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## Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court

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# THREE STEPS FORWARD: SHARED REGULATORY SPACE, DEFERENCE, AND THE ROLE OF THE COURT

Amanda Shami\*

*When a party files suit challenging the legitimacy of an agency's interpretation of its governing statute, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. instructs courts to defer to the agency's interpretation where (1) the court has found that Congress had not foreclosed the agency's interpretation, and (2) the agency's interpretation was a reasonable or permissible exercise of its authority. However, sometimes Congress enacts statutes delegating authority over a given regulatory space to more than one agency. When two agencies have shared authority under the same regulatory scheme, those agencies may disagree regarding the interpretation of certain provisions that the agencies administer. This forces courts to consider the applicability of Chevron: To which agency does the court owe deference? All of the agencies? Only one? Does the court owe deference at all?*

*Some courts refuse to award any deference where multiple agencies administer a statute. Other courts do not view deference as precluded, and they instead consider the reasonableness of the interpretations in awarding the less substantial Skidmore deference. The courts' differing treatments are a subsidiary problem to a more fundamental issue: Why should the fact that multiple agencies administer a statute affect the award of deference if the interpretation is a reasonable exercise of authority?*

*This Note argues that courts should rely on the policies, considerations, and canons of construction that gave way to and underlie the principles of deference in determining to which agency the court should defer. The Note offers a six-factor balancing test for courts to use in making this assessment.*

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#### INTRODUCTION

Consider a piece of legislation aimed at ensuring the safety of bioengineered food. Assume Congress has delegated concurrent authority to promulgate regulations with the force of law to both the Food and Drug Administration (FDA), which regulates the food safety standards for almost all food products, and the U.S. Department of Agriculture (USDA), which regulates the food safety standards related to meat, poultry, and processed egg products. The statute delegates to both agencies authority over the same regulatory space: the safety of the use of bioengineered food in breeding cattle.

Further assume that each agency construes the statute differently so that each interprets “safety” as it understands the term under its own regulations, and the FDA’s regulations are more stringent. These interpretations

directly conflict, and both agencies advocate on behalf of their interpretation. Assume for the moment that the FDA's standards were promulgated without reference to any scientific study, but that the USDA's standards were the product of thorough and rigorous scientific study. And assume that the USDA had been responsible for this particular regulatory space since 1906 and that the FDA received its current authority in 1958. How would a court confronting this situation resolve the conflict? Typically, courts will defer to agency interpretations of statutes under which the agency has regulatory control. But here, if both interpretations meet the standards for receiving that deference, the court can only defer to one agency; so how will it decide?

This problem occurs when Congress delegates shared regulatory authority to multiple agencies in the same policy space.<sup>1</sup> When Congress delegates power and authority to only one agency to promulgate regulations having the force of law, the agency deference issue is typically straightforward.<sup>2</sup> Where a party challenges either an agency's statutory interpretation or its regulation, the *Chevron* doctrine instructs courts to defer to most agency judgments where the court has found that (1) Congress has not explicitly foreclosed the agency's decision, and (2) the agency's interpretation was reasonable or permissible.<sup>3</sup> But when multiple agencies have authority over a given statute, to whom does the court owe deference on issues of statutory interpretation?<sup>4</sup> All of the agencies? Only one? Is deference precluded entirely?<sup>5</sup>

While it is unusual for agencies to directly oppose each other in court, it is not exactly rare.<sup>6</sup> “[A]gencies do not generally sue each other in court,”<sup>7</sup>

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1. See generally Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011); Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815 (2011); Daniel Lovejoy, Note, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879 (2002).

2. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1726–27 (2002).

3. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

4. *Chao v. Occupational Safety & Health Review Comm'n*, 540 F.3d 519, 525 (6th Cir. 2008) (“Left undecided by [the Supreme Court], however, is to whom does a reviewing court defer when the [two agencies] offer conflicting interpretations of a provision of the Act.”).

5. See Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2234–35 (2012).

6. See generally Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217 (2013).

7. Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunction of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 52 (2009); see also Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255 (1994) (describing the role of the Solicitor General in overseeing government litigation and resolving interagency conflicts). Furthermore, the executive branch has developed several avenues to resolve disputes between agencies internally. One example is Executive Order 12,866, which outlines a process for resolving disagreements among agency heads. Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1994), *reprinted as*

though they sometimes find themselves on either side of the court aisle because of statutory split-enforcement arrangements or adjudicatory relationships.<sup>8</sup> More often, conflicting agency views exist beneath the surface and only become apparent when the action of another agency is challenged.<sup>9</sup>

This Note focuses on these instances of inconsistency and disagreement between agencies tasked with overlapping regulatory authority. Part I discusses the evolution of judicial review of agency interpretations beginning with *Skidmore v. Swift & Co.*,<sup>10</sup> and reviewing the impact and implications of the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>11</sup> Part I also explains the several ways by which Congress creates overlapping regulatory authority. Part II summarizes some considerations regarding issues of shared jurisdiction that courts have confronted and analyzes the current interagency deference conflict, exploring several cases in depth. Finally, Part III applies this discourse and proposes a solution to the interagency deference conflict: the addition of a *Chevron* Step Three to assist courts in determining which agency is entitled to deference.

#### I. TWO STEPS BACK: BACKGROUND ON DEFERENCE AND SHARED REGULATORY SPACE

This part surveys the current landscape with respect to agency deference and shared regulatory space. Part I.A summarizes the topic of agencies and agency deference generally. It includes a brief description of the history of judicial review of agency determinations, the history of agency deference, and a discussion of *Skidmore*, *Chevron*, and *United States v. Mead Corp.*<sup>12</sup> as the articulations of the modern analytical framework for resolving deference cases. Part I.A concludes with a survey of the policy implications and considerations that underlie the deference framework.

Part I.B presents the different ways through which shared agency jurisdiction can come to exist. Part I.B first presents a theoretical framework to understand the ways Congress creates shared agency

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*amended in 5 U.S.C. § 601 app. at 108, 111 (Supp. IV 2010); see also Tex. State Comm'n for the Blind v. United States*, 796 F.2d 400, 404 (Fed. Cir. 1986) (reviewing a conflict between the Department of Education and the Department of Defense regarding interpretations of a statute and noting that Executive Order No. 12,146, 3 C.F.R. § 409.411 (1980), required the Department of Education to refer the matter for resolution to the Department of Justice, which advised that it resolved the conflict in favor of the Department of Defense).

8. *See, e.g.*, *Hinson v. Nat'l Transp. Safety Bd.*, 57 F.3d 1144, 1151–52 (D.C. Cir. 1995) (adjudicating a Federal Aviation Administration petition for review regarding a National Transportation Safety Board order).

9. *See, e.g.*, *Gulf Restoration Network v. U.S. Dep't of Transp.*, 452 F.3d 362, 367 (5th Cir. 2006) (considering an agency action where the National Oceanic and Atmospheric Administration, an administration of the Department of Commerce, disagreed with the Department of Transportation's action).

10. 323 U.S. 134 (1944).

11. 467 U.S. 837 (1984).

12. 533 U.S. 218 (2001).

jurisdiction and then provides concrete examples illustrating the types of shared space that exist. These include (1) the creation of shared regulatory space through a single statute, (2) the piecemeal creation of shared regulatory space through multiple statutes, and (3) the creation of potential shared regulatory space through ambiguous statutes.

#### A. Federal Agencies and Agency Deference

This section presents the basic history and principles of judicial deference that inform the discussions that follow on the problem of interagency conflict in shared regulatory space.

##### 1. Judicial Review of Agency Interpretations and Deference Before *Chevron*

Even before *Skidmore* or *Chevron*, the U.S. Supreme Court instructed reviewing courts to uphold regulations adopted by agencies pursuant to a specific grant of legislative power unless the promulgating agency exceeded the scope of its statutory authority.<sup>13</sup> This deference principle was not limited to agency rulemaking, but also extended to an agency's exercise of its formal adjudicatory authority.<sup>14</sup> From the New Deal era through the Supreme Court's opinion in *Chevron*, the Court's 1944 opinion in *Skidmore* was the primary source for guidance on judicial review of administrative interpretations and agency deference.<sup>15</sup>

In *Skidmore*, seven employees sued their employer for violations of the Fair Labor Standards Act (FLSA) in federal district court, seeking to recover overtime pay for periods of time where they were on-call for the employer, but not required to perform any specific tasks except to answer fire alarms.<sup>16</sup> In construing the language of the FLSA, the district court found that the hours employees spent on-call did not constitute hours worked under the FLSA for which overtime compensation would be owed to them. The Fifth Circuit affirmed.<sup>17</sup>

A unanimous Supreme Court reversed, finding that "the rulings, interpretations and opinions of the Administrator under [the FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants

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13. See, e.g., *Atchison, Topeka & Santa Fe Ry. v. Scarlett*, 300 U.S. 471, 474 (1937) ("The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute."); *AT&T v. United States*, 299 U.S. 232, 236-37 (1936) ("This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.").

14. See, e.g., *Gray v. Powell*, 314 U.S. 402, 412 (1941) ("Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched.").

15. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1239 (2007); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 211 (2006).

16. *Skidmore v. Swift & Co.*, 323 U.S. 134, 135 (1944).

17. *Id.* at 136.

may properly resort for guidance.”<sup>18</sup> The Court articulated the factors that courts should consider in their deference analysis: “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>19</sup>

Put another way, the *Skidmore* principle is that reviewing courts should respectfully consider an interpretation of a statute by an agency or agency official to which Congress has vested the primary responsibility in administering that statute.<sup>20</sup> Where a court is persuaded that the agency’s executive, authority-based interpretation should receive total or partial recognition in the outcome, that court should defer to that agency.<sup>21</sup> *Skidmore* provided courts with a balancing standard for cases involving agency deference that remained the primary guidance until *Chevron*.<sup>22</sup>

## 2. *Chevron* and Its Impact

In *Chevron*,<sup>23</sup> the Supreme Court considered a challenge to an Environmental Protection Agency (EPA) regulation promulgated under the Clean Air Act.<sup>24</sup> The case involved permit programs in states that had not met federal ambient air quality requirements (the “nonattainment” states).<sup>25</sup> The EPA regulations required nonattainment states to establish a permit program for “new or modified major stationary sources” of air pollution<sup>26</sup> and precluded the issuance of permits to a new or modified source unless it met those requirements.<sup>27</sup>

Before the 1980s, the EPA had treated any pollution-emitting device in a plant as a “source.”<sup>28</sup> In 1981, the EPA decided that it would no longer require a plant to apply for a permit if the modification of an existing device or the installation of a new device did not increase the plant’s total emissions.<sup>29</sup> This new interpretation departed from the old understanding that a “source” was each pollution-emitting device, replacing that interpretation with a broader definition of “source” that included the whole plant.<sup>30</sup> This plant-wide definition of source would enable a company to add or modify pollution-emitting devices as long as it reduced emissions

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18. *Id.* at 140.

19. *Id.*

20. *Id.*

21. John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1117 (2004).

22. Hickman & Krueger, *supra* note 15, at 1247.

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

24. 42 U.S.C. §§ 7401–7642 (1982).

25. *Chevron*, 467 U.S. at 839–40.

26. 42 U.S.C. § 7502(b)(6).

27. *Id.* § 7503.

28. *See* *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 720 (D.C. Cir. 1982), *rev’d sub nom. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

29. *Chevron*, 467 U.S. at 857–59.

30. *Id.* at 840.

from another part of the same plant to result in no net increase in emissions.<sup>31</sup>

The question before the Court in *Chevron* was whether the plantwide definition of “source” violated the Clean Air Act.<sup>32</sup> Before reaching the Supreme Court, the D.C. Circuit held that it did.<sup>33</sup> For the circuit court, the purpose of the nonattainment program was to bring about state compliance with federal air quality requirements in those states where compliance was lagging, and the plantwide definition of source was inconsistent with that overriding goal.<sup>34</sup> The court was unable to point to a particular provision that barred the EPA’s plantwide definition, but it said that the EPA’s definition was inconsistent with the general purposes of the nonattainment program.<sup>35</sup>

The Supreme Court rejected the D.C. Circuit’s rationale.<sup>36</sup> The Court found that nothing in the statute or its legislative history spoke to the issue of whether the plant or each pollution-emitting device within it amounted to a “source.”<sup>37</sup> The Court further found that the general objectives of the nonattainment program, embodying an effort to promote environmental quality with minimal restrictions on economic growth, were simply too broad to provide such a narrow definition.<sup>38</sup>

Because Congress had not directly addressed the exact conflict at issue, the question before the Court was whether a permissible construction of the statute grounded the agency’s interpretation.<sup>39</sup> For the Court, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”<sup>40</sup> In adjudicating the matter, the Supreme Court created the now-famous *Chevron* two-step inquiry: a court first asks whether Congress had explicitly foreclosed the agency’s interpretation (Step One), and if the answer is Congress has not, then the court asks whether that interpretation was reasonable or permissible (Step Two).<sup>41</sup> Though seemingly straightforward, the *Chevron* two-step inquiry becomes complex in a variety of cases.<sup>42</sup>

31. *Id.*

32. *Id.*

33. *Gorsuch*, 685 F.2d at 726.

34. *Id.* at 727–28.

35. *Id.*

36. *Chevron*, 467 U.S. at 842.

37. *Id.* at 842, 851.

38. *Id.* at 851, 862.

39. *Id.* at 842.

40. *Id.* at 844.

41. *Id.* at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” (citations omitted)).

