

AVOIDING MEAD: THE PROBLEM WITH UNANIMITY IN  
*Long Island Care at Home, Ltd. v. Coke*,  
127 S. Ct. 2339 (2007)

One of the central questions in administrative law is the appropriate level of deference courts should give to agency interpretations of statutorily conferred authority. The Supreme Court announced its most recent major doctrinal development in this area in *United States v. Mead Corp.*,<sup>1</sup> a 2001 opinion in which the Court held that an “administrative implementation of a particular statutory provision” was entitled to deference if the agency was self-consciously exercising congressionally delegated authority to “make rules carrying the force of law.”<sup>2</sup> In redefining the boundaries of the well-established *Chevron*<sup>3</sup> doctrine, *Mead* soon became the subject of significant confusion and academic discussion,<sup>4</sup> but the Court has not clarified its holding in the seven years since announcing the decision. Last term, in *Long Island Care at Home, Ltd. v. Coke*,<sup>5</sup> the Court gave deference to a Department of Labor decision to exempt “companionship services” employees from minimum wage and overtime compensation benefits.<sup>6</sup> At first glance, *Long Island Care* seems to be a straightforward and inconsequential opinion that invokes *Mead* to reach its disposition. In examining the opinion’s reasoning, however, it is evident that the Court avoided a full discussion of *Mead* for the sake of unanimity, thus making *Long Island Care* a notable example of Chief Justice

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1. 533 U.S. 218 (2001).

2. *Id.* at 226–27.

3. *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

4. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1447 (2005) (asserting that *Mead* has confused lower courts and “has complicated judicial review of agency action”); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1248 (2007) (stating that *Mead* “suffers from its own lack of clarity”); William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 719–20 (2002) (noting that *Mead* has contributed to “chaos” by helping to create “a cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards”).

5. 127 S. Ct. 2339 (2007).

6. *Id.* at 2339–40.

Roberts's announced preference for narrow and unanimous opinions. More importantly, *Long Island Care* demonstrates that narrowing an opinion for the sake of unanimity is undesirable when it delays much needed doctrinal clarification and development.

In 1913, President William Howard Taft signed a bill authorizing the creation of the Department of Labor, which was designed in part "to foster, promote, and develop the welfare of the wage earners of the United States."<sup>7</sup> Twenty-five years later, Congress enacted the Fair Labor Standards Act, which created the Wage and Hour Division within the Department of Labor and codified worker protections such as minimum wage and overtime pay.<sup>8</sup> In 1974, as part of a lengthy series of amendments designed to increase the scope of wage protections,<sup>9</sup> Congress brought most domestic service employees under the umbrella of the Act, but exempted workers who provide "companionship services" to individuals who cannot care for themselves.<sup>10</sup> Congress left the scope of this exemption ambiguous, indicating that the Department of Labor should define "domestic service employment" and "companionship services" through the promulgation of regulations.<sup>11</sup>

The Department responded to this congressional mandate by issuing a series of regulations the following year. The agency defined "companionship services" as "services which provide fellowship, care, and protection for a person who . . . cannot care for his or her own needs."<sup>12</sup> In addition, the Department issued a "General Regulation" defining "domestic service employment" to include "services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed."<sup>13</sup> Concurrently, in a regulation seemingly inconsistent with the General Regulation,

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7. An Act To Create a Department of Labor, Pub. L. No. 62-426, 37 Stat. 736 (1913).

8. 29 U.S.C. § 201 (1938).

9. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (noting that the amendments were passed to "expand the coverage" of the Fair Labor Standards Act).

10. *Id.* § 7(b)(3), 88 Stat. at 62 (codified as 29 U.S.C. § 213(a)(15)).

11. *See id.*

12. 29 C.F.R. § 552.6 (1975).

