# Multiple-Agency Delegations & One-Agency *Chevron*

## I. INTRODUCTION

Congress frequently delegates to agencies, and a host of Supreme Court decisions have articulated tests for determining what level of deference courts should give to agency interpretations of their statutory directives. Courts have historically undertaken these analyses in the context of a single agency. Congressional authorization of joint rulemaking authority is more complicated, however, and the traditional frameworks for review are inadequate.

When Congress delegates authority to multiple agencies, courts should review the agencies' rules with heightened deference. The traditional framework for judicial review of agency rules is ill equipped when rules are promulgated by multiple coordinated agencies. The prevalence of this type of delegation in recent legislation underscores the need to reconsider the framework under which courts review multiagency rules. For instance, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[1] ("Dodd-Frank Act") delegates broad authority to multiple agencies to promulgate rules jointly and in consultation with one another.[2] One particularly contentious provision of the Dodd-Frank Act delegates authority to the Treasury Department, the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Company, and the Securities and Exchange Commission to implement the "Volcker Rule"[3] by issuing joint rules.[4] Given the lengthy delays and

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

2. John F. Cooney, Chevron *Deference and the Dodd-Frank Act*, 37 ADMIN. & REG. L. NEWS, Spring 2012, at 7, 7.

3. The Volcker Rule will essentially restrict banks' ability to engage in proprietary trading. When the Rule is issued, it will have a big impact on a multitude of parties, particularly financial institutions. Thus, the Rule is likely to generate contentious litigation. *See* Kayla Tausche, *No Volcker Rule Until 2013: Sources*, CNBC (Nov. 28, 2012, 3:54 PM), http://www.cnbc.com/id/49891446; *see also* Scott Patterson & Deborah Solomon, *A Simple Bank Rule Proves Difficult to Write*, WALL ST. J., Sept. 11, 2013, at A1.

4. Dodd-Frank Wall Street Reform and Consumer Protection Act § 619.

contentious issues discussed during the notice-and-comment period,[5] the Volcker Rule itself is sure to generate a substantial volume of litigation. The recent issuance of the final rule will likely bring to light unresolved issues in judicial review of multiagency rules.[6]

Particularly, the question of which agency has interpretive authority over a statute when multiple coordinated agencies are charged to promulgate rules will likely prove vexing to the courts. In a recent article, John Cooney framed the dilemma as follows: "The issues presented may well include the question, long identified but not decided by the Supreme Court, concerning *which* agency's interpretation of a statute, *if any*, is entitled to deference under *Chevron*, when Congress has delegated equal and overlapping authority to multiple agencies."[7] While this question is an important one, it assumes that the Court will only afford *Chevron* deference to *one* agency in the realm of coordinated, multiagency rulemaking. This Note focuses on a slightly different question: Should courts employ a new paradigm for interpretive deference when multiple agencies jointly promulgate a single rule and Congress clearly intended for more than one agency to administer the statute?

The traditional *Chevron* framework is a one-agency model and is thus inappropriate for judicial review of the complex, multiagency form of congressional delegation. Instead, courts should employ an ultradeferential form of review, both to advance the likely benefits of coordinated, multiagency rulemaking and to ensure that courts do not venture into the policymaking realm when Congress makes it abundantly clear that it wants a group of agencies, not courts, to be the primary interpreters of the statute.[8]

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5. Patterson & Solomon, *supra* note 3 ("[T]he rule languishes unfinished and unenforced, mired in policy tangles . . . among five separate agencies whose job it is to produce the fine print.").

6. Peter Eavis, *'Long and Arduous Process' to Ban a Single Wall Street Activity*, N.Y. TIMES (Dec. 10, 2013), http://dealbook.nytimes.com/2013/12/10/long-and-arduous-process-to-ban-a-single-wall-street-activity/?ref=volckerrule; *see also* Cooney, *supra* note 2, at 7.

7. Cooney, *supra* note 2, at 7 (emphasis added).

8. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1184 (2012) (discussing the benefits of coordination on regulations); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 202–03 (discussing the allocation of decisionmaking authority among different government institutions); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 372–73 (2010) (discussing the choice Congress faces between delegating interpretive authority to courts or agencies); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000) ("This is hardly an ordinary case. Contrary to the agency's position from its inception until 1995, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.").