42. For further reading on *Chevron*, see Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L.



Since *Chevron*, three major justifications have been articulated as support for a presumption in favor of deferring to an agency's interpretation. The first justification is congressional intent—that Congress, in delegating authority to agencies, intends for the agencies to be the principal interpreters of regulatory statutes.<sup>43</sup> The Supreme Court has relied on this rationale in subsequent opinions,<sup>44</sup> but Justice Scalia and others highlight that this intent is a “fictional” construct as means to legitimize their deference to the agency.<sup>45</sup> The second and third justifications in support of agency deference come from the majority holding in *Chevron*, where the Court emphasized the specialized agencies' relatively greater technical expertise and the agencies' superior political accountability, noting that agencies are accountable to the electorate through the President.<sup>46</sup>

### 3. The Current Analytic Frameworks That Guide Agency Deference Analyses

In 2001, the Supreme Court somewhat clarified the approaches courts should use in adjudicating cases of agency deference in *United States v. Mead Corp.*<sup>47</sup> *Mead* involved a U.S. Customs Service's decision, based on its interpretive rules, to classify certain day planners Mead Corporation imported as “diaries” rather than as “other items” of a similar sort.<sup>48</sup> This classification meant that a 4 percent tariff would apply to each day planner Mead sought to import into the United States, whereas if the planners received the categorization of “other items,” no tariff would apply.<sup>49</sup> The Court of International Trade affirmed the Government's classification, but the Federal Circuit reversed, holding that the Customs Service's classification did not warrant either *Chevron* deference or any other deference scheme.<sup>50</sup>

The Supreme Court vacated the judgment, holding that while *Chevron* deference was inappropriate there, the interpretive rules could receive *Skidmore* deference.<sup>51</sup> The Court held that interpretative rules did not merit *Chevron* deference unless the statute authorizing the agency delegates

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REV. 301 (1988); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

43. See Sunstein, *supra* note 42, at 2109.

44. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

45. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517; see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2642–43 (2003); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006).

46. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

47. 533 U.S. 218 (2001).

48. *Id.* at 220–26.

49. *Id.* at 224–25.

50. *Id.* at 225–26.

51. *Id.* at 235.

lawmaking power to the agency.<sup>52</sup> As applied to *Mead*, the Court held that the Customs Service's classification rules could not receive *Chevron* deference because they "present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."<sup>53</sup> The Court continued that the agency could raise a claim that the rule deserved *Skidmore* deference based on the ruling's "thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."<sup>54</sup>

Following the Court's ruling in *Mead*, scholars have recognized the current scheme for resolving questions regarding agency deference to include three distinct analytic approaches.<sup>55</sup> In what scholars have termed "Step Zero,"<sup>56</sup> *Mead* instructs a reviewing court to first determine whether Congress had delegated authority to the agency generally to make rules carrying the force of law; if the court determines that Congress has, then the court asks whether the agency promulgated the regulation at issue in the exercise of that authority.<sup>57</sup> These two questions provide courts with a threshold inquiry as to which one of the two deference standards, *Chevron* or *Skidmore*, applies.<sup>58</sup> If the court answers either question in the negative, then the court applies the *Skidmore* balancing inquiry, which is the first analytic framework.<sup>59</sup> If the court answers both questions in the affirmative, then the court moves on to the *Chevron* analysis.<sup>60</sup>

*Chevron* deference, the second analytic framework, is an "all-or-nothing proposition," whereas *Skidmore* views deference "along a sliding scale" where the court assesses the agency's interpretation against multiple factors to determine what weight of deference the agency should receive.<sup>61</sup> Accordingly, courts award "various degrees of deference, ranging from none, to slight, to great, depending on the court's assessment of the strength of the agency interpretation under consideration."<sup>62</sup>

However, if a court answers the two Step Zero questions in the affirmative, the court then applies the *Chevron* two-step inquiry.<sup>63</sup> *Chevron* Step One asks whether the statute is ambiguous; if the court determines the

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52. *See id.* at 229 (recognizing "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings" as meriting of *Chevron* deference).

53. *Id.* at 231.

54. *Id.* at 235.

55. *See, e.g.,* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

56. Merrill & Hickman, *supra* note 55, at 836; Sunstein, *supra* note 15, at 191.

57. *Mead*, 533 U.S. at 226–27 (requiring courts to consider whether Congress gave the agency in question the authority to bind regulated parties with "the force of law" and, if so, whether the agency "exercise[d] . . . that authority").

58. *See* Hickman & Krueger, *supra* note 15, at 1247.

59. *See* Merrill & Hickman, *supra* note 55, at 873.

60. *See id.*

61. *Id.* at 855.

62. *Id.*

63. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

statute is ambiguous, then the court moves to Step Two, which asks whether the interpretation is a permissible reading of the statute.<sup>64</sup> If the court answers either Step One or Step Two in the negative, then the court turns to a de novo review of the agency's interpretation.<sup>65</sup>

At the same time, the Administrative Procedure Act (APA) instructs courts to decide "all relevant questions of law" using de novo review,<sup>66</sup> which is the third analytic approach to considering issues of agency interpretation of statutes. Though courts have had de novo authority over statutory interpretation since the APA's enactment, courts have used their discretion to defer to certain agency interpretations rather than use de novo review.<sup>67</sup> Accordingly, courts have discretion to undertake a de novo review or to apply a deference regime to cases involving agency interpretations.<sup>68</sup> In sum, *Mead* represents the current regime, which includes the *Chevron* inquiry, the *Skidmore* balancing test, and de novo review.<sup>69</sup>

#### 4. Deference Policy Considerations and Implications

Some scholars argue that when courts refuse to award deference to reasonable agency interpretations of statutes, they undermine the longstanding deference doctrine and the general idea that courts should not supplant their interpretations for the interpretations of the agency.<sup>70</sup>

Scholars have argued that an agency's reasonable interpretation of a statute it administers should prevail over whatever interpretation the court presents as an alternative.<sup>71</sup> The reasons and values that an agency's interpretation should prevail include (1) democratic theory, policymaking, and politics; (2) comparative competence; (3) flexibility; and (4) national uniformity.<sup>72</sup> First, adopting the agency's interpretations serves democratic

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64. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

65. *See id.*

66. 5 U.S.C. § 706 (2012).

67. *See* Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 380 (2002) (citing ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, 77th CONG., REP. ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 90–91 (Comm. Print 1941)).

68. *See* ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, 77th CONG., REP. ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 90–91 (Comm. Print 1941) (noting that courts may approach questions of statutory interpretation de novo or they may opt to determine whether the agency interpretation has substantial support rather than determine what the court perceives as the correct interpretation).

69. *See* Hickman & Krueger, *supra* note 15, at 1248.

70. *See, e.g.*, Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255 (1988); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

71. *See, e.g.*, Byse, *supra* note 70, at 257; Starr, *supra* note 70, at 307–08.

72. Byse, *supra* note 70, at 257.

theory, policymaking, and politics because this adoption is a “mechanism ‘for improving the responsiveness of government to the desires of the electorate.’”<sup>73</sup> The rationale is that delegations of authority to administrative agencies allow the electorate to secure a change in policies via its election of the President to office; in turn, this promotes democratic values and political accountability.<sup>74</sup>

Second, comparative competence involves the notion that the agency has superior skills as compared to the judiciary because of the expertise the agency has honed in managing its responsibilities.<sup>75</sup> This competence arises from the agency’s technical and professional experts, its day-to-day interactions with the industry it regulates, its relationships with the relevant congressional committees, its relationships with other government agencies, its experience in dealing with problems, and its experience in managing its administrative responsibilities generally, which include rulemaking, adjudication, investigation, negotiation, and prosecution.<sup>76</sup> Furthermore, and related to this point of competence, the disparity between the expertise of the agency and that of the court has only widened in recent years as federal statutory programs have become more complex.<sup>77</sup> The complexity is such that most federal judges would be unable to conceive of all of the ramifications triggered by the narrow questions that come before them.<sup>78</sup> And the complexity of federal statutory law is not limited to multiple or conflicting purposes but also includes the existence of interlocking provisions that only an expert may fully comprehend.<sup>79</sup> Accordingly, some scholars suggest that a practice in favor of deference to agency interpretations is necessary to ensure that laws are “internally coherent.”<sup>80</sup>

Third, scholars identify agency flexibility, noting that once a court has interpreted a statute, it is unlikely that the interpretation may change because of principles of stare decisis; in contrast, an agency is free to change its own interpretation in light of new scientific or other developments (so long as it remains reasonable).<sup>81</sup> Thus, if the interpretative responsibility belonged to the judiciary, this would restrict the agency’s flexibility to adapt to new technology or policy considerations.<sup>82</sup>

Finally, considerations of national uniformity provide further support for leaving the statutory interpretations in the hands of the relevant agency.<sup>83</sup> Agencies face lawsuits across the country, and if the judiciary does not adhere to *Chevron* principles uniformly, then the agency would be subject to differing and inconsistent rulings, a result that would frustrate the goal of

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73. *Id.* (quoting Mashaw, *supra* note 70, at 95).

74. *Id.* at 257.

75. *Id.* at 258.

76. *Id.* (citing Starr, *supra* note 70, at 309–10).

77. Merrill & Hickman, *supra* note 55, at 861.

78. *Id.*

79. *Id.* at 862.

80. *Id.*

81. Byse, *supra* note 70, at 259.

82. *Id.*

83. *Id.*

a uniform, nationwide administration.<sup>84</sup> A presumption in favor of the agency would prevent a national law that varied in application from region to region.<sup>85</sup>

Other scholars argue that separation of powers requires courts to award deference to an agency's reasonable and permissible interpretation of its statute.<sup>86</sup> These scholars suggest that courts owe deference to agency interpretations because the agency-court relationship is not a supervisory relationship but rather is a relationship between two branches of government and thus premised on norms of respect and noninterference.<sup>87</sup> Though the deference courts owe to agencies is not on par with the deference courts accord to Congress or the President, it remains that the congressional decision to delegate power to an agency (and that agency's political accountability via the executive) compel courts to defer where the agency presents a reasonable statutory interpretation.<sup>88</sup>

Moreover, Congress does not always speak in precise language, nor does it expressly delegate when and how courts should award deference.<sup>89</sup> When the legislature has not been clear, courts should, in the first instance, attempt to determine what Congress may have intended.<sup>90</sup> Where the courts cannot determine the congressional intent,<sup>91</sup> courts should engage in a value assessment of which regime is the "most sensible one to attribute to Congress under the circumstances."<sup>92</sup> As Professor Sunstein notes, "[t]his assessment is not a mechanical exercise of uncovering an actual legislative decision," but one which "calls for a frankly value-laden judgment about comparative competence, undertaken in light of the regulatory structure and applicable constitutional considerations."<sup>93</sup>

As a separate matter, though some have argued for the elimination of *Skidmore* from the deference regime,<sup>94</sup> the relevance of the framework and recent scholarship on its reemergence within the context of *Chevron* support the position that *Skidmore* remains an integral part separately from

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84. *Id.* (citing Strauss, *supra* note 70, at 1121–22).

85. *Id.* at 259–60; Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 282 (1988).

86. Kmiec, *supra* note 85, at 269.

87. *Id.* at 270 (citing Starr, *supra* note 70, at 300).

88. Kmiec, *supra* note 85, at 281.

89. Sunstein, *supra* note 42, at 2086.

90. See RONALD DWORKIN, *LAW'S EMPIRE* 337–38 (1986) (arguing that statutory interpretation is a process of making a statute "the best piece of statesmanship it can be" by finding "the best justification . . . of a past legislative event").

91. Sunstein, *supra* note 42, at 2086 ("Sometimes congressional views cannot plausibly be aggregated in a way that reflects a clear resolution of regulatory problems, many of them barely foreseen or indeed unforeseeable.").

92. *Id.* (encouraging this method where the courts confront the more frequent issue of one agency's interpretations). Professor Sunstein's suggestion is just as applicable where two or more agencies vie for deference. See *infra* Part III.

93. Sunstein, *supra* note 42, at 2086.

94. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 256–59 (2001) (Scalia, J., dissenting); Claire R. Kelly, *The Brand X Liberation: Doing Away with Chevron's Second Step As Well As Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 195–98 (2010).

and as an implicit part of the *Chevron* analysis itself.<sup>95</sup> Some scholars argue that an underappreciated feature of *Chevron*'s Step One requirement is that this process itself implicitly uses *Skidmore*.<sup>96</sup> This is the case because the history of an agency's interpretation is relevant to a court's determination of whether Congress has delegated unambiguous authority to the agency.<sup>97</sup> In assessing Step One, courts consider the consistency and the longstanding nature of the interpretation, both of which are explicit factors in *Skidmore*.<sup>98</sup> An agency's expertise, both a *Skidmore* factor and *Chevron* consideration, is also relevant to a court's determination whether the statute supports the agency's interpretation.<sup>99</sup> Moreover, an agency's participation in the statute's legislative history is pertinent to the Step One inquiry.<sup>100</sup> In this way, courts undertake the first step of *Chevron* through a *Skidmore* "lens," giving *Skidmore* weight to the means by which the agency interpreted its authority under its authorizing statute.<sup>101</sup>

### B. The Creation of Shared Regulatory Space

Congress often delegates shared and overlapping regulatory authority to multiple agencies,<sup>102</sup> and it is not unusual to see more than one agency responsible for certain regulated activity.<sup>103</sup> Congress often delegates the same or similar functions to more than one agency or compartmentalizes regulatory space across multiple agencies, assigning each agency a discrete area to regulate.<sup>104</sup> These instances are not uncommon—they are present in virtually all areas of social and economic regulation, from food safety to

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95. See, e.g., William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 449; Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1145–46 (2012).

96. Eskridge, Jr., *supra* note 95, at 449; see also Byse, *supra* note 70, at 265–66.

97. Eskridge, Jr., *supra* note 95, at 449.

98. *Id.* at 449; Strauss, *supra* note 95, at 1145–46.

99. Eskridge, Jr., *supra* note 95, at 449.

100. *Id.* at 449 n.151 (noting that the Supreme Court emphasized the agency's participation in the statute's legislative history in *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 549 (1940)).