13. *Id.* § 552.3 (noting that "cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs" all fall within the category of "domestic service employment").

the Department determined that workers who provide domestic services while employed by third parties are exempt from the pay protections of the Fair Labor Standards Act.<sup>14</sup> Justice Breyer later dubbed this the “third-party regulation.”<sup>15</sup>

In April 2002, Evelyn Coke brought a lawsuit in the United States District Court for the Eastern District of New York against her former employer, Long Island Care at Home, Ltd., challenging these Department of Labor regulations.<sup>16</sup> Coke sought compensation for overtime and minimum wage pay she had been denied while working for several years as a “home healthcare attendant” for Long Island Care.<sup>17</sup> The District Court granted Long Island Care’s motion for judgment on the pleadings and upheld both of the contested regulations.<sup>18</sup>

The Second Circuit affirmed in part and vacated in part, giving *Chevron* deference to the General Regulation and striking down the third-party regulation.<sup>19</sup> According to the Second Circuit, the third-party regulation was an “interpretive regulation”<sup>20</sup> that had not been promulgated as a conscious exercise of explicitly granted congressional authority, thus precluding *Chevron* deference on review and warranting less deferential *Skidmore* review.<sup>21</sup> Under this lower standard, the Second Circuit rejected the agency’s rationale supporting its third-party regulation, holding instead that the regulation was “inconsistent with Congress’s likely purpose in enacting the 1974 amendments.”<sup>22</sup>

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14. 29 C.F.R. § 552.109(a) (1975).

15. Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2345 (2007).

16. Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 121–22 (2d Cir. 2004), *rev’d*, 127 S. Ct. 2339 (2007). Coke specifically challenged 29 C.F.R. § 552.6 (the General Regulation) and 29 C.F.R. § 552.109(a) (the third-party regulation). *Id.* at 121–22.

17. *Id.* at 122.

18. Coke v. Long Island Care at Home, Ltd., 267 F. Supp. 2d 332, 333 (E.D.N.Y. 2003).

19. Coke, 376 F.3d at 118, 121–22, 131–32.

20. *Id.* at 131–32 (classifying the third-party regulation as an “interpretive rather than a legislative regulation,” in part because the Department of Labor included the regulation under a subpart labeled “Interpretations”).

21. *Id.* at 132 (“*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless ‘it appears that the agency interpretation claiming deference was promulgated in exercise of that authority.’”) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)); *see also Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (noting that administrative interpretations “constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance” such that they should be considered by a reviewing court and can be adopted if they are persuasive).

22. Coke, 376 F.3d at 133.

The Supreme Court granted certiorari,<sup>23</sup> but vacated and remanded the case before oral argument to give the Second Circuit an opportunity to reconsider its decision in light of a recently published Department of Labor “Wage and Hour Advisory Memorandum.”<sup>24</sup> Although the Department had considered modifying the third-party regulation in the past,<sup>25</sup> the agency indicated in the Advisory Memorandum that it considered the third-party regulation legally binding.<sup>26</sup> The Second Circuit found this memorandum unpersuasive and again decided to strike down the third-party regulation,<sup>27</sup> after which the Supreme Court granted certiorari for the second time.<sup>28</sup>

Justice Breyer, writing for a unanimous Court, authored an opinion reversing the Second Circuit’s decision and holding that the Department of Labor’s third-party regulation was entitled to *Chevron* deference.<sup>29</sup> The Court acknowledged that the General Regulation conflicted with the third-party regulation but deferred to the agency’s stated position in the Advisory Memorandum that the third-party regulation governed, even though this memorandum was written as a result of Coke’s lawsuit.<sup>30</sup> The Court noted functional reasons for adopting this deferential stance, including the potential impact on other groups of employees, but also cited its longstanding practice of deferring to agency interpretations of their own regulations.<sup>31</sup>

The Court disagreed with the Second Circuit’s finding that the third-party regulation was an interpretive regulation underserving of deference.<sup>32</sup> The agency’s treatment of the regulation as binding seemed more persuasive to the Court than the categorical question of whether it was an interpretive or legislative regulation.<sup>33</sup> The Court reasoned that the regulation was bind-

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23. *Long Island Care at Home, Ltd. v. Coke*, 545 U.S. 1103 (2005).