This Note argues for a shift in the traditional *Chevron* framework when (1) Congress delegates coordinated rulemaking authority to multiple agencies and (2) those agencies promulgate rules pursuant to that statutory mandate.[9] Part II discusses why and how Congress delegates to agencies and surveys the Supreme Court's framework for reviewing such agency action. Part III demonstrates that *Chevron* is a one-agency model and argues that the rise in coordinated, multiagency rulemaking complicates the Court's traditional approach to judicial review. Finally, Part IV proposes that the Court break from the traditional model and accord the fused agencies heightened deference when reviewing the joint rules.[10]

## II. THE INTERPLAY BETWEEN CONGRESS, AGENCIES, AND COURTS

The modern administrative state could not function without broad delegations from Congress to agencies.[11] Public-choice and agency theories both commonly recognize that Congress is most likely to delegate power to agencies when delegation promotes legislative efficiency.[12] This Part explores the reasons for and methods of congressional delegation that should inform the way courts review agency decisions.[13] Next, this Part outlines the role that courts have actually played in policing agency rules.

Congressional delegation to administrative agencies gained broad acceptance and became ubiquitous as a mechanism for

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9. Cooney, *supra* note 2, at 7 ("To implement its preferred allocation of authority among the supervisory agencies, Congress repeatedly declined to give any one agency primacy in implementation of a statutory provision. Rather, it granted equal authority to multiple agencies, each of which was directed to issue joint regulations carrying out ambiguous statutory provisions . . . .").

10. This Note does not address the problem that would arise if two different agencies, both delegated coordinated rulemaking authority under the statute, came to different interpretations of the joint rule within each particular agency's domain. However, the principles behind heightened deference for multiagency rules might also guide the Court addressing judicial review of single-agency interpretations of multiagency rules.

11. LISA BRESSMAN ET AL., THE REGULATORY STATE 140 (2010).

12. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 105–06 (2000); *see also* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 963–64 (1999) (explaining that Congress retains the creation of tax policy despite the considerable resources required because of political benefits).

13. Most of the *Chevron* literature discusses how the Court can get to the heart of what Congress was actually attempting to do, either by attacking *Chevron* as out of line with congressional intent, see, for example, David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203, or arguing that the presumption of delegation is similar to what Congress actually does, see, for example, Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2028 (2011).

implementing statutes over the latter part of the twentieth century.[14] The Court has also given its stamp of approval to congressional delegation, despite earlier attempts to thwart the practice under the nondelegation doctrine.[15] Today, Congress can freely delegate so long as it supplies an "intelligible principle" to guide the agency in filling the gaps of the statute.[16] In *Mistretta v. United States*, the Court articulated its broad view of the intelligible principle requirement as follows: "Applying this 'intelligible principle' test to congressional delegations, [the Court's] jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad, general directives."[17]

Congress does not delegate equally, however. Each delegation specifies the various institutional designs and mechanisms through which Congress can check agency action in each unique context. Sometimes Congress delegates broadly. Sometimes Congress cabins agency authority. Sometimes Congress requires agencies to adhere to procedural requirements that go beyond those required in the Administrative Procedure Act ("APA").[18] Increasingly, Congress delegates authority to more than one agency.[19] Carefully making these institutional design choices helps ensure that agencies stay within the bounds of their delegated authority.

### *A. Why Congress Delegates*

The sentiment conveyed by the Supreme Court in *Mistretta* is broadly shared by legal scholars: the complexity of governance

14. BRESSMAN ET AL., *supra* note 11, at 142.

15. This constitutional doctrine forbade congressional delegation of legislative power based on Article 1, Section 1 of the United States Constitution. For the last example of the Court invalidating a statute under the nondelegation doctrine, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (invalidating portions of the National Industrial Recovery Act under the nondelegation doctrine).

16. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); *see also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 958 (2007) (discussing the initial formulation of the "intelligible principle" requirement as one component of a two-part test).

17. Mistretta v. United States, 488 U.S. 361, 372 (1989).

18. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

19. *See* Freeman & Rossi, *supra* note 8, at 1134.

requires Congress to delegate broad policymaking authority.[20] It has also prompted scholars to ask why and under what conditions Congress is more likely to delegate to agencies.[21] While there is some dispute about which rationales motivate Congress the most,[22] there is general agreement that Congress delegates to conserve legislative resources and to get reelected.[23] For instance, Congress delegates to avoid contentious issues, to take advantage of an agency's comparative expertise over a given subject matter,[24] to obtain consensus on legislation,[25] and to take advantage of agencies' greater flexibility to adapt to changing circumstances.[26] All of these specific motivations allow members of Congress to be more efficient and advance their reelection prospects.

