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ALLOCATING DEFERENCE IN SHARED ADMINISTRATIVE SPACE

*Juan Caballero**

How do courts allocate deference when multiple agencies propose conflicting interpretations? While the Supreme Court has a clearly established Chevron-Mead paradigm for a single agency engaging in statutory interpretation, it has yet to articulate a method for applying deference in “shared administrative spaces,” legal jurisdictions wherein statutes task multiple agencies with implementing their provisions. The Court’s silence in this arena has allowed lower courts and scholars to develop competing and conflicting approaches to applying deference in shared administrative spaces.

This Article challenges the previously proposed rules for shared administrative spaces and proposes a new one. Courts should reframe Chevron “step zero” to determine which agency’s interpretive procedure best exemplifies congressional intent, public accountability, and agency expertise. Given the procedure-dependent strength of these justifications, courts should give preference to informal rulemaking over informal adjudications for the purposes of deference in shared administrative spaces. By adopting this approach, the Court would resolve interagency disputes in a manner that reflects established Chevron-Mead principles.

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INTRODUCTION

On October 4, 1957, the Soviet Union launched the first artificial satellite, Sputnik 1, into low earth orbit.¹ Sputnik 1 became the first man-made inhabitant of low orbital space and signaled the beginning of the Space Age.² Since the launch of Sputnik 1, humanity has launched nearly 10,000 satellites into orbit.³ Previous decades witnessed a slow but steady annual growth in the number of objects orbiting the earth.⁴ Starting in the 2010s, the pace of satellite proliferation has increased dramatically to the point that in 2020 alone, humanity launched 1,300 satellites into space.⁵

Today, the earth stands on the precipice of another explosion in the satellite population as companies begin launching “mega constellations” comprised of thousands of individual satellites.⁶ At the time of writing, fifteen different satellite constellations of varying sizes populate the low earth orbit.⁷ As companies such as SpaceX, Amazon, and OneWeb embark on this new phase launching mega constellations, the coordination problem posed by satellites and space debris

1. John Noble Wilford, *With Fear and Wonder in Its Wake, Sputnik Lifted Us into the Future*, N.Y. TIMES (Sept. 25, 2007), <https://www.nytimes.com/2007/09/25/science/space/25sput.html> [<https://perma.cc/P8AG-JKSK>]; Jacob Roberts, *Sputnik Fever*, SCI. HIST. INST. (July 12, 2014), <https://www.sciencehistory.org/distillations/sputnik-fever> [<https://perma.cc/7G6T-ZVTN>].

2. See Wilford, *supra* note 1.

3. Raffi Khatchadourian, *The Elusive Peril of Space Junk*, NEW YORKER (Sept. 21, 2020), <https://www.newyorker.com/magazine/2020/09/28/the-elusive-peril-of-space-junk> [<https://perma.cc/ZZ8Y-VMWK>]; Caleb Henry, *SpaceX Submits Paperwork for 30,000 More Starlink Satellites*, SPACE NEWS (Oct. 15, 2019, 6:18 PM), <https://spacenews.com/spacex-submits-paperwork-for-30000-more-starlink-satellites/> [<https://perma.cc/5XBU-CPM6>].

4. Supriya Chakrabarti, *How Many Satellites Are Orbiting Earth?*, SPACE.COM (Sept. 25, 2021), <https://www.space.com/how-many-satellites-are-orbiting-earth> [<https://perma.cc/TCA4-2EV2>]; see also Khatchadourian, *supra* note 3 (“By the nineteen-seventies, humanity had launched more than three thousand satellites—which, like space rocks, could eventually collide and fragment.”).

5. Chakrabarti, *supra* note 4.

6. Aaron C. Boley & Michael Byers, *Satellite Mega-Constellations Create Risks in Low Earth Orbit, the Atmosphere and on Earth*, SCI. REPS., May 20, 2021, at 1, <https://doi.org/10.1038/s41598-021-89909-7> [<https://perma.cc/WQ7J-5J4K>] (“In two years, the number of active and defunct satellites in [Low Earth Orbit] has increased by over 50%, to about 5000 (as of 30 March 2021). SpaceX alone is on track to add 11,000 more as it builds its Starlink mega-constellation and has already filed for permission for another 30,000 satellites with the Federal Communications Commission (FCC).”); Amy Thompson, *SpaceX Launches 51 Starlink Internet Satellites in the Constellation’s 1st West Coast Launch*, SPACE.COM (Sept. 13, 2021), <https://www.space.com/spacex-starlink-satellites-1st-west-coast-launch> [<https://perma.cc/MK3A-Y89M>] (reporting that, at the date of this writing, SpaceX had launched 1,791 Starlink satellites into orbit).

7. *Constellations*, LEOLABS (Feb. 17, 2022), <https://platform.leolabs.space/constellations> [<http://web.archive.org/web/20220217070124/https://platform.leolabs.space/constellations>].

has also grown exponentially.⁸ Low orbit collisions pose an existential threat to modern communication systems and space access;⁹ space litter resulting from these collisions tears through space at speeds of 30,000 miles per hour.¹⁰ Space debris traveling at these speeds collide with explosive force that could, in densely populated low orbit, cause a chain reaction of exploding satellite shrapnel that would render the low orbital atmosphere impenetrable.¹¹ Despite this cataclysmic threat, the current coordination infrastructure is woefully insufficient for the *current* task, let alone the new era of mega constellations that is about to unfurl.¹²

The proliferation of space junk mirrors the proliferation of regulatory agencies in the twentieth and twenty-first centuries. While executive agencies have existed since the founding of the republic, the first *modern* regulatory agency was created at the end of the nineteenth century.¹³ Much like the population of artificial satellites orbiting the

8. Marcia Smith, *ESA Urges Automated Satellite Collision Avoidance Systems After Aeolus/Starlink Maneuver*, SPACE POL’Y ONLINE (Sept. 3, 2019, 6:55 PM), <https://spacepolicyonline.com/news/esa-urges-automated-satellite-collision-avoidance-systems-after-aeolus-starlink-maneuver/> [https://perma.cc/W4HW-XKLF]; Devin Coldewey, *Near Miss Between Science Craft and Starlink Satellite Shows Need to Improve Orbital Coordination*, TECHCRUNCH (Sept. 3, 2019), <https://techcrunch.com/2019/09/03/near-miss-between-science-craft-and-starlink-satellite-shows-need-to-improve-orbital-coordination/> [https://perma.cc/6KSR-BCXJ]; Jonathan O’Callaghan, *SpaceX Declined to Move a Starlink Satellite at Risk of Collision with a European Satellite*, FORBES (Sept. 2, 2019, 3:55 PM), <https://www.forbes.com/sites/jonathanocallaghan/2019/09/02/spacex-refused-to-move-a-starlink-satellite-at-risk-of-collision-with-a-european-satellite/> [https://perma.cc/X4LA-NWCU].

9. Boley & Byers, *supra* note 6, at 1; Khatchadourian, *supra* note 3 (“[T]he problem, if ignored, could destroy all the satellites that orbit near the Earth—a loss that would be more acutely felt as humanity increasingly relied on space. Communication systems would fail; scientific instruments—to study climate, or pandemics, say—would become inoperable. The losses could be measured in billions of dollars, and perhaps in lives, too.”).

10. Khatchadourian, *supra* note 3.

11. Boley & Byers, *supra* note 6, at 4 (describing “Kessler Syndrome”).

12. *See id.* at 1 (“The current governance system for LEO, while slowly changing, is ill-equipped to handle large satellite systems . . . [M]ega-constellations require a shift in perspectives and policies: from looking at single satellites, to evaluating systems of thousands of satellites, and doing so within an understanding of the limitations of Earth’s environment, including its orbits.”); Smith, *supra* note 8 (“The European Space Agency (ESA) is urging development of automated collision avoidance systems to replace ‘archaic’ email exchanges between satellite operators.”).

13. JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 40 (2d ed. 2018), <https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agencies%20d%20ed.%20508%20Compliant.pdf> [https://perma.cc/K7CS-4GFX] (identifying the Interstate Commerce Commission, founded in 1887, as the first modern agency); *see also* STAFF OF S. COMM. ON GOV’T OPERATIONS, 95TH CONG., STUDY ON FEDERAL REGULATION 1 (Comm. Print 1977) (“For close to 100 years Congress chose to exercise the commerce power directly, without the aid of regulatory agencies. Although the actions of executive departments affected the economy, Congress

earth, the number of agencies, budgets, staff, and regulations has exploded in the ensuing 135 years.¹⁴ Today, hundreds of federal agencies collectively employ more than two million civilians in either a part- or full-time capacity.¹⁵

As with the proliferation of satellites, the proliferation of regulatory agencies in the twentieth century has created conditions for collisions between agency actors. The modern administrative state frequently requires that regulatory agencies occupy shared administrative spaces. Overlapping statutory mandates and conflicting statutory provisions mean that federal agencies frequently do not know which agency is tasked with implementing the relevant statutory provision.¹⁶ These fragmented administrative spaces create redundancy, inefficiency, gaps, and, most relevant to this paper, coordination challenges.¹⁷ Although overlapping regulatory spaces are not a new

maintained close supervision of these departments. Congress, in fact, directly supervised the heads of the Departments of Treasury, Post Office, and as late as 1849, Interior.”).

14. SELIN & LEWIS, *supra* note 13, at 19 (“Between 1933 and 1944, federal employment exploded from 603,587 to 3,332,356 workers.”).

15. There is no authoritative list of government agencies, but estimates range from 118 to 305 federal agencies. *Id.* at 10–12 (surveying third-party estimates and identifying 259 federal entities that qualify under the Administrative Conference of the United States’ definition of “agency”); *see also* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS 33, 33–34 (2021). Estimates similarly vary with regard to the federal workforce. *Cf.* JULIE JENNINGS & JARED C. NAGEL, CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 1 (2021), <https://sgp.fas.org/crs/misc/R43590.pdf> [<https://perma.cc/G2JS-2FVZ>] (listing the Office of Personnel Management federal workforce estimate of 2.1 million civilian workers, which excludes employees from the Legislative Branch, Judicial Branch, and select non-Postal Federal agencies); SELIN & LEWIS, *supra* note 13, at 10 (estimating 2.68 million civilian employees of federal agencies).

16. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134 (2012) (“Congress often assigns more than one agency the same or similar functions or divides authority among multiple agencies, giving each responsibility for part of a larger whole. Instances of overlap and fragmentation are not rare or isolated. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation.”); *see also* FTC v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001) (“Because we live in ‘an age of overlapping and concurring regulatory jurisdiction,’ a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may.” (internal citation omitted)).

17. *See, e.g.*, Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §§ 801–962 (1982) (tasking the Secretary of Labor or his delegate with “develop[ing], promulgat[ing], and revis[ing] . . . mandatory health or safety standards,” 30 U.S.C. §§ 811, adjudicatory authority for reviewing these standards to the Federal Mine Safety and Health Review Commission, 30 U.S.C. § 815); Williams-Steiger Occupational Safety and Health Act of 1970, 29 U.S.C.A. §§ 651–678 (authorizing the Occupational Safety and Health Administration, a subsidiary of the Department of Labor, to promulgate “occupational safety or health standard[s],” 29 U.S.C. § 655, and the independent Occupational Safety and Health Review Commission with adjudicating challenges to those standards, 29 U.S.C. § 659).

phenomenon,¹⁸ courts have yet to provide definitive guidance on how they defer to agencies in these shared administrative spaces.¹⁹

The current deference paradigm is defined primarily by two foundational cases: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁰ and *United States v. Mead Corp.*²¹ (collectively “*Chevron-Mead*”). While scholars and pundits have speculated the demise of the *Chevron-Mead* paradigm, it remains good law as of this writing.²² These precedents were developed in litigation involving single agency actors and largely fail to discuss statutes that task multiple agencies with implementing their provisions. Such statutes create shared administrative spaces wherein multiple agencies can arguably lay claim to the mantles of expertise and accountability that justify *Chevron* deference. Courts serve as coordination institutions and, as such, should adopt a clear, uniform background rule for deference in shared regulatory spaces. Supreme Court decisions have occasionally ventured into this arena²³ but have primarily focused their discussions of deference on single agency actors.

18. *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986) (“[O]urs is an age of overlapping and concurring regulatory jurisdiction.”) (citing *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977)).

19. See Ryan D. Doerfler, *Can a Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. 213, 222 (2019) (“[T]he Supreme Court has, for decades, failed to settle under what conditions deference is warranted for agency views of a statute that multiple agencies . . . administer.”) (internal quotation marks omitted).

20. 467 U.S. 837 (1984).

21. 533 U.S. 218 (2001).

22. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“We have studiously attempted to work our way around it and even left it unremarked. . . . Maybe the time has come to face the behemoth.”); James Kunhardt & Anne Joseph O’Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS INST. (Aug. 18, 2022), <https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/> [https://perma.cc/T6NU-T3UT]. Despite having several opportunities in recent years to overrule *Chevron-Mead*, the Court has declined to do so. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2405 (2019) (reaffirming the Court’s application of *Chevron-Mead* deference). The Court has refrained from explicitly rejecting this legal framework despite its recent precedent expanding of the “major questions” exception to *Chevron-Mead* deference. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–16 (2022) (rejecting the EPA’s Clean Power Plan pursuant to the major questions doctrine); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (barring the CDC’s enforcement of a federal moratorium on evictions under the major questions doctrine); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665–66 (2022) (applying the major questions doctrine to strike down the Department of Labor’s emergency temporary standards issued in response to the COVID-19 pandemic).

23. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144 (1991).

This Article proposes that courts reframe *Chevron-Mead* “step zero” to determine *which* agency action Congress intended to carry the force of law by considering the procedures used by each agency. The current justifications for deference in the *Chevron-Mead* jurisprudence—congressional intent, political accountability, and agency expertise²⁴—do not apply with equal force to all agency procedures. Given the procedure-dependent strength of these justifications, courts should defer to the agency that uses the procedure that best reflects the policy preferences articulated in *Chevron-Mead* precedent. In this analysis, informal rulemaking should be favored over informal adjudications, which are favored over less formal procedures for statutory interpretation. This proposed framework adheres to the principles articulated in *Chevron-Mead* and it facilitates cooperation, communication, and transparency among regulatory agencies.

Chevron deference is judicially created interpretive canon and, as such, it is subject to judicial review and improvement as necessary. Much as *Chevron* proposed a background rule to inform courts’ interpretations of ambiguous statutory language,²⁵ this proposal attempts to provide a background rule to inform courts’ interpretations of ambiguous congressional delegations. A clear rule will also provide certainty about an agency’s ability to invoke deference when they seek to resolve statutory ambiguities.

Part I discusses the historical foundations of the modern administrative state beginning with the Administrative Procedure Act (APA), a statute foundational to the categories of agency procedure at issue in this Article. This section clarifies the origins of the current deference regime and the principles that undergird it. Part II complicates this picture of deference by explaining how overlapping and fragmented delegations come into existence. It also discusses the coordination tools that currently exist to avoid potential collisions in shared administrative spaces. Part III reviews proposed solutions from scholars and

24. *See* *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (holding that deference was appropriate because of “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time”); *Chevron U.S.A. Inc.*, 467 U.S. at 865–66; *see also Mead Corp.*, 533 U.S. at 241 (Scalia, J., dissenting) (arguing that the principle of *Chevron* is “rooted in a legal presumption of congressional intent, important to the division of powers” between the branches of government).