101. *Id.* at 449–50. In 1988, four years after the Supreme Court handed down *Chevron*, Clark Byse advocated for a *Chevron* Step One where courts pay particular attention to (a) the [agency's] reasoning in support of its interpretation, (b) the potential or likelihood that later developments might indicate the appropriateness of a different interpretation, (c) the advantages of nationwide uniformity in the administration of federal statutes, (d) the desirability of allowing for presidential influence of policymaking, and (e) the fact that the [agency's] interpretation, "while not controlling upon the courts . . . , do[es] constitute a body of experience and informed judgment to which [the reviewing court] . . . may properly resort for guidance."

Byse, *supra* note 70, at 266 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

102. See, e.g., *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (quoting *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986)).

103. See, e.g., Freeman & Rossi, *supra* note 1; Gersen, *supra* note 1, at 160; Marisam, *supra* note 1; Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1699–701 (2006).

104. Freeman & Rossi, *supra* note 1, at 1134.

financial regulation.<sup>105</sup> For example, both the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are responsible for antitrust enforcement, even though in theory only one agency is necessary to enforce U.S. antitrust policies.<sup>106</sup> On the other hand, the FTC and DOJ may have different characteristics that, when taken together, lead to a more comprehensive antitrust enforcement regime.<sup>107</sup>

Another example is the food safety regulatory system, where fifteen federal agencies are vested with varying responsibilities for ensuring food safety.<sup>108</sup> Under the current scheme, the FDA,<sup>109</sup> the USDA,<sup>110</sup> the Department of Homeland Security (DHS),<sup>111</sup> the EPA,<sup>112</sup> and the National Marine Fisheries Service (NMFS),<sup>113</sup> among others, each have some subset of responsibilities. Though the agencies have coordinated with each other via interagency agreements,<sup>114</sup> the potential for conflict of interpretation remains.<sup>115</sup>

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105. *Id.*

106. *Id.* at 1146 (citing Kelly Everett, *Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 727, 754–58 (2009)).

107. As Freeman and Rossi point out, while DOJ is an agency of the executive branch, the FTC is an independent agency, and in addition to their different structures and levels of political accountability, the agencies possess differing (and arguably complementary) features, including expertise, resources, and remedial tools. Freeman & Rossi, *supra* note 1, at 1146.

108. *Id.* at 1147 (citing Lyndsey Layton, *Unsafe Eggs Linked to U.S. Failure to Act*, WASH. POST, Dec. 11, 2010, at A1).

109. The FDA performs the principal role and governs the food safety standards for almost all food products. *Id.* at 1147 & n.49.

110. The USDA is responsible for governing the food safety standards related to meat, poultry, and processed egg products. *Id.*

111. DHS is responsible for food security via monitoring and surveillance programs and as such, creates vulnerability assessments, mitigation strategies, and response plans. *Id.* at 1147 & n.51.

112. The EPA regulates, among other things, the toxicity of pesticides and maximum allowable residue levels on food commodities and animal feed. *Id.* at 1147 & nn.52–53.

113. NMFS, a component of the Department of Commerce, is responsible for conducting fee-for-service inspections of seafood safety and quality. *Id.* at 1147 & nn.49–51; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-435T, FEDERAL OVERSIGHT OF FOOD SAFETY: FDA'S FOOD PROTECTION PLAN PROPOSES POSITIVE FIRST STEPS, BUT CAPACITY TO CARRY THEM OUT IS CRITICAL 3 (2008), *available at* <http://www.gao.gov/assets/120/118821.pdf>.

114. A typical interagency agreement resembles a contract in that it assigns responsibility between the agencies, establishes procedures, and binds the agencies to fulfill mutual commitments. Freeman & Rossi, *supra* note 1, at 1161. However, these agreements are generally unenforceable and unreviewable by courts. *Id.* For further reading on other agency coordination tools, including interagency consultation, joint policymaking, and presidential coordination, all of which agencies may use where overlapping regulatory space exists, see *id.* at 1155–81.

115. For further examples of multiple agencies administering the same regulatory space, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-318SP, OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE TAX DOLLARS, AND ENHANCE REVENUE 5–154 (2011), *available at* <http://www.gao.gov/new.items/d11318sp.pdf> (identifying thirty-four areas of duplicative agency programs); Freeman & Rossi, *supra* note 1, at 1151.

The following subsections examine these delegations of shared authority, first by outlining theoretical approaches to the types of congressional delegations of authority, and then second by providing real examples of these theoretical approaches, which illustrate the shared regulatory spaces that exist. These actual examples are presented through the lens of authority creation and include (1) the creation of shared regulatory space through a single statute, (2) the piecemeal creation of shared regulatory space through multiple statutes, and (3) the creation of potential shared regulatory space through ambiguous statutes. This section's organization recognizes that framing the types of congressional delegations reflects only the end result of those delegations—simply the kinds of shared regulatory space that may exist. Accordingly, the beginning—the creation of that shared regulatory space, including the when, why, and how—provides the other half of the background on the existence of shared regulatory space. The next section takes up that analysis.

### 1. Theoretical Approaches to the Creation of Shared Regulatory Jurisdiction

As Professor Gersen explains, when Congress seeks to enact legislation authorizing two agencies to regulate some policy space, there are four theoretical models for the potential shared regulatory schemes.<sup>116</sup> The four variations turn on two elements: (1) exclusivity, that is, whether Congress seeks to delegate authority to one agency alone or to both, and (2) completeness, that is, whether Congress seeks to delegate authority to act over the entire policy space or only a subset of the space.<sup>117</sup> As an example, if both agencies receive concurrent authority, Congress has created a jurisdictional overlap, but if neither agency receives authority, then Congress has created a jurisdictional underlap.<sup>118</sup>

The first variation involves situations where Congress delegates complete and exclusive jurisdiction to the first agency over half a policy space and complete and exclusive jurisdiction to the second agency over the other half.<sup>119</sup> In this variation, on its face, Congress has not created overlapping authority.<sup>120</sup>

The second variation encompasses those situations where Congress delegates incomplete and exclusive jurisdiction to each agency, which is to say that, while the statute on its face has not created an overlap of authority, there remains some element of the policy space that belongs to neither agency (jurisdictional underlap).<sup>121</sup>

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116. Gersen, *supra* note 1, at 208–09. For an alternate taxonomy on authority allocation, see Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19, 37–61 (2014).

117. Gersen, *supra* note 1, at 208.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 208–09.



The third variation involves Congress delegating complete authority, which is to say, the entire policy space has someone regulating it, but the authority is nonexclusively assigned.<sup>122</sup> This means that Congress has given some authority to both agencies such that jurisdiction is partially overlapping.<sup>123</sup>

The fourth and final variation involves Congress delegating incomplete and nonexclusive authority to both agencies.<sup>124</sup> Here, each agency shares some portion of its delegated authority with the other agency—jurisdictional overlap—and like the second variation, there is jurisdictional underlap in that some portion of the policy space goes unassigned.<sup>125</sup>

Congress may have different policy reasons for creating such schemes. Some political scientists have argued that overlapping and potentially duplicative delegations might benefit Congress.<sup>126</sup> In turn, legal scholars have argued that overlapping regulatory jurisdiction can produce positive effects because the overlap creates a productive competition among the agencies,<sup>127</sup> prompting them to produce “policy-relevant information.”<sup>128</sup> Another scholar argues that overlapping regulatory authority across multiple agencies may reduce congressional monitoring costs<sup>129</sup> because the overlap creates a system of interagency “fire alarms.”<sup>130</sup> Another articulation rests on public choice theory: overlapping delegations provide congressional members with opportunities to take credit for decisions that benefit their constituents and deflect blame on the agencies when things go awry.<sup>131</sup>

Further, Congress may be legislating in order to avoid giving a single agency responsibilities that conflict: tasking an agency to further the goals of private industry while also tasking the same agency to promote general

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122. *Id.* at 209.

123. *Id.*

124. *Id.*

125. *Id.* In addition to creating the potential for inconsistency and ambiguity among agencies, variations three and four often create duplication of efforts and redundancy of mission. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-318SP, OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE TAX DOLLARS, AND ENHANCE REVENUE 5-154 (2011), available at <http://www.gao.gov/new.items/d11318sp.pdf> (identifying thirty-four areas of duplicative agency programs). For a comprehensive discussion of congressional duplication and redundancy, both intentional and inadvertent, see Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237 (2011); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78 (2012); Doran, *supra* note 1; and Marisam, *supra* note 1.

126. See, e.g., Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274 (2003).

127. Gersen, *supra* note 1, at 212.

128. Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1463 (2011).

129. William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 636-38 (1975).

130. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

131. Freeman & Rossi, *supra* note 1, at 1139-40.

public interest can and does lead to agencies focusing on the short-term industry interests at the expense of the long-term public interests.<sup>132</sup> In fact, it was these kinds of conflicting missions that prompted Congress to strip the Atomic Energy Commission of its development (furthering private industry) and safety (furthering general public interest) missions and give the development mission to the Department of Energy and the safety mission to the Nuclear Regulatory Commission.<sup>133</sup>

## 2. Original Creation of Shared Regulatory Jurisdiction Statutes

Congress can pass a single statute that creates shared regulatory jurisdiction between two or more agencies. This shared space can exist as either overlapping, compartmentalized, or competing jurisdiction.

One example of overlapping regulatory jurisdiction lies in the Nuclear Waste Policy Act of 1982,<sup>134</sup> which vested authority in three federal agencies to oversee the Act's purpose of disposing commercial nuclear waste in a geologic repository at Yucca Mountain, Nevada.<sup>135</sup> Under the statutory scheme, the Department of Energy is responsible for designing and ultimately operating the repository, the EPA is responsible for establishing generally applicable standards for protecting the environment from releases of radioactive materials, and the Nuclear Regulatory Commission is responsible for licensing the Department of Energy's proposed repository.<sup>136</sup>

A second illustration is the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>137</sup> through which Congress vested compartmentalized and complementary authority in multiple agencies. Under the statutory regime, the Consumer Financial Protection Bureau's (CFPB) role is to regulate financial products to protect consumers via rulemaking,<sup>138</sup> but its rules are subject to review by the Financial Stability Oversight Council (FSOC), which includes heads of the Federal Reserve and the Securities and Exchange Commission (SEC) among the Council's members.<sup>139</sup> The U.S. Treasury Department also has authority under the Act, including the Treasury Secretary's affirmative vote to subject a

132. Barkow, *supra* note 125, at 50–52; *see also* Biber, *supra* note 7, at 7 (“[A]gents will have systematic incentives to privilege certain goals over others—specifically, to privilege goals that are easily measured over conflicting goals that are difficult to measure.”).

133. Biber, *supra* note 7, at 33; *Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing Before the S. Subcomm. on Admin. Oversight and the Courts*, 111th Cong. 5–7 (2010) (statement of Nicholas Bagley, Assistant Professor of Law, University of Michigan Law School).

134. 42 U.S.C. §§ 10101–10270 (2012).

135. *See id.* § 10133.

136. *See id.* §§ 10132–10135 (describing the various roles of the government agencies).

137. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in sections of 7, 12, 15, 18, 22, 31, 42 U.S.C.).

138. 12 U.S.C. § 5491 (2012); *see also id.* § 5512(b)(4)(B) (treating CFPB as if it “were the only agency authorized to apply, enforce, interpret, or administer the provisions of . . . Federal consumer financial law”).

139. *Id.* § 5321(b) (establishing the composition of FSOC); *id.* § 5513(c)(3)(A) (requiring a two-thirds vote).

nonbank financial institution to supervision by the Federal Reserve,<sup>140</sup> and the power to initiate a liquidation process if he determines that a financial company is in default or is in danger of default where default would endanger the U.S. economy.<sup>141</sup>

A third example involves the so-called split-enforcement model for agency adjudications, which is where Congress divides a major area of regulatory activity between two wholly separate and independent agencies, giving one agency rulemaking authority and the second agency adjudicatory authority.<sup>142</sup> The split-enforcement model differs from the better-known arrangement where a single agency is responsible for all administrative or regulatory functions, including rulemaking and enforcement.<sup>143</sup> In this way, the shared jurisdiction is arguably competing.

Several pieces of legislation conform to this model. One example is the Federal Mine Safety and Health Amendments Act of 1977<sup>144</sup> (MSHA), which assigns “developing and promulgating mandatory safety and health standards for the nation’s mining industry” to the Mine Safety and Health Administration.<sup>145</sup> The independent Federal Mine Safety and Health Review Commission, which is composed of five members, adjudicates challenges to those standards.<sup>146</sup> At the time that Congress enacted MSHA, it was a unique model, but Congress has used the split-enforcement model more since then.<sup>147</sup>

Another illustration is the Occupational Safety and Health Act<sup>148</sup> (OSHA). The Occupational Safety and Health Administration (whose parent agency is the Department of Labor) is responsible for setting and enforcing health and safety standards, while the three-member Occupational Safety and Health Review Commission is responsible for adjudicating challenges to those standards.<sup>149</sup> In *Martin v. Occupational Safety & Health Review Commission*,<sup>150</sup> the Supreme Court confronted a conflict between the Secretary of Labor and the Health Review Commission arising out of OSHA.<sup>151</sup> As discussed in more detail later,<sup>152</sup> the Court adhered to the presumption that Congress delegates law-interpreting or “force of

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140. *Id.* § 5323(a)(1).

141. *Id.* § 5383(b). For a more comprehensive summary of the Dodd-Frank Act, see Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 693–709 (2013).

142. George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987).

143. *Id.*

144. 30 U.S.C. §§ 801–962 (2012).

145. Johnson, *supra* note 142, at 316.

146. *Id.*

147. *Id.* at 315.

148. 29 U.S.C. §§ 651–678 (2012).

149. Johnson, *supra* note 142, at 315; *Hinson v. Nat’l Transp. Safety Bd.*, 57 F.3d 1144, 1147 n.1 (D.C. Cir. 1995) (split-enforcement in the area of aviation).

