a mission legislatively given to the agency to achieve the values promoted by the rule in question. *But whatever courts find after looking for these, they regularly demand, and condition their deference upon, evidence that the agency has in fact responsibly considered the question fully and on the merits. . . .* Courts’ demands for such evidence and division of such evidence into its various usually encountered kinds make up the doctrines

⁶⁴ See, e.g., Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 Rutgers L. Rev. 313, 343-44 (1996).

and subdoctrines of the jurisprudence of deference, which are then linked into doctrines designed to allow time and opportunity for responsible decisions that can be so evidenced.

*Without these evidences of a responsible mind at work, a court is markedly less interested in the formality that the agency's name is attached to what is said to affected parties and the court. . . . The agency is like any other adversary in the world: to the extent it is not responsible, its statements do not have what is called "the force of law."*⁶⁵

It is not enough that the agency's name is attached; not enough that the agency used (comparatively) formal procedures; not enough that people were given an opportunity to participate⁶⁶; not enough that agency officials went through the motions that lie within their delegated authority or jurisdiction; not enough that the agency is willing to sign the brief and defend the position in court. For an agency's output to be recognized as carrying "the force of law," the court must be satisfied that there is sufficient evidence of the "creation of authority in the daily fabric of public life,"⁶⁷ a union of delegated power and its careful use. As noted, *Mead* has been criticized for being perfectionist, and no doubt the costs created by its insistence upon evidence of delegation and of deliberateness must be assessed; the costs of the alternative, however, the costs of

⁶⁵ Joseph Vining, *Authority and Responsibility: The Jurisprudence of Deference*, 43 ADMIN. L. REV. 135, 140 (1991) (emphasis added).

⁶⁶ *See id.* at 145.

⁶⁷ *Id.* at 146.

systematically ignoring the presence or absence of responsible mind, are too great to calculate.⁶⁸

That said, one should not hurry past the larger worry that lurks in the background, the concern that all of this is a mere cover for politics and interest trading. Vining exposes the cause for anxiety this way:

Legal analysis consists of working with texts, as others work with texts. There is much else in addition in the practice of law and much else in the deciding of a wrenching case. But this is what the legally trained do when asked to find the law and say what the law is, whether they are judges, or among those who are, in fact, the source of statements of law in that greater part of human affairs that does not and never can reach a court.

Are they foolish to engage in this kind of activity? Is it a front, a cover? Is it beside the point, superfluous or superstructural? The question is always with us and may be asked now⁶⁹

The quoted language is from Joseph Vining's *The Authoritative and the Authoritarian*, and I shall postpone reporting Vining's own answer to "[t]he question . . . [that] may be asked now." The question for us is whether it is foolish to read texts carefully. The rule of *Mead* is about how courts should treat agencies' interpretations and applications of the statutes they are charged with administering. It presses for evidence that the agency's

⁶⁸ If there was a big mistake in *Mead*, it might be the Court's not citing Joseph Vining.

⁶⁹ JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 40 (1988).

actors have read carefully and considered, with deliberation and fairness, the possible consequences of different readings and applications of the texts of their organic statutes. It presses, in other words, for true authority as a condition of requiring the willing obedience we associate with law.

Is all of this a cover or superfluous? Is the court's engaging in this enquiry before saying whether or not an output shall have the force of law silly? I would say no. Why? Because it tracks, anticipates, and encourages the empirical conditions of the possibility of giving effect to the natural law. Apart from the possibility of the accidental occurrence of goods, only responsible minds can identify the terms on which the good can enter. Agency actors do this in partnership with Congress, looking to Congress's intents and purposes given in legal texts, and by sizing up and then adjusting their consequences for those who will be affected. Agencies have jurisdiction, the power to make outputs that potentially carry the force of law, and *Mead* does what it can to require that those outputs carry authority – to require, that is, that they (as Koterski indicated) “witness to higher truths” or, in less lofty prose, to speak the truth about what is worth doing. This they can do only by being the products of responsible minds.