25. *Mead Corp.*, 533 U.S. at 257 (Scalia, J., dissenting) (“*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion.”).

jurists to the administration of deference in shared administrative spaces. Finally, Part IV details my proposed reformulation of the *Chevron-Mead* doctrine to address the unique dynamics posed in multi-agency deference disputes.

I. ESTABLISHING THE MODERN ADMINISTRATIVE STATE

A proper understanding of the modern administrative state and the principles undergirding deference precedent requires an appreciation of the historical context in which they developed. Despite *Chevron*'s centrality in discussions of modern administrative law,²⁶ the foundations of the modern administrative state predate the 1984 Supreme Court decision.²⁷ Many of these core principles can be traced back to the historical development of administrative law during the first half of the twentieth century. This part explores the relevant jurisprudential underpinnings of the modern administrative state.

A. *Administrative Procedure Act and the Paradigm of Agency Action*

The first notable development in the creation of the modern administrative state occurred in 1946 with the passage of the APA, which established procedures an agency must follow to promulgate binding rules and regulations.²⁸ The APA sought to balance bureaucratic expertise against what was perceived as the competing goal of legislative accountability.²⁹ The APA created a new paradigm for agency actions which continues to apply today.

While the APA is by no means the sole statute governing administrative functions currently, it does still provide the fundamental framework and vocabulary that scholars and courts use when discussing agency actions. The procedures contained in the APA are generally applicable in the absence of more specific statutory provisions. Congress may enact statutes that either impose additional procedures or exempt agencies from APA requirements.³⁰ Enacting statutes have

26. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) (“[*Chevron*] has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.”).

27. *See* *Negusie v. Holder*, 555 U.S. 511, 529 (2009) (Stevens, J., dissenting).

28. The Administrative Procedure Act, 5 U.S.C. § 500–596.

29. Dudley, *supra* note 15, at 36–37.

30. *See, e.g., Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810–14 (2019) (analyzing the significance of differences between the APA and the Medicare statute’s procedural provisions);

taken a number of approaches for authorizing agency action. Some agencies are authorized in either rulemaking *or* adjudication.³¹ Many agencies set policy through both.³²

The APA codified two distinct forms of agency pronouncement—rules and orders.³³ A rule is an agency pronouncement of “general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”³⁴ Rulemaking, as the name suggests, is the process by which an agency formulates, amends, or repeals a rule.³⁵

Orders, conversely, tend to be narrower actions.³⁶ In contrast to rulemaking, which imposes a general notice requirement on the agency at the outset of the proceeding that is published in the Federal Register,³⁷ there is no requirement that the adjudicating agency inform the public of the issues it is reviewing.

The authority to engage in rulemaking and adjudication is considered fundamental to federal administrative authority. To this end, the judiciary has recognized that only Congress can restrict an agency’s authority to engage in either rulemaking or adjudication; thus, unless statutorily required, agencies have the discretion to choose between either rulemaking or adjudication for their policymaking procedure.³⁸ “Most agency authorizing statutes include language that explicitly authorizes the agency to promulgate rules and/or regulations.”³⁹

Kiewit Power Constructors Co. v. Sec’y of Lab., 959 F.3d 381, 400–01 (D.C. Cir. 2020) (observing that the Occupational Safety and Health Act “expressly exempted the Secretary from APA rulemaking” and considering the implications for *Chevron* deference); see also Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 944–45 (2021) (“The APA, after all, is just a default; Congress is free to add more procedures to it or eliminate procedures otherwise required by it. And, in fact, Congress often does add more procedures.”).

31. See, e.g., SELIN & LEWIS, *supra* note 13, at 117–18 tbl.18 (forty-two federal agencies or their subparts are authorized to hold hearings or adjudications).

32. *Id.* at 116.

33. Hickman & Nielson, *supra* note 30, at 942 (“[T]he APA divides what agencies do between rulemaking and adjudication. This particular line may be the APA’s most important innovation.”).

34. 5 U.S.C. § 551(4)–(5).

35. 5 U.S.C. § 551(5).

36. See 5 U.S.C. § 551(6)–(7).

37. 5 U.S.C. § 553(b)–(c). Following public notice, agencies allow for a comment period during which, any interested party may submit written arguments. 5 U.S.C. § 553(c). There is an exception to the public notice requirement for rulemaking in the case of particularized rulemaking, where the agency provides personal notice to the affected parties. 5 U.S.C. § 553(b).

38. SEC v. Chenery Corp., 332 U.S. 194, 201–02 (1947); see Aneil Kovvali, *Context-Specific Seminole Rock Reform*, 46 FLA. ST. U. L. REV. 415, 438 (2019).

39. SELIN & LEWIS, *supra* note 13, at 118.

Currently, the Court does not distinguish between rulemaking and adjudication for the purposes of deference.⁴⁰

B. Chevron-Mead Deference

The current deference paradigm is defined primarily by two foundational cases: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴¹ and *United States v. Mead Corp.*⁴² (collectively “*Chevron-Mead*”). This precedent provides essential background rules against which Congress legislates and agencies act. *Chevron-Mead* achieves this by embracing the comparative strengths of both courts and agencies as institutions.⁴³

In 1984, the Supreme Court issued its unanimous opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴⁴ Authored by Justice Stevens, the watershed opinion articulated a deference standard that became a central tenant of administrative law.⁴⁵ Much like passage of the APA, the 1984 opinion in *Chevron* was another major inflection point in the development of modern administrative law.⁴⁶ While judicial deference to agency interpretations predates *Chevron*, this opinion distilled previous deference precedent into a generally applicable formula. Prior to *Chevron*, courts used varying,

40. *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013) (“What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field. There is no such case, and what the dissent proposes is a massive revision of our *Chevron* jurisprudence.”).

41. 467 U.S. 837 (1984).

42. 533 U.S. 218 (2001).

43. Scholars have long debated the merits of *Chevron*. See Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 562 n.1 (2006) (cataloging law review articles wherein scholars question the political and constitutional legitimacy of the administrative state); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1199–200 (2021) (“[T]he potential demise of *Chevron* deference was a core talking point against Gorsuch’s elevation to the Supreme Court.”). Despite the decades of academic critiques, the Court has repeatedly used and reified the deference framework including, most recently, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). In *Kisor*, the Court reaffirmed the *Chevron* framework and held that an agency’s reasonable reading of its own genuinely ambiguous regulations is entitled to deference. 139 S. Ct. at 2408; see also *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (noting that the major issues exception to *Chevron-Mead* only applies in “extraordinary cases”). This Article does not seek to question the validity of *Chevron-Mead* precedent.

44. 467 U.S. 837 (1984).

45. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), U.S. DEP’T OF JUST.: EXEC. OFF. OF IMMIGR. REV. (Aug. 10, 2021), <https://www.justice.gov/enrd/chevron-usa-v-natural-res-def-council> [<https://perma.cc/4YNA-P94F>].

46. *Id.*

and occasionally competing, justifications for administrative deference. For instance, these pre-*Chevron* courts frequently used temporal considerations in their deference analysis. Courts initially emphasized agencies' consistent application of regulations or statutes over time to legitimize the interpretation during a dispute.⁴⁷ Relatedly, pre-*Chevron* jurisprudence also preferred agency interpretations that were contemporaneous with the passage of the statute or enactment of the regulation.⁴⁸ These early deference standards incentivized agencies to lock in their statutory interpretations and limited the agencies' ability to adopt subsequent interpretations. *Chevron* did away with the conflicting rationales and instead replaced them with a two-step analysis; first the court considers whether the statutory language at issue is ambiguous and, if it is, the reviewing court then considers whether the agency's interpretation is reasonable.⁴⁹ If the agency's interpretation satisfies both steps in the analysis, then the court defers to it.⁵⁰

Chevron articulated a succinct standard for allocating deference. Seventeen years later, the Court was forced to consider whether this singular deference standard was sufficient to address the multifarious procedures that Congress provides to administrative agencies.⁵¹ Confronted with the decision of collapsing its deference analysis for the universe of potential agency actions into a singular standard or

47. See, e.g., *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978) (“[A] totally unjustified departure from well-settled agency procedures of long standing might require judicial correction.”); *Peters v. Hobby*, 349 U.S. 331, 355 (1955) (Reed, J., dissenting) (“Such reasonable interpretation promptly adopted and long-continued by the President and the Board should be respected by the courts. That has been judicial practice heretofore.”); see also *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 736 (5th Cir. 2018) (post-*Chevron* case citing consistency in the Department of Labor’s interpretation of a statute as reinforcing the court’s conclusion that the agency’s interpretation was reasonable).

48. See, e.g., *Vt. Yankee Nuclear Power*, 435 U.S. at 549 (“We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must ‘stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review.’”); *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 549 (1940) (“In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve ‘contemporaneous construction [sic] of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.’”); *Comm’r v. Fisher*, 150 F.2d 198, 200 (6th Cir. 1945) (“As a contemporaneous interpretation of the meaning of the regulations by those who are appointed to carry out its provisions, Treasury Decision No. 5024 has great weight and is entitled to respect.”), *rev’d*, 327 U.S. 512 (1946); see also Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 997–99 (2017).

49. *Chevron U.S.A., Inc.*, 467 U.S. at 842–43.

50. *Id.*

51. *United States v. Mead Corp.*, 533 U.S. 218, 235–36 (2001).

tailoring multiple forms of deference to this reality, the Court chose the latter.⁵² In *Mead*, the Court's majority wrote, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."⁵³ The Court recognized that the variety of agency procedures necessitated more than one form of judicial deference.⁵⁴ To this end, Justice Souter's opinion revived *Skidmore* deference,⁵⁵ which articulated a deference framework that incorporated various enumerated factors to weigh an agency interpretation's persuasive value.⁵⁶

Mead modified the *Chevron* analysis by imposing a new threshold analysis known as *Chevron* "step zero."⁵⁷ Specifically, the Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."⁵⁸ Agency actions that do not satisfy this threshold inquiry are subject to the less deferential standard articulated in *Skidmore*.⁵⁹

While the first inquiry under *Chevron* step zero focuses on congressional intent, the second focuses on the "form and context" of the agency's interpretation.⁶⁰ The Court in *Mead* presumed that Congress delegated the right to act "with the force of law" to agencies engaging in informal rulemaking and formal adjudications,⁶¹ but it did not hold these procedures to constitute the comprehensive list of agency actions

52. *Id.* at 239–61 (Scalia, J., dissenting).

53. *Id.* at 226–27.

54. *Id.* at 236–37.

55. This deference standard derives its name from *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

56. *Mead Corp.*, 533 U.S. at 234–35.

57. *Id.* at 229–31 (offering different considerations to weigh in particular cases); see Sunstein, *supra* note 26, at 191 (describing "initial inquiry into whether the *Chevron* framework applies at all" as "Step Zero").

58. *Mead Corp.*, 533 U.S. at 226–27 (emphasis added).

59. *Id.* at 227.

60. Hickman & Nielson, *supra* note 30, at 957.

61. *Mead Corp.*, 533 U.S. at 229–31.

that qualified as carrying the force of law.⁶² Beyond the discussions of adjudication and rulemaking, the Court in *Mead* did not provide much guidance on the opinion's applications to nontraditional forms of agency action.⁶³

Chevron and *Mead* are premised on three justifications: congressional intent, political accountability, and agency expertise.⁶⁴

1. Congressional Intent

The *Chevron-Mead* deference regime is built on a legal fiction that statutory ambiguity signals congressional intent to delegate to the agency the authority to serve as the statute's principal interpreter.⁶⁵ Despite being recognized as a legal fiction, courts have repeatedly reaffirmed their commitment to the principle.

Congressional intent is the most controversial justification for *Chevron*. Since its inception, *Chevron* has experienced sustained criticism by scholars and jurists who view the congressional delegation

62. *Id.* at 230–31 (“That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”); see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1793 (2007) (contending that in order to qualify for *Chevron* deference post-*Mead*, the agency interpretation must provide adequate information emanating from an official source, thereby allowing Congress to engage in fire-alarm oversight).

63. *Mead Corp.*, 533 U.S. at 237 (“Whether courts do owe deference in a given case turns, for him, on whether the agency action (if reasonable) is ‘authoritative.’ The character of the authoritative derives, in turn, not from breadth of delegation or the agency’s procedure in implementing it, but is defined as the “official” position of an agency and may ultimately be a function of administrative persistence alone.”) (internal citations omitted); cf. *Christensen v. Harris County.*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”) (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995)).

64. Cf. *Immigr. & Naturalization Servs. V. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (stating that pre-*Chevron* deference depended on consistent application of regulations or statutes over time to legitimize the agency interpretation as opposed to the three *Chevron-Mead* justifications) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

65. See *Mead Corp.*, 533 U.S. at 241 (Scalia, J., dissenting) (arguing that the principle of *Chevron* is “rooted in a legal presumption of congressional intent, important to the division of powers” between the branches of government); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589–90 (2006) (describing the legal presumption of “congressional will” to be a legal fiction that provides the foundation of *Chevron* itself); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (“[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”).

justification to be inapposite with constitutional separation of powers principles.⁶⁶

2. Political Accountability

In addition to congressional intent, *Chevron* and *Mead* use political accountability and agency expertise as justifications for deference. Political accountability distinguishes agency actors from federal courts because the agencies are subject to presidential control.⁶⁷ Scholars and jurists agree that agencies have a distinct advantage over the courts with respect to these two variables.⁶⁸

Chevron-Mead's dual reliance on political accountability and technical expertise as a justification is a marked departure from the earlier precedent that imagined these two principles as inapposite when it came to regulating.⁶⁹ Choices made in light of statutory ambiguity were not initially understood to constitute political decisions, but rather were viewed as applications of solution-oriented expertise to "fix the nation's ills."⁷⁰ Early twentieth century courts understood agency expertise as guiding agency action to objective decisions, void of political considerations, much as a doctor would when treating a patient's condition.⁷¹ This belief in a singular objective agency

66. See Hickman & Nielson, *supra* note 30, at 954 (cataloging critiques of the implicit delegation justification of *Chevron* deference); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

67. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."); see Bressman, *supra* note 62, at 1764–65 (2007) (discussing the "presidential control" model of administrative law).

68. See, e.g., Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 357 n.85 (2013) ("The classic prudential bases for *Chevron* deference are expertise and accountability. Where intent is ambiguous, courts may at times presume that Congress would prefer deference to non-deference simply because it makes for more effective policy.")

69. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) ("The [Federal Trade Commission] is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001) (discussing the writing of James Landis, principal spokesman for the idea that expertise was the primary justification for federal agencies' "enhanced bureaucratic power" during the New Deal Era).

