“Buy Stock in the GPO”? An Empirical Analysis of How United States v. Mead Corp. Increased the Use of Informal Rulemaking by Federal Agencies

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ABSTRACT

In the dynamic field of administrative law, no case has received more attention over the past ten years than United States v. Mead Corp., in which the Supreme Court created a threshold requirement for federal-agency action to receive Chevron deference. But despite this focus from courts and commentators, one of that case's major implications has thus far escaped the spotlight of analysis: To what extent has Mead affected agencies' choice of policymaking device? In an excoriating dissent, Justice Scalia forewarned that Mead would precipitate an undesirable increase in informal (so-called "notice-and-comment") rulemaking. However, whether Mead has increased informal rulemaking over the ensuing nine years is an empirical question, and it has not yet been analyzed. This Article provides an answer. To do so, it employs an original data set containing thousands of observations from forty-four federal agencies from 1983 to 2009. The results of the multiple-regression analysis suggest that Justice Scalia was correct in his prediction: Mead is indeed associated with a statistically significant increase in informal rulemaking across all federal agencies. Surprisingly, however, this increase is attributable only to cabinet departments, but not to independent agencies. To explain this discrepancy, the Article posits a novel theory for the interaction of Mead with the role of the Office of Information and Regulatory Affairs ("OIRA"), which reviews and sculpts all cabinet-department (but not independent-agency) rules made through informal rulemaking. The White House covets such regulatory control, and the judicial safe harbor for informal rulemaking in Mead provided White House lawyers with the ideal means to encourage informal rulemaking and thereby to shift cabinet-department policymaking into its hands. This theory, in turn, implies that Mead may have unwittingly caused a consolidation of regulatory power in the White House—in direct contradiction to Justice Scalia's more fundamental concern that the case would result in federal-court encroachment on the policymaking power of the executive branch.
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I. INTRODUCTION

For all of the attention already received by the Supreme Court’s decision in United States v. Mead Corp., at least one of its major implications has thus far escaped the spotlight of analysis: To what extent has Mead affected federal agencies’ choice of policymaking devices? Justice Scalia argued in dissent that Mead would precipitate an undesirable increase in informal (so-called “notice-and-comment”) rulemaking, and a theoretical analysis of agency incentives supports such a prediction. However, whether Mead indeed increased informal rulemaking over the ensuing nine years is an empirical question, and it is one that has not yet been rigorously analyzed. This Article provides an answer. It then uses a surprising distinction that arises within the empirical results to suggest that Justice Scalia’s dissent overlooked a significant and yet-unidentified consequence of Mead.

In Mead, the Court created a threshold requirement for federal-agency action to qualify for Chevron deference, which commands courts to defer to reasonable agency interpretations of ambiguities in their enabling statutes. By refusing to defer to a ruling letter issued by the Customs Office, it narrowed the scope of actions meriting deference to include only those carrying the “force of law.” Although the Court stopped short of delineating the precise contours of the force-of-law standard, it made clear that actions taken through informal rulemaking almost certainly qualify. On the contrary, policies created through ruling letters, guidance documents, and other instances of nonlegislative rulemaking are outside of this safe harbor and thus do not likely qualify for deference. The implication for agencies was clear: to maximize the odds that their policymaking decisions would be upheld in court, they should act through informal rulemaking whenever possible.

1. 533 U.S. 218 (2001). A search in Westlaw’s JLR database conducted on January 29, 2011 found 1012 law journal pieces that cited to Mead. A similar search across all federal opinions resulted in 1081 opinions that have cited to Mead. See also Peter F. Strauss et al., Administrative Law: Cases & Comments 1089 (10th ed. 2003) ("The Mead case threatens to become as much of a cottage industry for academics as Chevron was.").
2. Mead, 533 U.S. at 246 (Scalia, J., dissenting).
5. Id. at 226-27.
7. See Mead, 533 U.S. at 231-32 (explaining why the Customs Office ruling letter failed to qualify for Chevron deference).
Justice Scalia countered in dissent that agencies would rush to the Court’s newly pronounced safe harbor. As one arrow in the quiver of his broader attack, the Justice predicted that *Mead* would cause “an artificially induced increase in informal rulemaking.”8 Any increase would be “artificial” because the purpose of the *Mead* majority was to determine when courts should defer to agencies, not to increase agency use of a particular policymaking device. “Buy stock in the GPO,” he chided. “Informal rulemaking . . . will now become a virtual necessity.”9

The theoretical argument that *Mead* would cause an increase in informal rulemaking from preexisting levels is simple. Although agencies may choose to make policy through case-by-case adjudication or formal rulemaking, most agencies seeking to promulgate generally applicable rules to fill the gaps in their enabling statutes proceed through either informal rulemaking or nonlegislative rulemaking. These two policymaking devices have corresponding costs and benefits, and one important cost is the risk that a court will invalidate a challenged policy. *Mead*, for the first time, caused the risk of judicial invalidation to vary with the policymaking device used. It simultaneously decreased the risk associated with informal rulemaking and increased the risk associated with nonlegislative rulemaking. After *Mead*, a rational agency—which prefers its policies to receive deference when challenged in court—should in theory substitute informal rulemaking for nonlegislative rulemaking in some, and perhaps many, instances.

This Article tests that theory empirically to provide an answer to the significant and open question of whether *Mead* has caused an increase in the levels of informal rulemaking. It employs an original data set created from a comprehensive collection of all federal-agency rulemaking actions from 1983 to 2009. This data set includes thousands of observations from forty-four of the most significant federal agencies. Using multiple-regression analysis to control for other important explanatory variables, this Article determines what impact, if any, *Mead* has had on the levels of informal rulemaking. The overall empirical result is consistent with theory: *Mead* is indeed associated with a statistically significant increase in informal rulemaking across all federal agencies. This result suggests that Justice Scalia was correct in his prediction that *Mead* would cause a

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8. *Id.* at 246 (Scalia, J., dissenting).
9. *Id.* The “GPO” refers to the Government Printing Office, which Justice Scalia implied would be increasingly churning its presses due to the escalated volume of paperwork, arising from more notice-and-comment rulemaking, in response to *Mead*.
surge in informal rulemaking. If the GPO issued stock, one would have been wise to buy it.

A closer look at the empirical results, however, reveals that not all is as expected. Separate regressions demonstrate that the positive relationship between *Mead* and informal rulemaking across all agencies is attributable only to cabinet departments and not to independent agencies. Put differently, while cabinet departments have engaged in significantly more informal rulemaking after *Mead*, their independent-agency counterparts have not. The analysis set forth in *Mead* did not vary the likelihood of deference by the type of agency; it gave both independent agencies and cabinet departments the same incentive to use more informal rulemaking. Accordingly, an explanation for the surprising empirical reality—that one type of agency has increased its use of informal rulemaking, while another has not—must come at least in part from forces external to *Mead*.

A significant and yet-unidentified consequence of *Mead* provides the best explanation: the interaction of that case with the role of the Office of Information and Regulatory Affairs (“OIRA”). OIRA reviews and sculpts all executive-agency rules made through informal rulemaking.10 The White House covets such regulatory control and, thus, has the incentive to promote informal rulemaking over the use of other policymaking devices for executive agencies (which include, most prominently, the cabinet departments). By creating a judicial safe harbor for informal rulemaking, *Mead* provided White House lawyers with the ideal argument to encourage informal rulemaking and thereby to shift executive-agency policymaking into its hands. Of course, because OIRA review applies only to executive agencies, the White House has no reason to instruct independent agencies to use more informal rulemaking. This theory implies that executive agencies should increase their use of informal rulemaking after *Mead*, while independent agencies might not—precisely the results of the empirical analysis.