24. *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006).

25. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345 (2007).

26. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 51 (2d Cir. 2006).

27. *Id.* at 51.

28. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 853 (2007).

29. *Long Island Care at Home*, 127 S. Ct. at 2344, 2349–52.

30. *Id.* at 2348–49.

31. *Id.*

32. *Id.* at 2350.

33. It is strange that the Court did not give much weight to this distinction because under *Chevron* only legislative regulations are binding on reviewing courts. *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding that “legislative regulations” are controlling “unless they are arbi-

ing because it directly governed “the conduct of members of the public” and because Congress intended the Department of Labor to fill the statutory gap left by the undefined terms in the Fair Labor Standards Act.<sup>34</sup>

The opinion concluded with a discussion of the notice-and-comment procedure undertaken before the adoption of the third-party regulation. Coke had argued that this procedure was defective because the final rule was not a logical outgrowth of the proposed rule.<sup>35</sup> The Second Circuit did not reach this question, but implied in its original opinion that the Department failed to provide a sufficient explanation for departing from its announced intention to enact a third-party regulation that would bring employees of third parties under the wage protections of the Fair Labor Standards Act.<sup>36</sup> The Supreme Court disagreed, however, and found that the Department’s procedure was legally sufficient because it was “reasonably foreseeable” that the final rule would not be the exact codification of the proposed rule.<sup>37</sup>

Although *Long Island Care* was not a high-profile decision, the opinion is notable because of the way it avoided a thorough treatment of the *Mead* doctrine. Justice Breyer approached the analysis from the premise that Congress explicitly left gaps in the Fair Labor Standards Act and delegated the power to fill these gaps to the Department of Labor, concluding that the Department’s third-party regulation “seems to fill a statutory gap.”<sup>38</sup> In framing the issue in this way, Justice Breyer side-stepped a significant finding by the Second Circuit. In its 2004 opinion, the Second Circuit noted that after Congress delegated authority to the Department of Labor to define terms contained in § 213(a)(15) of the Act, the Department indicated that these definitions could be found in a series of four regulations.<sup>39</sup> Notably missing from this list, however, was 29 C.F.R. § 552.109(a), the third-party regulation at issue in Coke’s lawsuit.

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trary, capricious, or manifestly contrary to the statute,” but containing no provision for deference to interpretive regulations).

34. *Long Island Care at Home*, 127 S. Ct. at 2350–51.

35. *Id.* at 2351.

36. See *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 132 (2004), *rev’d*, 127 S. Ct. 2339 (2007).

37. See *Long Island Care at Home*, 127 S. Ct. at 2351.

38. *Id.* at 2346.

39. The Department of Labor indicated in 29 C.F.R. § 552.2(c) that the regulations in question were 29 C.F.R. §§ 552.3, 552.4, 552.5, and 552.6. See *Coke*, 376 F.3d at 131.

The Second Circuit interpreted this omission as evidence that the Department of Labor “effectively conceded” that this regulation was not “promulgated pursuant to Congress’s express legislative delegation,” and therefore was not entitled to deference under *Mead*, because the second step of the two-step *Mead* analysis was not satisfied.<sup>40</sup>

Justice Breyer’s avoidance of *Mead*’s second step is significant because it allowed him to write an opinion that neither further engaged nor fully endorsed *Mead*. Doing either likely would have cost him Justice Scalia’s vote. Justice Scalia vigorously dissented in *Mead*, an opinion he characterized as an “avulsive change” in administrative law doctrine that was “neither sound in principle nor sustainable in practice.”<sup>41</sup> His blistering dissent—which was longer than the majority opinion—was not the end of the matter. Four years later, Justice Scalia dissented in *National Cable & Telecommunications Association v. Brand X Internet Services*,<sup>42</sup> a decision that seemed to entrench further *Mead*’s holding. In *Brand X*, the Court ruled that an administrative agency may ignore a judicial interpretation of a statutory provision so long as the issue has not been addressed by Congress and falls within the scope of the *Chevron* “step two” analysis.<sup>43</sup> In dissent, Justice Scalia forcefully argued against this outcome, and argued that *Mead*’s misguided holding had paved the way for the “bizarre” conclusion that an agency can effectively overrule a judicial determination.<sup>44</sup>