70. Bressman, *supra* note 62, at 1759–61.

71. *Id.*

interpretation was reflected in pre-*Chevron* courts' preference for longstanding and contemporaneous statutory interpretations.⁷² Courts no longer articulate this theory of policymaking as objective science.⁷³

While pre-*Chevron* courts favored stability and longevity in agency interpretations, the *Chevron-Mead* jurisprudence dispatched with these considerations in favor of flexible, politically informed responses. In *Chevron*, Justice Stephens wrote:

[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.⁷⁴

Justice Stephens reasoned that the act of interpreting ambiguous statutory provisions required the agency to make a variety of policy decisions and constituted inherently political decisions.⁷⁵ Given that interpreting ambiguous statutory provisions was now considered a political act, the agencies were better positioned to make these determinations since they, unlike the judiciary, are located in the political branches of government.⁷⁶ Now that courts no longer viewed

72. Scalia, *supra* note 65, at 517 (“[T]here is no longer any justification for giving ‘special’ deference to ‘long-standing and consistent’ agency interpretations of law. That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one, permanent, ‘correct’ meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose.”).

73. See Bressman, *supra* note 62, at 1761; Kagan, *supra* note 69, at 2261–64 (describing James Landis’s articulation of bureaucratic technocrats implementing an “objective public interest”).

74. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

75. *Id.* at 865 (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences.”); see also Scalia, *supra* note 65, at 517 (identifying flexibility and political participation as major advantages enacted in *Chevron* precedent).

76. *Chevron U.S.A., Inc.*, 467 U.S. at 865–66; see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (discussing *Chevron* justifications); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1775 (2012) (“Although courts had long emphasized that agencies are more politically accountable

“expertise” as a vehicle for achieving a singular “right” legal conclusion; flexibility in light of shifting facts and policy preferences was beneficial to implementing statutes.⁷⁷ After all, agencies can only be responsive to political preferences if they can alter prior interpretations in light of new political variables.⁷⁸

Chevron’s embrace of political accountability to justify deference also marked the end of the Court’s preference for longstanding and contemporaneous interpretations. The *Chevron* Court’s rejection of the traditional preference for longstanding and contemporaneous interpretations was premised on the notion that agencies must be free to adopt evolving interpretations in light of shifting policy considerations.⁷⁹ In contrast to the pre-*Chevron* regime that favored consistency over accountability, the Court post-*Chevron* no longer viewed evolving interpretations negatively.⁸⁰ This was yet another way that agencies had a comparative advantage over courts, which are bound by principles of *stare decisis* that limit their ability to overturn precedent to address new facts. In this way, courts were bound—in a way that agencies were not—to a singular understanding of statutory ambiguities.⁸¹ Now, rather than viewing longstanding interpretations favorably, courts view stable agency interpretations with wariness. Justices have expressed concern about creating any system that leads to the

than the judiciary, *Chevron* tied agency accountability to the president himself, which gives these executive agencies a claim to democratic legitimacy.”); Manning, *supra* note 66, at 626 (“*Chevron*’s reasoning devotes far greater emphasis to the broader assumptions underlying our structure of government. Specifically, the Court emphasized that our constitutional system favors relatively more accountable agencies, and not relatively less accountable courts, as repositories of policy-making discretion.”).

77. Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35, 54–55 (1991) (“As an agency gains experience with a regulatory scheme, its understanding of that scheme increases. This understanding can alter the agency’s view of regulatory problems and affect its interpretations. Thus, even though an agency may have interpreted a regulation one way when the regulation was promulgated, it might interpret that same regulation in a different way at a later date.”); Scalia, *supra* note 65, at 519.

78. *Chevron U.S.A., Inc.*, 467 U.S. at 863–64.

79. *Id.* (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

80. *See id.*; *see also* Bamzai, *supra* note 48, at 942–47; Thomas W. Merrill, *Re-Reading Chevron*, 70 DUKE L.J. 1153, 1178–79 (2021); Scalia, *supra* note 65, at 517 (identifying flexibility and political participation as major advantages enacted in *Chevron* precedent).

81. *See* Scalia, *supra* note 65, at 517–19 (“One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change.”).

ossification of opinions.⁸² In *Chevron*, the Court expressed a general policy preference for flexibility on the part of the agency power to address shifting needs and realities.⁸³ The Court has repeatedly articulated this reasoning in its subsequent jurisprudence. In 2005, it explicitly rejected inconsistency in agency interpretations as a reason for withholding deference.⁸⁴

3. Agency Expertise

Agency expertise is the third pillar of *Chevron* deference jurisprudence.⁸⁵ In contrast to congressional intent and, arguably, political accountability, agency expertise was a core principle of administrative law prior to *Chevron*.⁸⁶ Traditionally, this expertise was viewed as an

82. *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (“[T]he majority’s approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency’s ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.”).

83. *Chevron U.S.A., Inc.*, 467 U.S. at 863–64 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.”).

84. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699–700 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a reversal of policy, ‘change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.’”) (internal citations omitted). Despite the Court’s rejection of consistency and longevity as justifications for deference, courts will occasionally reference these principles favorably when reviewing agency actions. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (“And this Court will normally accord particular deference to an agency interpretation of ‘longstanding’ duration.”) (citing *N. Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912, 1918 n.12 (1982)); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (“Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA.”).

85. *See, e.g.*, *Chevron U.S.A., Inc.*, 467 U.S. at 865–66; *Barnhart*, 535 U.S. at 222 (holding that deference was appropriate because of “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.”); *Ardestani v. Immigr. & Naturalization Servs.*, 502 U.S. 129, 148 (1991) (Blackmun, J., dissenting) (“This Court has indicated, however, that reviewing courts do not owe deference to an agency’s interpretation of statutes outside its particular expertise and special charge to administer.”) (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–650 (1990)).

86. *See, e.g.*, *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (“Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.”) (internal quotation marks omitted).

organizing principle removed from political partisanship.⁸⁷ Progressives in the early twentieth century believed that agencies should be staffed with neutral experts, who were expected to act apolitically in order to implement laws in pursuit of an objective public interest.⁸⁸

This expertise is typically framed as the agency's expertise relative to the Article III courts. Both the courts and Congress are generalist bodies with legal and constitutional scholars who are not necessarily experts in the complex fields that agencies are regularly tasked with regulating.⁸⁹ *Chevron* and its progeny are heavily influenced by this notion of expertise as a pragmatic way of ensuring that regulations are directed by the institution best situated to employ specialized expertise to address complex issues.⁹⁰

87. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (“Expert discretion is the lifeblood of the administrative process . . .”); see also Aaron L. Nielson, *Deconstruction (Not Destruction)*, 150 DAEDALUS 143, 144–45 (2021) (“[T]he New Deal theory was that ‘expert professionals,’ acting apolitically, can ‘ascertain and implement an objective public interest.’”).

88. Feliz Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 621 (1927) (“The shaping of our administrative law thus calls for students trained in the common law and familiar with its history. . . . Above all, he must have a rigorously scientific temper of mind. For we are seeking the formulation of a body of law based upon objective criteria . . .”); see also Nielson, *supra* note 87, at 144–145 (describing progressive views of the administrative state).

89. Meazell, *supra* note 76, at 1772.

90. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 56 (2011) (“We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (“The identification and classification of medical eligibility criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.”); *Chevron U.S.A., Inc.*, 467 U.S. at 865 (“Judges are not experts in the field, and are not part of either political branch of the Government.”); *Catawba County v. EPA*, 571 F.3d 20, 41 (D.C. Cir. 2009) (“[W]e give an extreme degree of deference to EPA when it is evaluating scientific data within its technical expertise. Such deference is especially appropriate in our review of EPA’s administration of the complicated provisions of the Clean Air Act.” (internal quotation marks and citations omitted)); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (“[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential.”); see also Meazell, *supra* note 76, at 1772–73 (“[E]ven if regulators are captured by rent-seeking regulated entities, as a matter of comparative institutional expertise, courts cannot come close to duplicating the scientific and factfinding capabilities of agencies. Agencies can conduct their own science, after all; courts are relegated to reviewing a record post hoc. Accordingly, expressions of deference on the basis of expertise persist in the case law. And ultimately, a prevailing reason that courts insist that they may not substitute their judgment for that of agencies is because of the agencies’ expertise.”).

II. SHARED ADMINISTRATIVE SPACE

While the Court addressed one form of administrative complexity in *Mead*, it has yet to conclusively address another: shared administrative spaces. This section provides an overview of administrative spaces and how agencies deal with them. It canvasses the existing academic literature and court opinions discussing these overlapping agency jurisdictions.

A. *Creating Shared Administrative Spaces*

Shared administrative spaces are pervasive in the modern administrative state.⁹¹ While *Chevron* and *Mead* focus on “traditional administrative agencies”⁹²—agencies that incorporate rulemaking, enforcement, and adjudicative powers into a single agency—Congress has distributed these authorities in a variety of agency structures.⁹³

91. See, e.g., 29 U.S.C. §§ 657, 661 (portions of the Occupational Safety and Health Act tasking the Occupational Safety and Health Administration, a subsidiary of the Department of Labor, with setting and enforcing health and safety standards, and the three-member Occupational Safety and Health Review Commission with adjudicating challenges to those standards); see also *City of Arlington v. FCC*, 569 U.S. 290, 323 (2013) (Roberts, C.J., dissenting) (noting that the Dodd-Frank Wall Street Reform and Consumer Protection Act “concerns statutes that parcel out authority to multiple agencies, which ‘may be the norm, rather than an exception’”); *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144 (1991) (considering the OSHA’s “split enforcement” structure); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (“[W]e live in ‘an age of overlapping and concurring regulatory jurisdiction,’ a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may.”) (internal citation omitted); *Tex. State Comm’n for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986) (reviewing a conflict between the Department of Education and the Department of Defense); Amanda Shami, *Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court*, 83 *FORDHAM L. REV.* 1577 (2014). See generally *Managing for Results: Using GPRA to Help Congressional Decisionmaking and Strengthen Oversight Before the Subcomm. on Rules & Org. of the H. Comm. on Rules*, 106th Cong. 19 (2000) (statement of David M. Walker, Comptroller General of the United States), <http://www.gao.gov/assets/110/108330.pdf> [<https://perma.cc/T7WX-CSVZ>] (“Virtually all of the results that the federal government strives to achieve require the concerted and coordinated efforts of two or more agencies. Yet our work has repeatedly shown that mission fragmentation and program overlap are widespread and that crosscutting federal program efforts are not well coordinated.”).

92. *Martin*, 499 U.S. at 154 (quoting *Dole v. Occupational Safety & Health Rev. Comm’n*, 891 F.2d 1495, 1498 (10th Cir. 1989)).

93. See, e.g., Controlled Substances Act, 21 U.S.C. § 811 (permitting the Attorney General to add, remove, or reschedule substances to the controlled substances schedule, but requiring that they first accept the findings of the Secretary of Health and Human Services on all scientific and medical matters); see also Sharkey, *supra* note 68, at 329 (“[I]n the field of consumer protection, horizontal coordination—necessitated when Congress charges different federal agencies with discrete and overlapping jurisdiction—raises equally intractable problems. Or at least, problems that, to date, have received considerably less attention by courts and academics.”); *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 192–93 (D.C. Cir. 1986) (reviewing challenge to Federal Trade Commission complaint alleging false and misleading advertising of over-the-counter analgesic).

Scholars have suggested a number of theories to explain the creation of these overlapping administrative structures. I have taken the liberty of categorizing these various theories into two groupings. The first classification of theories focuses on the congressional intent to structure shared administrative spaces as a reflection of congress itself. For instance, Professors Jody Freeman and Jim Rossi theorize that bureaucratic redundancy is modeled after the structural redundancy in the congressional committee system.⁹⁴ Under this theory, congress members are motivated by a desire to advance their constituents' interests and thereby their own prospects for reelection.⁹⁵ Committees, they suggest, will attempt to seize as much jurisdiction as possible for the agencies they supervise.⁹⁶ A similar theory for congressional action posits that shared administrative spaces are an inadvertent product of the compromises that are inherent in the legislative process.⁹⁷ Legislative compromises require that lawmakers balance their competing policy preferences; shared administrative spaces similarly require agencies to compromise in order to act.⁹⁸

94. Freeman & Rossi, *supra* note 16, at 1138–40.

95. *Id.* at 1139–40.

96. *Id.*

97. Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 712 (2013) [hereinafter Gersen, *Administrative Law Goes to Wall Street*] (“[S]hared jurisdiction schemes are a way to manage the principal-agent problem generated when Congress delegates to the bureaucracy. By crafting a regime in which multiple agents compete with each other, Congress might encourage the development and accurate revelation of information by agencies. Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent.”).

98. See, e.g., *Individual Reference Servs. Grp., Inc. v. FTC*, 145 F. Supp. 2d 6, 23 (D.D.C. 2001) (“The Regulations were the result of coordinated effort among all the defendants.”), *aff’d*, 295 F.3d 42 (D.C. Cir. 2002); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1463 (2011) (“Redundant systems are thought to act as a form of insurance: if one agent fails in her task, another agent’s contributions may compensate. Furthermore, if agents’ contributions are partial rather than perfect substitutes (that is, if the agents’ functions overlap but are not fully redundant), then the contributions from multiple agents may add value to the final outcome even if none of them shirk.”); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 882–96 (2006) (arguing that regulatory overlap may be a strategy for overcoming regulatory inertia, encouraging innovation, or facilitating integration across jurisdictions). Relatedly, scholars suggest that bureaucratic redundancy may cultivate greater agency expertise. See Stephenson, *supra*; Freeman & Rossi, *supra* note 16, at 1139; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324–27 (2006); Ahdieh, *supra*, at 882–83; see also *Improving Coordination of Related Agency Responsibilities*, ADMIN. CONF. OF U.S. (June 15, 2012), <https://www.acus.gov/recommendation/improving-coordination-related-agency-responsibilities> [<https://perma.cc/H5AH-WKP5>] (“A key advantage to such delegations may be the potential to harness the expertise and

The second category of explanations for Congress's motivations in creating shared administrative spaces focuses on the expected outcomes of overlapping jurisdictions. For instance, Professor Gersen suggests that congress members strategically create shared administrative spaces to shift a portion of the oversight burden onto the agencies occupying the shared space and thereby limit their own oversight costs.⁹⁹ Alternatively, rather than limit the oversight costs imposed on Congress, bureaucratic fragmentation and splintering may be a strategy for *imposing* costs on the executive. Under this theory, the inter-agency coordination necessary to implement policies in shared administrative spaces imposes additional costs on the executive branch.¹⁰⁰ A variation of this theory is that these shared regulatory spaces are created to insulate the agencies from capture by outside interest groups.¹⁰¹ Or Congress may also create shared administrative spaces in order to protect individuals' rights.¹⁰²

Given the variety of explanations for bureaucratic redundancy and the variety of circumstances in which it arises, it is unlikely that

competencies of specialized agencies. But that potential can be wasted if the agencies work at cross-purposes or fail to capitalize on one another's unique strengths and perspectives.”)

99. Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 712–13; Freeman & Rossi, *supra* note 16, at 1139.

100. See Meazell, *supra* note 76, at 1778–79 (“Multimember panels are expected to benefit from enhanced deliberative decisionmaking; when a single political party can hold only a bare majority, for example, decisions are less likely to amplify short-term political views. Other reasons for creating independent agencies involve maintaining stability, providing insulation from interest-group capture, and protecting against bureaucratic drift.”); Freeman & Rossi, *supra* note 16, at 1140.

101. Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 539–49 (2012) (contending that the presence of multiple financial regulators with different missions makes them less susceptible to capture by any single group); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 50 (2010); Katyal, *supra* note 98, at 2325 (“Moreover, to the extent that particular agencies are captured by interest groups, overlapping jurisdiction can mitigate the harm.”); see, e.g., *Dole v. Occupational Safety & Health Rev. Comm’n*, 891 F.2d 1495, 1498 (10th Cir. 1989) (noting that Congress created the OSHRC “in response to business concerns that combining prosecutorial and adjudicative authority in the Secretary would produce decisions biased against employers” (citing S. 2193, 91st Cong. § 6 (1969) (enacted))) *rev’d sub nom. Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144 (1991).

102. See, e.g., *Hearing on “The State of Judicial Independence and Due Process in U.S. Immigration Courts” Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong., 3–4 (statement of Judge A. Ashley Tabaddor, President, National Association of Immigration J.J.) (2020), <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf> [<https://perma.cc/QZX3-WBGX>] (noting that Congress’s decision to split immigration adjudication from immigration enforcement responsibilities with the 2002 creation of the Department of Homeland Security was an attempt to preserve the independence of the Immigration Court).

the courts will be able to identify any single theory or collection of theories that adequately encapsulates the nuance and complexity of the modern administrative state in all circumstances.

B. *Categories of Shared Administrative Space*

While most statutory schemes combine rulemaking, enforcement, and adjudicative authorities in a single administrative agency,¹⁰³ there is no shortage of statutes that distribute these powers between multiple agencies. Nor do these statutes adhere to a singular model for structuring the shared administrative space. For instance, Rachel Barkow distinguishes between statutes that create overlapping administrative jurisdictions on the basis of whether or not they grant either agency veto authority over the other.¹⁰⁴ Jacob Gersen, in contrast, categorizes shared administrative spaces into four distinct categories based on exclusivity and completeness of the statutory delegation of authority.¹⁰⁵ While many different models exist, only certain administrative structures create the conditions that are likely to result in litigation.¹⁰⁶ Conflicts arise when a statute or statutory scheme¹⁰⁷ empowers multiple

103. See *Martin*, 499 U.S. at 151 (citing Federal Trade Commission Act, 15 U.S.C. § 41; Securities and Exchange Commission Act, 15 U.S.C. §§ 77(s)–77(u); 47 U.S.C. § 151).

104. Barkow, *supra* note 101, at 55–56.

105. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208–09 (2006) (categorizing shared administrative spaces into four principle categories based on two sets of variables: (1) exclusivity—which concerns whether Congress has granted authority to one agency or both, and (2) completeness—which concerns whether Congress has delegated authority to an agency to act over the entire policy space or only a subset of the space); Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for A Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. 389, 419 (1991) (“The so-called ‘split-enforcement model,’ in which rulemaking and enforcement responsibility are vested in one agency and adjudicatory power in another, has won acceptance in other contexts as a means of achieving enhanced administrative fairness.”).

106. Jessica Asbridge evaluates the likelihood of litigation to arise from the different models described by Gersen. She argues that litigation is unlikely to arise in multi-agency schemes that either (a) delegate complete and exclusive jurisdiction to each agency or (b) delegate incomplete and exclusive jurisdiction. Jessica L. Asbridge, *Be Reasonable: The Applicability of Chevron to Agency Interpretations of Split-Authority Statutes*, 104 MARQ. L. REV. 813, 832–34 (2021); see also Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 710 (2013). She concludes that litigation is likely in split authority structures—wherein Congress delegates complete authority to multiple agencies, but provides nonexclusive jurisdictional assignments—and nonexclusive shared jurisdiction structures. Asbridge, *supra*, at 834; see also Freeman & Rossi, *supra* note 16, at 1145 (distinguishing between four types of multi-agency delegations).

107. These shared administrative spaces may also be created intentionally or inadvertently with the passage of multiple unrelated pieces of legislation. For instance, in *Chicago Mercantile Exchange v. SEC*, a conflict arose between the CFTC and the SEC’s application of their respective statutes. 883 F.2d 537, 548 (7th Cir. 1989) (“We may assume without deciding that even in this jurisdictional dispute, each agency is entitled to leeway in applying its own statute to IPs.”).

agencies to act and the agencies disagree about the proper interpretation of a statutory provision relevant to each agency's authority.¹⁰⁸

This Article will focus on two models of structuring these shared administrative spaces, namely split enforcement (a.k.a. overlapping jurisdiction) and compartmentalized authority.¹⁰⁹ The split enforcement model occurs when Congress divides regulatory activity between two separate agencies by giving one agency rulemaking authority and the second agency adjudicative authority.¹¹⁰ An example of this model is observed in the Occupational Safety and Health Act (OSHA), which delegates adjudicatory authority to the Occupational Safety and Health Review Commission (OSHRC),¹¹¹ an independent agency, and rulemaking authority for workplace safety standards to the Occupational Safety and Health Administration,¹¹² located within the Department of Labor.

In contrast with the split enforcement model, the compartmentalized authority model assigns discrete areas of enforcement to multiple agencies.¹¹³ For example, the Americans with Disabilities Act (ADA) entrusts three agencies—the EEOC, Attorney General, and Secretary of Transportation—with implementing regulations enforcing the statutes' provisions. Each agency, however, is entrusted with regulating within distinct jurisdictions. The EEOC is empowered to regulate the portions of the statute relating to employment.¹¹⁴ The Secretary of Transportation may enact regulations enforcing provisions of the

108. Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 714.

109. Meazell, *supra* note 76, at 1797 (“It is rare for agencies to be directly opposing parties before a court. Agencies do not typically sue one another, though they are occasionally opposing parties by virtue of adjudicatory relationships or split-enforcement structures.”).

110. Asbridge, *supra* note 106, at 834–35; Shami, *supra* note 91, at 1589–90; Sharkey, *supra* note 68, at 329–31 (labeling overlapping agency jurisdictions at the federal level “horizontal agency coordination,” as distinct from “vertical” overlapping authorities between state and federal agencies); Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 714 (labeling this form of shared administrative space a “concurrent-authority regime”).

111. See 29 U.S.C. § 661; see also Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 710–11.

112. 29 U.S.C. § 655.

113. See Freeman & Rossi, *supra* note 16, at 1145 (describing this model as “related jurisdictional assignments, where Congress assigns closely related but distinct roles to numerous agencies in a larger regulatory or administrative regime.”); Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 710 (discussing the model of shared administrative space where Congress delegates incomplete and & exclusive jurisdiction to the relevant agencies); Weaver, *supra* note 77, at 65 (“Some cases involve situations in which two or more agencies are jointly involved with a regulatory scheme, but each agency applies the scheme in its own sphere of influence.”).

114. 42 U.S.C. § 12116.

ADA related to public transportation¹¹⁵ and select portions of the statute related to public accommodations.¹¹⁶ Meanwhile, the Attorney General is entrusted to enact regulations related to portions of the ADA not delegated to the other two administering agencies.¹¹⁷ Each agency has a separate fiefdom within which their regulations reign supreme. This structure has the potential to create ambiguous statutory gaps where it is unclear whether Congress vested the authority to act in a specific context to a single agency at all, let alone which agency it intended to vest the power in.¹¹⁸

In this latter category of compartmentalized jurisdiction, the statute *may* provide guidance to courts on its proper administration. Congress has on occasion established clear guidelines for applying *Chevron* in shared regulatory spaces. For example, the Dodd-Frank Act created the Consumer Financial Protection Bureau (CFPB) and tasked it with interpreting or enforcing “Federal consumer financial laws” as well as additional responsibilities related to policing unfair or deceptive acts.¹¹⁹ While the CFPB operated singularly in the former category, the latter category of enforcement coincided with responsibilities previously delegated to the Federal Trade Commission, the Office of Comptroller of the Currency, the Federal Reserve, and the Federal Deposit Insurance Corporation.¹²⁰ Nevertheless, the statute contained clear guidance and structure for these agencies.¹²¹

C. *Interagency Conflicts in Shared Administrative Spaces*

These split administrative spaces can lead to friction and litigation between the relevant agencies.¹²² There exist several mechanisms for avoiding litigation, but none are perfect at preventing litigation over

115. 42 U.S.C. §§ 12149, 12164.

116. 42 U.S.C. § 12186(a).

117. 42 U.S.C. §§ 12134(a), 12186(b).

118. See Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 714.

119. 12 U.S.C. § 5491.

120. 12 U.S.C. § 5581; see also Sharkey, *supra* note 68, at 329–30.

121. 12 U.S.C. § 5581.

122. See Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1231–58 (2013); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunction of Multiple-Goal Agencies*, 33 HARV. ENV'T L. REV. 1, 51–52 (2009); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 258–59 (1994); Shami, *supra* note 91, at 1620.

conflicting agency interpretations.¹²³ As the home to numerous federal agencies,¹²⁴ the executive branch has developed various interagency coordination procedures and structured hierarchies intended to preempt litigation between federal agencies.¹²⁵ Aside from these centralized coordination mechanisms, the federal agencies may engage in formal coordination, interagency agreements, or joint policymaking, to avoid potential litigation.¹²⁶ Similarly, Congress has tools at its disposal to avoid these interagency conflicts.¹²⁷ While substantial, this

123. See, e.g., *Matter of Briones*, 24 I&N Dec. 355, 364–65, 365 n.7 (BIA 2018) (“DHS policy memoranda that have not been embodied in regulations are not binding on Immigration Judges or this Board, although the policies may be adopted by the Board when appropriate.”).

124. SELIN & LEWIS, *supra* note 13, at 9 (“The bulk of federal administration is housed in the executive branch.”).

125. The most prominent executive tool for interagency coordination originates in Executive Order 12,866, which outlines a centralized process for resolving disagreements among agency heads. Exec. Order No. 12,866 § 7, 3 C.F.R. § 638, 648 (1993), *reprinted as amended* in 5 U.S.C. § 601 app. at 108, 111 (2010). This executive order tasks the Office of Information and Regulatory Affairs (OIRA), located within the Office of Management and Budget, with overseeing executive agency regulatory processes to ensure that the regulations remain consistent with the president’s priorities and are economically justified. *Id.* § 6(b). During the OIRA’s review of proposed regulations, it circulates the proposed rule to other executive agencies and invites these bodies to comment and propose revisions. *Id.* § 4(c); see also Bressman, *supra* note 62, at 1763–64 (discussing the history of the Office of Management and Budget). Other interagency coordinating mechanisms located within the executive include policy offices and councils, such as the National Security Council, the Office of the Director of National Intelligence, and the Domestic Policy Council. See NAT’L SEC. COUNCIL INTELLIGENCE DIRECTIVE NO. 1, DUTIES AND RESPONSIBILITIES (1950), <http://fas.org/irp/offdocs/nscid01.htm> [<https://perma.cc/QB9U-YVXX>]; FREDERICK M. KAISER, CONG. RSCH. SERV., R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATION 13 (2011), <https://sgp.fas.org/crs/misc/R41803.pdf> [<https://perma.cc/NR27-QR6B>]; Freeman & Rossi, *supra* note 16, at 1176–78 (describing executive offices that promote interagency collaboration, including the Office of White House Policy, which contains the Domestic Policy Council). The Department of Justice also serves a centralized coordination function by directing litigation involving federal agencies. See Devins, *supra* note 122, at 256–59.

126. See, e.g., Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984, (May 29, 1992) (announcing that FDA would defer to EPA on regulating “substances that are pesticides” and “nonpesticide substance[s] that may be introduced into a new plant variety and that is expected to become a component of food”); U.S. DEP’T OF LAB., INTERAGENCY AGREEMENT BETWEEN THE MINE SAFETY AND HEALTH ADMINISTRATION AND THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (1979), <https://www.osha.gov/laws-regs/mou/1979-03-29> [<https://perma.cc/24KF-UDJU>] (defining the elements that constitute a “mine” for the purposes of the Mine Act, 30 U.S.C. §§ 801–962 and OSHA); see also Sharkey, *supra* note 68, at 341–56 (proposing “balkanization” and coordination as dual strategies for agencies with overlapping agency jurisdictions to avoid the creation of conflicting policies); Freeman & Rossi, *supra* note 16, at 1155–73; Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 398–99 (2016) (describing “guidances” and other informal interpretive procedures as a byproduct of “the limited utility and efficacy of rulemaking and the increasingly complex overlap of regulatory mandates and competencies”).

127. In addition to its general oversight authority, Congress can repeal non-major regulations issued by federal agencies with a joint resolution, which only requires simple majorities in both chambers. 5 U.S.C. § 802.

coordination infrastructure remains insufficient to resolve all frictions that arise in shared administrative spaces.¹²⁸ For this reason, the judiciary must also develop coordination mechanisms that address inter-agency conflicts that arise.¹²⁹

These interagency frictions are not invisible to the courts. On multiple occasions, the Supreme Court has noted that cases before it concerned shared administrative space.¹³⁰ Nevertheless, the Court has yet to conclusively address the proper method to apply *Chevron* in such cases.¹³¹ The Supreme Court came closest to providing a legal framework in *Martin v. Occupational Safety & Health Review Commission*,¹³² where the Court considered a regulation enacted under OSHA.¹³³ The conflict concerned competing statutory interpretations by the OSHRC, a three-member independent agency created by OSHA with members appointed by the President, and the Department of Labor.¹³⁴ The Department of Labor was tasked with setting “mandatory occupational safety and health standards applicable to businesses affecting interstate commerce,” while the OSHRC enforced the statute through adjudication.¹³⁵ The Department of Labor issues

128. Gersen, *Administrative Law Goes to Wall Street*, *supra* note 97, at 713 (“[T]hat mechanism [for resolving interagency conflicts] often requires judicial intervention of one sort or another.”).

129. Devins, *supra* note 122, at 262 (“Intramural disputes within the Executive Branch are also commonplace. Department and executive agency heads, while appointed and subject to removal by a ‘unitary’ President, rarely fall in line uniformly with White House attempts to coordinate a centralized vision of the President’s public policy objectives. These individuals have different visions of the social good, serve different constituency interests, and labor under different oversight committees.”).

130. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3555 (“Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any.”); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (“Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,” 467 U.S. 837, 844 (1984).”).

131. Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1797 (2015) (“[T]he Supreme Court has yet to decide how its central deference doctrine—*Chevron*—applies when multiple agencies share authority.”).

132. 499 U.S. 144 (1991).

133. *Id.* at 147; see also *Kiewit Power Constructors Co. v. Sec’y of Lab.*, 959 F.3d 381, 385 (D.C. Cir. 2020) (describing the ineffective patchwork of federal and state safety regulations that predated OSHA).

134. 29 U.S.C. §§ 651(b)(3), 661; *Martin*, 499 U.S. at 147.