In turn, the explanation for the surprising distinction in the regression results undermines a separate, and perhaps more fundamental, argument in Justice Scalia’s *Mead* dissent. Justice Scalia feared that the majority opinion would allow the federal courts to acquire policymaking power that should properly reside in the executive branch. The courts would have increased ability to

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10. See Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. Tex. L. Rev. 987, 999 (2008) (“Under the last two Executive Orders directing this program (issued by Presidents Reagan and Clinton), including the currently operative Executive Order 12,866, OIRA must approve any rule issued by non-independent executive agencies before it may be published in the Federal Register.”).
invalidate agency policies, so the argument goes, and therefore would impose their own. Justice Scalia's fear, however, overlooked the interaction of *Mead* with the role of OIRA. Though *Mead* may have amplified the administrative power of courts in relatively infrequent instances of litigation, it gave the White House the perfect tool to funnel more regulation through OIRA and increase its control over the daily operations of the regulatory apparatus. In spite of Justice Scalia’s fears and because of the precise way in which it increased informal rulemaking, *Mead* may have unwittingly caused a consolidation of regulatory power in the White House.

The Article proceeds as follows: As a foundation for the empirical analysis, Part II explains in greater detail why and how *Mead* should increase informal rulemaking in theory. Part III presents the empirical results of *Mead*’s impact on informal rulemaking. It begins by briefly reviewing the existing empirical studies on informal rulemaking and by giving an overview of the data set’s creation. After presenting useful descriptive statistics, this Part provides and explains the results of the multiple regression analysis. In light of the surprising distinction between cabinet departments and independent agencies in the empirical results, Part IV posits a novel theory for how the interaction of *Mead* and OIRA may have increased White House control over the regulatory state. It finally reveals how this theory, in turn, undermines the broader reasons for Justice Scalia’s dissent in this seminal case.

II. WHY *Mead* IN THEORY SHOULD INCREASE INFORMAL RULEMAKING

To understand the empirical analysis of how *Mead* actually affected informal rulemaking levels, it is first important to know why it should do so in theory. A rational agency choosing between available policymaking devices will consider the costs and benefits associated with each.\(^{11}\) For the purposes of this Article, the most important cost is the risk of judicial invalidation—the possibility that a court will strike down that agency’s policy. Since *Chevron v. National Resources Defense Council*,\(^ {12}\) all federal agencies have benefited from a general deference from courts, regardless of which policymaking device they used. But the Court changed its tune in *Mead* and declared that, when it comes to deference, not all policymaking devices are created equal.

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By providing a safe harbor for informal but not nonlegislative rulemaking, Mead in theory should cause these agencies to use informal rulemaking in at least some instances where they otherwise would have used nonlegislative rulemaking.

It is first important to understand the broad range of policymaking devices federal agencies have at their disposal. Although some agencies make policy through case-by-case adjudications, rulemaking is the category of choice for most federal agencies and is thus the focus of this Article.13 Within the broad category of “rulemaking,” three important subcategories emerge: formal rulemaking, informal rulemaking, and nonlegislative rulemaking.14 Formal rulemaking is rarely used, largely because it requires a trial-type hearing15 and courts have been reluctant to find it mandated by organic statutes.16 Because formal rulemaking is used so infrequently, this Article confines its focus to informal rulemaking and nonlegislative rulemaking. Informal rulemaking has been a critical tool for agency policymaking for decades. An agency must first alert the public through a Notice of Proposed Rulemaking (“NPRM”) that it intends to create a particular rule.17 A comment period ensues, during which any interested party may inform the agency of its views on the proposed rule. At the end of this period, the agency promulgates a final rule.18 Nonlegislative rulemaking, on the other hand, is a catchall that includes the many, even-less-formal means that agencies use to make policy. The most common examples of nonlegislative rulemaking are guidance documents, policy statements, and interpretive rules.19 These least-formal policymaking devices involve

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13. To engage in rulemaking, an agency’s organic statute must empower it to do so. M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. CHI. L. REV. 1383, 1386 (2004). However, as a practical matter, most agencies possess this authority, and rulemaking has long been the preferred means for agencies seeking to make generally applicable policy. See id. at 1385 (“[B]y the 1970s, a detectable shift had occurred and most administrative agencies pursued their mandates by promulgating legislative rules.”).13.

14. O’Connell, supra note 12, at 900. In fact, O’Connell identifies a fourth subcategory of rulemaking: legislative rulemaking without previous opportunity for comment. This subcategory, which includes both direct final rules and interim final rules, has grown in recent years. Id. at 903. However, it still constitutes the vast minority of rulemakings and is therefore excluded from the empirical analysis.

15. 5 U.S.C. §§ 553(c), 556, 557.

16. See United States v. Florida E. Coast R.R. Co., 410 U.S. 224, 237-38 (1973) (requiring the organic statute to contain the precise language that agency action must occur “on the record after opportunity for an agency hearing” to require formal rulemaking).

17. 5 U.S.C. § 553(b).

18. Id. § 553(c).

little public input—for example, they do not permit notice and comment—but can be promulgated at far less cost.

Many costs and benefits underlie an agency’s choice between informal and nonlegislative rulemaking. One benefit is the amount of information conveyed to the agencies during the rulemaking process. Agencies rarely have immediate access to all of the important information that bears on a regulatory decision, such as how a proposed policy would affect a distinct industry or community. Such information helps agencies reach the best decisions. A related benefit that varies with the choice of policymaking device is the extent to which it permits public participation. Agencies desire the participation of the regulated public because agencies know that the public is more likely to comply with regulatory outcomes when it believes its input was considered. Informal rulemaking, which allows the affected public to communicate information to the agency through comments, scores highly on both bringing relevant information to agencies and making the public believe its input was considered. However, these benefits of informal rulemaking come at a cost—they require more time and greater resource expenditures. Nonlegislative rulemaking, although comparatively lacking in the benefits of information-conveyance and public participation, requires substantially less time and fewer resources.

Another important cost that agencies must consider is the risk of judicial invalidation. If a court strikes down an agency’s policy, that agency must expend more resources either to devise a new policy or to recast the same policy in a more acceptable form. The odds also increase that the agency will be entirely unable to effectuate its first-choice policy. For most of the time since the Supreme Court handed down *Chevron* in 1984, however, the risk of judicial invalidation has presented agencies with only little concern, because that case proclaimed a general rule of deference by courts. *Chevron* posited a now-familiar two-step test: as long as an agency’s enabling statute does not unambiguously preclude its issued policy, a court must defer to the agency’s reasonable interpretation.


view on the propriety of a policy for that of the agency.\textsuperscript{23} Accordingly, \textit{Chevron} allowed agencies to regulate with great confidence that courts would uphold their policies; the cost associated with the risk of judicial invalidation was quite low.\textsuperscript{24}

Notably, the analysis in \textit{Chevron} did not turn on the type of agency or its choice of policymaking device. As for the type of agency, \textit{Chevron} did not differentiate between “executive” and “independent” agencies. A brief primer on these categories may be helpful. One important difference between them is that the President may remove the heads of executive agencies at will, but the President may not remove the heads of independent agencies except for good cause.\textsuperscript{25} Another difference is that each executive agency is led by a single administrator, while independent agencies are generally run by multi-member commissions or boards whose members serve fixed, staggered terms.\textsuperscript{26} These distinctive features of independent agencies seek to insulate them from politics, to a degree, and to promote expertise and nonpartisan decisionmaking in sectors where those things are most important.\textsuperscript{27} What is important, for present purposes, is that although \textit{Chevron} itself mandated deference to a regulation promulgated by an executive agency (i.e., the Environmental Protection Agency),\textsuperscript{28} it did not suggest that the analysis should differ for independent agencies.

As for the agency’s choice of policymaking device, \textit{Chevron} similarly gave no indication that the analysis should differ with respect to this choice. In \textit{Chevron}, the Court deferred to a regulation promulgated through informal rulemaking.\textsuperscript{29} But the opinion did not indicate that deference would have been any less appropriate if the agency had promulgated its policy through nonlegislative rulemaking instead. In short, \textit{Chevron} deference appeared to apply equally across the spectrum of agencies and policymaking devices. For example, it appeared to apply as fully to an independent agency using

\textsuperscript{23} The reasons for requiring courts to give such great deference to agency policymaking decisions are threefold: First, agencies are more accountable to the electorate than courts. Second, agencies typically possess more substantive expertise on technical regulatory issues than do courts. Third, Congress delegates this authority to agencies when it intentionally leaves gaps to fill in enabling statutes.

\textsuperscript{24} For two pre-\textit{Mead} cases invaliding agency statutory interpretation despite nominal reliance on \textit{Chevron}, see MCI Telecomm. Corp. v. AT&T, 512 U.S. 218 (1994), and FDA v. Brown \& Williamson Tobacco Corp., 529 U.S. 120 (2000).