Congress typically delegates to agencies when it is politically advantageous or more efficient. Most literature on congressional motives assumes that members of Congress are primarily driven by reelection.[27] From this perspective, the key motivating factor behind delegating a particular policy issue seems to be avoiding politically perilous issues.[28] After all, individual members can then take credit for agency successes and still deflect blame for agency failures.[29]

Moreover, Congress is an institution filled with generalists, so agency expertise is widely recognized as one motivating factor for congressional delegation.[30] Both critics and defenders of the *Chevron*

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20. *See* Lemos, *supra* note 8, at 364 ("[D]elegations are inevitable. Congress lacks the time, resources, foresight, and flexibility to attend to every conceivable detail of regulatory policy."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (positing that the broad idea of a nondelegation doctrine is no longer viable, but that the doctrine shows up in canons that limit agency action in specific ways).

21. *See* Epstein & O'Halloran, *supra* note 12, at 950 ("Legislators delegate authority in those areas—such as pork barreling in appropriations bills, military base closings, and trade policy—where the legislative process produces inefficient outcomes."); Lemos, *supra* note 8, at 368–69 (citing agency expertise and flexibility, congressional time constraints, and politically infeasible resolution in Congress as reasons for delegation).

22. *Compare* Epstein & O'Halloran, *supra* note 12, at 961 (offering a public choice explanation of delegation), *with* Barron & Kagan, *supra* note 13, at 203–05 (suggesting that Congress makes strategic choices about when courts should defer to agencies).

23. Lemos, *supra* note 8, at 368.

24. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 110 (2010) (discussing comparative expertise as a rationale for judicial deference).

25. Lemos, *supra* note 8, at 369.

26. BRESSMAN ET AL., *supra* note 11, at 140.

27. Epstein & O'Halloran, *supra* note 12, at 952, 962.

28. *Id.*; Lemos, *supra* note 8, at 369.

29. Epstein & O'Halloran, *supra* note 12, at 961–62.

30. *See* Lemos, *supra* note 8, at 368 ("Whereas agencies have (or can accumulate) special expertise in their areas of authority, legislators tend not to be experts, and the costs of educating

decision agree that agency expertise was a primary reason for the Court's presumption that Congress delegated authority to an agency.[31] Indeed, along with political accountability, agency expertise provided the second major pillar of the *Chevron* doctrine.[32] When an issue is technical and agency expertise is important, delegation is more likely.[33]

Congress delegates for other reasons as well. Recent literature suggests that Congress sometimes delegates to ensure consensus on a bill that otherwise might divide the legislative body if it had to iron out the details of legislation.[34] At the very least, Congress does think about when to take more control over the details of a statute and regulatory scheme and when to delegate those matters to an agency.[35]

### *B. How Congress Delegates: A Variety of Forms*

Of course, Congress decides more than simply *whether* to delegate authority. It must also decide *how* to delegate authority.[36] Congressional delegations take a variety of forms, demonstrating that Congress is attentive to how its directives are carried out.[37] Much of the scholarship in this area focuses on how delegations to agencies maximize agency expertise while maintaining political

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Congress would be prohibitive."); Spence & Cross, *supra* note 12, at 136 ("For informational reasons, a Congress charged with making regulatory decisions is likely to produce inferior ones.").

31. *See, e.g.*, Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 576 (2009) (noting the *Chevron* Court's observation that Congress may delegate interpretive authority to an agency because of its superior informational position); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. Rev. 1271, 1286 (2008) (stating that agencies' greater experience in the relevant field provides a popular justification for *Chevron* deference); *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Perhaps [Congress] consciously desired the Administrator 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 . . . .").

32. *Chevron*, 467 U.S. at 865–66.

33. *Id.* at 963–64.

34. Lemos, *supra* note 8, at 369.

35. *See* Epstein & O'Halloran, *supra* note 12, at 961–62 (describing how Congress must make choices when policy is made and must weigh the costs of either delegating to agencies or writing the laws themselves).