In response, Justice Breyer wrote a concurrence in *Brand X* for the express purpose of pointing out the flaws in Justice Scalia’s

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40. *Coke*, 376 F.3d at 131–32. This reading of *Mead* as requiring a two-step analysis is consistent with the text of the opinion. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”). Many academic commentators agree with this characterization of *Mead*’s holding. See, e.g., Hickman & Krueger, *supra* note 4, at 1249 (noting that a court must “affirmatively find[]” both steps of the inquiry); Jordan, *supra* note 4, at 725–26 (noting that *Mead* requires an agency to show first that it was delegated authority to act and second that it acted under the guise of that authority); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 813 (2002) (describing *Mead* as a “two part inquiry”).

41. *Mead*, 533 U.S. at 239–41 (Scalia, J., dissenting).

42. 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting).

43. *Id.* at 982–84 (majority opinion).

44. *Id.* at 1015–17 (Scalia, J., dissenting).

interpretation of *Mead*.<sup>45</sup> This direct reply was not surprising, as Justices Breyer and Scalia have often stood on opposite sides of questions involving the application of *Chevron* deference, which is the key aspect of *Mead*. Professor Cass Sunstein has argued that this issue “has become the central location of an intense and longstanding disagreement” between the two Justices.<sup>46</sup> Given their divergence on the question of the degree of deference that should be properly accorded to agencies, it is curious that Justice Scalia joined Justice Breyer’s opinion in *Long Island Care*.<sup>47</sup> Whereas Justice Scalia cannot be expected to dissent from each opinion upholding a precedent with which he has taken issue in the past, the *Mead* fight does not appear to be over, and it seems unlikely that Justice Scalia would have joined an opinion that thoroughly engaged the *Mead* doctrine.

*Mead* seems unsettled in part because it has been the subject of lower court confusion and academic criticism since it was decided.<sup>48</sup> In addition, the voting patterns in *Brand X* seem to suggest that support for *Mead* may not be fully entrenched, or at least that the Justices may harbor different interpretations of its holding. In *Brand X*, four years after the Court voted 8-1 against Justice Scalia in *Mead*, the majority opinion did not fully address Justice Scalia’s dissenting arguments about *Mead*’s breadth. In addition, none of the other Justices joined Justice Breyer’s *Brand X* concurrence attacking Justice Scalia’s charac-

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45. *Id.* at 1003 (Breyer, J., concurring) (“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.*”). Professor Lisa Bressman has argued that Justice Breyer’s concurring opinion “acknowledges the confusion that *Mead* has wrought” without providing any “additional guidance.” Bressman, *supra* note 4, at 1448.

46. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006).

47. One year before *Mead* was decided, Justices Scalia and Breyer argued in concurring and dissenting opinions about the appropriate scope of *Skidmore* deference. See *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 596 (Breyer, J., dissenting).