\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 611-14.

\textsuperscript{28} \textit{Chevron}, 467 U.S. at 866

\textsuperscript{29} \textit{Id.} at 840.
nonlegislative rulemaking as to an executive agency using informal rulemaking. When it came to deference, these categorizations simply had no analytical relevance. For fifteen years this continued, until the Court proclaimed in Mead that some policymaking devices carry greater judicial weight than others.

In Mead, the Supreme Court refused to give Chevron deference to an instance of nonlegislative rulemaking: a ruling letter issued by the U.S. Customs Office.\(^3\) The conflict arose after the Customs Office attempted to use a “ruling letter” to increase the tariff on “day planners” (essentially personal calendars) imported by the Mead Corporation.\(^3\) Mead challenged the new tariff classification in court. Instead of simply conducting the familiar Chevron analysis, the Court introduced a preliminary requirement for Chevron deference: it must appear “that Congress delegated authority to the agency generally to make rules carrying the force of law,” and the agency must have actually promulgated the challenged policy “in the exercise of that authority.”\(^3\) The ruling letter in Mead failed to satisfy this force-of-law test for two reasons. First, it declared on its face that it was not binding on third parties. Second, it was only one of over ten thousand such letters issued from forty-six different Customs offices.\(^3\) In conclusion, the Court remanded for a determination of whether the tariff in the ruling letter would survive a weaker form of deference.\(^3\)

On remand, the agency lost.\(^4\) Although the Court did not delineate the precise contours of which policymaking devices would satisfy its new force-of-law requirement, it made clear that informal rulemaking fell safely within this category.\(^5\) It reasoned that Congress likely contemplates that these “relatively formal administrative procedures tending to foster . . . fairness and deliberation” should carry the force of law.\(^6\) The Court refused to shut the door entirely on giving Chevron deference to policies promulgated through nonlegislative rulemaking, but it gave only one esoteric example where deference was appropriate.\(^7\)

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31. Id. at 224-25.
32. Id. at 226-27. One prominent commentator-turned-administrator has argued that Mead’s holding added a new step to the traditional Chevron test. See Sunstein, supra note 4.
33. Mead, 533 U.S. at 233.
34. Id. at 238-39.
35. Mead Corp. v. United States, 283 F.3d 1342, 1350 (Fed. Cir. 2002).
36. Mead, 533 U.S. at 230 (“[T]he overwhelming number of our cases applying Chevron deference have reviewed the fruit of notice-and-comment rulemaking or formal adjudication.”).
37. Id.

facts from *Mead* itself provide another data point: ruling letters from the Customs Office fail to carry the force of law. However, ruling letters were not a close call for the majority, so *Mead* left somewhat murky the binding power of other forms of nonlegislative rulemaking. Significantly, *Mead*—like *Chevron* before it—did not concern itself with the type of agency that made the policy: it contained no indication that independent agencies would face a different analysis than executive agencies. Accordingly, after *Mead*, all federal agencies were officially on notice that policies promulgated through informal rulemaking were safe, while policies promulgated through nonlegislative rulemaking faced an unknown, but clearly increased, risk of judicial invalidation.

Justice Scalia issued an excoriating dissent. He criticized the majority for what he saw as the undesirable implications of this safe harbor surrounded by uncertainty. In addition to finding the majority’s opinion indefensible for other practical reasons, he ominously predicted “an artificially induced increase in informal rulemaking.” Due to the majority opinion’s requirement that an agency not merely possess informal rulemaking authority but employ it, he argued that “informal rulemaking . . . will now become a virtual necessity.” Justice Scalia gave two indications why such a shift—if one indeed occurred—would be so problematic. First, *Mead* would undermine the Court’s precedent that informal rulemaking is voluntary unless it is required by statute, because *Mead* created such a strong incentive for agencies to use informal rulemaking. Second, *Mead* could result in agencies “rush[ing] out barebone[] regulations only to clarify them later, because other cases have suggested that agencies’ clarifications of their own ambiguous regulations merit judicial respect.
More fundamentally, Justice Scalia feared that the majority’s approach would cause an unwanted transfer of regulatory power from the executive branch to the courts. He argued that *Mead* would increasingly allow federal judges, rather than agencies, to fill the policy gaps in statutory mandates. This result, he urged, undermined the spirit of *Chevron*, which championed deference to the executive branch. “Statutory ambiguities,” Justice Scalia emphasized, “were left to reasonable resolution by the Executive.”

His proposed alternative to the majority’s force-of-law test sought to retain this power in the executive branch. He proposed that courts should engage in *Chevron* deference whenever an agency pronouncement is “authoritative”—that is, a policy that the agency and the Solicitor General confirm during litigation. Unlike the majority’s approach, deference would not turn on the agency’s choice of policymaking device, and courts would have little leeway to strike down agency policies, so long as the agency puts its full weight behind it in court. Accordingly, Justice Scalia’s approach, on its face, would give agencies (and the White House, through the Solicitor General) more control over policy.

The controversial majority opinion in the *Mead* case marked a sharp departure from the simple two-step world of *Chevron*. As Justice Scalia’s dissent highlighted, *Mead* forces agencies to consider the risk of judicial invalidation when choosing between policymaking devices. No longer can agencies simply consider resources, information, and public participation. Policies promulgated through informal rulemaking clearly benefit from *Chevron* deference, but the access to deference is much less clear for policies promulgated through nonlegislative rulemaking. At least in theory, *Mead* increased the net cost of using nonlegislative rulemaking relative to informal rulemaking. Accordingly, one would expect to empirically find an increase in informal rulemaking (attributable to *Mead*) across all agencies. While the existence of such an increase has not yet been rigorously tested, the passage of time since *Mead*, an empirical foundation from other research, and a massive government database allow for such a determination.

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46. *Id.* at 243.
47. *Id.* at 258. Justice Scalia found such confirmation in *Mead* because the Solicitor General and the General Counsel of the Department of the Treasury had filed a brief indicating the challenged tariff indeed represented their official position.
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III. THE EMPIRICAL RESULTS: DID MEAD ACTUALLY CAUSE AN ARTIFICIAL INCREASE IN INFORMAL RULEMAKING?

This Part empirically tests whether Justice Scalia’s ominous prediction of an increase in informal rulemaking since Mead has actually materialized. Despite a wealth of data on agency rulemaking activity, few studies have yet provided rigorous empirical examinations of informal rulemaking. The existing research does not directly address the effects of Mead, but it does provide a useful empirical framework by identifying political variables that are statistically correlated with rulemaking activity.

To perform the empirical analysis, I first drew from a large government database to create an original panel data set containing the number of informal rulemakings initiated by each of forty-four federal agencies in semiannual periods from 1983 to 2009. Multiple regression analysis of this data reveals that the release of Mead in the second half of 2001 is associated with a statistically significant increase in informal rulemaking activity across all agencies over the remaining time period. This result is not uniform, however, when broken down type of agency: while Mead is associated with a significant increase in informal rulemaking for cabinet departments, no such association exists for independent agencies.

A. Prior Empirical Investigations of Informal Rulemaking

The empirical literature on informal-rulemaking activity by administrative agencies is slim but growing.48 This literature, which currently straddles the law reviews and political science journals, has applied a variety of statistical techniques to test the relationship between agency rulemaking and a handful of variables. These articles have identified several political variables that are correlated with rulemaking levels. Accordingly, any study attempting to discern the impact of Mead on the use of informal rulemaking must “control” for these variables to help ensure the empirical analysis does not fall victim to the statistical pitfall of omitted variable bias.