135. 29 U.S.C. §§ 651, 661; see also *P. Gioioso & Sons, Inc. v. Occupational Safety & Health Rev. Comm’n*, 115 F.3d 100, 102 (1st Cir. 1997) (“In general, the Secretary [of Labor] sets mandatory safety and health standards applicable to particular businesses. The Occupational Safety and Health Administration (OSHA) enforces those standards. Citations issued in respect to alleged

citations or penalties to employers for violating OSHA, but these citations are reviewed by the OSHRC's administrative law judges whenever the employer challenges the citation or penalty.¹³⁶ Thus, the Department of Labor retained the rulemaking authority under the statute, while adjudicatory authority rested with the OSHRC.¹³⁷

Martin arose from the Department of Labor's citation of the CF&I Steel Corporation for violating its OSHA regulations that required employers to institute a respiratory protection program.¹³⁸ Following the citation, the OSHRC found that the facts alleged in the citation did not establish a violation of the regulations the employer had been cited under.¹³⁹ The Department of Labor appealed the decision to overturn their citation to the Tenth Circuit and eventually to the Supreme Court to determine which agency's interpretation—the Department of Labor's or the OSHRC's—deserved deference.¹⁴⁰

The Court held that deference rested with the Department of Labor due to the statutory structure and history of the statute.¹⁴¹ The Court included two key assumptions in its opinion. First, despite the agencies' overlapping authorities, the Court assumed that Congress intended to grant deference to only one agency as the power to issue authoritative interpretations of OSHA regulations was a “necessary adjunct” to the power to promulgate and enforce the regulations.¹⁴² Second, the Court reasoned that Congress favored the agency with the most expertise for the purposes of deference.¹⁴³ Taking these two assumptions together, the Court found that the Department of Labor was in the best position to render authoritative interpretations because it promulgated the standards in the first instance and therefore had the

violations are adjudicated by the [Occupational Safety and Health Review] Commission.” (internal citations omitted)).

136. 29 U.S.C. §§ 659(c), 661(j); *see also Martin*, 499 U.S. at 147–48.

137. 29 U.S.C. § 661.

138. *Martin*, 499 U.S. at 148–49.

139. *Id.* at 149.

140. *Id.* at 149–150. While the case caption listed both the OSHRC and the Secretary of Labor, by the time the case reached the Supreme Court, the OSHRC was only nominally a party to the litigation; the OSHRC did not participate in the circuit court proceedings and was authorized only to appear as *amicus* in the proceedings before the Supreme Court. Mead, *supra* note 122, at 1241–42.

141. *Martin*, 499 U.S. at 152.

142. *Id.*

143. *Id.* at 152–53.

greatest expertise as to the regulation's purpose.¹⁴⁴ The Court viewed the OSHRC's role in arbitrating conflicts as akin to a "neutral arbiter" rather than that of the policymaking and enforcing entity.¹⁴⁵

The Court, relying heavily on OSHA's legislative history, explicitly limited the decision's scope to the facts of the case before it.¹⁴⁶ Lower courts took heed; following the Court's decision, *Martin* was cited for its discussion of the wide latitude afforded to agencies interpreting their own regulations, more so than for its discussion of shared administrative spaces.¹⁴⁷ OSHA remains a statute subject to considerable interagency conflict and litigation.¹⁴⁸ *Martin* has been of limited assistance to courts considering disputes arising in other shared administrative spaces.¹⁴⁹ Subsequent cases have raised the specter of deference in shared administrative spaces, but the Court has yet to provide a definitive framework for lower courts reviewing interagency disputes.¹⁵⁰

144. *Id.* ("Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question. Moreover, by virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations.")

145. *Id.* at 153-55; *see also id.* at 145 ("Moreover, since the Secretary, as enforcer, comes into contact with a much greater number of regulatory problems than does the Commission, the Secretary is more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation.")

146. *Id.* at 157 ("We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act.")

147. *See* *Mass. Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 524 (1st Cir. 1993); *Vulcan Constr. Materials, L.P. v. Fed. Mine Safety & Health Rev. Comm'n*, 700 F.3d 297, 313-14 (7th Cir. 2012).

148. *See, e.g., Kiewit Power Constructors Co. v. Sec'y of Lab.*, 959 F.3d 381 (D.C. Cir. 2020); *Sec'y of Lab. v. Cranesville Aggregate Cos., Inc.*, 878 F.3d 25 (2d Cir. 2017); *Chao v. Occupational Safety & Health Rev. Comm'n*, 540 F.3d 519, 525 (6th Cir. 2008) ("Left undecided by *Martin*, however, is to whom does a reviewing court defer when the Secretary and Commission offer conflicting interpretations of a provision of the Act."); *Sec'y of Lab. v. Excel Mining, LLC*, 334 F.3d 1 (D.C. Cir. 2003); *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291 (D.C. Cir. 1995); *Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab. v. Gen. Dynamics Corp.*, 980 F.2d 74 (1st Cir. 1992).

149. *See, e.g., Kiewit Power Constructors Co.*, 959 F.3d at 394 (applying *Martin* in OSHA litigation); *Salleh v. Christopher*, 85 F.3d 689, 692 n.1 (D.C. Cir. 1996) (noting the narrow holding in *Martin*); *S.G. Loewendick & Sons*, 70 F.3d at 1294 (applying *Martin* in OSHA litigation).

150. *See, e.g., Long v. Soc. Sec. Admin.*, 635 F.3d 526, 534 (Fed. Cir. 2011) ("[C]ourts have addressed but left unresolved the issue of whether *Chevron* deference is appropriate where multiple agencies are responsible for administering a statute." (citing *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998))); *see Salleh*, 85 F.3d at 692 n.1 (noting that the decision was inapposite with *Martin* but confirming the holding based on its conclusion that the factors the *Martin* Court identified as relevant to the *Chevron* analysis do not clearly favor the Secretary or the Board); *see also* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 246

III. PREVIOUSLY PROPOSED DEFERENCE FRAMEWORKS FOR SHARED AGENCY SPACES

In light of the Supreme Court’s failure to provide a comprehensive framework for addressing shared administrative spaces, scholars and jurists have proposed deference rules for agencies navigating these spaces.¹⁵¹ This section discusses various approaches to addressing interagency interpretation conflicts.

A. “Best-Positioned” Standard

The first approach is to defer to the agency that is “best positioned” to bring the policy principles that undergird *Chevron-Mead* deference—congressional intent, technical expertise, and political accountability—to bear in its interpretation.¹⁵² To this end, courts must consider both agencies’ relative positioning as a proxy for Congress’s intent when determining how deference should be allocated.¹⁵³ This was the approach used by the majority in *Martin v. Occupational Safety & Health Review Commission*.¹⁵⁴ The majority in *Martin* concluded that under the OSHA framework, the Department of Labor, which was tasked with setting and enforcing workplace health and safety standards, was the agency best positioned rather than the OSHRC, which was tasked with carrying out adjudicatory functions.¹⁵⁵

Under this best-positioned standard, the reviewing court takes an additional step prior to *Chevron* step zero by determining which

(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”).

151. See, e.g., Sharkey, *supra* note 68, at 341–56 (discussing “balkanization” and “coordination” approaches for shared regulatory spaces).

152. See Asbridge, *supra* note 106, at 835–36 (“When agencies have overlapping jurisdiction, courts often presume that Congress delegated law-interpreting authority to the more expert agency as opposed to the less expert agency and examine other indicators of legislative intent.”).

153. *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 154 (1991); see also *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 980 (7th Cir. 1998) (“The principal rationale underlying [*Chevron*] deference is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details This rulemaking process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny. It is this process that entitles the administrative rules to judicial deference.” (internal quotations omitted)).

154. 499 U.S. at 153.

155. *Id.* at 147, 152–53.

agency is the “policymaking” entity.¹⁵⁶ Once the court has identified the relevant policymaking agency, it then proceeds to the traditional *Chevron* step zero analysis of determining whether the agency action was formal enough to warrant *Chevron* deference, or informal enough to warrant only *Skidmore* deference.¹⁵⁷ The non-policymaking agency falls out of the court’s deference analysis after the threshold inquiry.¹⁵⁸ To date, the courts applying this precedent have treated the placement of deference as static and permanently entrusted to the “policymaking” agency.¹⁵⁹

While *Martin* adopted the best-positioned standard, the precedent has had limited impact in guiding future agency actions in shared administrative spaces because the Court explicitly limited *Martin*’s holding to the facts inherent in OSHA.¹⁶⁰ For this reason, the effect of this precedent remains limited primarily to litigation concerning OSHA and similarly structured statutes regulating occupational safety.¹⁶¹ The best-positioned standard presumes that one agency is perpetually entitled to deference, whether *Chevron* or *Skidmore*, over another. The form of agency action, at least as applied in *Martin*, was relevant to determining which agency was “best positioned.” In *Martin*, the Court

156. See, e.g., *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir. 2002); see also Meazell, *supra* note 76, at 1800 (“And when two agencies truly are at odds, as illustrated by *Martin v. Occupational Safety & Health Review Commission*, a court’s role is to examine the statutory scheme and determine which agency Congress intended to enjoy deference. Once these matters are decided, the appropriate action is to proceed with the typical reasoned-decisionmaking review, which includes any deference principles that might apply.”).

157. See, e.g., *Kiewit Power Constructors Co. v. Sec’y of Lab.*, 959 F.3d 381, 402 (D.C. Cir. 2020); *Chao*, 291 F.3d at 227–28.

158. See, e.g., *Sec’y of Lab. v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *Chao*, 291 F.3d at 226–28; *Knox Creek Coal Corp. v. Sec’y of Lab.*, 811 F.3d 148, 158 (4th Cir. 2016).

159. See, e.g., *Kiewit Power Constructors Co.*, 959 F.3d at 394; *Sec’y of Lab. v. Cranesville Aggregate Cos.*, 878 F.3d 25 (2d Cir. 2017); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528, 531–32 (7th Cir. 1991).

160. *Martin*, 499 U.S. at 157 (“We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act.”).

161. See, e.g., *Kiewit Power Constructors Co.*, 959 F.3d at 394; *Chao v. Occupational Safety & Health Rev. Comm’n*, 540 F.3d 519, 525 (6th Cir. 2008); *Chao v. Occupational Safety & Health Rev. Comm’n*, 401 F.3d 355, 372–73 (5th Cir. 2005); *Chao*, 291 F.3d at 226–28; *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3d Cir. 1996); *Martin*, 933 F.2d at 530. The *Martin* precedent has also been applied in the context of other similarly structured statutes regulating occupational safety such as the Mine Safety and Health Act (Mine Act) and the Longshore and Harbor Workers’ Compensation Act (Longshore Act). See, e.g., *Cranesville Aggregate Cos.*, 878 F.3d at 32 (Mine Act); *Knox Creek Coal Corp.*, 811 F.3d at 160 (Mine Act); *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 823–25 (9th Cir. 2012) (Longshore Act); *Excel Mining, LLC*, 334 F.3d at 5–6 (Mine Act).

reasoned that rulemaking better positioned an agency to engage in statutory interpretation relative to an adjudicating agency.

Some scholars have attempted to refine this “best-positioned” standard by proposing additional elements for courts to consider when determining which agency is “best positioned.” For example, Professor Hammond proposes a different balancing test that focuses on the application of three factors: “the locus of expertise, the features of independence, and the form and formality of agency procedure.”¹⁶² She argues that the proper consideration of these factors will promote adherence to the statutory mandate while simultaneously preventing courts from substituting their own judgments for those of the agencies.¹⁶³

B. De Novo Review

Another approach is one most closely associated with the D.C. Circuit, which held that in litigation involving multiple agencies charged with administering a statute, no agency interpretation is entitled to *Chevron-Mead* deference; instead, courts review the agency interpretation *de novo*.¹⁶⁴ This approach accords with pre-*Chevron* precedent wherein the Supreme Court considered multiple agencies administering a statute as justification for giving reduced deference to any individual agency’s interpretation.¹⁶⁵ The D.C. Circuit articulated a post-*Chevron* version of this precedent in a 1995 decision, where the panel held that *de novo* review of conflicting agency interpretations was necessary for three reasons. The first justification related to congressional intent; the D.C. Circuit concluded that Congress’s decision to split a statute’s enforcement was a refusal to delegate interpretative authority to any single agency, leaving the reviewing court to apply *de novo* review.¹⁶⁶ The D.C. panel also articulated two policy

162. Meazell, *supra* note 76, at 1803.

163. Meazell, *supra* note 76, at 1769, 1803 (“These factors are meant to promote adherence to the statutory mandate and are suggested tentatively as possible—but not required—indicia of a congressional desire to promote adherence to the scope of authority within a statute.”).

164. *Rapaport v. U.S. Dep’t of Treasury*, 59 F.3d 212, 216–17 (D.C. Cir. 1995); *see also* *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996) (summarizing cases concluding that no deference is warranted where more than one agency is granted authority to interpret the same statute); *Sharkey*, *supra* note 68, at 342–43 (labeling this approach in which no deference is afforded to the agencies the “traditional view”).

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

166. *Rapaport*, 59 F.3d at 216–17.

justifications for this approach, namely that *de novo* review avoided the creation of conflicting agency interpretations and it disincentivized agencies racing to the courthouse in order to advance their preferred interpretation.¹⁶⁷

This approach has been subject to debate in other circuits as well. The Third Circuit has similarly held that shared agency spaces are *Chevron*-free zones.¹⁶⁸ Conversely, the Second Circuit has previously articulated a modified version of this approach by giving agencies in shared administrative spaces *Skidmore* deference.¹⁶⁹ The Second Circuit did *not* consider the agencies' relative expertise or the formality of their proposed interpretation as part of this analysis.¹⁷⁰

This *de novo* review approach presents two primary problems. The first relates to the justifications for *Chevron-Mead*, which do not dissipate when multiple agencies operate in a shared space.¹⁷¹ The *Chevron-Mead* framework is premised on the view that judicial review of agency legal interpretations should emphasize the comparative strengths of the judiciary and administrative agencies.¹⁷² *Chevron* and its progeny assume that courts have a comparative advantage in enforcing the rule of law and constitutional values, while agencies have a comparative advantage in reconciling conflicting policy objectives.¹⁷³ Thus, the judiciary's role is to police the boundary of delegated statutory authority to the agency, not substitute its own

167. *Id.*

168. *Chao v. Cmty. Tr. Co.*, 474 F.3d 75, 85 (3d Cir. 2007) ("The mere fact that there could be conflicting regulations should preclude *Chevron* deference.").

169. *1185 Ave. of Americas Assocs. v. Resol. Tr. Corp.*, 22 F.3d 494, 497 (2d Cir. 1994) ("Because FIRREA [(the Financial Institutions Reform, Recovery, and Enforcement Act of 1989)] is administered by several agencies in addition to the RTC [(Resolution Trust Corporation)], we do not owe full *Chevron* deference to the RTC's interpretation. We therefore turn to the question of which interpretation is most reasonable." (internal citation omitted)).

170. *Id.* at 497–98 (deferring to RTC's interpretation of FIRREA after considering statutory analysis and congressional intent without consideration of agency expertise).

171. *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 547 (7th Cir. 1989) ("Perhaps a court could say that because the agencies disagree, neither is entitled to deference. Yet disagreement doesn't make the court the recipient of interpretive powers.").