48. See, e.g., Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) (describing how difficult it has been for the D.C. Circuit to wrestle with the application of *Mead*, and suggesting that the doctrine may be a “failed experiment” in need of reversal); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 290–91 (2001) (concluding that the first six months of lower court decisions applying the *Mead* standard led to confusion as well as an erosion of the *Chevron*-era judicial deference to agency authority); see also Bressman, *supra* note 4.

terization of *Mead*.<sup>49</sup> Finally, Justice Souter, who authored the majority opinion in *Mead*, actually joined Part I of Justice Scalia's *Brand X* dissent, perhaps signaling his discomfort with *Mead*'s potential implications.<sup>50</sup>

Given these uncertainties about the doctrine and Justice Scalia's aggressive attacks on *Mead*, it seems unlikely that Justice Scalia would have joined the *Long Island Care* opinion if it had engaged in an extended discussion of *Mead*. But in avoiding a full-scale *Mead* analysis, Justice Breyer managed to write for a unanimous Court.<sup>51</sup>

Although the *Long Island Care* outcome will likely have significant repercussions for the home care industry,<sup>52</sup> the decision received very little attention in the media, and has been the subject of virtually no academic discussion since its issu-

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49. *Id.* at 1003.

50. Part I of Justice Scalia's dissent did not address *Mead*, arguing against the majority's holding in *Brand X* on other grounds. It is nonetheless surprising that Justice Souter associated himself with the first part of a dissenting opinion which, in the second part, forcefully condemned the opinion he had written in *Mead*. See 545 U.S. 967, 1005 (Scalia, J., dissenting). It is difficult to gauge the degree of support *Mead* now commands among the Justices, as Chief Justice Roberts and Justice Alito have not expressed their views on the decision since joining the Court. During his tenure on the Third Circuit, Justice Alito cited *Mead* several times, but never in a way that revealed his opinion about the breadth or soundness of the decision. See *Soltane v. U.S. Dep't of Justice and Naturalization Serv.*, 381 F.3d 143, 148 n.4 (3d. Cir. 2004) (citing *Mead* once); *Chen v. Ashcroft*, 381 F.3d 221, 224, 232 n.18 (3d. Cir. 2004) (citing *Mead* twice); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 299 (3d. Cir. 2004) (citing *Mead* twice); *Thomas v. Comm'r of Soc. Sec.*, 294 F.3d 568, 573-74 (3d. Cir. 2002) (citing *Mead* three times), *rev'd*, 540 U.S. 20 (2003).

51. Professor Elizabeth Foote seems to agree that Justice Breyer did not base his *Long Island Care* opinion on *Mead*, noting that the Court's holding "is highly reminiscent of the approach that was taken by the Court in pre-*Chevron* cases." Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 721 (2007).

52. See Brief for Nat'l Ass'n for Home Care & Hospice, Inc. as Amicus Curiae Supporting Petitioners, *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593) (pointing out that "approximately 2.8 million Medicare beneficiaries received home health services" in 2005, and arguing that bringing the workers who care for these beneficiaries under the protections of the Fair Labor Standards Act would "discriminate against the elderly and infirm" by increasing the cost of Medicare). *But see* Brief for AARP, et al. as Amici Curiae Supporting Respondents, *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007) (No. 06-593) (noting the shortage of home health care workers and arguing that denying wage protections to these workers will "cause severe disruptions" in the home health care industry by further discouraging this type of employment).

ance last year.<sup>53</sup> Perhaps it was this relative obscurity that made *Long Island Care* a prime opportunity for the nine Justices to speak with one voice. The decision conforms with the model of unanimity that Chief Justice Roberts has embraced.<sup>54</sup> Since his elevation to the Court in 2005, Chief Justice Roberts has made no secret of his goal of encouraging the issuance of unanimous opinions.<sup>55</sup> Reaching such consensus with nine Justices is not easy, but Chief Justice Roberts has indicated that one way to achieve greater unanimity is to craft very narrow holdings.<sup>56</sup> According to the Chief Justice, increased unanimity

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53. For a cursory explanation of the holding, see Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006–2007 Terms of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 143–45 (2007) (briefly outlining the holding in *Long Island Care* with no discussion or analysis). Two other commentators have mentioned that *Long Island Care* was important but failed to state their reasons. See Foote, *supra* note 51, at 677 (asserting that *Long Island Care* is a “key administrative law” decision); Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN L. REV. 725, 773 n. 383 (2007) (noting that *Long Island Care* was “important”).