48. Although the author is unaware of any such empirical articles published before 2008, at least five have been published since then. In addition to the two articles discussed in greater detail in the ensuing two paragraphs, see Michael Kolber, Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, 72 ALB. L. REV. 79 (2009), Jason W. Yackee & Susan W. Yackee, Administrative Procedures and Bureaucratic Performance: Is Federal Rulemaking “Ossified”?, 19 J. PUB. ADMIN. RES. & THEORY 579 (2009), and Jacob E. Gersen & Anne Joseph O’Connell, Hiding in Plain Sight? Timing and Transparency in the Administrative State, 76 U. CHI. L. REV. 1157 (2009)
Professor Anne O'Connell has carefully studied the impact of politics on agency rulemaking.\(^49\) Her recent article employed regression analysis to determine the extent to which political variables impact the levels of informal rulemaking. As her dependent variable, she used the number of notice of proposed rulemakings ("NPRMs") published by ten agencies in three-month periods from 1983 to 2002.\(^50\) Her findings demonstrate a statistically significant relationship between political variables and levels of informal rulemaking. In particular, she found that "[t]he Executive Branch . . . appears to influence the initiation of rulemaking activities, at least to some extent."\(^51\) While she noted the significance of the Supreme Court’s decision in *Mead*, her empirical analysis stopped short of analyzing the effects of that case.\(^52\) Her data set only extended one year after *Mead*, so it did not contain sufficient observations to draw reliable conclusions about the post-*Mead* period.

Professors Jason and Susan Yackee also recently studied the relationship between the levels of informal rulemaking and a set of political variables.\(^53\) Their dependent variable was a monthly count of the NPRMs published by each of sixty-three federal agencies from 1983 through 2005.\(^54\) One of their discoveries was that federal agencies engaged in significantly fewer informal rulemakings during periods of divided government—which they defined as years in which a single political party did not control all three of the presidency, House, and Senate.\(^55\) Another finding was that the presidential administration in power at a given time is a significant explanatory variable for the level of informal rulemaking at that time.\(^56\) That is, as one would expect, each presidential administration has its own emphasis on regulation and therefore regulates in different amounts, holding all else equal. Interestingly, the Yackees found that two potentially important variables are not associated with levels of informal rulemaking: neither the differences in agencies' budgets or

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50. *Id.* at 940-42. NPRMs are the first major step in the informal rulemaking process and therefore a good gauge of the levels of informal rulemaking beginning during any time period. The agencies she used were USA, DOC, HHS, DOI, DOT, EPA, IRS, FCC, NRC, and SEC. Her regression had a sample size of two hundred.

51. *Id.*

52. *See id.* at 932-33 (noting in passing that in the one year after *Mead* included in her data set there did appear to be an increase in NPRMs).


54. *Id.* at 132.

55. *Id.* at 134.

56. *Id.* at 138.
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employment levels over time attained statistical significance.\textsuperscript{57} Most importantly for this Article, while the Yankees’ data set reached up to 2005, they too provided no analysis of the potential impact of \textit{Mead} on informal rulemaking.

\textbf{B. Creating the Data Set and Useful Descriptive Statistics}

If each agency kept a careful record of the number of informal rulemakings it initiated during any given time period, determining the impact of \textit{Mead} would be relatively easy. Unfortunately, no such information is readily available. Instead, the closest approximation comes in the form of the extensive Unified Agenda database.\textsuperscript{58} The Unified Agenda is a semiannual publication that records details of all reported rulemaking activity by all federal agencies from 1983 to the present. It is a massive amalgamation of data, containing literally billions of discrete pieces of information.\textsuperscript{59} Transforming this data into a useable form requires an understanding of how the Unified Agenda records rulemaking information. It also requires one to perform a long series of computational manipulations. Appendix 2 provides greater detail on this process and the deliberate coding decisions behind the original data set’s creation.

The resulting data set contains the number of NPRMs published by each of forty-four federal agencies during semiannual periods from 1983 to 2009. It contains data for over 27,000 NPRMs. Of the forty-four agencies represented, fourteen are cabinet departments,\textsuperscript{60} ten are non-cabinet executive agencies,\textsuperscript{61} and twenty

\textsuperscript{57} Id. at 140. The Office of Management and Budget and the Office of Personnel Management keep general data on agency employment and budgets. However, these data do not break down how much of those numbers are devoted to rulemaking, rather than other agency tasks. Id. Moreover, this data is only available back to 1995.

\textsuperscript{58} The Unified Agenda is maintained by the Regulatory Information Services Center (“RISC”). It may be accessed online via: http://www.reginfo.gov/public/do/eAgendaMain.

\textsuperscript{59} An XML file for a single edition of the Unified Agenda (containing all data for one semiannual period) is, on average, 25 megabytes. Thus, combined XML files for all existing Unified Agendas take up approximately a whopping 1.3 gigabytes of computer storage space. For more detail on managing and making sense of such an unwieldy data set, see Appendix 2.

\textsuperscript{60} The cabinet departments include the Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, Department of Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of Treasury, and Department of Veterans Affairs/Veterans Administration.

\textsuperscript{61} The non-cabinet department executive agencies include the Environmental Protection Agency, Federal Emergency Management Agency, General Services Administration, Internal Revenue Service, National Aeronautics and Space Administration, National Archives and
are independent agencies. Although there are more than forty-four federal agencies, I excluded several minor agencies that either did not exist for the entire period or published so few NPRMs that they could fairly be considered outliers. It seems fair to say that the forty-four agencies considered in this analysis are nearly all of the most important ones. However, I excluded one significant agency, the Department of Homeland Security (“DHS”), for two reasons. First, it was created in 2002, so no rulemaking information exists for it from the pre- era. Second, DHS was created as a direct response to the terrorist attacks of September 11, 2001 (“9/11”), and its exclusion helps to ensure that any detectable increase in informal rulemaking is the result of rather than the regulatory response to 9/11.

Some descriptive statistics give a better idea of the contours of the data set. The mean number of NPRMs per semiannual period across all agencies is 522, implying that slightly over 1,000 rules are initiated each year in total. The semiannual mean for cabinet departments is 334; the semiannual mean for independent agencies is 71. Because of the generally larger budgets, employment levels, and responsibilities of cabinet departments, it is unsurprising that they engage in rulemaking on a larger scale than independent agencies. Also noteworthy, the average agency in the sample begins 12.1 NPRMs per semiannual period. For cabinet departments, the average is 23.8; for independent agencies, it is 3.8. The average cabinet department thus begins many more rulemakings per year than the average independent agency. Appendix 1 breaks down the statistics for each semiannual period in greater detail.

A graphical display of the trends in informal rulemaking activity by agencies over time is also instructive. Chart 1 presents the number of NPRMs published by type of agency over the covered time period. Perhaps the most striking feature of the chart is the volatility of the data; rather than following smooth trends, the number of NPRMs published by all agencies per semiannual period jumps

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63. These outliers include, for example, the Smithsonian Institute and the Peace Corps.
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around much like equity prices in the stock market. A closer look reveals that the volatility in all-agency NPRMs is driven by volatility in cabinet-department NPRMs. While independent-agency NPRMs tended to stay relatively close to their mean, cabinet-department NPRMs fluctuated greatly in short periods of time. Indeed, Appendix 1 reveals that the standard deviation in the number of NPRMs per semiannual period is nearly four times greater for cabinet departments than for independent agencies. Independent agencies are much more consistent in their regulatory levels over times.

Another notable observation from Chart 1 is that (despite the short-term fluctuations) the number of NPRMs issued per time period was greatest, on average, during the 1990s. Informal rulemaking at that time was at its zenith of the past three decades. Such a result is consistent with the hypothesis that the Democratic Clinton administration regulated more than the Republican presidential administrations in power during the covered time period. Indeed, the greatest use of informal rulemaking occurred in the first two years of the Clinton administration.

While Chart 1 reveals some interesting features of the regulatory apparatus, it does not assist greatly in the central purpose of this Article—determining the impact of Mead on informal rulemaking. The level of NPRMs in the 2000s is the lowest in the studied time period, providing preliminary visual evidence that Mead

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64. The volatility in the publication of NPRMs is corroborated by the Yackee article, which found similar volatility using monthly rather than semiannual data. Yackee & Yackee, supra note 48, at 136. Indeed, because the Yackees identify that NPRMs fluctuate wildly on a monthly basis, the impetus behind semiannual volatility is more complex than a seasonal effect—i.e., that agencies release more NPRMs in the first rather than latter half of each year.
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had no effect. However, the low level of NPRMs could instead be explained by the entry of the Republican George W. Bush administration. A slight uptick in NPRMs appears shortly after Mead—in late 2001 through 2002—but it is not much greater than the fluctuation in the data that occurs throughout the entire period. In short, mere visual evidence provides mixed indications regarding whether Mead had an impact. Fortunately, the statistical technique of multiple regression analysis allows for a firmer answer.