150. 499 U.S. 144 (1991).

151. See generally Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35 (1991).

152. See *infra* Part II.A.2.

law”<sup>153</sup> authority to a single agency<sup>154</sup> and ultimately held that the Secretary of Labor was the agency entitled to deference, not the Commission.<sup>155</sup>

### 3. Piecemeal Creation of Shared Regulatory Jurisdiction Statutes

Congress can provide authority to one agency but then can give authority to a second agency by passing a subsequent piece of legislation. Piecemeal legislation is not unusual, and the creation of overlapping regulatory authority may not be intentional; instead, it may simply result from the way that Congress creates legislation on a “rolling basis,” where Congress amends or revises existing statutory schemes to grant authority to additional agencies.<sup>156</sup> Because of this process, many times when there is overlapping regulatory jurisdiction, it is the actions of several Congresses.<sup>157</sup> This piecemeal process can lead to the unintended consequence of inconsistent or overlapping jurisdictions over regulatory areas.<sup>158</sup>

One example of this piecemeal legislation involves Congress’s efforts to regulate unsafe food additives in 1958 with the passage of the Food Additives Amendment, which empowered the FDA to regulate such additives.<sup>159</sup> At the time of passage, the USDA was responsible for the regulation of meat additives under the Meat Inspection Act of 1906.<sup>160</sup> Congress specifically stated in the new bill that any meat additive that the USDA had approved prior to 1958 was presumed safe and therefore exempt from FDA review.<sup>161</sup> In an effort to harmonize the overlapping regulatory space the 1958 Act created, Congress passed the Food Additives

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153. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (reasoning that deference is owed an agency “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”).

154. According to Gersen, the Court implied the idea of single-agency deference by the way the Court phrased the issue before it: “The question before us in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this ‘interpretive’ lawmaking power under the OSH Act.” Gersen, *supra* note 1, at 223 (quoting *Martin*, 499 U.S. at 151).

155. *Martin*, 499 U.S. at 157–58.

156. Freeman & Rossi, *supra* note 1, at 1143. A historical example of legislation passed on a rolling basis is Congress’s attempt to regulate the futures market. *See Hunter v. FERC*, 711 F.3d 155, 157 (D.C. Cir. 2013). As the court described in *Hunter*, Congress enacted the Future Trading Act in 1921, but the Supreme Court held the regulatory scheme unconstitutional. *Id.* (citing *Hill v. Wallace*, 259 U.S. 44 (1922)). Thereafter, Congress enacted the Grain Futures Act in 1922 and the Commodity Exchange Act in 1936. *Id.* Later, in 1974, Congress amended the Commodity Exchange Act to streamline the regulatory scheme and established the Commodity Futures Trading Commission. *Id.*

157. Freeman & Rossi, *supra* note 1, at 1143.

158. *See id.* (citing DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 7 (2003)).

159. Food Additives Amendment of 1958, 21 U.S.C. § 348 (2012) (delegating the authority to review all food additives to the FDA).

160. *Id.* § 601 (delegating the authority to regulate all meat products to the USDA).

161. *Id.* § 321(s)(4); *see also* *Pub. Citizen v. Foreman*, 631 F.2d 969, 972 (D.C. Cir. 1980) (discussing the “grandfather,” or “prior sanction,” exemption).

Amendment of 1958,<sup>162</sup> which created a presumption that a food additive was unsafe (1) until proven otherwise or (2) unless the additive had been exempted from this rule by statute or regulation.<sup>163</sup> Although Congress attempted to stem a conflict between the agencies, a federal suit nonetheless arose that required the Court to determine whether a certain meat additive fell under either FDA or USDA control.<sup>164</sup> This example illustrates both the piecemeal creation of shared regulatory space, as well as the conflict that may continue despite attempts at a congressional remedy.<sup>165</sup>

This potential inconsistency or competing authority only becomes a live issue after the agencies find themselves trying to implement their overlapping regulatory obligations.<sup>166</sup> In some instances, it could even be the judiciary that creates overlapping regulatory jurisdiction, interpreting a certain statute to vest authority in one agency where another agency may already have asserted regulatory jurisdiction.<sup>167</sup>

#### 4. Ambiguity Within Shared Regulatory Jurisdiction Statutes

Statutory ambiguity with respect to regulatory jurisdiction can come to exist in a few ways. As noted above, Professor Gersen's third and fourth variations illustrate theoretical examples where Congress delegates nonexclusive jurisdiction to two agencies, in one variation the jurisdiction is complete and in the other incomplete.<sup>168</sup>

One example of such an ambiguous statutory provision that creates the potential for conflict is within the Biomass Energy and Alcohol Fuels Act.<sup>169</sup> In that statute, Congress legislated that "[e]ither the Secretary of Agriculture or the Secretary of Energy may be the Secretary concerned in the case of any biomass energy project which will have an anticipated annual production capacity of 15,000,000 gallons or more of ethanol."<sup>170</sup> In this way, either agency may regulate this particular area, and if the agencies do not agree, the provision on its face does not provide the judiciary guidance in resolving the conflict.

Even where the statute does not appear to overlap on its face and actually appears to create very compartmentalized jurisdictions between two or more agencies, an ambiguity may still arise. For example, in the

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162. Pub. L. No. 85-929, 72 Stat. 1784.

163. 21 U.S.C. § 348(a) (1976).

164. *See Foreman*, 631 F.2d 969.

165. *See Marisam*, *supra* note 1, at 191–93.

166. *Id.* at 191–92.

167. *Id.* at 210 (citing *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)). In *Massachusetts v. EPA*, the Court created a potential regulatory jurisdiction overlap between the EPA's obligation to regulate vehicle emissions and the National Highway Traffic Safety Administration's regulation of vehicle fuel economy when the majority interpreted the Clean Air Act, 42 U.S.C. § 7521(a)(1), to authorize the EPA with the regulation of greenhouse gases. 549 U.S. at 532.

168. *See supra* notes 116–25 and accompanying text.

169. 42 U.S.C. § 8801 (2012).

170. *Id.* § 8812(a)(2)(A).

Commodity Exchange Act,<sup>171</sup> Congress authorized the Commodity Futures Trading Commission (CFTC) to regulate trading of futures contracts, including futures on securities and options on futures contracts.<sup>172</sup> Congress had previously authorized the SEC to regulate trading of securities and options on securities.<sup>173</sup> Where an instrument was both a security and a futures contract, the CFTC was to be the sole regulator because the Commodity Exchange Act had explicitly held the CFTC to have exclusive jurisdiction with respect to transactions involving contracts of sale (and options on such contracts) for future delivery.<sup>174</sup> Where the instrument was both a futures contract and an option on a security, the SEC was to be the sole regulator as the Commodity Exchange Act had carved out authority preventing the CFTC from having jurisdiction over any transaction whereby the party to such transaction acquired any put, call, or other option on one or more securities.<sup>175</sup>

In *Chicago Mercantile Exchange v. SEC*,<sup>176</sup> the Seventh Circuit considered this now modified regulatory scheme because while the CFTC regulates futures and options on futures and the SEC regulates securities and options on securities per this compartmentalization, the Commodity Exchange Act did not define either contracts for future delivery or future options.<sup>177</sup> As a result, the financial instrument at issue in the case (index participation) could have been characterized as either options on futures or options on securities, and thus either the CFTC or SEC could have reasonably asserted authority over index participation.<sup>178</sup>

## II. THE CHEVRON TWO-STEP AND THE SKIDMORE SHUFFLE:<sup>179</sup> THE COURTS CONSIDER DEFERENCE AMONG MULTIPLE AGENCIES

When reviewing an agency's interpretation of its governing statute or another statute giving the agency authority to regulate, courts may give deference to that agency's interpretation either under *Chevron* or *Skidmore*.<sup>180</sup> These cases almost always involve one federal agency's

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171. 7 U.S.C. § 1 (2012).

172. *Id.* § 2(a)(1)(A).

173. Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (2012).

174. 7 U.S.C. § 2(a)(1). However, the litigation that arose from this conflict, *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537 (7th Cir. 1989), arose before subsequent statutory revisions and, as such, is identified in the case as being codified at 7 U.S.C. § 2a(ii) (1988). 883 F.2d at 539.

175. 7 U.S.C. § 2(a)(1)(C)(ii) (identified in *Chi. Mercantile Exch.*, 883 F.2d at 539, as codified at 7 U.S.C. § 2a(i) (1988)).

176. 883 F.2d 537 (7th Cir. 1989).

177. *Chi. Mercantile Exch.*, 883 F.2d at 539.

178. *Id.* at 539–48. The Seventh Circuit ultimately determined that the CFTC had jurisdiction over the financial instrument. *Id.* at 548.

179. For the credit on this play on words and an examination on courts' deference considerations for positions advanced for the first time in litigation, see Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447 (2013).

180. See *supra* notes 47–69 and accompanying text.

interpretation of one statute,<sup>181</sup> and underlying the *Chevron* opinion itself is the assumption that only one agency is responsible for the statute at issue.<sup>182</sup> However, Congress does not always vest administrative authority in only a single agency, and there are many occasions when Congress has apportioned authority between two or more agencies.<sup>183</sup> When two agencies have shared authority under the same regulatory scheme, whether the shared authority is overlapping, competing, or compartmentalized, those agencies may disagree regarding the interpretation of certain provisions that both agencies administer.<sup>184</sup> Often times, federal agencies will have similar interpretations of the statute they administer.<sup>185</sup> Other times, these agencies will have inconsistent interpretations or will disagree with each other outright over the correct interpretation.<sup>186</sup>

Because a reviewing court may award deference to only one of these agencies when their interpretations are inconsistent,<sup>187</sup> courts have conducted varying reviews in reaching a holding. This part first provides a historical survey outlining judicial review of deference conflicts arising from shared regulatory space and then sets out several cases where the Supreme Court and circuit courts have confronted conflicts between two or more agencies seeking deference to its respective statutory interpretation.

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181. *See, e.g.*, *Natural Res. Def. Council, Inc. v. FAA*, 564 F.3d 549 (2d Cir. 2009) (finding valid the Federal Aviation Administration's interpretation of a provision in the Airport and Airway Improvement Act).

182. According to Gersen, the Supreme Court implies this idea by the way it phrased the issue presented in *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991): "The question before us in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this 'interpretive' lawmaking power under the OSH Act." Gersen, *supra* note 1, at 223 (quoting *Martin*, 499 U.S. at 151). *See also* William Weaver, Note, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275, 277 (2014) ("The traditional *Chevron* framework is a one-agency model and is thus inappropriate for judicial review of the complex, multiagency form of congressional delegation.").

183. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in sections of 7, 12, 15, 18, 22, 31, 42 U.S.C.) (apportioning authority between the Consumer Fraud Protection Bureau, Federal Reserve, Securities & Exchange Commission, and U.S. Department of Treasury); *see also* Weaver, *supra* note 151, at 37 n.10–12 (listing cases); *infra* Part I.B (describing the Dodd-Frank Act's delegations to multiple agencies).

184. *See, e.g.*, *Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988) (noting "[t]he diffusion of the interpretive authority among several agencies, and the possibility of inconsistent interpretations").

185. *See, e.g.*, *Individual Reference Servs. Grp., Inc. v. FTC*, 145 F. Supp. 2d 6, 16, 23 (D.D.C. 2001) (regulations were the result of coordinated effort among six agencies: FTC, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, and the National Credit Union Administration), *aff'd sub nom. Trans Union LLC v. FTC*, 295 F.3d 42 (D.C. Cir. 2002).

186. *See, e.g.*, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991) (outlining the conflict between the Occupational Safety and Health Review Commission and the Secretary of Labor).

187. Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 246 (2004) (noting that *Chevron* analysis as it stands now may not resolve the dispute between two agencies because if a court awards deference to one, it "offends the principle of deference to the view of the other").

A. *How Courts Adjudicate Shared Agency Jurisdiction*

The APA authorizes courts to review an agency's interpretation of a statute it administers.<sup>188</sup> However, judicial review is not simply limited to the standards in the APA.<sup>189</sup> As the Supreme Court held in *Chevron*, courts should accept a federal administrative agency's interpretation of its own governing statute and regulations if "Congress has not directly addressed the precise question at issue," and if the interpretation is reasonable.<sup>190</sup> *Chevron* suggested that the degree of deference owed to an agency depends on each particular situation.<sup>191</sup>

Under pre-*Chevron* case law, courts occasionally cited the fact that multiple agencies administered a statute as a factor for giving reduced deference to an agency's interpretation.<sup>192</sup> Relatedly, some courts adopted a presumption of exclusive jurisdiction, which holds that Congress would not vest law-interpreting authority in more than one agency; using this presumption, courts interpret the statute to favor only one agency having authority with the force of law despite multiple agencies receiving delegations of authority.<sup>193</sup> For example, in *California v. Kleppe*,<sup>194</sup> the Ninth Circuit asked whether two agencies, the EPA and the Secretary of Interior, had concurrent regulatory jurisdiction over air quality,<sup>195</sup> and answered that question in the negative, holding that there was no overlapping jurisdiction because such authority would "impair or frustrate the authority which [the statute] grants to the Secretary."<sup>196</sup>

At the same time, though the Ninth Circuit presented a theory of exclusive jurisdiction, this position is in conflict with cases extending back into the mid-twentieth century.<sup>197</sup> And as one court noted, "[o]ther agencies and their mandates . . . overlap," and "not even a faint clue exists that Congress desired otherwise."<sup>198</sup> Other courts that had considered potentially overlapping jurisdiction schemes asserted that "when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect."<sup>199</sup>

188. Administrative Procedure Act, 5 U.S.C. § 706 (2012) (stating that the "reviewing court shall decide all relevant questions of law").

189. *Id.* § 706(2)(A) (stating that a court may invalidate a rule where the rule is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law").

190. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

191. *Id.* at 842–45.

192. *See, e.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982); *Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 144–45 (1976).

193. Gersen, *supra* note 1, at 222–25.

194. 604 F.2d 1187 (9th Cir. 1979).

195. *Id.* at 1192.

196. *Id.* at 1193–94.

197. *See, e.g.*, *FTC v. Cement Inst.*, 333 U.S. 683, 689–93 (1948) (approving concurrent FTC/DOJ jurisdiction); *Pennsylvania v. Interstate Commerce Comm'n*, 561 F.2d 278, 292 (D.C. Cir. 1977) (approving concurrent Interstate Commerce Commission/Federal Maritime Commission jurisdiction); *Friedlander v. U.S. Postal Serv.*, 658 F. Supp. 95, 103 (D.D.C. 1987) (approving concurrent FDA/FTC/U.S. Postal Service jurisdiction).

198. *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986).

199. *Pennsylvania*, 561 F.2d at 292.



Issues of conflicting agency interpretations arose soon after *Chevron*,<sup>200</sup> and the adjudication of those cases usually hinged on the assumption that the reviewing court's task was limited to "decid[ing] which agency [wa]s in charge and defer[ring] to that agency's interpretation."<sup>201</sup> As it stands now, courts typically do not award *Chevron* deference to interpretations of statutes of general applicability, such as the Freedom of Information Act (FOIA) or the APA, which are administered by many agencies.<sup>202</sup> This is so because none of the agencies claiming an entitlement to deference has a particular expertise in the substance of the statute.<sup>203</sup>

Even where the authorizing statute is narrower than general administration, for example, only conferring authority to three agencies,<sup>204</sup> the courts approach the inquiry in a variety of ways. In the D.C. Circuit, for example, if multiple agencies are charged with administering a statute, an agency's interpretation is generally not entitled to *Chevron* deference;<sup>205</sup>

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200. See, e.g., *Paralyzed Veterans of Am. v. Civil Aeronautics Bd.*, 752 F.2d 694 (D.C. Cir. 1985), *rev'd sub nom. U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 612–13 n.14 (1986) (reversing D.C. Circuit's decision for "ignoring this longstanding administrative interpretation" when it ruled against the Department of Transportation's predecessor agency when the President had tasked DOJ to coordinate all regulations implementing the various civil rights laws); *Keyes v. Sec'y of the Navy*, 853 F.2d 1016, 1021 (1st Cir. 1988) (holding that the Office of Personnel Management had primary responsibility for administering the competitive service, and the Secretary of the Navy was bound by that interpretation).

201. *Weaver*, *supra* note 151, at 39.

202. See, e.g., *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137–38 n.9 (1997) (holding that agency's interpretation of the APA is not entitled to *Chevron* deference because the APA is not a statute the agency is "charged with administering"); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (holding that the Court owes no deference to one agency's interpretation of the Rehabilitation Act); *Sherley v. Sebelius*, 689 F.3d 776, 786 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 847 (2013) (reversing the lower court's award of *Chevron* deference to the National Institute of Health because the statutory authority at issue was an "annual rider by its terms appli[cable] generally to multiple agencies"); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 341–42 (D.C. Cir. 2002) (holding "the court owes no deference" to an agency's interpretation of the National Environmental Policy Act because all federal agencies are responsible for the Act's administration); *Proffitt v. Fed. Deposit Ins. Corp.*, 200 F.3d 855, 860 (D.C. Cir. 2000) (holding that the court owes no deference to one agency's interpretation of a statute of limitations); *Benavides v. U.S. Bureau of Prisons*, 995 F.2d 269, 272 n.2 (D.C. Cir. 1993) (holding that the court owes no deference to agency's interpretation of the Privacy Act).

203. See *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252–53 (D.C. Cir. 2003) ("Where a statute is generic, two bases for the *Chevron* presumption of implied delegation are lacking: specialized agency expertise and the greater likelihood of achieving a unified view through the agency than through review in multiple courts." (citing *Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1471 (4th Cir. 1994))).

204. See, e.g., *Use of Real Property to Assist the Homeless*, 56 Fed. Reg. 23,789 (May 24, 1991) (codified at 24 C.F.R. pt. 581, 41 C.F.R. pt. 101-47, and 45 C.F.R. pt. 12a) (identifying the U.S. Department of Health and Human Services, General Services Administration, and U.S. Department of Housing and Urban Development as promulgators of a joint interim final rule).

205. *Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988) (finding deference inappropriate because the regulation was written and promulgated by the Department of Defense, General Services Administration, and National Aeronautics and Space Administration and the "diffusion of the interpretive authority among several agencies, and the possibility of inconsistent interpretations, weaken the case for deference"); see also *Hunter v. FERC*, 711 F.3d 155, 156–57 (D.C. Cir. 2013) (declining to defer to either agency

rather, the court reviews the agency's interpretation *de novo*.<sup>206</sup> In a similar vein, where there is even the potential for conflicting regulations as a result of multiple agencies administering the same statute, the Third Circuit holds that *Chevron* is precluded entirely.<sup>207</sup>

In contrast, the Second Circuit adopted a different approach to the deference question in *1185 Avenue of Americas Associates v. Resolution Trust Corp.* First, the court stated that it did not owe the full *Chevron* deference to any interpretation, and then it determined which interpretation was most reasonable between those proffered.<sup>208</sup>

When analyzing the level of deference to award, if any, different courts accord varying emphasis based on a host of factors, including whether one agency is executive and the other is independent,<sup>209</sup> the statutory scheme,<sup>210</sup> expertise,<sup>211</sup> and political accountability.<sup>212</sup>

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regarding a “jurisdictional turf war” between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission). *But see* U.S. Postal Serv. v. Postal Regulatory Comm’n, 599 F.3d 705, 710 (D.C. Cir. 2010) (deferring to the Postal Regulatory Commission because the *particular provision* at issue is the responsibility of the Commission even though both the USPS and Commission have authority under the statute). Moreover, the D.C. Circuit withholds *Chevron* deference both in instances of actual agency conflict and *potential* agency conflict. *See* Rapaport v. U.S. Dep’t of Treasury, 59 F.3d 212, 216–17 (D.C. Cir. 1995) (holding *Chevron* inapplicable either where “the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all”); *see also* Wachtel v. Office of Thrift Supervision, 982 F.2d 581, 585 (D.C. Cir. 1993).

206. Grant Thornton, LLP v. Office of Comptroller of the Currency, 514 F.3d 1328, 1331 (D.C. Cir. 2008) (holding that no automatic deference is owed to Office of the Comptroller of Currency on the interpretation of Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)); *Rapaport*, 59 F.3d at 216–17 (no automatic deference to Office of Thrift Supervision on the interpretation of FIRREA). The D.C. Circuit helpfully divided the shared-enforcement schemes into three types. *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003). First, where the statutes are generic, like the APA and FOIA, the “broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretative questions *de novo*.” *Id.* For statutes where multiple agencies have specialized enforcement responsibilities, but there exists a risk of inconsistent enforcement or uncertainty in the law because the agencies’ authorities overlap, courts may find *de novo* review necessary. *Id.* Third, where expert enforcement agencies have mutually exclusive authority over separate sets of regulated persons per statutory outline, concerns about inconsistency and uncertainty do not diminish the weight of *Chevron* deference. *Id.*

207. *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 85 (3d Cir. 2007) (“The mere fact that there could be conflicting regulations should preclude *Chevron* deference.”); *see also* Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 342–45 (describing the “traditional” approach of awarding no deference where more than one agency administers a statute).

208. *See, e.g.*, *1185 Ave. of Ams. Assocs. v. Resolution Trust Corp.*, 22 F.3d 494, 497 (2d Cir. 1994); *see also* *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (“[W]here . . . Congress has entrusted more than one federal agency with the administration of a statute . . . a reviewing court does not . . . owe as much deference as it might otherwise give if the interpretation were made by a single agency similarly entrusted with powers of interpretation.”).

209. *See, e.g.*, *In re Aiken Cnty.*, 645 F.3d 428, 440–41 (D.C. Cir. 2011).

210. *See, e.g.*, *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991).

211. *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986).

212. *See, e.g.*, *Martin*, 499 U.S. at 156.

Though the Seventh Circuit has suggested that “it is possible to defer simultaneously to two incompatible agency positions,”<sup>213</sup> presently there is no case that purports to do so.

The Supreme Court has not resolved the issue of shared agency jurisdiction under *Chevron*.<sup>214</sup> In *Bragdon v. Abbott*,<sup>215</sup> the Court noted the question of whether enforcement by multiple agencies is incompatible with *Chevron* deference but did not resolve that question.<sup>216</sup> One term later in *Sutton v. United Air Lines*,<sup>217</sup> the Supreme Court confronted another case where multiple agencies vied for deference. Though the Court highlighted the fact that Congress gave three agencies the authority to issue regulations implementing different provisions of the Americans with Disabilities Act,<sup>218</sup> the Court ultimately concluded that it did not need to determine which agency deserved deference because all three agencies had adopted impermissible interpretations.<sup>219</sup>

Because Congress continues to create shared regulatory jurisdiction,<sup>220</sup> “a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may.”<sup>221</sup> Moreover, a court should exercise further caution when considering a claim that one agency has conclusively interpreted and settled an issue that an agency with a different substantive jurisdiction may later interpret with a different perspective.<sup>222</sup>

The following cases illustrate the absence of a controlling deference scheme by presenting conflicts that have varying statutory origins, present varying types of shared regulatory spaces, and demonstrate the divergent judicial rationales where the courts confront two or more agencies seeking deference.

#### 1. *Chevron*’s Applicability to Interagency Conflicts: *ETSI Pipeline Project v. Missouri*

In 1988, the Supreme Court considered a case where two agencies proffered opposing interpretations of a particular statute. Though the Court ultimately sidestepped the issue of determining which agency it owed deference, the case is important because the Court’s use of the *Chevron*

213. See, e.g., *Bd. of Trade of Chi. v. SEC*, 187 F.3d 713, 719 (7th Cir. 1999).

214. See John F. Cooney, *Chevron Deference and the Dodd-Frank Act*, 37 ADMIN. & REG. L. NEWS, Spring 2012, at 7 (“[T]he question, long identified but not decided by the Supreme Court,” asks “which agency’s interpretation of a statute, if any, is entitled to deference under [*Chevron*], when Congress has delegated equal and overlapping authority to multiple agencies.”).

215. 524 U.S. 624 (1998).

216. *Id.* at 642 (“[W]e need not pause to inquire whether this causes us to withhold deference to agency interpretations under [*Chevron*].”).

217. 527 U.S. 471 (1999).

218. *Id.* at 478–80.

219. *Id.* at 482.

220. *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986).

221. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (citing *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1369–70 (D.C. Cir. 1988)).

222. *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977) (en banc).

analysis counters the notion that interagency conflicts preclude the use of *Chevron*. In *ETSI Pipeline Project v. Missouri*,<sup>223</sup> the Secretary of the Interior entered into a contract with a private company that allowed the company to withdraw a specified quantity of water for industrial use from a large federal reservoir.<sup>224</sup> Several states sued, seeking injunctive relief to prevent performance of the contract.<sup>225</sup> These states argued that the Secretary of the Interior had no statutory authority to enter into such a contract, arguing that under the Flood Control Act of 1944,<sup>226</sup> the authority to approve any withdrawal of water from the reservoir belonged to the Secretary of the Army, not the Department of the Interior.<sup>227</sup> Moreover, the states pointed to, and both the district court and court of appeals held as undisputed, the fact that the Army Corps of Engineers, a part of the Department of the Army, had constructed the reservoir and controlled its operations.<sup>228</sup>

The Flood Control Act envisioned that both the Department of the Interior and the Department of the Army<sup>229</sup> would have roles in the development of the reservoir.<sup>230</sup> In so envisioning, Congress allocated funds to both agencies to pursue their respective functions,<sup>231</sup> required information-sharing between the agencies on any other projects within the affected area,<sup>232</sup> and conferred authority to both Departments to take certain other actions in connection with the operation of the reservoir.<sup>233</sup>

However, the Supreme Court rejected the Secretary of the Interior's claim of entitlement to deference for the Department's statutory interpretation because the statute clearly indicated that the Department of the Interior may not enter into a contract to withdraw water from an Army reservoir without the approval of the Department of the Army.<sup>234</sup> The Court held that although the statute did delegate some authority over the ongoing administration of the project to the Department of the Interior, and although the text of the statute did not expressly speak to whether the Department

223. 484 U.S. 495 (1988).

224. *Id.* at 497–98.

225. *Id.* at 498.

226. Pub. L. No. 78-534, 58 Stat. 887 (1944) (codified in scattered sections of titles 16, 33, 43 U.S.C.).

227. *ETSI*, 484 U.S. at 498.

228. *Id.* at 498–99.

229. The Flood Control Act actually referred to the Department of War, which is the predecessor to the Department of the Army. *Id.* at 498.

230. *Id.* at 502.

231. *Id.*

232. *Id.* at 503.

233. *See id.* at 503–05.

234. *See id.* at 517. The statute specifically authorized “the Secretary of War . . . to make contracts . . . at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department.” *Id.* at 504 (internal quotation marks omitted). The Court reasoned that this explicit delegation to the Secretary of War entirely undermined the Department of the Interior's argument that the various powers granted to him could permit the contracts the Department had entered into with *ETSI Pipeline*. *Id.* at 505. As a result, any contracts the Department of Interior sought to create required the concurrence of the Secretary of the Army, to whom Congress gave the authority to make such contracts. *Id.*

had contractual authority, the reference to the Secretary of the Army's contractual power compelled the conclusion that the Department of the Interior lacked the authority to contract.<sup>235</sup>

Accordingly, as between the interpretations proffered by both agencies, the Court found that the Interior Secretary's argument failed at *Chevron* Step One, since the statute "indicate[d] clearly that the Interior Secretary may not enter into a contract to withdraw water . . . without the approval of the Department of the Army."<sup>236</sup> Finding that the Interior Secretary failed at Step One, the Court saw no need to continue with the *Chevron* test. However, the importance of this case is not the determination the Court made, but rather the fact that the Court used *Chevron* to assess an interagency conflict over statutory interpretation. This provides support for the position that interagency conflicts and multiple delegations do not preclude either *Chevron* analysis or *Chevron* deference.