36. *See, e.g.*, Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 316 (2006) ("[Congress] must determine to whom to grant power, what organizational structure to create, what administrative processes to require, and how the recipients of statutory authority may be removed.").

37. *See, e.g.*, BRESSMAN ET AL., *supra* note 11, at 11 (discussing the choice between allocating authority to an Independent or Executive Agency); Freeman & Rossi, *supra* note 8, at 1134 (discussing how Congress sometimes delegates overlapping authority to different agencies).

accountability.[38] Congress creates varied forms of regulatory regimes using different statutory language for different policy contexts.[39] Sometimes Congress is explicit, cabining an agency's authority to a specific realm.[40] In other statutes, Congress is vague, issuing a broad delegation that leaves vast space in which an agency can operate.[41] Congress also creates extrajudicial checks on agency action to ensure accountability and sound policymaking.[42] In short, Congress uses various institutional designs and procedural requirements to achieve an appropriate level of agency involvement in each policymaking context.[43]

### 1. Choices of Institutional Design

In terms of institutional design, Congress is often deliberate when deciding whether to delegate authority to an executive or independent agency.[44] Executive agencies have greater political accountability, while independent commissions are more shielded from political pressures.[45] The decision to grant authority to a specific type of agency attests to the fact that Congress cares about political accountability when it delegates authority.[46]

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38. *See, e.g.*, Lemos, *supra* note 8, at 365 ("[C]ommentators have identified various characteristics of agency decisionmaking and institutional structure—agencies' expertise . . . and their responsiveness to the political branches—that make agencies tolerable (and perhaps even superior) substitutes for congressional lawmaking.").

39. Freeman & Rossi, *supra* note 8, at 1168.

40. BRESSMAN ET AL., *supra* note 11, at 140 (discussing how Congress can give agencies specific targets or requirements in a statutory delegation).

41. *Id.* (giving the National Highway Transportation Safety Act as an example of a statute that delegated broadly).

42. Epstein & O'Halloran, *supra* note 12, at 958–60 (discussing congressional controls on agency action). Of course, effectuating congressional intent does not necessarily lead to good policy. But, it seems like a safe assumption that Congress believes the policy to be good, or it would not have enacted it in the first place. So, to the extent that Congress seeks to align agency policymaking with the intent of the statute, it is trying to advance "good" policymaking.

43. *See* Stack, *supra* note 36, at 316 (discussing how Congress makes choices of institutional design and procedural requirements).

44. *See id.* at 11–13 (discussing the differences in political accountability between the two types of agencies); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 15 (2010) (discussing how Congress is purposeful about the choice to create an independent or executive agency). While executive agencies are directly accountable to the President, independent agencies are more politically insulated.

45. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 547 (2009) (Breyer, J., dissenting) (noting that an independent commission had "freedom from ballot-box control").

46. BRESSMAN ET AL., supra note 11, at 11 (examining the differences between appointment and removal powers between independent and executive branch agencies); *see also Fox*, 556 U.S. at 547 (discussing how independent agencies are shielded from political influences).

When Congress authorizes an agency or agencies to promulgate rules through notice-and-comment rulemaking, the statute explicitly confers authority on the agency to fill in any statutory gaps.[47] Congress, however, is not always explicit about its delegations of authority to administrative agencies.[48] Sometimes, Congress plainly and explicitly delegates rulemaking authority to administrative agencies.[49] Other times, Congress delegates authority to agencies, but not *rulemaking* authority.[50] Either way, the inclusion or exclusion of informal, notice-and-comment-rulemaking authority is an important institutional design choice that Congress makes when delegating authority to an agency.[51]

### 2. Extrajudicial Checks

Congress also employs extrajudicial checks, including heightened procedural requirements, when it delegates authority to agencies.[52] Put differently, Congress designs different structural mechanisms—outside of judicial review under the APA—to ensure that agency rules effectuate legislative intent.[53] Moreover, Congress always retains some amount of control over agency decisions through ordinary procedural requirements, control of the budget, and oversight hearings.[54]

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47. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

48. BRESSMAN, ET AL, *supra* note 11, at 140 (using the Sherman Antitrust Act as an example of general language being an implicit delegation to courts).

49. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. (2012)).

50. *See* BRESSMAN ET AL., *supra* note 11, at 718 (discussing how some statutes confer authority—but not rulemaking authority—on agencies).

51. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 236–39 (2001) (suggesting that the use of notice-and-comment rulemaking would provide a safe harbor for agencies to receive deference).

52. *See* Lemos, *supra* note 8, at 375 n.46 (citing Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751–52 (2007)) (discussing how Congress sometimes adds procedural requirements to control agency action).

53. *Id.* For the procedural requirements under the APA, see 5 U.S.C. §§ 701–06 (2012).

54. Lemos, *supra* note 8, at 375.

Furthermore, a number of statutes require multiagency interactions prior to rulemaking,[55] and some even require an agency to get approval from another agency before taking action.[56] These consultation requirements seek to enhance agency coordination in implementing complex regulatory regimes and to bring more and varied types of expertise to bear on difficult problems.[57]

Congress also makes institutional design decisions about delegating authority to a single agency or to multiple agencies.[58] Congress can choose to require agency coordination before agencies promulgate rules or take other action.[59] This extrajudicial check often improves agency efficiency in areas of bureaucratic overlap.[60]

Arguably, the strongest coordination requirement is a congressional mandate that two or more agencies negotiate to promulgate a joint rule.[61] Mandating joint rulemaking can solve coordination problems for agencies with overlapping jurisdictions and "improve both cumulative expertise and the quality of the final . . . decision."[62] Congress has increasingly mandated joint rulemaking, especially in complex policy arenas that require coordination among similar but distinct regulatory agencies.[63] The variety of delegation regimes—both in terms of scope and institutional design—suggests that Congress attends to institutional design in a

55. *See* Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 755 (2011) (describing how some statutes require agency consultation and coordination prior to action).

56. *Id.* at 756 (explaining how some agency decisions require the approval of a directing agency).

57. *See* Freeman & Rossi, *supra* note 8, at 1155–56, 1167–68 (discussing the various agency consultation requirements, including joint rulemaking); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (discussing the benefit of multiple agencies negotiating a shared position on an issue).

58. *See* Gersen, *supra* note 8, at 208–10 (discussing the different ways Congress can delegate to one or multiple agencies).

59. *See, e.g.*, J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221–22 (2005) (discussing consultation requirements imposed on FERC).

60. Freeman & Rossi, *supra* note 8, at 1184.

61. Because the negotiations and joint rules are mandated by Congress, agencies are required by law to work together to fill in the statutory gaps. Because agencies are legally bound to act in concert, the benefits of increased agency expertise and more thorough reasoning behind the rule are enhanced more than when agencies have a choice whether to consult or when Congress mandates less formal consultation requirements and the final rule is still issued by a single agency. *See id.* at 1155–70 (discussing a variety of consultation requirements).

62. Freeman & Rossi, *supra* note 8, at 1184.

63. *See id.* at 1168 (discussing how Congress recently required many rules to be issued jointly in Dodd-Frank).

way that it believes will keep agency policymaking in accord with congressional intent.[64]

### 3. What Is Congress Delegating and to Whom?

Congress delegates *policymaking* authority to agencies. In essence, Congress wants agencies to exercise a gap-filling function by formulating specific policy details from general statutory guidance.[65] Of course, if an agency has authority to implement a statute, it must first determine what the statute means.[66] Thus, policymaking authority necessarily requires some degree of *interpretive* authority.[67]

Some have criticized the courts for propagating a judge-centric (rather than agency-centric) view of the fundamental nature of delegation.[68] Couched in terms of *interpretive* authority, *Chevron* and the other deference doctrines mistakenly define what Congress and agencies more properly regard as *policymaking* authority.[69] Yet, this distinction is mostly semantic. In the final analysis, courts simply adjudge whether Congress wants the judiciary to defer to an agency in performing its gap-filling function, which includes both interpretative and policymaking elements.[70]

When Congress writes a statute that is ambiguous, it implicitly grants courts interpretive authority.[71] If Congress delegates authority to agencies to implement a vague statute—especially when the method chosen is notice-and-comment rulemaking—it also delegates authority to interpret that statute.[72] Congress also has the backstop of

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64. *See supra* Part II.A.2; *see also* Freeman & Rossi, *supra* note 8, at 1155–58 (discussing mandatory consultation rules).

65. *See, e.g.*, Lemos, *supra* note 8, at 364–65 (discussing that Congress can delegate policy decisions to agencies).