C. Multiple Regression Methodology and Results

The empirical centerpiece of this Article is the use of multiple regression analysis to determine the relationship between the volume of informal rulemakings employed by federal agencies and the Mead case. Like the O'Connell and Yackee studies, I used NPRMs as my dependent variable. NPRMs provide the best indication of the volume of informal rulemaking activity over any given time period because the number published within that interval indicates how many informal rulemakings began during that time. More precisely, the dependent variable was the number of NPRMs published by each agency for each semiannual period from 1983 to 2009. For example, one observation was the number of NPRMs published by the Department of Transportation in the first half of 1985. The decision to use semiannual periods—rather than, say, weekly, monthly, or yearly periods—was deliberate. Semiannual periods are sufficiently long to minimize any seasonal “noise” that could arise in the use of weekly or monthly periods, but they are also short enough to permit a large sample size for statistical analysis. Across all agencies and time periods, the data set allows for 2,279 observations.

A quick note on my choice of dependent variable. The ideal dependent variable for this study would be the ratio of informal rulemaking to nonlegislative rulemaking for each agency over time periods both before and after Mead; after all, the goal is to determine whether that case caused agencies to begin substituting the former for the latter. Unfortunately, though, there is a dearth of comprehensive recordkeeping on nonlegislative rulemaking activity—especially when compared to the wealth of data on informal rulemaking in the Unified Agenda database. Accordingly, my empirical analysis must settle for a second-best alternative for its dependent variable: the volume of informal rulemakings alone, rather than the ratio of informal rulemakings to nonlegislative rulemaking. But although this alternative may be second best, it still has a strong theoretical footing. By controlling for the effects of non-Mead variables on the volume of
informal rulemaking, any changes in the volume of informal rulemaking that are associated with the release of *Mead* should be the result of agencies substituting informal rulemaking for nonlegislative rulemaking—as both Justice Scalia and Part II of this Article predict.

The explanatory variable of interest was, of course, the *Mead* case. The opinion was handed down on June 18, 2001, so one would expect any agency reaction to begin in the second half of 2001. To determine the relationship between *Mead* and the number of NPRMs, I used a dummy variable (which I called “Mead”) that took the value of one from the second half of 2001 onward, and a value of zero prior to the second half of 2001. The expected sign on the “Mead” dummy variable is positive. In other words, I expect agencies to issue more NPRMs, all else equal, after the release of *Mead*, because that case incentivized agencies to employ informal rulemaking in situations where they previously would have used nonlegislative rulemaking.

To help ensure that any change in NRPMs associated with *Mead* is due to effects of that case rather than other, omitted variables, one must include those variables to “control” for them. Fortunately, the O’Connell and Yackee articles provide the needed foundation. Because both studies detected a significant relationship between the executive branch and informal rulemaking levels, I included a matrix of dummy variables to account for the presidential administration in power at any time. Specifically, I included dummy variables to capture the differing approaches to rulemaking by the Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama administrations. Each dummy variable took a value of one when that President was in office and zero otherwise. Principles of statistics require me to omit one of these dummy variables, and I chose the Reagan administration as the omitted variable,\(^65\) thus, the signs on the coefficient estimates indicate whether more or less informal rulemaking occurred relative to the Reagan baseline. Though the visual evidence from Chart 1 suggests more regulation from the Democratic Clinton administration than the Republican Reagan administration (and therefore a positive sign on “Clinton”), I do not hazard a guess at the signs on “Bush I” and “Bush II.” In other words, while I expect more informal rulemaking from the Clinton administration, I have no expectation regarding the rulemaking levels from the Republican and Obama administrations.

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65. When dummy variables span an entire time period, one of them must be omitted to avoid perfect multicollinearity. Otherwise, the dummy-variable matrices would sum to one, and regression analysis would be indeterminate because the matrix could not be inverted. (This statistical problem is similar conceptually to how one cannot divide by zero.) The choice of which variable to exclude is statistically irrelevant, so I chose Reagan at random.
Finally, I included two more sets of explanatory variables. The first was another dummy variable to account for the potential effect that divided government can have on rulemaking. The Yackees found divided government to have a statistically significant and negative effect on informal rulemaking levels across a variety of specifications.\textsuperscript{66} As in the Yackee article, this dummy variable took a value of one when the same political party did not control all three of the presidency, House, and Senate, and a value of zero otherwise. The expected sign on “Divided Government” is negative. Second, I included a matrix of agency fixed-effects dummy variables to account for the likelihood that some agencies consistently regulate more or less than others.\textsuperscript{67} I did not include any direct measures of agency size or resources for three reasons. First, the agency fixed-effects variables should explain much of the variation in size and resources among agencies, because they capture persistent differences in NPRM levels across agencies. Second, the employment and budgetary data do not exist for the full time period, so a more limited time period (with fewer observations) would have to be used. Third, and most importantly, the Yackee study included employment and budgetary data in several specifications and found that the coefficients on those variables did not attain statistical significance.\textsuperscript{68}

I estimated the coefficients on the explanatory variables using heteroskedasticity-robust calculations through ordinary least squares (“OLS”).\textsuperscript{69} To determine the statistical relationship between \textit{Mead} and informal rulemaking in the aggregate, the first specification of the regression included NPRM data from all agencies. However, due to the possibility that any discovered relationship did not exist for particular types of agencies, I ran two additional regression specifications: the second specification included NPRM data from cabinet departments only, and the third used NPRM data from independent agencies only. Table 1 displays the coefficient estimates calculated from the regressions.

\begin{itemize}
  \item \textsuperscript{66} Yackee & Yackee, \textit{supra} note 48, at 134, 138.
  \item \textsuperscript{67} When estimating the regression coefficients across all agencies and for cabinet departments, I omitted the dummy variable for Department of Agriculture to prevent perfect multicollinearity. When estimating the coefficients using only independent agencies, I omitted the dummy variable for the Commodity Futures Trading Commission.
  \item \textsuperscript{68} Yackee & Yackee, \textit{supra} note 48, at 140.
  \item \textsuperscript{69} Though each of the explanatory variables is a dummy variable, OLS is appropriate because the independent variable is linear. Coefficient estimates were calculated using the econometric software Stata.
\end{itemize}
As a preliminary matter, the fixed-effects dummy variables were highly significant across all specifications. Accordingly, as is intuitively obvious, some agencies simply regulate more than others. For the all-agency specification, the coefficient for each agency dummy variable was statistically significant except for Health and Human Services (“HHS”) and the Internal Revenue Service. As for cabinet departments, the coefficient on each agency dummy variable exhibited significance except for HHS, again. For independent agencies, all coefficients were significant except that for the Federal Communications Commission. Every other agency dummy variable coefficient throughout all three specifications was significant at the 99
percent confidence level. Consistent with economic conventions, Table 1 excludes the coefficient estimates for the forty-three agency fixed-effects variables.

Now to the focal point of this Article. The coefficient on “Mead” is statistically significant at the 95 percent confidence level and possesses the expected positive sign in the all-agency specification. This result tends to confirm Justice Scalia’s prediction: *Mead* is indeed empirically associated with an increase in the initiation of informal rulemaking. The magnitude of the *Mead* effect also appears to be rather large: it is associated with a 17.3 percent increase in the number of NPRMs published by the average agency.\(^{70}\) (Table 2 presents the percentage effects of each significant variable on semiannual NPRMs published by the average agency.)

As for the presidential-administration dummy variables in the all-agencies specification, two are statistically significant: “Bush II” and “Obama.” Both coefficients are negative. Thus, both the George W. Bush and Obama administrations are associated with a lower level of informal rulemaking than their counterparts across all federal agencies. The Bush result is consistent with the hypothesis that Republican administrations generally regulate less, though it provides one piece of evidence to belie any claim that the Bush administration greatly expanded the size of government.\(^{71}\) The Obama result is surprising in light of the fact that most people expect Democratic administrations to regulate at greater levels. However, it reflects only one semiannual period of data (the first half of 2009) and is consistent with both O’Connell’s finding that less regulation occurs in the first year of a new administration\(^{72}\) and press reports that President Obama had not yet filled many of his important regulatory positions at that time.\(^{73}\) The Bush effect is great in magnitude; “Bush II” is associated with a 44.0 percent decrease in NPRMs for the average agency. The size of the Obama effect, 37.6 percent, is similarly large.