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

173. See discussion *supra* Part I.B.; see, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*"); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.").

interpretations for the agency's.¹⁷⁴ By engaging in *de novo* review, however, the court is potentially substituting its interpretation of the statute for that of the respective agencies.¹⁷⁵ Any proposal for addressing the problem of shared administrative spaces should refrain from reverting the ultimate authority back to the courts. The second problem with the traditional approach is that by imposing *de novo* review in these circumstances, the court is creating a rigid interpretation of the statute that is at odds with the flexibility principles articulated in *Chevron*.¹⁷⁶ Although courts are bound by principles of *stare decisis*, deference affords agencies the flexibility to re-evaluate decisions in light of new facts and considerations.¹⁷⁷

C. Defer to Multiple Agencies

The Seventh Circuit has articulated a third approach to coordinating agency actions in shared spaces. In *Chicago Mercantile Exchange v. SEC*¹⁷⁸ a Seventh Circuit panel considered whether to defer to the Commodity Futures Trading Commission's or the Securities and Exchange Commission's attempts to regulate index participation, a then-novel instrument that lies at the intersection of both agencies'

174. Merrill, *supra* note 80, at 1169–70; *see also* Sharkey, *supra* note 68, at 344–45 (“Nor is it in synch with what drafters of congressional legislation typically intend. The no deference position makes sense for a limited category of cases, namely with respect to certain statutes (such as the Administrative Procedure Act, Freedom of Information Act, and National Environmental Policy Act) that apply across the board to all agencies but are not administered by any agency. But outside of that limited context, withholding deference simply on account of shared interpretive authority is counterproductive.”).

175. *See* Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923, 934 (5th Cir. 1998) (“If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld.”); *Chi. Mercantile Exch.*, 883 F.2d at 547 (“When two agencies claim to be the addressees, though, this allocation breaks down. Perhaps a court could say that because the agencies disagree, neither is entitled to deference. Yet disagreement doesn't make the court the recipient of interpretive powers. One or the other agency is still in charge.”).

176. *Chevron U.S.A., Inc.*, 467 U.S. at 863–64 (“[T]he agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena . . . [T]he fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.”).

177. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 983 (2005) (holding that limiting agency discretion to interpret ambiguous statutes based on *stare decisis* would “lead to the ossification of large portions of our statutory law” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting))); *see also* Scalia, *supra* note 65, at 517 (“One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change.”).

178. 883 F.2d 537 (7th Cir. 1989).

exclusive jurisdictions.¹⁷⁹ The majority decision proposes simultaneously deferring to both agencies' interpretation of their respective statutes.¹⁸⁰ Subsequent opinions have clarified that deference is simultaneously afforded to multiple agencies by accepting the position of the agency whose order is under review.¹⁸¹ In practice, this gives both agencies an effective veto since either agency can block the other by adopting the more restrictive policy.¹⁸²

Multiple scholars have proposed frameworks similar to this one to address shared administrative spaces. These scholarly proposals, however, tend to focus on the agency's relationship with each other when allocating deference. Jacob Gerson, for instance discusses a "competing agents" framework, whereby competition (as opposed to coordination) brings the agencies' policies into closer alignment with congressional preferences.¹⁸³ He reasons that, since the agencies retain their comparative expertise and political accountability relative to courts, regardless of the number of agencies involved in the dispute, it doesn't make sense for the court to attempt to parse out the agencies' expertise relative to each other.¹⁸⁴ Instead, Gerson contends that courts should grant deference to agencies in shared administrative spaces to incentivize them to venture into areas of ambiguous jurisdiction.¹⁸⁵

179. *Id.* at 539.

180. *Id.* at 548 ("We may assume without deciding that even in this jurisdictional dispute, each agency is entitled to leeway in applying its own statute to IPs."). This position was articulated in dicta as the court noted that it was not essential to its decision. *Id.* ("Difficulties in establishing the competence of the agencies and the judicial branch do not influence the outcome of this case, however."); see also *Bd. of Trade v. SEC*, 187 F.3d 713, 719 (7th Cir. 1999) ("Just as in *Chicago Mercantile Exchange*, however, it is not necessary to reach a definitive conclusion about how to proceed when these two agencies disagree over an issue under the Commodity Exchange Act.").

181. *Bd. of Trade*, 187 F.3d at 719.

182. See *id.*; see also *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003) (adopting a similar approach in the context of competing Coast Guard and National Transportation Safety Board interpretations of the 1972 International Regulations for Preventing Collisions at Sea (COLREGS)).

183. Gerson, *Overlapping and Underlapping Jurisdiction in Administrative Law*, *supra* note 105, at 212.

184. *Id.* at 220; see also Doerfler, *supra* note 19, at 253 ("If Congress has assigned to different agencies 'mutually exclusive authority over separate sets of regulated persons,' that is strong indication that Congress regards those 'separate sets of . . . persons' as importantly different. More still, because each 'set[] of . . . persons' is under the authority of only one agency, all such 'persons' are insulated from potentially conflicting instructions from other agencies. Given the lack of practical downside, the question thus becomes why *wouldn't* Congress want those different agencies to be able to interpret the provisions they share differently?" (emphasis added) (quoting *Collins*, 351 F.3d at 1253)).

185. Gerson, *Overlapping and Underlapping Jurisdiction in Administrative Law*, *supra* note 105, at 215.

Catherine Sharkey has similarly proposed that an agency's interpretations deserve deference in shared administrative space when there is no disagreement between the agencies.¹⁸⁶ Unlike Gerson's view that agencies compete with one another, Sharkey's proposal imagines courts as facilitating agency coordination efforts by soliciting input from relevant agencies and allocating deference only when there is interagency agreement.¹⁸⁷ Sharkey reasons that, "[w]here multiple agencies share regulatory space—but all agree on the interpretation of a statute—it makes little sense for courts to withhold deference from that shared interpretation when put forth by a single agency."¹⁸⁸ Sharkey proposes practical justifications for this model since she contends that it would incentivize agency coordination and collaboration in shared spaces and thereby allow the court to "reach better policy outcomes."¹⁸⁹

These approaches, however, seem to be at odds with current Supreme Court precedent in this area. In *Martin*, the majority concluded that "[b]ecause dividing the power to promulgate and enforce OSH Act standards from the power to make law by interpreting them would make *two* administrative actors ultimately responsible for implementing the Act's policy objectives, we conclude that Congress did not expect the Commission to possess authoritative interpretive powers."¹⁹⁰ The Court thereby articulated a presumption against multiple agencies simultaneously possessing ultimate interpretive authority over the statutes they administer. However, scholarly proposals fail to establish a framework that facilitates a principled and unequivocal delegation of this ultimate authority. Moreover, these approaches would create administrability obstacles for courts seeking to implement them. Gerson imagines deference as an incentive to agencies to venture into ambiguous jurisdictions,¹⁹¹ but doesn't provide a resolution mechanism for inevitable disputes. Sharkey's proposal requires that courts partake in a modified notice and comment procedure by soliciting input from

186. Sharkey, *supra* note 68, at 345 (gleaning this standard from Judge Rogers's concurrence in *Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212, 221 (D.C. Cir. 1995) (Rogers, J., concurring)); Asbridge, *supra* note 106, at 836 ("This Article rejects both of those approaches and instead argues that both agencies should be accorded *Chevron* deference as to their interpretations in the absence of conflict.").

187. Sharkey, *supra* note 68, at 330.

188. *Id.* at 353.

189. *Id.* at 354–57.

190. *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 153–54 (1991).

191. *See supra* text accompanying note 185.

stakeholder agencies that are not party to the litigation.¹⁹² But in this scenario, the court acts like a rulemaking agency but gives no consideration to the agency procedures it mimics.

IV. RESTRUCTURING *CHEVRON-MEAD* IN SHARED ADMINISTRATIVE SPACES

Given the complexity of navigating shared administrative spaces, background rules are essential for coordinating agency actions in these overlapping jurisdictions. Just as the Court's *Chevron-Mead* precedent gave agencies a clear background rule and incentive to engage in procedures that guaranteed deference, so too must courts develop a background rule for deferring to agencies in shared administrative spaces.¹⁹³ While statutes occasionally establish clear administrative hierarchies or explicit delegations of interpretive authority in shared administrative spaces, these statutory schemes are notable for their rarity.¹⁹⁴ Where a statute is unambiguous, the reviewing court must observe the clearly articulated congressional intent.¹⁹⁵ But it is not feasible or practical to expect Congress to have the foresight to include such guidance in all shared administrative spaces since the law develops in piecemeal and unforeseen ways.¹⁹⁶ For these reasons, I propose that the Supreme Court adopt a procedurally focused rule that adheres

192. Sharkey, *supra* note 68, at 349–50.

193. ADMIN. CONF. OF THE U.S., RECOMMENDATION 89-5, ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS 1 (1989), <https://www.acus.gov/sites/default/files/documents/89-5.pdf> [<https://perma.cc/6WHQ-5GBC>].

194. *See, e.g.*, 49 U.S.C. § 44709(d) (directing the National Transportation Safety Board to defer to Federal Aviation Administration interpretations of its own regulations); Dodd-Frank Act, 12 U.S.C. § 5512(b)(4)(A) (establishing the Consumer Financial Protection Bureau's "exclusive authority to prescribe rules" under federal consumer financial laws irrespective of other agencies' authority to regulate in that space); Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136a (authorizing the EPA Administrator to consult with other federal agencies in the course of reviewing applications for pesticide registration); Endangered Species Act, 16 U.S.C. § 1536 (instructing federal agencies to ensure that any actions undertaken are "not likely" to jeopardize the continued existence of any endangered or threatened species designated by the Department of the Interior or the Department of Commerce); *see also* Freeman & Rossi, *supra* note 16, at 1157–61 (discussing various forms of statutory structures governing shared administrative space).

195. *See, e.g.*, *Catawba County v. EPA*, 571 F.3d 20, 32 (D.C. Cir. 2009) (finding the second step of the *Chevron* analysis inapplicable where congressional intent was clear regarding designation of nonattainment areas within the Clean Air Act).

196. *See, e.g.*, 7 U.S.C. § 2a (authorizing the CFTC to regulate futures and options on futures and the SEC to regulate securities and options on securities); *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989) (considering which agency had the authority to interpret a then-novel financial instrument, the index participation, which had elements of both a futures contract and an option on a security).

to the guiding principles of the *Chevron-Mead* jurisprudence—namely, congressional intent, political accountability, and technical expertise.

This Article proposes elevating the procedure used by the agencies in their respective interpretations as part of the court’s deference analysis in *Chevron* step zero. This is because the policy justifications undergirding *Chevron-Mead* deference do not apply equally to these two forms of agency action. This proposal is similar to the “best-positioned” standard, in that it favors rulemaking over adjudication grant deference.¹⁹⁷ However, where the “best-positioned” standard understands the placement of deference as static,¹⁹⁸ my proposed approach imagines it as transferrable depending on the agencies’ actions. The primary consideration in determining where deference applies is the procedure used by the agency to advance its proposed interpretation. Such an approach is in keeping with *Chevron-Mead* precedent that establishes procedural formality as a decisive factor when a single agency requests deference.¹⁹⁹ Similarly, when presented with multiple agency actors, the court must focus its attention on *which* agency’s interpretive procedure Congress intended to carry deferential authority. If Congress has not clearly expressed its intent to delegate the authority to act to a single agency, then the court should implement a hierarchy of procedures based on their formality for determining where deference lies in the shared administrative space.

In contrast to other scholars that propose form and formality as one of several factors relevant for determining when courts defer to an agency interpretation,²⁰⁰ I propose that “form and formality” of the agency interpretation is the *primary* variable courts consider when reviewing conflicting agency interpretations. This Article will focus on

197. See *supra* Part III.A.

198. See, e.g., *Kiewit Power Constructors Co. v. Sec’y of Lab.*, 959 F.3d 381, 394 (D.C. Cir. 2020); *Sec’y of Lab. v. Cranesville Aggregate Cos.*, 878 F.3d 25, 32 (2d Cir. 2017); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528, 531–32 (7th Cir. 1991).

199. See, e.g., *Vulcan Constr. Materials, L.P. v. Fed. Mine Safety & Health Rev. Comm’n*, 700 F.3d 297, 315 (7th Cir. 2012) (“Granting *Chevron*-type deference to an agency’s general policy or interpretive statements, regardless of how and in what form they are communicated, runs afoul of the Supreme Court’s guidance in *Christensen v. Harris County*.”).

200. See, e.g., Meazell, *supra* note 76, at 1802–09 (arguing that courts should primarily base their deference determination on the congressional intent expressed by the statutory text and, if necessary, select other variables including the form and formality of the agency interpretation).

informal rulemaking and adjudications as these make up the vast majority of agency actions in modern times.²⁰¹

A. Congressional Intent

At its core, the guiding principle underlying *Chevron-Mead* is the presumption that Congress prefers agencies over courts to be the principal actors in interpreting ambiguous statutory provisions.²⁰² Thus, just as *Chevron-Mead* precedent cautions courts against supplanting the agency's interpretation except in select circumstances, so too must any model for addressing multi-agency disputes caution against courts supplanting agency interpretations.²⁰³

My proposal recognizes that the question of congressional intent is frequently unanswerable. The variety in statutory schemes and approaches to legislative drafting makes it impossible to articulate a single rule for gleaning congressional intent in shared administrative spaces. Questions surrounding congressional intent will arise primarily in circumstances where the statutory text does not explicitly answer this question.²⁰⁴ While legislative history is one tool for gleaning congressional intent, it is subject to dispute and generally disfavored by the Court.²⁰⁵ For this reason, we must begin with the premise that any

201. See BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 1 (2021), <https://crsreports.congress.gov/product/pdf/R/R46930> [<https://perma.cc/BC38-RGA5>] (“Although the formal adjudication requirements of the Administrative Procedure Act (APA) establish an adversarial, trial-type process for federal agency adjudication, the vast majority of federal agency adjudications deviate from this formal model.”); Aaron L. Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 665 (2021) (“Informal adjudication, moreover, is not a small box. To the contrary, it may be the largest box of the four, as informal adjudications are essentially the default form of agency decisionmaking.” (internal quotation marks omitted)); Hickman & Nielson, *supra* note 30, at 968–69 (“Congress rarely expressly requires the formal adjudication procedures imposed by the APA. Congress often merely calls for a ‘hearing’ without specifying the procedures it means the agency to follow.”).

202. See *supra* note 65.

203. See, e.g., *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (holding that a reviewing court cannot “impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good”).

204. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”); cf. 12 U.S.C. § 5581 (transferring authority over consumer protection from numerous agencies to the Consumer Financial Protection Bureau).

205. *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011) (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”); see also Harvard Univ., *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc>

singular answer to the question of congressional intent in shared administrative spaces will almost certainly be a legal fiction.

Nevertheless, since *Chevron's* inception, the Court has recognized the need to provide a background rule on which to premise its analytical framework.²⁰⁶ While any meter for determining congressional intent will ultimately be arbitrary, the need to establish a guiding principle, even if based on a legal fiction, is no less in the context of shared administrative spaces. To this end, courts should adopt a presumption that Congress intends to grant deference to the procedure that best affords advance notice to the public. This would adhere to constitutional principles and judicial presumptions that disfavor retroactive laws.²⁰⁷ If the court were to adopt such a presumption, it would favor informal rulemaking over adjudication for the purposes of deference. Informal rulemaking is a public-facing process that requires agencies to publish proposed rules and engage in public deliberation about the merits of the rule prior to its adoption.²⁰⁸

While rulemaking results in generally applicable, prospective regulations,²⁰⁹ agency adjudications can be opaque affairs with

/F8RT-65UW] (when asked how Justice Antonin Scalia has impacted the other Justices, Justice Elena Kagan responded, “Well, I think we’re all textualists now . . .”).

206. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Perhaps [Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.”); see also John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1950 (2015) (“*Chevron* recognized that ambiguity can come from many sources. And since we cannot know, even now, why Congress leaves gaps in any particular statute, the Court felt it could fill the void with a presumption that makes sense of the relative institutional competencies of the agency and the reviewing court.”).

207. See, e.g., U.S. CONST. art. I, § 9, cl. 3 (prohibiting *ex post facto* laws and bills of attainder); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”); *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992) (“Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.”); *Calder v. Bull*, 3 U.S. 386, 391 (1798) (“Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust; and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon.”); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEXAS L. REV. 425, 471 (1982) (“The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.”).

208. 5 U.S.C. § 553(b), (c).

209. See *supra* text accompanying notes 34–35.

retroactive orders.²¹⁰ The APA defines adjudications by what they are *not*, which is almost any agency action that is not rulemaking.²¹¹ While the APA provides a number of procedural safeguards for formal adjudications, it provides minimal guidance for informal adjudications.²¹² No uniform set of detailed statutory parameters exists delineating the procedural requirements of informal adjudications.²¹³ Adjudications also tend to be limited in their application as the “immediate effects” of the order are felt primarily by the parties to the proceeding and not the regulated public.²¹⁴ For this reason, agencies have pursued a variety of models for their informal adjudications provided they satisfy the

210. See HARRINGTON & SHEFFNER, CONG. RSCH. SERV., R46930, *supra* note 201, at 11–22 (surveying different procedures used in informal adjudications); Daniel J. Sheffner, *Access to Adjudication Materials on Federal Agency Websites*, 51 AKRON. L. REV. 447, 450–51 (2017) (“Non-APA adjudication schemes vary substantially, ranging from ‘semi-formal’ proceedings that, like APA hearings, are conducted pursuant to procedurally robust evidentiary procedures, to those, like tariff classification rulings, that are non-adversarial and procedurally bare.”).

211. *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161 n.17 (D.C. Cir. 1979) (“[I]nformal adjudication occurs when an agency determines the rights or liabilities of a party in a proceeding to which [section] 554 does not apply.” (internal citations omitted)); see 5 U.S.C. § 551(7) (defining “adjudication”); 5 U.S.C. § 551(6) (defining “order”).

212. See, e.g., 5 U.S.C. §§ 554, 556–57 (imposing notice, evidentiary hearing, and adjudicatory findings requirements, respectively, in formal adjudications); see also Hickman & Nielson, *supra* note 30, at 978 (“[A]gency organic statutes contemplating adjudication often provide little or no procedural guidance—for example, merely calling for a ‘hearing’ with no further indication of the procedures to be used, thereby allowing agencies tremendous latitude to determine for themselves the procedures they will follow.”).

213. See HARRINGTON & SHEFFNER, CONG. RSCH. SERV., R46930, *supra* note 201, at 1 (“For informal adjudication, no uniform set of detailed statutory parameters applies. Procedural rules for informal adjudication come mostly from program-specific sources, such as the provisions of a statute that authorizes the adjudication system in question or, more often, agency-made rules and guidance.”).

214. A small number of statutory provisions apply to informal adjudications. See 5 U.S.C. §§ 554(b), 555, 558; see also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1561–62 (1992) (“In [informal adjudications], agencies obtain their data and views about policies they might adopt from selective sources. Only ‘active players’ who work closely with agency personnel have any chance to address the issues raised by the adoption of these policies. No requirements of an open record or public discussion operate to constrain pure political influence or an agency’s pursuit of a private agenda Subsequent agency adjudicatory proceedings are adversarial and hence probably will not cure the lack of opportunities for access and deliberation. The adversarial nature of subsequent proceedings will be aggravated by the fact that the agency has already committed itself to a position and may be reluctant to consider seriously arguments to the contrary.”); Hickman & Nielson, *supra* note 30, at 978 (“[A]gency organic statutes contemplating adjudication often provide little or no procedural guidance—for example, merely calling for a ‘hearing’ with no further indication of the procedures to be used, thereby allowing agencies tremendous latitude to determine for themselves the procedures they will follow.”).

minimum requirements imposed by the Due Process Clause of the Fifth Amendment.²¹⁵

While precedent may prohibit courts from requiring that agencies engage in rulemaking where possible,²¹⁶ they can tailor deference in these shared administrative spaces to incentivize that transparency and public notice. To this end, the courts should presume that congressional intent in shared administrative spaces favors informal rulemaking over informal adjudications. This proposal is in keeping with the implicit trajectory of Supreme Court decisions that elevate the procedure in their analysis, including those that appear to favor rulemaking over adjudication for *Chevron* deference.²¹⁷

B. Political Accountability

Post-*Chevron* courts recognize that the decisions involved in interpreting and applying ambiguous statutes to specific events is an inherently political act and therefore not one that the courts are well suited to take on.²¹⁸ While neither federal agencies' policies nor their administrators are themselves subject to democratic elections,²¹⁹ they are nonetheless considered accountable to the public in ways that federal courts are not. This is largely a function of the agency heads' relationship to the democratically elected branches of the federal government.²²⁰ Agency heads are appointed by and presumably responsive to the desires and agenda of the executive who appointed them.²²¹ Congress similarly expresses control over the agency both

215. HARRINGTON & SHEFFNER, CONG. RSCH. SERV., R46930, *supra* note 201, at 8–24.

216. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

217. *See* Bressman, *supra* note 62, at 1791 (discussing the Court's decision to award deference in *Mead* on the basis of procedural formality).

218. *See* Merrill, *supra* note 80, at 1182 (noting the non-political nature of the judiciary as discussed by the *Chevron* court is a "famous passage . . . quoted in all excerpts of the decision").

219. *See* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984) (noting that "agencies are not directly accountable to the people").

220. *See* Merrill, *supra* note 80, at 1166 ("Political scientists also point out that agencies are subject to a number of constraints that make them more accountable to elected politicians than judges. Agencies depend on Congress for their appropriations, which means the heads of agencies must attend closely to the wishes of appropriations committees. High-level agency personnel also appear periodically before congressional oversight committees, which can expose embarrassing missteps and extract commitments about future action.")

221. *See id.* at 1166–67 ("Under current practice, agency budget requests are also screened by the Office of Management and Budget ('OMB'), a White House agency, which means the heads of agencies must attend to the wishes of the president. And political appointees of agencies are subject to removal from office by the president, either at will or indirectly through various forms of pressure.") Note that while independent agencies have structural designs insulating them from

through the confirmation process as well as through oversight committees and the appropriations process.²²² Judges, in contrast, are recipients of lifetime appointments who face few obstacles outside the judiciary to imposing their interpretations.²²³

The two most prominent forms of agency action—informal rulemaking and adjudication—can also be categorized and ranked according to the political accountability inherent in the procedure; informal rulemaking as a process provides for significantly greater public accountability than adjudication for two reasons. First, it incorporates public opinion into the agency rulemaking procedure. Second, as a direct corollary to this greater public participation, it requires the acting agency to act with greater transparency. For these reasons, political accountability also supports the favoring of rulemaking over adjudications when these two procedures come into conflict in shared administrative spaces. Both considerations are discussed at greater length below.

1. Informal Rulemaking Requires Public Participation in the Drafting and Review of Proposed Regulations

Rulemaking and adjudications serve distinct functions; rulemaking is a prospective procedure, while adjudication is retrospective.²²⁴ This generalized framework for distinguishing orders and rules is not reflected in the APA but is a distinction that courts regularly cite.²²⁵ Moreover, as the colloquial name for the process suggests, informal rulemaking allows for affected parties to receive notice prior to the rule's enactment and an opportunity to comment on the proposed

influence by the democratically elected branches, the Court has not yet conclusively ruled on whether *Chevron* deference applies to independent agency interpretations. *Cf.* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523–25 (2009) (plurality opinion) (holding, in the only portion of the plurality opinion that failed to garner sufficient votes to be binding, there was no distinction between independent and executive agencies for the purposes of deference). Some scholars have cautioned the Court when applying deference to independent agency interpretations. *See* Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433, 443–49 (2010).

222. Merrill, *supra* note 80, at 1166.

223. *Id.* at 1166–67.

224. Hickman & Nielson, *supra* note 30, at 939.

225. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate *retroactive* rules unless that power is conveyed by Congress in express terms.” (emphasis added)); *Neustar, Inc. v. FCC*, 857 F.3d 886, 895–96 (D.C. Cir. 2017) (discussing the D.C. circuit’s precedent relating to the “prospective-retroactive distinction” between rules and adjudications); *see also* 5 U.S.C. § 551(4), (6).

regulation.²²⁶ This process provides a venue for constituent stakeholders to petition the government and requires the agency to respond to critiques levied in these comments. The agency's response creates a record of dialogue between the agency and the public that is absent in adjudications. This procedure allows agencies to leverage public participation to benefit their knowledge of the affected issues and stakeholders and strengthen the rule's political legitimacy.

In contrast with rulemaking, adjudications, much like judicial opinions, apply retroactively.²²⁷ Adjudications are frequently structured in much the same way as trials, wherein administrative law judges preside over adjudicatory hearings as arbiters of law and fact.²²⁸ While adjudications can shape the application of a law or regulation for third parties in future adjudications, the administrative law judge is primarily concerned with the application of the law to facts that have already occurred.²²⁹ Much like *post hoc* litigation positions sometimes disfavored by courts,²³⁰ informal adjudications deprive the

226. 5 U.S.C. § 553(b); see *Bowen*, 488 U.S. at 208 (“[A] statutory grant of legislative rule-making authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”).

227. Compare 5 U.S.C. § 551(4), with 5 U.S.C. § 551(6). See also Cohen, *supra* note 126, at 396 (“The model of regulation established by the federal Administrative Procedure Act envisions two general types of administrative activity: rulemaking and adjudication . . . the two types are opposites: rules are promulgated in orderly, quasi-legislative proceedings and later applied in orderly, quasi-judicial proceedings.”).

228. Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 143 (2019).

229. *Bowen*, 488 U.S. at 216–217 (Scalia, J., concurring) (“Adjudication—the process for formulating orders, see § 551(7)—has future as well as past legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason.”).

230. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action.”) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 156 (1991) (denying *Chevron* deference to agency “litigating positions” that are advanced for the first time in a reviewing court); *Bowen*, 488 U.S. at 212 (“We have never applied the principle of [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”). *But see* *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1294 (D.C. Cir. 1995) (finding that the Department of Labor’s litigation positions before the OSHRC were entitled to deference even when “those interpretations for the first time during litigation before the Commission”); *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1364 (Fed. Cir. 2005) (affording the International Trade Commission deference to its interpretation of its own regulation even where it “had not previously advanced the precise interpretation of its regulation” where there was no reason to suspect that the Commission’s interpretation had disregarded the agency’s judgement on the matter); *Humane Soc’y v. Jewell*, 76 F. Supp. 3d 69, 102 (D.D.C. 2014), *aff’d sub nom.* *Humane Soc’y v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (noting that *Chevron* deference was appropriate “even if the agency’s interpretation first appears during litigation, unless the interpretation conflicts with prior

public of advance notice of the agency's proposed actions and with it the opportunity to participate in the process.²³¹

Despite the lack of public participation in adjudications, the resulting orders can bind third parties who were not party to the adjudication.²³² These adjudications create a precedent of sorts. While agencies are not bound by the same *stare decisis* principles that undergird the common law system, reliance interests develop around these decisions.²³³

For these reasons, informal adjudication, unlike informal rulemaking, is structured to focus the agency actors on a narrow set of parties and shrouds the process in esoteric procedures that inhibit public input and data. As quasi-precedent within the agency, adjudications do impact individuals who are not always party to the litigation; despite this far-reaching impact, there is no statutorily ensured public notice requirement or central clearinghouse for these adjudications.²³⁴

2. Adjudications Lack Transparency Relative to Rulemaking

Just as informal rulemaking ensures greater public participation, it also allows for greater transparency. Today, individuals interested in providing comments as part of informal rulemaking have a single,

interpretations or amounts to nothing more than a convenient litigating position" (quoting *Shieldalloy Metallurgical Corp. v. Nuclear Regul. Comm'n*, 768 F.3d 1205, 1208–09 (D.C. Cir. 2014))).

231. See Bressman, *supra* note 62, at 1791 ("An interpretation may be authoritative yet lack the process that provides constituents with access to what the agency knows. This is particularly acute with post hoc justifications, such as litigating positions, which appear after the agency action is final.").

232. *Bowen*, 488 U.S. at 216–217 (Scalia, J., concurring) ("Adjudication—the process for formulating orders, *see* § 551(7)—has future as well as past legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason.").

233. See Hickman, *supra* note 30, at 944 ("The future effect of agency adjudication is not precisely the same as that of judicial precedent, as agencies are not strictly bound by the same *stare decisis* principles that govern judicial adherence to precedent. But agency decisions do have some precedential effect. When an agency makes a decision through adjudication with respect to one set of parties, the public recognizes that the agency likely will follow that decision in the future with respect to other, like parties."); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1042 (1995) (contrasting adjudications with the *stare decisis* effect of judicial precedent and noting that "an agency is free to depart from an interpretation or policy it adopts through adjudication provided that its explanation for its departure can survive judicial review for arbitrariness"). Despite the quasi-precedential status of adjudications, rulemaking produces "stickier" policies than adjudications in part because of the extra procedural steps required. Hickman, *supra* note 30, at 944.

234. Hickman, *supra* note 30, at 968–69.

unified website where they can upload their comments.²³⁵ The agencies' comments, in turn, are also published for the public to review.²³⁶

Unlike rulemaking, Congress has enacted several statutes with varying processes for agencies engaging in adjudications. While some statutory requirements impose limited publication requirements on agencies, there is significant leeway for unpublished decisions.²³⁷ As an example of the opaqueness of the adjudicatory process, consider the Executive Office of Immigration Review's process for adjudicating the deportation of noncitizens. Between 2012 and 2016, the Board of Immigration Appeals (BIA) issued more than 30,000 decisions annually.²³⁸ Approximately 99.9 percent of these 30,000 annual decisions were "non-precedential," meaning that they were not binding on third parties in future immigration court cases.²³⁹ While the BIA publishes the 0.1 percent of its decisions that are deemed precedential on its website,²⁴⁰ the vast majority of the decisions issued by the BIA remain unpublished and unavailable to the public.²⁴¹ These unpublished opinions ostensibly are not considered "final orders" and do not carry precedential value.²⁴² Nevertheless, while the public may not be able

235. *Regulations.gov*, GENERAL SERVICES ADMINISTRATION, <https://www.regulations.gov> [<https://perma.cc/HG5Y-X6YN>].

236. 5 U.S.C. § 553(c); *see also* *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("[A] dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.").

237. *See, e.g.*, 5 U.S.C. §§ 552(a)(2)(A) (requiring that agencies make public certain categories of information, which includes "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases"); *see also* *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 209–10 (2d Cir. 2021) (discussing agency disclosure obligations under the Freedom of Information Act, 5 U.S.C. § 552).

238. *N.Y. Legal Assistance Grp.*, 987 F.3d at 210.

239. *Id.* ("The BIA designates only about 30 decisions a year as precedential, and therefore binding on future immigration courts.")