## 2. Deference Awarded:

### *Martin v. Occupational Safety & Health Review Commission*

Though the Court did not label the deference it ultimately confers to the Secretary of Labor,<sup>237</sup> the important consequence of the following case is that the Court engaged the facts and statutory interpretations each agency proffered and determined that one agency's interpretation merited deference over the other. In *Martin v. Occupational Safety & Health Review Commission*,<sup>238</sup> the controversy arose from the Secretary of Labor's effort to enforce compliance with OSHA standards relating to coke-oven emissions.<sup>239</sup> OSHA established a comprehensive regulatory scheme designed to ensure safe working conditions for all working individuals.<sup>240</sup> Here, the Secretary had used his rulemaking powers pursuant to OSHA to promulgate standards setting the maximum permissible emission levels and requiring the use of employee respirators in certain conditions.<sup>241</sup> A Labor compliance officer found that the respondent before the Court, CF & I Steel Corporation, though having equipped many of its employees with respirators, equipped its employees with respirators that failed to protect their wearers from coke-oven carcinogenic emissions exceeding the regulatory limit.<sup>242</sup> Based on these findings, the compliance officer issued a citation to CF & I for violating the regulation.<sup>243</sup>

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235. *Id.* at 517.

236. *Id.*

237. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1117–20 (2008), for further discourse on the Court's common practice of engaging in ad hoc judicial reasoning in assessing deference without invoking particular deference regimes by name.

238. 499 U.S. 144 (1991).

239. *Martin*, 499 U.S. at 148.

240. 29 U.S.C. § 651(b) (1988).

241. *Martin*, 499 U.S. at 148.

242. *Id.*

243. *Id.*

At the Occupational Safety and Health Review Commission (OSHRC), an administrative law judge upheld the citation, which included upholding the Department of Labor's interpretation of the regulation.<sup>244</sup> On petition for a review of the full Commission, OSHRC reversed the administrative law judge's decision, adopting a different interpretation.<sup>245</sup> The Secretary of Labor disagreed with OSHRC's interpretation and petitioned the Tenth Circuit for review.<sup>246</sup>

Though concluding that the regulations were ambiguous, the Tenth Circuit found both the Secretary's interpretation and OSHRC's interpretation reasonable.<sup>247</sup> As a result, the court confronted two permissible interpretations and had to choose to which agency to defer.<sup>248</sup> The court ultimately reasoned that because Congress gave OSHRC adjudicative power, which the Tenth Circuit found to "necessarily encompass[] the power to 'declare' the law," OSHRC prevailed.<sup>249</sup>

The Supreme Court unanimously reversed.<sup>250</sup> The Court considered so-called authority principles and concluded that the Secretary of Labor was entitled to deference over OSHRC.<sup>251</sup> Although the Court considered several factors,<sup>252</sup> the opinion emphasized OSHA's statutory structure and the history of the statute.<sup>253</sup> The Court found that the Secretary was in the best position to render authoritative interpretations because the Department of Labor is the agency authorized to promulgate the standards in the first instance and, therefore, is more familiar with the regulations' purposes.<sup>254</sup> Moreover, the Court favored the Secretary of Labor's interpretation because the Court assumed that Congress wanted interpretive power in the agency with the most expertise.<sup>255</sup> The Court reasoned that because the Labor Secretary enforces OSHA, the Department of Labor confronts a wider range of regulatory problems and is therefore able to develop better expertise.<sup>256</sup> In contrast, OSHRC confronts only those problems that the Secretary contests, seeing only a subset of issues and is less likely to develop expertise.<sup>257</sup>

The Court also considered OSHA's legislative history, reading the Congressional Record to suggest that Congress preferred the Secretary's

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244. *Id.*

245. *Id.* at 148–49.

246. *Id.* at 149.

247. *Dole v. Occupational Safety & Health Review Comm'n*, 891 F.2d 1495, 1497 (10th Cir. 1989), *rev'd sub nom. Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991).

248. *Id.* at 1497.

249. *Id.* at 1498.

250. *Martin*, 499 U.S. at 150.

251. *Id.* at 150–54.

252. *Id.* at 152–58.

253. *Id.* at 152.

254. *Id.* at 152–54.

255. *Id.* at 152–53.

256. *Id.*

257. *Id.*

interpretations.<sup>258</sup> Because Congress gave the Secretary the power to promulgate regulations, the Court reasoned that Congress must have intended to give the Secretary interpretive authority.<sup>259</sup> To hold otherwise would vest two agencies with implementing OSHA's policy objectives, which the Court considered unreasonable.<sup>260</sup> The Court held that Congress delegated to OSHRC limited adjudicative power,<sup>261</sup> distinguishing between agencies like OSHRC, which exercise only adjudicative authority, and traditional administrative agencies—agencies that have a unitary structure composed of legislative, enforcement, and adjudicative powers—which are free to make law by either regulation or adjudication.<sup>262</sup> The Court held that unitary agencies possess broad authority because Congress delegated to them power to make law and policy through rulemaking, and since the only means available to OSHRC was adjudication, the Court declined to “infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role.”<sup>263</sup>

The Court concluded that because OSHRC's role was similar to the role of a reviewing court, and similar to the courts' roles in agency interpretation matters, OSHRC should not have substituted its judgment for the Secretary's.<sup>264</sup> Congress authorized OSHRC “to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.”<sup>265</sup> The Court limited OSHRC's role to making authoritative factual findings; as to legal questions, its role is that of a “neutral arbiter,” undertaking only a limited review of the Secretary's interpretations.<sup>266</sup>

Though important because of the conferral of deference, *Martin* is not dispositive on all cases involving shared regulatory space. The Court was careful to limit its holding to OSHA and declined to take a position “on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure.”<sup>267</sup> This caveat has not prevented other courts from applying this reasoning to the split-enforcement cases they confront.<sup>268</sup> Courts narrowly construing *Martin* use it as precedent for OSHA cases only,<sup>269</sup> while other courts broadly construing *Martin* use it for split-enforcement models of shared regulatory space.<sup>270</sup> Other courts do not view *Martin* as dispositive in split-enforcement model cases and accordingly engage in their own reasoning to

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258. *Id.* at 153.

259. *Id.*

260. *Id.* at 153–54.

261. *Id.* at 154.

262. *Id.*

263. *Id.*

264. *Id.* at 154–55.

265. *Id.*

266. *Id.* at 155.

267. *Id.* at 158.

268. *See, e.g.,* *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252 (D.C. Cir. 2003).

269. *See, e.g.,* *Perez v. Loren Cook Co.*, 750 F.3d 1006, 1009 (8th Cir. 2014).

270. *See, e.g.,* *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006).

determine the application, if any, of deference to an agency interpretation.<sup>271</sup>

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Taken together, *Martin* and *ETSI* can stand as examples that the Supreme Court does not object to a deference analysis in cases where multiple agencies administer the same statute. A recent Supreme Court opinion illustrates that at least a portion of the current Court does not find multiagency statutes preclusive of deference. In *City of Arlington v. Federal Communications Commission*,<sup>272</sup> the Court considered whether it should award *Chevron* deference to an agency's interpretation of a statutory ambiguity that concerned the scope of its regulatory jurisdiction.<sup>273</sup> The majority reasoned that because the statute's language allowed the agency to promulgate necessary rules and regulations, the agency's decision that it had lawmaking power to fill in the ambiguity was within the scope of its statutory authority.<sup>274</sup> In his dissent, Chief Justice Roberts, joined by Justices Kennedy and Alito, stated that "whether a particular agency interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue."<sup>275</sup> And to illustrate his point regarding what he viewed as the problems of allowing agencies to assert the boundaries of their jurisdiction, Chief Justice Roberts noted that "statutes that parcel out authority to multiple agencies . . . 'may be the norm, rather than an exception,'"<sup>276</sup> and insisted that a court cannot ask "whether the statute is one that the agency administers," but rather should ask "whether authority over the particular ambiguity at issue has been delegated to the particular agency."<sup>277</sup> The inference from this passage is that a *Chevron* analysis is not at odds with a multiagency statute.

### 3. The Lower Courts Refuse Deference: *Salleh v. Christopher*

Construed broadly, *Martin* stands for the proposition that in a split-enforcement model of shared regulatory space, a court considering the interpretations of the rule-promulgating agency and the reviewing agency should defer to the rule-promulgating agency; however, the following case rejects this reasoning and instead holds that where multiple agencies are responsible for shared space, deference is precluded. In *Salleh v. Christopher*<sup>278</sup> the Secretary of State discharged Jamari Salleh, a foreign service officer, even though the Foreign Service Grievance Board concluded that no cause for the discharge had been established at the

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271. See, e.g., *Hinson v. Nat'l Transp. Safety Bd.*, 57 F.3d 1144 (D.C. Cir. 1995).

272. 133 S. Ct. 1863 (2013).

273. *Id.* at 1866.

274. *Id.* at 1874.

275. *Id.* at 1881 (Roberts, C.J., dissenting).

276. *Id.* at 1883 (quoting Gersen, *supra* note 1, at 208).

277. *Id.* at 1884.

278. 85 F.3d 689 (D.C. Cir. 1996).



applicable hearing.<sup>279</sup> The State Department hired plaintiff Salleh in 1981 and subsequently granted her career status.<sup>280</sup> In 1989, Salleh pleaded guilty to an indictment alleging that she filed falsified claims with the U.S. government.<sup>281</sup> After her conviction, the Acting Director General of the Foreign Service proposed her discharge.<sup>282</sup> The Foreign Service Grievance Board conducted an evidentiary hearing on the discharge proposal and concluded that discharging Salleh would violate § 501 of the Rehabilitation Act of 1973 since her criminal conduct stemmed from her alcoholism, a disability under the Act.<sup>283</sup>

Thirteen months later, the Secretary of State issued an order concluding that he “possesse[d] authority to review conclusions of the Foreign Service Grievance Board, and to reach a contrary conclusion if merited;” and so concluding, the Secretary of State directed Salleh’s discharge from the Service.<sup>284</sup> In response, the Board protested, asserting that its decision was final and that the Secretary could not ignore it.<sup>285</sup> Salleh filed an action under the APA seeking reinstatement, among other remedies.<sup>286</sup> The district court held that because the Board’s decision was final, the Secretary’s discharge of Salleh was invalid.<sup>287</sup>

The Secretary of State appealed, and the D.C. Circuit affirmed.<sup>288</sup> The analysis to determine which agency had final authority hinged on the proper interpretation of § 610(a) of the Foreign Service Act.<sup>289</sup> The Secretary of State relied on the “plain meaning” of the provision to support his argument that he had plenary authority to discharge employees and that therefore his determination was entitled to *Chevron* deference.<sup>290</sup> The Board, however, read the provision to delegate to it final authority to determine the validity of the Secretary’s discharge decisions.<sup>291</sup> To bolster its argument, the Secretary cited a previous D.C. Circuit case where the court had deferred to the State Department regarding an interpretation of a provision in the same Act.<sup>292</sup> The court rejected the argument that the previous case created a general rule that deference is owed to the Secretary, as opposed to the Board, highlighting that the provision at issue before the previous court explicitly delegated authority to the Secretary.<sup>293</sup>

The court held it would be inappropriate to defer to either agency’s interpretation as to the issue of basic authority, noting it had never deferred

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279. *Id.* at 690.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 691.

290. *Id.*

291. *Id.*

292. *Id.* (citing *Molineaux v. United States*, 12 F.3d 264, 266–67 (D.C. Cir. 1994)).

293. *Id.*

where two competing governmental entities asserted conflicting jurisdictional claims.<sup>294</sup> The court stated that where Congress has delegated authority to multiple agencies, it has not implicitly delegated authority “to reconcile ambiguities or to fill gaps” to any one of those agencies.<sup>295</sup> The court declined to defer to either the Secretary or the Board and instead opted to interpret the whole section of the statute *de novo*.<sup>296</sup> The court looked at previous iterations of the particular provision at issue, other sections of previous iterations of the statute, the legislative history, and the plain meaning of the provision to determine that the Board had the correct interpretation of the Act.<sup>297</sup>

Although the court declined to engage in a deference analysis for either agency because of the conflict, the means by which the court came to its determination are illustrative of the types of material courts can consult when confronted with interagency conflicts over deference (and are in fact what courts consult generally even in instances of single-agency deference questions).<sup>298</sup>

#### 4. Applying *Skidmore* Rather than *Chevron*: *Collins v. National Transportation Safety Board*

A court’s application of the less deferential *Skidmore* analysis to interagency conflict situations does not resolve the unequal treatment agencies have received where more than one agency administers the same statute, although it is arguably a better result than no deference. For example, in *Collins v. National Transportation Safety Board*,<sup>299</sup> the D.C. Circuit, in remanding the case back to the district court, speculated that although *Chevron* deference was not proper, the *Skidmore* analysis may be.<sup>300</sup> In *Collins*, a Coast Guard administrative law judge made a finding that a Coast Guard–licensed pilot committed misconduct under the 1972 International Regulations for Preventing Collisions at Sea (COLREGS)<sup>301</sup> when he failed to sound a warning signal after he ascertained that another vessel was not taking sufficient action to avoid collision.<sup>302</sup> The Commandant of the Coast Guard affirmed the finding, but the National

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294. *Id.* at 691–92.

295. *Id.* at 692.

296. *Id.*

297. *Id.* at 692–93.