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\(^{70}\) I calculated the percentage effect by dividing the coefficient on “Mead,” which represents the increase of NPRMs due to *Mead* for the average agency, by the average number of NPRMs published by any agency per semiannual period, and then multiplying by one hundred.

\(^{71}\) Of course, the data set intentionally excluded the Department of Homeland Security, in order to isolate any effect associated with *Mead*, and this agency may have been a large part of expansion of government under George W. Bush.

\(^{72}\) O’Connell, *supra* note 13, at 942.

\(^{73}\) *Key Positions Vacant as Nominees Await Senate Confirmation*, *Wash. Post*, Dec. 31, 2009 (“Though most of this week’s attention has focused on the lack of stable leadership at the Transportation Security Administration, several other agencies are also without top leadership, and others are missing key deputies in policy and management roles.”).
The last significant explanatory variable in the all-agencies specification is “Divided Government.” Its coefficient is significant at the 99 percent confidence level, and it possesses a negative sign. Accordingly, federal agencies initiate less informal rulemaking when a single political party does not control all three of the presidency, House, and Senate. The magnitude of the effect is substantial but not overwhelming; NPRMs decline by 13.0 percent under divided government. This result is highly corroborative of the findings in the Yackee article, which found that divided government was a statistically significant explanatory variable for rulemaking levels across all agencies and was associated with an 11 percent decrease in NPRMs.74 This Article provides more evidence to suggest that divided government deters agency rulemaking.

As for the cabinet-department specification, the results are quite similar to those for the all-agency specification. “Mead” is again statistically significant at the 95 percent confidence level. Accordingly, Mead is associated with an increase in the initiation of informal rulemaking by cabinet departments, just as it is across all agencies. The effect of “Mead” on cabinet-department NPRMs is similar but slightly greater in magnitude than its effect across all agencies. For the typical cabinet department, “Mead” is associated with a 20.7 percent increase in NPRMs.

As for the presidential-administration dummy variables, all take on statistical significance in the cabinet-department specification.

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74. Yackee & Yackee, supra note 48, at 134.
Interestingly, the coefficients on both “Bush I” and “Clinton” possess positive signs. The implication is that the volume of informal rulemaking by cabinet departments was greater during both the George H.W. Bush and Clinton administrations than during the Reagan-administration baseline. The magnitude of these differences is relatively limited, however, as “Bush I” is associated with a 17.4 percent increase in NPRMs, and “Clinton” is associated with a 9.0 percent increase. The fact that cabinet departments during the George H.W. Bush administration regulated more than those during the Reagan administration is not necessarily surprising, but the fact that they regulated more than those under the Clinton administration is certainly unexpected. The coefficients for “Bush II” and “Obama” are negative, and the magnitudes of the effects those variables had on cabinet-department NPRMs are similar to the magnitude of the effects they had on NPRMs across all agencies.

The coefficient on the “Divided Government” variable is statistically significant at the 99 percent confidence level and negative in sign for cabinet departments, just as it was in the all-agency specification. The 18.4 percent decrease in cabinet-department NPRMs associated with divided government is only slightly greater than the decrease in NPRMs associated with divided government across all agencies. Again, this result is perfectly in line with the results from the Yackee article, which found divided government to be “associated with an 18% decrease in cabinet-department NPRM volume.”

As for the independent-agency specification, the similarity in the regression results comes to an end. Most interestingly, the coefficient on “Mead” loses significance in this specification. The Mead case may be associated with an increase in informal rulemaking for cabinet departments and across all agencies, but no such relationship exists specifically with independent agencies. Similarly, the coefficient on “Divided Government” also loses significance in the independent-agency specification. The existence of divided government apparently does not put the brakes on informal-rulemaking activity at independent agencies, as it does with cabinet departments. Yet again, this particular finding is consistent with the Yackee article, in which the divided-government variable was insignificant for non-cabinet departments.

The presidential-administration variables all exhibited at least minimal statistical significance in the independent-agency

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75. Id. at 138.
76. Id.
specification, and the coefficients on all four possess a negative sign. “Bush I” and “Bush II” are both significant at the 99 percent confidence level. Both variables exhibit effects of relatively large magnitude, as they are associated with 32.0 and 52.2 percent decreases in NPRMs, respectively. The coefficients on “Clinton” and “Obama” only possess statistical significance at the 90 percent confidence level. The magnitude of the “Clinton” effect is slight—a 16.2% decrease for the average independent agency—while the magnitude of the “Obama” effect—a 59.6% decrease—is enormous. Because the Reagan administration was the omitted variable, interpretation of these executive branch variables occurs from the Reagan baseline. The implication of these results is surprising: the independent agencies’ levels of informal rulemaking were the greatest during the Reagan administration, slightly less under President Clinton, less still under President George H.W. Bush, and the least under Presidents George W. Bush and Obama (through 2009, at least).

The reliability of these findings is underscored by the large number of observations from a comprehensive source, the fact that many variables possess the expected sign, and the close corroboration of the Yackee article for the effect of divided government. The regression specifications contained between 742 observations (for independent agencies) and 2,279 observations (for all agencies) of informal rulemaking levels by agency and time period. Those observations came from the Unified Agenda database, which “represent[s] as complete a snapshot as possible” of federal rulemaking activity. Additionally, though some of the signs on the coefficient estimates came as a surprise, most of the variables—including “Mead,” “Bush II,” and “Divided Government”—took the expected sign. Finally, the close corroboration between this Article’s results and those from the Yackee article is striking. The Yackee article used a four-year shorter time frame (involving thousands fewer NPRMs), employed monthly rather than semiannual NPRM levels as its independent variable, and used distinct explanatory variables absent from this Article (e.g., a variable capturing political transition periods). Despite these differences, both studies found divided government to have a statistically significant and negative association with informal rulemaking across all agencies and for cabinet departments, but not for independent agencies. Moreover, both

77. Steven J. Balla, Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking, 1 J.L. & PUB. POL’Y FOR INFO. SOC’Y 59, 70 (2005).
estimated the magnitude of the effect on cabinet departments as a
decrease of precisely 18 percent, and the difference between the
magnitude effects for the all-agencies specification was a mere 2
percentage points.\textsuperscript{79} Such similar results across models and time
periods provide support for the findings of both studies.

One concern arises from the temporal proximity of the Court’s
release of \textit{Mead} to the terrorist attacks of 9/11: because the former
occurred only three months before the latter, an analysis of the effect
of \textit{Mead} could inadvertently sweep the 9/11 response into its
measurement. I negotiated this risk in two distinct ways. First, I
excluded the Department of Homeland Security (“DHS”) entirely.
Because the George W. Bush administration created DHS as a direct
response to 9/11, much of DHS’s use of informal rulemaking was likely
attributable to 9/11 rather than \textit{Mead}. Although it is likely that
agencies other than DHS engaged in some informal rulemaking due to
9/11, the fact that DHS was devoted largely to the 9/11 response
suggests that the non-DHS regulatory response was likely small.
Second, I estimated an additional regression specification including
9/11 and excluding \textit{Mead}. Because the 9/11 response could not occur
until the first half of 2002, “9/11” took the value of one from that time
forward, and zero before. That variable therefore differed slightly from
“Mead,” which took the value of one from the second half of 2001
onward. Although the temporal difference between “9/11” and “Mead”
was not great, “9/11” completely failed to attain statistical
significance. That the coefficient on “Mead” was significant but the
coefficient on “9/11” was not provides further confidence that “Mead”
was not inadvertently capturing the regulatory response to 9/11.

In sum, although it cannot be gleaned by a quick glance at
Chart 1, the results of multiple-regression analysis support the
conclusion that \textit{Mead} has caused an increase in informal rulemaking.
The data bear out Justice Scalia’s prediction in his \textit{Mead} dissent. The
results, however, are not so simple. An unexplained gap emerges
between the impact of \textit{Mead} on cabinet departments and independent
agencies. And attempting to explain that gap suggests that Justice
Scalia, though correct in his prediction, overlooked a crucial
consequence of the case.