240. *See id.* ("Designated precedential decisions are available online in the [Executive Office for Immigration Review]'s electronic reading room."). *Agency Decisions*, U.S. DEP'T OF JUST.: EXEC. OFF. OF IMMIGR. REV., <https://www.justice.gov/eoir/ag-bia-decisions> [<https://perma.cc/HX66-J8DPJ>].

241. *See N.Y. Legal Assistance Grp.*, 987 F.3d at 210–11 (noting that a "handful" of non-precedential decisions are published) (citing *Frequently Requested FOIA Records*, U.S. DEP'T JUST.: EXEC. OFF. FOR IMMIGR. REV. (Apr. 12, 2018), <https://www.justice.gov/eoir/frequently-requested-foia-records> [<https://perma.cc/Y9MX-M7EG>]).

242. *See* *Brief of Defendant-Appellees at 5-7*, *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207 (2d Cir. May 7, 2020) (No. 19-3248-cv), 2020 WL 2318711; *see also* 8

to access these “non-precedential” BIA decisions, attorneys representing the Department of Homeland Security in these adversarial proceedings do.²⁴³ This places individuals in removal proceedings at a substantial information disadvantage relative to the government attorneys. The Executive Office of Review guidelines discourage citations to unpublished BIA decisions in immigration proceedings, but they do not prohibit them.²⁴⁴ BIA judges, Immigration Judges, and lawyers representing the government frequently cite unpublished decisions in immigration proceedings.²⁴⁵ Individuals, therefore, must contend with defending themselves in removal proceedings with an incomplete view of the relevant case law. These volumes of unpublished cases allow for government attorneys, Immigration Judges, and BIA judges to cherry-pick among thousands of cases, citing only those that support their arguments for removal without a fair opportunity for rebuttal.²⁴⁶

This reality runs counter to the core tenet of due process by preventing anyone outside of the government from reviewing the universe of case law to verify that facts are being used to justify the grant or withholding of relief consistently.²⁴⁷ Immigration Judges are regularly tasked with interpreting convoluted immigration statutes and, as such, they play a vital role in setting immigration policy for the country; without access to the full universe of case law shaping these decisions, the public cannot hold the government accountable for its policy choices or the outcomes of cases.²⁴⁸

C.F.R. § 1003.1(g); U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIG. REV., IMMIGRATION COURT PRACTICE MANUAL App. J-3 (2020) (“Citation to unpublished decisions [in briefs] is discouraged because these decisions are *not binding* on the Immigration Court in other cases.” (emphasis added)); U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 61 (2020) <https://www.justice.gov/eoir/book/file/1528926/download> [<https://perma.cc/43NS-VK9F>] (“Citation to non-precedent Board cases by parties not bound by the decision is discouraged.”).

243. See *infra* notes 245 and 246.

244. U.S. DEP’T OF JUST., *supra* note 242, at app. J-3.

245. *N.Y. Legal Assistance Grp.*, 987 F.3 at 211.

246. See Amanda Frost, *Deportation Without Disclosure: Immigration Courts Need Transparency*, BLOOMBERG (Feb. 23, 2021), <https://news.bloomberglaw.com/us-law-week/deportation-without-disclosure-immigration-courts-need-transparency> [<https://perma.cc/PM94-YJ9K>].

247. *Id.*

248. *Id.*

C. Agency Expertise

Just as the valence of political accountability favors rulemaking over adjudications, agency expertise also does not apply with equal force to informal rulemaking and adjudication. In single-agency *Chevron* cases, this expertise is of the agency relative to the courts with regard to technical matters within the agency's jurisdiction. Current precedent provides little guidance on how courts can weigh agencies' experiences relative to each other. In the context of shared administrative spaces, however, what little the courts have spoken on the subject suggests that they similarly view agency expertise as fixed between the two agencies.²⁴⁹

I challenge the courts' presumption that "expertise" remains static among the agencies regardless of the actions taken by the agency. Agency expertise is not fixed but rather exercised through careful, deliberative consideration.²⁵⁰ Courts already implicitly rely on procedural formality when determining whether deference is warranted in solitary agency cases. The procedural formality inherent in notice and comment rulemaking—unlike other forms of agency action—consistently satisfies the *Chevron-Mead* threshold inquiry and allows the reviewing court to consider the substance of the agency's proposed interpretation relative to the statute. Informal adjudication, in contrast, does not follow a singular procedural model and may not satisfy *Chevron* step zero as frequently.²⁵¹ For instance, in *Mead* the Court noted that, "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure

249. See *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 152–53 (1991) (concluding that the Department of Labor is more likely to develop and maintain expertise relative to the OSHRC); *Potomac Elec. Power Co. v. Dir., U.S. Dep't of Lab.*, 449 U.S. 268, 279 n.18 (1980) (noting the Benefits Review Board was not the policymaking agency under the Longshore Act and was therefore not entitled to deference); *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 825 (9th Cir. 2012) ("Because the Board is not a policymaking entity, we accord no special deference to its interpretation of the Longshore Act. . . . The Director, by contrast, *is* a policymaking entity under the Act; he has the power to resolve legal ambiguities in the statute." (internal citations and quotation marks omitted)).

250. *United States v. Mead Corp.*, 533 U.S. 218, 230 ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (emphasizing the Social Security Administration's "careful consideration" of the legal question when affirming its decision pursuant to *Chevron*).

251. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 36–44 (2017) (discussing the notable discrepancy in agency "win rates" among informal rulemaking, formal adjudication, and informal adjudication).

tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”²⁵² Thus, procedural formality was held to reflect the agency’s due consideration. The Court went on to note that the majority of its previous *Chevron* decisions, where the Court found the agency to be acting with congressionally delegated authority to act with the force of law, concerned formal adjudications and informal rulemaking.²⁵³ This presumption is so ingrained in *Chevron* precedent that a panel of the Seventh Circuit, before *Mead*, incorrectly noted that *Chevron* deference was available *only* to agencies that had rulemaking authority.²⁵⁴

The Court reinforced this presumption in *Martin* when it deferred to the Department of Labor’s interpretation of OSHA rather than the OSHRC; the former agency had the authority to engage in rulemaking, while the latter was tasked solely with adjudicative authority.²⁵⁵ The Court wrote:

[A]gency adjudication is a generally permissible mode of lawmaking and policymaking only because the unitary agencies in question also had been delegated the power to make law and policy through rulemaking Insofar as Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role.²⁵⁶

In doing so, the Court articulated a presumption favoring rulemaking agencies in shared administrative spaces as the primary policymaking authority and relegated adjudication to a secondary role. As part of its analysis, the majority opinion differentiated between adjudicatory functions when used by a unitary agency and agencies that

252. *Mead Corp.*, 533 U.S. at 230.

253. *Id.* at 230–31. Precedent also requires that the agency use its expertise to shape the regulation. For instance, one limitation is that the regulation is not entitled to deference merely for parroting the language of the statute. *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (“[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”).

254. *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 441–42 (7th Cir. 1994), *aff’d sub nom. Bhd. of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152 (1996).

255. *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 151–57 (1991).

256. *Id.* at 154.

shared enforcement functions.²⁵⁷ Only when adjudicatory authority is combined with the rulemaking authority can the agency's pronouncements be viewed as falling within that agency's policymaking role; informal adjudication alone did not, according to the *Martin* Court, constitute policymaking that warrants deference. After all, the Court reasoned, the adjudicatory function operates as a quasi-judicial proceeding where the agency's interpretations are reviewed only for internal consistency and reasonableness rather than policymaking.²⁵⁸

The similarities between informal adjudications and judicial proceedings also create other tensions when applying deference to agency interpretations. Current precedent prohibits courts from deferring to agency interpretations announced in litigation.²⁵⁹ The Court has labeled these litigation interpretations *post hoc* interpretations unworthy of judicial deference.²⁶⁰ Courts have identified various reasons for refusing to defer to agency litigation positions. First, agency litigation positions may represent the views of individual employees or officers rather than those of the agency head.²⁶¹ Second, interpretations arising in litigation do not provide fair warning to affected parties.²⁶² Both of

257. *Id.* at 151–57.

258. *Id.* at 154–55.

259. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (“[W]e have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question, on the ground that ‘Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.’” (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971))); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (“The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely ‘*post hoc*’ rationalizations, which have traditionally been found to be an inadequate basis for review.” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *Fed. Lab. Relations Auth. v. U.S. Dep’t of Navy*, 966 F.2d 747, 764 (3d Cir. 1992) (“Nevertheless, we will not defer to an agency interpretation of its own unchanged regulation that is confined to an *amicus* brief and unpublished letter because this method of dissemination is wholly inadequate to notify the public of the agency’s interpretation.”).

260. *Martin*, 499 U.S. at 156.

261. *See, e.g., Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1366–67 (Fed. Cir. 2005) (holding that the court must defer to the International Trade Commission’s interpretation of the Byrd Amendment because it represented an “agency-wide position” rather than an “interpretation that was made at a low level within the agency”); *see also* Scalia, *supra* note 65, at 519 (noting that agency litigation by relatively low-level agency adjudicators or general counsel may not be undertaken with the full approval of the agency head).

262. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019) (“[A] court may not defer to a new interpretation, whether or not introduced in litigation that creates ‘unfair surprise’ to regulated parties.” (quoting *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339, 2349 (2007))); *see also* *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 2156, 2167 (2012) (“To defer to the agency’s interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” (quoting

these stated limitations regarding agency litigation positions arise in informal adjudications; agency opinions may be authored by low-level administrative law judges speaking on behalf of the agency as a whole and these quasi-precedential opinions are adopted with no public notice.

The Court's comparison of informal rulemaking and adjudication remains true in shared administrative spaces. According to this reasoning, rulemaking, not adjudication, is the procedure that best ensures that the agency is utilizing this presumed expertise in the course of its actions. After all, informal rulemaking procedures are "designed to assure due deliberation."²⁶³ Rulemaking allows for interagency coordination and deliberative consideration on the part of the acting agency in ways that adjudication does not.²⁶⁴

Thus, given that *Chevron-Mead* is premised on empowering agencies, with their heightened political accountability and technical expertise relative to courts, it follows that agency procedures that are transparent and publicly informed best exemplify this standard.²⁶⁵ When considering conflicting agency interpretations in a shared regulatory space, Courts should consider the formality of the procedure—giving preference to interpretations resulting from rulemaking, adjudications, and other procedures in that order—when determining where deference should lie. In this proposed framework, informal rulemaking is favored over informal adjudications, and both procedures are favored over all other forms of agency action. In instances of mixed adjudication and rulemaking, the rulemaking agency's interpretation is then subject to the deference analysis rather than the adjudicatory agency's interpretation. Similarly, if one agency uses an informal adjudication for its interpretation and the other agency uses a procedure typically subject to *Skidmore* deference,²⁶⁶ then the court proceeds to consider the adjudicating agency's interpretation under the

Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

263. *Smiley v. Citibank (S. Dakota)*, N.A., 517 U.S. 735, 741 (1996). *But see* Seidenfeld, *supra* note 214, at 1541–62 (discussing rulemaking as a process for structuring deliberation by decisionmakers).

264. *See* Hickman, *supra* note 30, at 968 ("To the extent that the Court has justified *Chevron* on pragmatic grounds, the pragmatic argument for it is stronger in the rulemaking context, where, at least as compared to informal adjudication, we should expect higher-quality outcomes that command greater legitimacy.").

265. Hickman, *supra* note 30, at 939.

266. *See supra* text accompanying note 55.

Chevron two-step analysis. This evaluation should occur as part of *Chevron* step zero considerations.²⁶⁷ This proposed deference allocation rule would incentivize agencies to engage in rulemaking over adjudication in these shared administrative spaces.²⁶⁸ This approach also accords with the longstanding precedent established in *Chenery II*, wherein the Court held that, in the absence of statutory constraints, agencies are entitled to choose between adjudication and rulemaking for formulating generally applicable policy.²⁶⁹

Under this proposed approach, the agency retains its authority to choose the procedure by which it will engage in statutory interpretation, and it can do so with the added knowledge of which procedure increases its chances of receiving deference.²⁷⁰ The agency is now able to make *informed* decisions about which course of action to take in order to best implement the agency objectives in these shared administrative spaces.

CONCLUSION

Much as the new world of mega satellite constellations necessitates new coordination mechanisms to prevent collisions, the increasing prevalence of shared administrative spaces necessitates new coordination tools to address interagency collisions. To date, the Supreme Court has never adopted a definitive framework for administering *Chevron-Mead* deference in shared administrative spaces. Lacking such a framework, lower courts all too often muddle their way through such litigation without clear guidelines. To this end, I propose that the Court articulate a clear rule for allocating deference in shared

267. See Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, *supra* note 105, at 219–20 (describing the process of allocating deference in shared administrative spaces as a “Step Zero inquiry”).

268. See Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 68–72 (2015) (empirical analysis suggesting that agency use of rulemaking procedures is inversely related to the threat of a successful lawsuit challenging that avoidance).

269. SEC v. *Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (“[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.”).

270. Bressman, *supra* note 62, at 1792. (“Even if *Chenery II* tells agencies that they have broad choice among informal procedures, it does not promise them judicial deference regardless of compliance with the informational floor.”).

administrative spaces. By establishing a background rule, the judiciary and the legislature can communicate more efficiently in this iterative process.²⁷¹ Congress has attempted to provide additional clarification about *Chevron's* application in certain shared spaces, but *Chevron* is a judicially created tool and therefore deserves judicial clarification whenever Congress fails to speak clearly.

To align with *Chevron-Mead* precedent, any proposed rule should accord with the justifications that underlie the deference structure. Under this paradigm, courts must recognize that these justifications do not apply with equal force to these two interpretive procedures used. When in shared administrative spaces, courts should preference rule-making over adjudication to allocate deference. Such a rule reinforces the legal and policy considerations that undergird *Chevron-Mead* without limiting the agency's right to choose which procedures to use when interpreting a statute. Moreover, agencies will be incentivized to engage in more formal procedures of statutory interpretation in these shared administrative spaces since this rule would notify them that they cannot presume deference will be granted. Agencies can still produce their guidance, but they know that it may be beaten out by a conflicting interpretation by another agency in the shared administrative space.

This Article does not purport to address all agency coordination interactions but focuses on the role of the courts as coordinators and instruments for facilitating common multi-agency interactions. Questions related to agencies engaging in formal adjudications and formal rulemaking in shared administrative spaces or multiple agencies engaging in the same procedure are beyond the scope of this project.²⁷² These questions remain as the subjects for future papers and, perhaps, future cases before the courts.

The Supreme Court's deference jurisprudence has significantly influenced the nature and degree of judicial oversight of agency

271. See Scalia, *supra* note 65, at 517 ("If that is the principal function to be served, *Chevron* is unquestionably better than what preceded it. 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, whose policy biases will ordinarily be known.").

272. See, e.g., *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 n.6 (2014) (noting that, while primary enforcement responsibilities under the Sarbanes-Oxley Act of 2002 lay with the Department of Labor, the SEC also had the authority to issue regulations enforcing the whistleblower provisions of the act).

rulemaking at all levels of the court system for more than thirty-seven years. In order to ensure that agencies' interpretations effectively carry out their intended purpose, the Supreme Court must take affirmative steps to coordinate agency action in these shared spaces by clarifying the proper role the judiciary plays in applying deference. Given the prominence of shared administrative spaces, the Court will find this challenge inescapable.

