

BREYER, J., concurring

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-

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).

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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.