\textsuperscript{79} \textit{Id.} The Yackees estimated the effect of divided government on all agencies to be an 11
percent decrease, while this Article estimated it as a 13 percent decrease.
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IV. HOW THE OVERLOOKED INTERACTION OF OIRA AND MEAD INCREASED WHITE HOUSE REGULATORY CONTROL AND UNDERMINES JUSTICE SCALIA’S DISSENT

The central empirical finding of this Article—that cabinet departments have increased their use of informal rulemaking since Mead, but their independent-agency counterparts did not—is initially puzzling. After all, this distinction does not arise from the Mead doctrine itself, which makes clear to all agencies that policies executed through nonlegislative rulemaking may not receive deference in court. As an explanation, this Part posits a novel theory for a consequence of Mead that, thus far, has gone unnoticed: the interaction of Mead and the role of the Office of Information and Regulatory Affairs (“OIRA”) has allowed the White House to increase its control over regulatory policymaking. Justice Scalia’s dissent warned of an increase in informal rulemaking; however, it feared most fundamentally that Mead would shift regulatory power away from the executive branch and toward the courts. The theory developed in this Part suggests that Mead has done the opposite. Although it may have increased the power of courts over regulatory matters in (relatively infrequent) instances of litigation, it has consolidated the regulatory power in the White House for the vast majority of rulemakings. Justice Scalia may have been correct in his prediction of a surge of informal rulemaking, but the precise way in which Mead increased informal rulemaking undermines the broader reasons for his dissent.

A. Reconciling Differences: The Overlooked Interaction of Mead and OIRA

How can one explain the increased use of informal rulemaking by cabinet departments but not independent agencies after Mead? One explanation is that attorneys at independent agencies have been slower to detect the change in the law than attorneys at cabinet departments. Put differently, independent-agency lawyers are inferior to their cabinet-department counterparts. If the lawyers in independent agencies did not realize the implications of Mead, but their counterparts at executive agencies did realize its implications, then only the latter group would advise its agencies to employ more informal rulemaking, thereby creating the observed discrepancy. This explanation seems improbable, however, for two reasons. First, independent-agency lawyers are diffuse among the twenty distinct

80. See supra Part II.
independent agencies; they do not all practice as part of a single group. The possibility that all, or even most, independent agencies have inferior attorneys seems quite remote. Second, Mead is simply too significant of a case for any agency lawyer to overlook. In its eight years of existence, it has drawn more attention than any other case in the field of administrative law.\textsuperscript{81} That lawyers who exclusively practice administrative law would fail to read the Mead case is just plain unrealistic.

A second explanation is that independent agencies are, as a group, less concerned about the risk of courts invalidating the policies that they promulgated through nonlegislative rulemaking. Perhaps independent agencies share some characteristic that makes their policies less likely to be challenged by litigants. Recall that what denotes independent agencies is the inability of the President to remove their leaders except for cause,\textsuperscript{82} and that the justification for making agencies independent is to insulate them from politics and allow them to rely more heavily on bureaucratic expertise.\textsuperscript{83} Whether the President can remove an agency’s leader on a whim seems completely divorced from the likelihood that private litigants will sue to prevent that agency from enforcing its policy. One might argue, however, that the more insulated an agency is from politics, the less controversial its pronouncements, and the less likely people will sue in protest. Under this theory, independent agencies would confront a lesser need to employ informal rulemaking than executive agencies because the apolitical nature of independent agencies is associated with fewer lawsuits. Empirically testing the validity of this theory is beyond the scope of this Article. However, a simple response is that just because Congress decided that an agency should be relatively insulated from politics does not necessarily imply that its pronouncements are less controversial. The ranks of the independent agencies include the Equal Employment Opportunity Commission, the Federal Communication Commission, and the Securities Exchange Commission—whose regulations affect a wide range of human and financial interests. Anecdotal evidence from a few major cases suggests that these agencies, too, spend their fair share of time defending their policy pronouncements in court.\textsuperscript{84}

\textsuperscript{81} See supra note 2 and accompanying text.
\textsuperscript{82} Bressman & Thompson, supra note 26, at 610.
\textsuperscript{83} Id. at 611-14.
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A third theory seems the most probable: the interaction of Mead and OIRA gives the executive branch a special incentive, which it lacks with respect to independent agencies, to shift toward informal rulemaking. OIRA is a meta-federal agency that has the power to review and sculpt the policy decisions of many other agencies. In the name of cost-benefit analysis, OIRA can significantly alter rules early in the regulatory process, thereby resulting in final rules clearly reflecting its fingerprints. The President appoints the head of OIRA, and the agency works closely under his directives. As such, OIRA review is a powerful means for the White House to sculpt regulatory policy across the administrative state, and the White House seeks to maximize the policymaking passing through OIRA’s doors. But OIRA’s jurisdiction is limited. By executive order, OIRA only reviews the rules of executive agencies, and only those rules that are promulgated through informal rulemaking. The implication is that the White House—seeking maximum control over the vast regulatory apparatus—has the incentive to funnel as much executive agency policymaking into informal rulemaking as possible.

Mead’s holding coincides with the desire of the White House for executive agencies to use informal rulemaking. By providing a safe harbor for policymaking promulgated through informal rulemaking, Mead gave the White House the perfect tool to herd executive agencies toward informal rulemaking at the expense of nonlegislative rulemaking. White House counsel could urge executive agencies to employ informal rulemaking so that courts would uphold their policies.

interpret Title VII so as to permit more employees alleging discrimination to satisfy the administrative statute of limitations; NetCoalition v. Securities Exchange Comm’n, 615 F.3d 525 (D.C. Cir. 2010) (considering whether the Securities Exchange Commission’s decision regarding the fees charged by a large securities exchange was in accordance with the Exchange Act).


88. See id. at 876-79 (explaining that the results of an empirical analysis suggest that “agencies do not usually succeed in persuading White House reviewers that their rules would be best unchanged”).

89. See Exec. Order No. 12,866, 3 C.F.R. 638, 641 (1993) (defining “agency” as “any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10)). Although Executive Order 12,866 does not expressly limit OIRA review to informal rulemaking, there is no formal mechanism by which executive agencies would submit instances of nonlegislative rulemaking to OIRA for review.
under *Mead*’s new framework, while knowing that more informal rulemaking would most importantly mean greater regulatory control. This incentive for White House counsel does not exist, however, for independent agencies. Because independent-agency rulemaking is not subject to OIRA review regardless of policymaking form, White House counsel would not gain increased regulatory control if independent agencies used more informal rulemaking. Thus, White House counsel has reason to urge executive agencies, but not independent agencies, to employ more informal rulemaking as a result of *Mead*.

This theory of an unforeseen consequence of *Mead* provides a cogent explanation for the surprising gap in the regression results. The empirical analysis demonstrated that *Mead* was associated with a statistically significant increase in informal rulemaking across all agencies and for cabinet departments (which is simply a very large subset of executive agencies), but not for independent agencies. The analysis in *Mead* itself did not suggest that informal rulemaking was “more” necessary for cabinet departments than for independent agencies, so the explanation for the asymmetry must be external to the case. Perhaps informal rulemaking increased at cabinet departments because the White House was encouraging executive agencies to use more informal rulemaking; and it did not increase at independent agencies because no such external pressure existed. That *Mead* caused a significant increase in informal rulemaking for cabinet departments but not independent agencies provides evidence that a White House quest for regulatory power has been taking place in the name of *Mead*.

B. How OIRA’s Overlooked Role Undermines Justice Scalia’s Dissent

A fundamental argument in Justice Scalia’s *Mead* dissent was that the majority opinion would result in a transfer of regulatory power from the executive branch to the courts. As mentioned above, he argued on principle that “[s]tatutory ambiguities were left to reasonable resolution by the Executive.”[^90] *Chevron* had proclaimed generally that courts should defer to the statutory interpretations made by agencies, and Justice Scalia feared that *Mead* took a step away from that important principle. In a sense, *Mead* did convey to federal judges greater power to affect regulatory policy. By instructing judges only to defer to agency policies that were promulgated through devices carrying the force of law, it empowered the courts to strike

down agency policies and even interpret statutory language where they could not do so before.