54. That *Long Island Care* seems to be an example of the Court acting in accordance with Chief Justice Roberts’s views on unanimity does not suggest the Court is necessarily moving in the direction of greater consensus. It is true that the Court issued 36 unanimous opinions in the 2005 term, the first with Chief Justice Roberts at the helm, *The Supreme Court Statistics*, 120 HARV. L. REV. 372, 377 (2006), but this number dropped to 21 in the 2006 term, *The Supreme Court Statistics*, 121 HARV. L. REV. 436, 441 (2007). Some commentators have suggested that the brief honeymoon period the new Chief Justice enjoyed in 2005 has largely evaporated, and that one possible reason for the spike in unanimity during the 2005 term is that the Court was waiting for Justice O’Connor’s replacement to arrive before deciding many controversial cases. See Andrew Seigel, *A Tale of 2 Terms: A Transitional Year for the United States Supreme Court*, S. CAROLINA LAWYER, Sept. 2006, at 30. This theory suggests that unanimity will not become a fixture of the Roberts Court. The Chief Justice, however, seems to have a more optimistic view: “We had more unanimous opinions announced in a row than ever before. There’s some limitation on this statistic—in the modern Court, or in the modern era—but in the first 5-4 decision, people are writing, ‘So much for unanimity.’” JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 225–26 (2006).

55. ROSEN, *supra* note 54, at 224–28; James Taranto, *Getting to Yes*, WALL ST. J., July 1, 2006, at A11. Even in his Senate Confirmation Hearings, then-Judge Roberts indicated that “bring[ing] about a greater degree of coherence and consensus in the opinions of the Court” was a “top priority.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong.* (2005) (statement of John G. Roberts, Jr.), reprinted as *Nomination of John G. Roberts, Jr., of Maryland, to be Chief Justice of the United States*, in 20 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY SENATE JUDICIARY COMMITTEE, 1916–2005, at 371 (Roy M. Mersky & Tobe Liebert, eds., 2006).

56. See ROSEN, *supra* note 54, at 228.

will bring more legitimacy to an increasingly scrutinized Court, because it “‘promote[s] clarity and guidance’ to lawyers and lower courts.”<sup>57</sup>

Chief Justice Roberts is correct that unanimity can send clear signals that leave little ambiguity in the law. The Court demonstrated the merits of this approach with respect to school desegregation in the 1950s and 1960s. *Brown v. Board of Education* spawned an impressive string of at least fifteen years of nearly perfect unanimity on desegregation issues.<sup>58</sup> It was particularly important that the Court spoke with one voice on such a volatile subject to ensure that the States both understood and adhered to the urgency of the constitutional mandate to desegregate.<sup>59</sup> Absent a particularly divisive and pressing issue akin to school desegregation, however, unanimity for the sake of consensus is not a sustainable or beneficial objective if it comes at the price of doctrinal clarity.

*Long Island Care* is an example of a unanimous opinion that does not exemplify the clarity and guidance envisioned by Chief Justice Roberts. In avoiding a discussion of the second prong of the *Mead* analysis in *Long Island Care*, the Court passed over an opportunity to further illuminate the proper application of agency deference under *Mead*. As noted, this is troublesome both because the *Mead* doctrine is confusing and because the current level of support for *Mead* among the Justices is not entirely clear.

Professor Mark Tushnet has observed that “unanimity achieved by compromise” may actually undermine the legitimacy of the Court by leading to vote trading and logrolling,

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57. Taranto, *supra* note 55, at A11 (quoting Chief Justice Roberts).

58. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 43 (1979) (noting that the Court issued unanimous decisions regarding school desegregation from 1954 to 1969). See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Holophane Co. v. United States*, 352 U.S. 903 (1956) (per curiam); *Pennsylvania v. Bd. of Dir. of City Trusts*, 353 U.S. 230 (1957) (per curiam); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Bradley v. Sch. Bd.*, 382 U.S. 103 (1965) (per curiam); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (per curiam).