In sum, law's appearing depends upon the operations and the reciprocal discernings of a chain of responsible minds. Whether XYZ does what it does arbitrarily or lawfully – and *that* is the dilemma -- can only be settled by a mind that is capable of saying where there is law, and it would be a mistake to imagine that this is like doing arithmetic or following a recipe. Saying where there is law will require *belief* and, correlatively, something worthy of being believed, which just is the authoritative.

What I mean by *belief* has been developed at length by Vining⁷⁰ and elsewhere by Steven Smith.⁷¹ Here it will be enough to mention James Boyd White's equally illuminating and complementary account of belief in law. White notes that belief of the sort law depends upon is not belief in the way we usually understand the word, "namely an assertion of propositions claiming to utter the truth of what cannot be known." Rather, it refers to "a form of love: it is cognate with the archaic 'lief,' as in 'I would lief,' and with our word 'love' itself."⁷² As White goes on to explain, law worthy of obedience, rather than of craven compliance, depends for its creation upon a love of persons, of justice for them, and, as I would say, of goods for them. Without such belief – without such love – law cannot but stifle and oppress, because it cannot, except accidentally, realize goods. The statistician can tell us when force will be used, but only the person capable of belief, of the sort I have just indicated, is able to say where the law is, because only such a person is capable of detecting and discerning what is truly good. Note well I do not suggest that the callous mind that does not believe -- does not grant the authority of a good law -- is not the beneficiary of law. Those who do not believe in the law do sometimes experience law's consequences and enjoy law's benefits. There are among us freeriders on the believers and the believable, and they among those who imagine that we can *approach* a state of being ruled by laws to the exclusion of rule by men and women.

VIII.

⁷⁰ See, e.g., VINING, NEWTON'S SLEEP, at 4-5, 11, 15-16, 35, 67, 105-06, 125, 130, 136, 145, 165, 262-63, 274, 351, 357.

⁷¹ Steven Smith, *Believing Like a Lawyer*, 45 B.C. L. REV. 1041 (1999).

⁷² JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 214 (2006).

In conclusion, I would not wish to be misunderstood as imagining there exists “a Catholic view” on administrative law or, more broadly, on constitutionalism or the like. The Catholic tradition, though, does consistently testify to a number of truths about the human person and the society he creates that have more or less inescapable implications for statecraft and governance. What I have underlined in Sections V, VI, and VII is that the simplifying moves by which courts might conclude that Congress can delegate lawmaking powers and then let agencies do whatever lies formally within the scope of that delegation, have been in our American jurisprudence subordinated to a higher requirement. That requirement is of the sort Catholics, I think, must insist upon. It is not that agencies must be giving effect to that “ghostly Internal Revenue Code,” but rather that agencies must be giving effect to the requirement that we pursue goods. In families, it is usually sufficient for a parent to say “It is good for you to eat your spinach; you will eat it” or “It is bad for you to play with poison; you will not play with it.” The more highly developed and differentiated the society, though, the greater the distance between the basic goods, such as nourishment and safety, and the systemic requirements for avoiding contamination, such as ensuring regular production and timely delivery, and so forth. In the contemporary situation, agencies have a vast role in creating the goods that ensure that the basic goods get delivered, and it would not work, for long, for agencies not to be deliberate. Courts’ encouraging them to be deliberate is a good, and courts’ refusing effect to what is not the product of deliberation is a related good. Courts encourage agencies to believe, so that they can in turn be believed – and obeyed. Even if Congress did not intend courts to review, and therefore did not delegate to courts the jurisdiction to review, formal administrative outputs for indicia of authority, and even if

Congress did not delegate to courts the power to recognize non-formal agency outputs as having the force of law – still, the linking of deference to true authority found in responsible mind has its own warrant. “Legislation is the arbitrary that we allow – but also limit.” To be sure, there must be a division of labor, and for the reasons I argued in Parts III and IV, those divisions must be respected; anything else would be *ultra vires*.