298. *See supra* notes 43–45 and accompanying text; *see also infra* notes 360–67 and accompanying text.

299. 351 F.3d 1246 (D.C. Cir. 2003).

300. *Id.* at 1253–54.

301. Though the COLREGS is a treaty and not a statute, the D.C. Circuit found this distinction did not preclude *Chevron* application in the first instance. The Circuit noted that treaty interpretation should be “guided by principles similar to those governing statutory interpretation.” *Id.* at 1251 (quoting *Iceland S.S. Co., Ltd. v. Dep’t of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000)). The Circuit then also cited to *Hill v. Norton*, 275 F.3d 98, 104 (D.C. Cir. 2001), where it had applied the *Chevron* framework to an agency’s interpretation of a treaty. *Collins*, 351 F.3d at 1251.

302. *Collins*, 351 F.3d at 1248–49.

Transportation Safety Board (NTSB)<sup>303</sup> reversed that determination.<sup>304</sup> The Coast Guard appealed to the D.C. Circuit, and the pilot intervened.<sup>305</sup>

The differing interpretations turned on the meaning of the word “doubt.” The Coast Guard interpreted doubt about the sufficiency of the other vessel’s actions to include both cases where (1) one is uncertain whether the other vessel’s actions are sufficient and (2) one is certain that those actions are not sufficient.<sup>306</sup> The NTSB found that the COLREGS’s text specifies that the warning signal requirement is triggered only when a pilot is “in doubt whether sufficient action [is] being taken by the [other vessel] to avoid collision.”<sup>307</sup> According to the NTSB, “the rule cannot apply where a pilot is certain that sufficient action is not being taken.”<sup>308</sup>

The D.C. Circuit viewed the Supreme Court’s split-enforcement opinion in *Martin* as similar to the case before the panel and assumed that some deference was proper.<sup>309</sup> The court noted that even if the situation did not require *Chevron* deference, *Skidmore* deference could be applied given the Coast Guard’s specialized expertise in maritime safety and efficient administration of licensing and discipline procedures.<sup>310</sup> Assuming *Skidmore* deference gave the Coast Guard’s decision more weight, the court found the Coast Guard’s COLREGS interpretation sufficiently persuasive that the NTSB erred in reversing the Coast Guard Commandant’s affirmance.<sup>311</sup>

Accordingly, this case serves as an example of a court, though typically resistant of even considering the deference question between two conflicting agencies, relying on one agency’s specialized expertise and policy concerns of efficiency—policy considerations that animated *Chevron* and *Skidmore*<sup>312</sup>—to award *Skidmore* deference.

### B. Policies and Considerations Regarding Interagency Conflicts

Although there is some literature regarding the general topic of shared regulatory space and interagency conflict,<sup>313</sup> not many have written on the appropriateness of awarding deference to one agency over another agency

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303. “The NTSB is an independent agency charged with determining the probable cause of transportation accidents and promoting transportation safety.” *Transportation Safety*, NAT’L TRANSP. SAFETY BD., <http://www.nts.gov/safety/> (last visited Nov. 26, 2014). The Coast Guard is an executive agency under the blanket of the Department of Homeland Security. *USCG: About Us—Overview*, U.S. COAST GUARD, <http://www.uscg.mil/top/about/> (last visited Nov. 26, 2014).

304. *Collins*, 351 F.3d at 1249.

305. *Id.*

306. *Id.* at 1251.

307. *Id.* at 1249 (internal quotation marks omitted).

308. *Id.*

309. *Id.* at 1251–52.

310. *Id.* at 1253–54.

311. *Id.* at 1254.

312. *See infra* Part I.A.4.

313. *See supra* note 1 and accompanying text.

in multiagency regulatory schemes.<sup>314</sup> The following section outlines some of the discourse available on what factors a court should consider in reviewing a deference request in cases of interagency conflict.

In his article discussing interagency conflict, Professor Weaver described an approach where, even though the court cannot defer to both agencies' interpretations on the subject of jurisdiction between them, the court does not need to ignore the agencies' interpretations because both agencies have expertise and are interpreting their governing statutes.<sup>315</sup> Accordingly, Professor Weaver considers it appropriate to consider the agencies' competing interpretations.<sup>316</sup>

In another article, Professor Gersen cites *Martin* and argues that as between two agencies conflicting over an interpretation of their governing statute, "courts should presume that Congress delegated law-interpreting authority to the more expert agency rather than the less expert agency."<sup>317</sup> In *Martin*, the Supreme Court reasoned that "[b]ecause historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court," the Court could presume that "Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes."<sup>318</sup>

Further supporting the importance of expertise, Professor Gersen cites the role it played in the Court's opinion in *Gonzales v. Oregon*.<sup>319</sup> In that case, the Supreme Court emphasized the importance of expertise when it declined to defer to the DOJ's interpretation on the ground that the Attorney General lacked the relevant expertise.<sup>320</sup> The Court held that instead, the Secretary of Health and Human Services possessed the expertise to consider health and medical practices.<sup>321</sup> However, Professor Gersen notes the shortcomings of expertise as "too static and exogenous," since a

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314. See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1365 (2012) (noting the existence of scholarship examining some courts' practices of denying agencies deference when considering agencies with shared or overlapping regulatory responsibilities and the absence of an "assessment of whether such administrative structures and regulatory designs might support greater judicial deference"); see also Cooney, *supra* note 214, at 7 (framing "the question, long identified but not decided by the Supreme Court," as "concerning which agency's interpretation of a statute, if any, is entitled to deference under [*Chevron*], when Congress has delegated equal and overlapping authority to multiple agencies"). But see Weaver, *supra* note 182, at 277 (arguing that courts should employ an "ultradeferential form of review" when multiple agencies jointly promulgate a single rule as that both "advance[s] the likely benefits of coordinated, multiagency rulemaking" and "ensure[s] that courts do not venture into the policymaking realm").

315. Weaver, *supra* note 151, at 64.

316. *Id.*

317. Gersen, *supra* note 1, at 225 (citing *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991)).

318. *Martin*, 499 U.S. at 153.

319. Gersen, *supra* note 1, at 206–07, 225.

320. *Id.* at 225.

321. *Id.*

multiagency regulatory scheme would necessarily facilitate each agency developing its own expertise.<sup>322</sup>

Professor Gersen further argues that when multiple agencies administer one statute, whether one agency's view about the statute's meaning receives deference under *Chevron* is best treated as a Step Zero inquiry.<sup>323</sup> According to Professor Gersen, although political accountability and expertise are no longer sufficient to support *Chevron* deference by themselves, they remain relevant in the Step Zero inquiry if the court determines that expertise or accountability constitute reasons that Congress would prefer deference to agencies.<sup>324</sup>

Professor Gersen notes that courts regularly use the absence of expertise to justify not giving deference to agency views of shared jurisdiction statutes.<sup>325</sup> At the same time, and especially in the overlapping jurisdiction context,<sup>326</sup> when several agencies share responsibility for administering a statute, they all may have more expertise than the generalist courts.<sup>327</sup> And despite having multiple agencies administer the same statute, these agencies generally will be more responsive to democratic accountability than a court.<sup>328</sup>

In contrast, Professor Hammond takes a less favorable approach to expertise as a dispositive factor.<sup>329</sup> Professor Hammond analyzes a particular kind of agency conflict—one where one agency claims superior authority via expertise and the other claims it via political accountability—and determines that the deference question ought to hinge on the text of the statute and congressional intent.<sup>330</sup> Professor Hammond argues that the judiciary's focus on these two elements facilitate congressional control, while still recognizing the policymaking authority of the executive branch.<sup>331</sup>

Professor Hammond cites to the very language that Professor Gersen cites above to argue that expertise is not a compelling factor because the Court engaged in a statutory analysis aimed at ascertaining Congress's intent: "[T]he statute governed the relationship between the agencies and their respective spheres of authority[, and] once that issue had been decided, ordinary judicial review was to proceed, with deference as warranted."<sup>332</sup>

Most recently, Professor Sharkey proposed a two-point strategy to issues stemming from shared regulatory space.<sup>333</sup> The first is a balkanization

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322. *Id.*

323. *Id.* at 219.

324. *Id.* at 220.

325. *Id.*

326. *See supra* notes 75–80 and accompanying text.

327. Gersen, *supra* note 1, at 220.

328. *Id.*

329. Emily Hammond Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763 (2012) [hereinafter Hammond].

330. *Id.*

331. *Id.* at 1796.

332. *Id.* at 1798–99.

333. Sharkey, *supra* note 207, at 329–31.

strategy, which constrains shared regulatory space by encouraging agencies to create “separate, non-overlapping spheres of authority.”<sup>334</sup> The second strategy tasks courts with soliciting input from other relevant agencies when the courts confront an agency both operating in a shared regulatory space and offering its own interpretation within its delegated shared authority.<sup>335</sup> Professor Sharkey posits that “[c]ourts could easily . . . adopt a clear default rule in overlapping delegations to better facilitate agency coordination and exploit shared spaces to reach better policy outcomes” by soliciting absent agency views in determining deference.<sup>336</sup>

### III. THREE STEPS FORWARD: ADDING ONE MORE STEP TO *CHEVRON*

Some scholarship and courts have recommended that in the context of overlapping regulatory schemes, *Chevron* should not apply;<sup>337</sup> but that proposition should not be the entire standard.

The D.C. Circuit divided the types of shared regulatory authority-conferring statutes into three categories: statutes of general applicability, statutes where a few specialized agencies have potentially overlapping authority, and statutes where specialized agencies have mutually exclusive authority.<sup>338</sup> This division is helpful in determining when and how deference should be accorded. The consensus regarding statutes of general applicability, like the APA and FOIA, should be followed because it seems correct that “the broadly sprawling applicability undermines any basis for deference.”<sup>339</sup> Accordingly, courts should review all interpretative questions arising from conflicting interpretations of general statutes *de novo*.<sup>340</sup>

However, for statutes like the Federal Deposit Insurance Act, where Congress tasked four agencies with enforcement,<sup>341</sup> and statutes where expert enforcement agencies have mutually exclusive authority over separate sets of regulatory space, as outlined by the D.C. Circuit, courts should adhere to the *Chevron* doctrine.<sup>342</sup> After all,

[i]f regulatory decisions in the face of ambiguities amount in large part to choices of policy, and if Congress has delegated basic implementing authority to the agency, the *Chevron* approach might reflect a belief,

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334. *Id.* at 330.

335. *Id.*

336. *Id.* at 357.

337. *See supra* notes 202–07 and accompanying text.

338. *See supra* notes 299–311 and accompanying text.

339. *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003); *see also supra* notes 299–311 and accompanying text.

340. *See supra* notes 299–311 and accompanying text.

341. The statute vests authority in the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision in the Treasury Department. 12 U.S.C. § 1812 (2012).

342. The D.C. Circuit argued that for statutes like the Federal Deposit Insurance Act, *de novo* review may be necessary because, although the agencies have specialized enforcement responsibilities, their authority potentially overlaps, creating risks of inconsistency or uncertainty. *Collins*, 351 F.3d at 1253. Where the regulatory spaces are mutually exclusive, the D.C. Circuit believes that *Chevron* deference is not precluded. *Id.*

attributable to Congress in the absence of a clear contrary legislative statement, in the comparative advantages of the agency in making those choices.<sup>343</sup>

In the same way that scholars have argued against courts supplanting their own interpretations for those of the agency, a court's refusal to award *Chevron* deference or to consider the application of the persuasive *Skidmore* deference simply because more than one agency has interpretive authority undermines the deference doctrine and the idea that courts ought not replace reasonable agency interpretations with their own interpretations.<sup>344</sup>

Moreover, Congress's awareness of *Chevron* bolsters the position that the legislating body itself prefers that the agencies resolve ambiguities, not courts.<sup>345</sup> Accordingly, to promote the principles outlined above, this Note proposes an additional step in the *Chevron* assessment that is applicable where two or more agencies have proffered reasonable interpretations of a statute that each administers or where two or more agencies have authority over the same policy space. Part III.A presents this "Step Three" as a *Skidmore*-like analysis that asks the court to consider several factors as part of a balancing test. Part III.B uses the hypothetical presented in the Introduction as an example of how the new step would work.

#### A. *The Proposal: Chevron Step Three*

As discussed earlier,<sup>346</sup> *Chevron* and *Mead* provide a three-step inquiry to determine whether an agency may receive *Chevron* deference: Step Zero, Step One, and Step Two.<sup>347</sup> Consider again the hypothetical posed in the Introduction.<sup>348</sup> Assume Congress has delegated to the FDA and USDA force of law authority to promulgate regulations in the same shared regulatory space, specifically over the safety of the use of bioengineered food in breeding cattle. Further assume that each agency interprets the statute differently so that each interprets "safety" as it understands the term under its own regulations, and these interpretations directly conflict. Because *ETSI* and *Martin* do not preclude the award of deference to one of two agencies,<sup>349</sup> a court confronting this situation would apply the current regime, which begins with Step Zero.<sup>350</sup>

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343. Sunstein, *supra* note 42, at 2087.

344. *See supra* notes 70–74 and accompanying text.

345. Scalia, *supra* note 45, at 517 (defending *Chevron* because "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency"). *But see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (providing empirical results and analysis outlining what canons and assumptions congressional staffers do consider in drafting legislation).

346. *See supra* notes 56–64 and accompanying text.

347. *See supra* notes 47–69 and accompanying text.

348. *See supra* Introduction.

349. *See supra* notes 223–77 and accompanying text.

350. *See supra* notes 47–69 and accompanying text.