59. See WOODWARD & ARMSTRONG, *supra* note 58, at 43 (suggesting that the Court ruled unanimously in the desegregation cases because “it was essential to let the South know that not a single Justice believed in anything less than full desegregation”). The appeal of unanimity was so strong that it appears to be one reason that Justice Reed laid aside his reservations to vote with the majority in *Brown*. For a discussion of Justice Reed’s complex motivations, see Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in Brown*, 49 N.Y.L. SCH. L. REV. 741 (2004–2005).

thereby producing more confusion than “could emerge from a fractious Court.”<sup>60</sup> Fractured opinions may offer little or no guidance to lower courts, particularly in instances where most or all of the Justices issue separate opinions.<sup>61</sup> The Supreme Court, however, rarely produces such extremely splintered decisions,<sup>62</sup> and should not shy away from opportunities to explore and clarify confusing and uncertain doctrinal issues relevant to the case at hand.<sup>63</sup> Principles of judicial restraint suggest that the Court should use moderation in deciding which issues to explore, but in *Long Island Care*, where the lower court’s opinion largely turned on one step of an ill understood two-step analysis, the Court did a disservice to the lower courts by sidestepping the issue. If the Court did not agree with the Second Circuit’s approach to *Mead* as a two-step test, it should have so held. If the Supreme Court seeks to avoid contentious issues by crafting narrow holdings in individual cases, lower courts may be kept in the dark about confusing doctrines. Thus, when the Supreme Court enables itself to speak with one voice by greatly narrowing the issue presented, it risks preventing lower courts from becoming similarly united by leaving unclear doctrinal issues underdeveloped.<sup>64</sup>

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60. Mark Tushnet, *Symposium Foreword: The First (And Last?) Term of the Roberts Court*, 42 TULSA L. REV. 495, 497–98 (2007).

61. One of the most striking examples of the splintering of opinion among the Justices occurred in 1972, when the Court’s one-paragraph per curiam opinion in *Furman v. Georgia*, 408 U.S. 238, was followed by nine separate opinions totaling a staggering 231 pages.

62. This Author’s review of the 80 decisions issued by the Supreme Court during its 2004 Term (the last full term before Chief Justice Roberts joined the Court) revealed only five instances in which five or more Justices issued separate opinions. An additional seven decisions drew four separate opinions, while the remaining 68 decisions of the term were reported with three or fewer separate opinions. Of course, this empirical snapshot is not evidence of the relative cohesiveness of the Court’s decisions, but the consistency with which the Court issued decisions with three or fewer opinions in the 2004 Term seems to suggest that the Court is infrequently splintered to the point of confusion.

63. This doctrinal fleshing out must be done judiciously to avoid overly broad holdings that could lead to unanticipated consequences. This Comment contends, however, that issuing overly narrow holdings for the sake of unanimity is an unwise approach.

64. Unanimity could also result in the suppression of arguments that might otherwise be contained in a dissent or concurrence. Such opinions can become increasingly valuable over time, as was famously demonstrated by Justice Harlan’s forward-looking dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (arguing that the Constitution forbids government-sanctioned racial discrimination).

Chief Justice Roberts has made it clear that he hopes to help the Court achieve greater clarity in the law by issuing more unanimous opinions and by narrowing the holdings of individual decisions. The Supreme Court's decision making process is by no means transparent, but *Long Island Care* seems to be one example of a case that fits Chief Justice Roberts's mold because its holding was both unanimous and narrow. Although the decision necessarily involved invocation of the *Mead* doctrine, Justice Breyer framed the discussion to avoid fully engaging the relevant two-step analysis, a move that allowed Justice Scalia to join the opinion without retreating from his previous condemnation of *Mead*. In doing so, however, the Supreme Court delayed further development of the unsettled *Mead* doctrine, demonstrating that unanimity is undesirable when it comes at the expense of doctrinal clarification.

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