The *ultra vires vel non* analysis, however, proceeds against the background requirement of everyone’s and the system’s being under the natural law. As (at least) an aggregate of individuals under the natural law, the people should parcel out power in a way that optimizes the possibility that legal decision-makers will be in position to be just flexible enough to see that the natural law is given effect, and the particulars will depend upon time and place. But in any workable legal system we should not be surprised to hear courts say the following:

The courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice⁷³

Likewise, we should not be surprised to hear courts requiring agencies to be deliberate, and courts, and those watching them, should not lightly presume that courts do not have the jurisdiction to demand that agencies be deliberate and truly authoritative in their lawmaking work. Though we should admit that we often fall short, we should not hesitate also to acknowledge the ways in which the legal system we inherit holds out for

⁷³ President, Managers, & Co. of the Monongahela Bridge Co. v. U.S. 216 U.S. 177, 195 (1910).

what is worthy of obedience. What I have been describing “might be characterized as implementation of the rule of law. But no longer is it best described in that way.” Vining continues:

The connotations of both ‘rule’ and ‘law’ in the phrase ‘rule of law,’ of objective legal substance, objective legal persons, and hierarchical obedience, are descended from societies less aware of their dynamism than ours. Speaking of this rather as attention to the force of law, and to what is necessary if society is to have the force of law within it, will be truer to the language and more natural to the wider consciousness of those who are thus engaged in the creation of authority in the daily fabric of public life.⁷⁴

Law’s appearing depends upon the achievement of the authoritative. It would be the perverse and reliably self-defeating legal system that attempted to confine the project of implementing human goods to the interpreting of legal texts solely in light of the texts themselves (whatever that might mean). Somehow, somehow, whatever the power delegated to legislature for giving effect to the natural law, the variousness of human living would seem ordinarily, if not always, to require others in the lawmaking, and applying, and enforcing work to have, as a matter of established human law, at least some

⁷⁴ Vining, *Authority and Responsibility*, *supra* note <> at 146. “Law and politics are conceptually distinct but reciprocally interactive in the dynamic processes of government and of law-application and interpretation.” NEIL MACCORMICK, *INSTITUTIONS OF LAW* 185 (2007).

access to speak the natural law directly.⁷⁵ *Mead* applies, by its own terms, “even . . . [when] ‘Congress did not actually have an intent as to the particular result.’” The good always is particular, and texts can never anticipate every particularity. “When American government officials bind themselves ‘to support’ the Constitution, they are not swearing blind obedience to some form or process of arbitrary decision. They are, as [Chief Justice] Marshall explained, making a promise to engage their ‘abilities and understanding’ in a serious effort to make sense of an instrument that is susceptible to their efforts.”⁷⁶

Looking back, we can ask again the question put by Vining, and now benefit the more from Vining’s answer:

Are they foolish to engage in this kind of activity? Is it a front, a cover? Is it beside the point, superfluous or superstructural? The question is always with us and may be asked now

The shape of the answer that will emerge should be evident. It is an answer of the not-if kind. Not foolish, not superfluous, if law is to have authority. Not if law is to hold us, evoke our willing acceptance rather than our resistance. Not if law is to be a source to be looked to in discovering what we ought to do. Perhaps we do not or ought not to want that; but if we do not, then we cannot complain about disintegration,

⁷⁵ For discussion of the opposing view, according to which the Constitution of the United States is “sovereign,” see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 4-5 (1991).

⁷⁶ H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 84 (2008).

disappearance of authority, of respect, and of self-respect, or loss of meaning in the modern state.⁷⁷

And if we do not, nor can we complain, in the idiom I have preferred in this essay, about the failure of the natural law to be given effect in our living, the disappearance of goods from our fragile lives in which the good, if it is to be alive, must be always under construction.

⁷⁷ VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN, *supra* note <> at 40.