Justice Scalia’s proposed alternative had the effect of enhancing the regulatory power of the executive branch. While the majority opinion asked whether agency policymaking actions carry the force of law, Justice Scalia argued that courts should give *Chevron* deference to “authoritative” positions of agency policy.\(^91\) A showing of authoritativeness would come from confirmation by the Solicitor General (and the head of the agency) during litigation that the policy indeed represented the agency’s official position.\(^92\) Thus, Justice Scalia’s alternative would require courts to give *Chevron* deference to agency policies whenever they were reasserted in litigation, regardless of whether the agency initially promulgated that policy through informal rulemaking or nonlegislative rulemaking. Under this approach, the White House and federal agencies, rather than the courts, arguably would possess greater control over the regulatory apparatus. A rule resulting from a policymaking device that may not carry the “force of law” under *Mead*—and which would therefore be subject to invalidation at the whim of a court—could go forward due to agency insistence.

The above-stated theory of OIRA’s interaction with *Mead*, however, undermines Justice Scalia’s fundamental argument against the majority opinion that case. The discrepancy between cabinet departments and independent agencies in the regression results provides evidence that *Mead* has enabled the White House to increase vastly the volume of executive agency rulemaking that passes through the sculpting hands of OIRA. Justice Scalia feared that *Mead* would enhance the regulatory power of the courts at the expense of the executive branch, but may have, in fact, done just the opposite: consolidated regulatory power in the White House. Although *Mead* may have increased the courts’ regulatory power in some instances, it did so only in those relatively infrequent instances where litigants challenged agency policies promulgated through nonlegislative rulemaking. Indeed, because it appears that executive agencies substituted informal rulemaking for nonlegislative rulemaking in some instances, as Justice Scalia predicted, this already-small category decreased in size after *Mead*.

As a corollary, the interaction of *Mead* and OIRA suggests that the majority opinion in *Mead* unwittingly directed more regulatory power to the executive branch than Justice Scalia’s proposed

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91. *Id.* at 258.
92. *Id.*
alternative. Justice Scalia’s approach would have given the White House (through the Solicitor General) the ability to affirm the relatively few products of nonlegislative rulemaking that are challenged in court. *Mead*, it appears, allowed the White House to funnel a greater proportion of the vast bulk of executive agency rulemaking activity through OIRA. To the extent that Justice Scalia’s approach sought to champion the regulatory power of the executive branch over the courts, it may very well have been less successful than the approach he criticized in the majority opinion. In sum, *Mead* expanded the power of courts in those rare instances where policies created through nonlegislative rulemaking are subject to litigation, but it may have given the White House much greater power over the average executive-agency rule.

**V. Conclusion**

Despite the massive attention it has garnered, at least one of the major implications of the Supreme Court’s decision in *United States v. Mead Corp.* was previously untested: Did *Mead* actually increase agency use of informal rulemaking? Justice Scalia’s dissent ominously predicted an increase as part of his broader attack on that case. This Article first outlined why, in theory, *Mead* should have caused all agencies to increase their use of informal rulemaking at the expense of nonlegislative rulemaking. As informal rulemaking is the predominant means by which federal agencies create policy, and nonlegislative rulemaking is perhaps the most controversial one, the implications of the answer to this question are of vast importance.

To answer the question, the Article drew from a data set containing observations of nearly thirty thousand informal rulemakings by forty-four federal agencies from 1983 to 2009. It employed multiple regression analysis and controlled for other explanatory variables that have been identified in the small but burgeoning literature. It came to two interesting but collateral conclusions that corroborate the findings of other research. First, the volume of cabinet-department rulemaking is much more volatile over time than the volume of independent-agency rulemaking. Second, the presence of divided government slows the rate of cabinet-department but not independent-agency rulemaking. Regarding its central focus, the Article found that the release of the *Mead* case is indeed associated with a statistically significant increase in the use of informal rulemaking across all agencies. Justice Scalia was correct in his prediction; one would have been wise to buy stock in the GPO.
The regression results, however, paint a more complex picture: *Mead’s* effect on informal rulemaking extends to cabinet departments, but not to independent agencies. This discrepancy in the regression results is initially surprising because the case itself did not vary its analysis by the type of agency that promulgated the policy. A novel theory for the interaction of *Mead* and OIRA provides the best explanation. OIRA review gives the White House increased control over informal rulemaking by executive agencies. The White House therefore has the incentive to encourage executive agencies, but not independent agencies, to employ informal rather than nonlegislative rulemaking. The Court’s holding in *Mead* provided the White House with a neutral means to provide exactly such encouragement. Despite Justice Scalia’s fears to the contrary, *Mead* may have unwittingly increased the regulatory power of the White House.
APPENDIX 1: NPRMs Per Semiannual Period

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"BUY STOCK IN THE GPO"?

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APPENDIX 2: DETAILED METHODOLOGY FOR CREATION OF UNIQUE DATA SET

The original data set was created through a series of manipulations performed on the entire Unified Agenda database (from Spring 1983 to Spring 2009). The Unified Agenda publishes information semiannually on both informal rulemaking and NRWOC. It reports all public actions taken during the life of the rulemaking process—from ANPRMs and NPRMS, to changes in the length of a comment period, to final rules. Significantly, each agenda reports not only information about rulemaking activities taken during its semiannual period, but also past actions and projected future actions associated with an ongoing rule. For example, when the Spring 2004 Agenda reports that EPA extended its comment period in February 2004, it also reports that EPA published the related NPRM in June 2003 and expects to promulgate the final rule in October 2005.

The fact that each agenda contains information from outside its own time period causes the problem of duplicate entries: an observation of the cumulative data from all Unified Agendas suggests there were multiple (as many as a dozen) NPRMs for any given rulemaking, when in actuality there was only one. The duplicate entry problem is solvable, however, because the Unified Agenda assigns each rulemaking a unique indentifying number, called a Regulation Identification Number (“RIN”). All actions taken during the life of the rulemaking are reported using this RIN. As a result, all reported NPRMs for a given rulemaking may be grouped together so that the duplicates can be eliminated.

I created the original data set pursuant to the following process: First, I received the entire database of Unified Agendas from Spring 1983 to Spring 2009 from the Regulatory Information Service Center in XML format. After importing the relevant data for all agencies over the full time period into multiple spreadsheets (because the files exceeded Microsoft Excel’s maximum number of rows in a single worksheet), I eliminated all rows that did not involve a NPRM. This data contained duplicate entries (as explained above), however, so I sorted by RIN and removed all but the most recently published account of each NPRM. Next, I eliminated all data involving NPRMs that were projected but never actually occurred. Some NPRMs, rather

93. In other words, if seven agendas contained entries on a particular NPRM, I removed all but the entry published in the most recent agenda. (This decision can be significant, because different entries for a particular NPRM report different dates on which that NPRM was published.) This method follows that of Anne O’Connell on her assumption that the most recent publication is likely the most reliable.
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than containing a discrete date under the corresponding row in the publication date column, instead contained “To be determined.” Because only the most recently published record of NPRMs existed in the data set at this point, these rulemaking must have either been aborted (most of them) or had not yet occurred (for NPRM records in the 2007, 2008, and 2009 agendas). I removed all these entries.

The data set then reflected one row for each NPRM for all agencies across the entire time period. However, the agencies were all indicated by code numbers. I thus performed forty-four “find and replaces” to substitute the agency name for the code number for each of the forty-four desired agencies. At this point I also deleted all agencies that were not selected for the sample because of their relatively paucity of NPRMs (e.g., U.S. Metric Board, Smithsonian Institute, and the Peace Corps).

The next step was to count the number of NPRMs each agency published within semiannual periods. For each NPRM, data also existed for the precise date (e.g., June 21, 1989) on which it was published. I sorted the data by agencies first and date second. Because approximately thirty thousand NPRM entries existed, it would be nearly impossible to count the number per period by hand. I therefore employed a “countsif” function in Microsoft Excel to count the number of NPRMs occurring for a particular agency within a particular semiannual period. The result was a single column for each of forty-four agencies at each of fifty-three semiannual periods, each containing the number of NPRMs for each agency-period.