Step Zero first asks whether Congress had delegated authority to the agency generally to make rules carrying the force of law; in this hypothetical, Congress has.<sup>351</sup> The second part of Step Zero asks whether the agency promulgated the regulation at issue in the exercise of that authority; here, the agency has.<sup>352</sup> Because the court answered both Step Zero questions in the affirmative, the court moves to the *Chevron* two-step inquiry.<sup>353</sup> *Chevron* Step One asks whether the statute is ambiguous in its delegation of authority to the agencies; here, the construction of the statute is ambiguous with respect to jurisdiction.<sup>354</sup> Accordingly, the court moves to Step Two, which asks whether each agency's interpretation is a permissible reading of the statute; in this hypothetical, both agencies have proffered permissible interpretations.<sup>355</sup>

The court has determined that both agencies have met the *Chevron* tests, but the court cannot award deference to both since their interpretations conflict. It is at this point that the court should employ a third step to determine to which agency it ought to defer. Step Three comprises of a six-factor balancing test; and these factors reflect the considerations and canons of construction underlying *Chevron* and *Skidmore*.

The factors are as follows:

**1. Agency Expertise.** The *Chevron* standard values agency expertise and relies on it as a factor,<sup>356</sup> as does the *Skidmore* standard, which includes the experience of agencies as guidance.<sup>357</sup> Moreover, scholars point to the comparative competence between the generalist court and specialized agency in advocating for a presumption of deference.<sup>358</sup> Accordingly, it is reasonable for a court to consider the respective expertise of each agency in the regulatory space over which the agencies claim authority.<sup>359</sup> On balance, whether an agency has accumulated a particular expertise and whether the agency relies on that expertise to carry out the provision at issue can provide a reviewing court one way to distinguish between two agencies and their reasonable interpretations.

**2. Congressional Intent and Legislative History.** Although not all legislative history is reliable,<sup>360</sup> there are some types of legislative history that are highly reliable because they represent an "integral part of the shared understanding reached by Congress as a whole."<sup>361</sup> These types of legislative history include (1) instances where one or both houses of Congress base their decisions for amending or changing a legislative

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351. *See supra* note 57 and accompanying text.

352. *See supra* note 57 and accompanying text.

353. *See supra* note 63 and accompanying text.

354. *See supra* note 64 and accompanying text.

355. *See supra* note 64 and accompanying text.

356. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

357. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

358. *See supra* notes 75–80, 315–28 and accompanying text.

359. *See supra* notes 317–28 and accompanying text.

360. James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 48–69 (1994).

361. *Id.* at 70–74.



action on statements made in committee reports;<sup>362</sup> (2) the report language of the relevant committees that Congress understands as the “controlling guidance on a textual provision;”<sup>363</sup> and (3) explanatory statements that comprise all interested legislative opinions when viewed objectively.<sup>364</sup> And as Professor Hammond notes, the history was relevant to the determination in *Martin* and helps to ascertain the true intent of Congress.<sup>365</sup> Courts should further consider the general purpose of Congress in enacting the statute and the evil the statute was meant to remedy in assessing whether one agency appears to merit deference. To the extent they provide explicit guidance for a court, the intent, as gleaned from the legislative history, provides a second important element to consider in resolving the issue of deference where there is interagency conflict.

**3. The History of the Statute and the History of the Agency’s Authority.** The history of the statute, its body of amendments and revisions, is an important consideration for courts to determine the true intent of Congress—especially where a subsequent piece of legislation transfers authority from one agency to another.<sup>366</sup> If Congress transfers authority from one agency to another or expands the authority of an agency, that intent takes precedent over the more outdated legislation.<sup>367</sup> In these ways, a court can determine from these considerations an element of congressional intent to vest certain powers in certain agencies, and as such, this factor provides a third reasonable element for courts.

**4. Political Accountability.** *Chevron* values the democratic system and notes that unlike the judiciary, agencies are politically accountable, at least indirectly through the President.<sup>368</sup> And also similarly, in arguing for a presumption favoring deference, scholars point to the political accountability of agencies over the judiciary.<sup>369</sup> However, the question of political accountability is more nuanced when the choices are between two agencies: where the court is determining whether to defer to an executive agency or to an independent agency, there may be accountability considerations.<sup>370</sup> The traditional understanding is that executive agencies are more directly accountable, however, recent scholarship indicates that independent agencies are directly accountable to a constituency.<sup>371</sup> Because the determination is case-specific and certain

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362. *Id.* at 70.

363. *Id.* at 71.

364. *Id.* at 73.

365. *See supra* notes 330–32 and accompanying text.

366. *See supra* notes 156–67, 330–31 and accompanying text.

367. *See supra* notes 95–101, 156–64 and accompanying text; *see also* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 862–64 (1984) (focusing on the interpretation of the Clean Air Act Amendments of 1977 rather than the Clean Air Act of 1970 as it represented the intent of Congress).

368. *Chevron*, 467 U.S. at 865–66.

369. *See supra* notes 71–74, 86–88 and accompanying text.

370. *See* Hammond, *supra* note 329, at 1774–76.

371. *See, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U.L. REV. 459 (2008); Lanora C. Pettit, *Cincinnatus or Caesar: American Czars and the Appointments Clause*, 26 J.L. & POL. 81 (2010); Aaron J. Saiger, *Obama’s “Czars” for*

agencies are more independent (or accountable) than others,<sup>372</sup> this factor is helpful to courts considering the question of deference.

**5. Whether the Executive Branch Has Weighed in on the Matter.** Related to the previous factor on political accountability, this factor considers whether the executive branch, either through the President, the Office of Legal Counsel (OLC) of the Department of Justice, or the White House's Office of Information and Regulatory Affairs (OIRA) have weighed in on the matter. Though this speaks to the Executive's will and not the will of Congress, whether and how the Executive has weighed in should be a consideration because it implicates notions of democratic accountability.<sup>373</sup> Whether it be through executive orders, other executive announcements,<sup>374</sup> OIRA,<sup>375</sup> the Solicitor General,<sup>376</sup> or OLC,<sup>377</sup> the Executive addressing or weighing in on the matter is important information for the judiciary to consider. A significant part of the missions of OIRA and OLC is to resolve conflicts between agencies,<sup>378</sup> and in particular, OIRA's role is more about coordination between agencies rather than cost-benefit analysis. In this way, a court may look at the role of the Executive in balancing the factors for deference.

**6. Thoroughness of Consideration.** Rooted in the *Skidmore* opinion, a court may consider the process by which the competing agencies came to their interpretations.<sup>379</sup> Courts generally have favored processes that permit and incorporate public comment, like notice-and-comment rulemaking. When confronted with one agency that promulgated regulations without notice and another that undertook a meaningful notice and comment period,<sup>380</sup> the court may find deference applicable to the latter agency. The consideration of *Skidmore* factors, both here in factor six and above in factor three, in a third Chevron step resonates with the scholarship arguing that *Skidmore* is an implicit consideration in Step One.<sup>381</sup>

Where two agencies, both authorized by the same statute to have nonexclusive and incomplete jurisdiction over some policy space, have interpreted a statutory ambiguity in different ways, Step Three will resolve

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*Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011); Tuan Samahon, *The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation*, 2011 U. CHI. LEGAL F. 169; Jonathan D. Puvak, Note, *Executive Branch Czars, Who Are They? Are They Needed? Can Congress Do Anything About Them?*, 19 WM. & MARY BILL RTS. J. 1091 (2011).

372. Datla & Revesz, *supra* note 371, at tbl. 8.

373. See *supra* notes 71–74, 86–88 and accompanying text.

374. Vivek V. Nemane, *Food and Agricultural Security Strategy and Its Implementation Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002*, 8 J. FOOD L. & POL'Y 317, 322 (2012) (discussing the Homeland Security Presidential Directives).

375. Freeman & Rossi, *supra* note 1, at 1178–81.

376. Datla & Revesz, *supra* note 371, at 801–04.

377. Freeman & Rossi, *supra* note 1, at 1175–76.

378. *Id.* at 1175–78.

379. See *supra* notes 16–20 and accompanying text.

380. See *supra* notes 51–54 and accompanying text.

381. See *supra* notes 95–101 and accompanying text.

the conflict. That the statute authorizes both agencies to have enforcement power meets the Step Zero threshold. That the statute contains ambiguities—assuming no other provision of the statute precludes one or both of the agencies from exercising authority—meets Step One. And assuming that both interpretations are reasonable, meeting Step Two, the court is left with two interpretations that could be awarded *Chevron* deference. Step Three provides a framework for courts to use to determine to which agency to defer.

As Justice Stevens's opinion in *Chevron* notes, by passing ambiguous statutes, Congress has explicitly or implicitly delegated power to administrative agencies to fill in the gaps of the statute.<sup>382</sup> This suggests that courts should defer to an agency because of the ambiguity.<sup>383</sup> Step Three is consistent with and seeks to further this argument by encouraging courts to use the relevant principles and policies to balance and determine which agency should be filling in those gaps.

As a temporal matter, it is preferable that this balancing test be a third step rather than at the initial phase because, to the extent that any one or all of the agencies do not pass through either of the well-established *Chevron* steps,<sup>384</sup> the court need not consider the Step Three factors at all. Because engaging in a standards test, such as the one proposed, requires the court to balance several factors, it would be in the interest of judicial economy if a court could resolve the conflict at any of those threshold marks.

Professor Sunstein's remarks about *Chevron* carry the same force with respect to the proposed Step Three; just like *Chevron*, the Step Three assessment should not be "a mechanical exercise of uncovering an actual legislative decision," but one which "calls for a frankly value-laden judgment about comparative competence, undertaken in light of the regulatory structure and applicable constitutional considerations."<sup>385</sup>

### B. Step Three at Work

Returning to the hypothetical posed in the Introduction,<sup>386</sup> Step Three would allow a court to resolve the dispute. The Introduction presented a piece of legislation aimed at ensuring the safety of bioengineered food fed to cattle, as well as a subsequent conflict between the FDA and the USDA over the interpretation of the word "safety" as used in their authorizing statute. Using Step Three, a court could balance the facts and factors to determine that the USDA should receive deference.

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382. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

383. *Id.*; accord Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (stating that "[w]e do not inquire what the legislature meant; we ask only what the statute means").

384. See *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). In *ETSI*, the Court found a resolution at Step One, holding that the Flood Control Act gave explicit authority to the Department of the Army and did not give that same authority to the Department of the Interior. *Id.* at 517.

385. Sunstein, *supra* note 42, at 2086.

386. See *supra* Introduction.

Considering (1) agency expertise, though both the FDA and USDA have their particularized expertise—the FDA having oversight over food safety standards for almost all food products and the USDA having oversight over the food safety standards related to, among other things, meat—a court reviewing the scope of each agency’s jurisdiction would determine that the USDA has honed a more specialized expertise in the safety of meat products over the FDA. Moreover, the court would look at the fact that the USDA had been honing this expertise for over fifty years before the FDA even received authority in the same general regulatory space. In so doing, the court would find that, on balance, expertise favored the USDA.

Examining (2) congressional intent and legislative history, the court may determine that Congress wanted the FDA to take control of this regulatory space because the 1958 statute came later in time, reflecting a new intent on the part of Congress to vest the FDA with this power. The court would undertake a review of the legislative history to see whether the congressional members discussed the topic of transferring authority and would consider the results of that search. Here, the hypothetical does not note any legislative history.

Reviewing (3) the history of the statute and the history of the agency authority, the court may determine that on balance, both agencies have claims to deference. For substantially the same reasons articulated in assessing factor (2), the court could find that the history of the agency authority tended to support a new direction by Congress, finding the FDA prevailed in this factor. On the other hand, the court could view the history of the statute, again paying particular focus to the number of years that the USDA had been overseeing this policy space, and determine that on balance, the USDA was the agency Congress intended to regulate the policy space.

Considering (4) political accountability, the court would initially note that both agencies are executive agencies but would ultimately determine that the USDA is the more politically accountable agency. Historically, the FDA has enjoyed practical independence from presidential influence (as well as other political and interest group pressure) because of its effective role as a watchdog agency,<sup>387</sup> whereas the USDA enjoys very little independence.<sup>388</sup>

Reaching (5) whether the executive branch has weighed in on the matter, the hypothetical is silent on the role of the executive branch, and accordingly, the court would not consider the factor in its analysis. Because a balancing test is a value determination rather than a threshold inquiry, the absence of one factor or information allowing the consideration of one factor does not negate the utility of the balancing test.

And finally, examining (6) the thoroughness of the consideration, the court would review the scientific thoroughness of the USDA’s methods in reaching its interpretation of safety against the means by which the FDA

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387. Datla & Revesz, *supra* note 371, at 817–18.

388. *Id.* at 825.

reached its interpretation of safety. Although the FDA's interpretation is more stringent, if the court determines that the USDA's methods were more thorough, the court would ultimately find that the USDA was the agency meant to regulate the policy space.

Having walked through each factor, the court would see that the majority of the factors, and the weight of those factors as compared to the weight of factors urging for the FDA, compel the conclusion that the USDA is the agency to which the court owes deference. This hypothetical presents a simple set of facts that lend themselves to a resolution of the conflict via Step Three.

#### CONCLUSION

*Chevron* provides the framework for a court considering whether to award deference to a single agency's interpretation of its authorizing statute, but because Congress increasingly enacts multiagency statutes, courts increasingly confront both interagency conflicts and deference problems arising from the very existence of shared regulatory space. In reviewing these conflicts and problems, courts have employed a variety of rationales, and usually have declined to award any deference.

This Note argues that multiagency statutes do not preclude agency deference and that courts should undertake a modified *Chevron* analysis to determine deference. The goal of this Note is to afford similar deference principles to agencies authorized under multiagency schemes as those agencies authorized under single-agency schemes. The application of *Chevron* deference should not turn on how many agencies Congress authorizes to regulate a particular policy space but rather on the principles that the Supreme Court has articulated through the years in awarding deference to agencies. A balancing test that considers these principles preserves the separation of powers between the judiciary and the agencies, promotes uniformity in a national administrative regime, and fosters internal coherence within the law.