66. *See* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 675–78 (2007) (criticizing the shift in judicial treatment of the role of agencies from "carrying out" statutes to interpreting them).

67. *Id.*; *see also* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013) (holding that courts must apply the *Chevron* framework, even when agencies interpret ambiguous statutory provisions relating to the scope of the agencies' authority, or their jurisdiction).

68. *Id.* at 676.

69. *Id.*

70. Foote, *supra* note 66, at 680–82.

71. BRESSMAN ET AL., *supra* note 11, at 140 ("[D]elegation is implicit, as are all delegations to courts."). As a matter of constitutional law, Congress knows that courts have authority to interpret the statute. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

72. BRESSMAN ET AL., *supra* note 11, at 140, 400–01; Lemos, *supra* note 8, at 373–80 (discussing Congress's choice to delegate between courts and agencies).

the APA,[73] which ensures that courts will still have a role in reviewing agency decisions after congressional delegation.[74] Thus, even when statutes are written ambiguously, Congress is aware that it is delegating interpretive authority to agencies to administer statutes.[75]

### C. The Court's Role in Policing Congressional Delegations

In recent years, the Supreme Court has developed various legal doctrines to assess the validity of agency actions.[76] However, courts have struggled over when to defer to an agency's interpretation of a statute that the agency itself is charged with implementing.[77] Judicial review becomes particularly complex when the implementation of the statute requires an agency to exercise its interpretive authority.[78] While the Court has developed multiple types of deference—including, most famously, *Chevron*—the fundamental question of how much deference agencies should receive in exercising their statutory gap-filling function remains a difficult one.

#### 1. The Nondelegation Doctrine

While the exact parameters of the nondelegation doctrine are disputed, it has largely gone unenforced since the early twentieth century.[79] It is widely accepted that the practical complexities of the administrative state in the twenty-first century require broad statutory delegations.[80] The Court made this clear in *Mistretta*, and despite the volume of scholarship on the nondelegation doctrine, the Court has not signaled that it will resurrect the doctrine from its

73. 5 U.S.C. §§ 701–06 (2006).

74. BRESSMAN ET AL., *supra* note 11, at 140.

75. *See id.* (discussing the "levers of control" used by Congress); Lemos, *supra* note 8, at 365 (asking what makes Congress "choose" from among its various delegation possibilities).

76. BRESSMAN ET AL., *supra* note 11, at 679.

77. *Id.* at 140–41.

78. While it can be argued that *any* agency action involves interpretation of a statute, courts have created specific doctrines in situations where the agency interpretation is disputed. This scenario has been looked at as distinct from administrative actions in which a particular agency interpretation of the statute is not at issue (e.g., FTC enforcement actions).

79. BRESSMAN ET AL., *supra* note 11, at 141. *Contra* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (arguing that the nondelegation doctrine as it is known today is without legitimate constitutional foundation).

80. Posner & Vermeule, *supra* note 79, at 1722; *see also* Lemos, *supra* note 8, at 364 ("Congress lacks the time, resources, foresight, and flexibility to attend to every conceivable detail of regulatory policy.").

New Deal–era grave.[81] Some scholars have suggested that the Court—in the face of an increasingly powerful administrative state—has revived aspects of the nondelegation doctrine through what Professor Cass Sunstein has termed "nondelegation canons."[82] Whether it is actually reviving the nondelegation doctrine through other means, the Court has certainly played an active role in policing legislative delegations and agency action since *Chevron*.[83]

### 2. *Chevron* and Its Foundation

Decided in 1984, *Chevron* established the oft-invoked two-step test to determine whether an agency interpretation warrants deference from a court.[84] Under Step One, the court asks if Congress has "directly spoken to the precise question at issue."[85] If Congress has not, then under Step Two, the court will defer to the agency's interpretation as long as it is reasonable.[86] While there is evidence that courts actually employ a variety of deference regimes when deciding whether to defer to an agency's interpretation of a statute,[87] *Chevron* is considered the primary framework.[88]

Despite a continuing normative debate over the propriety of *Chevron*,[89] both critics and supporters of the doctrine generally agree that *Chevron*'s presumption of congressional delegation rests on two

81. BRESSMAN ET AL., *supra* note 11, at 140.

82. *See* Sunstein, *supra* note 20, 315–16 ("[The nondelegation doctrine] has been relocated rather than abandoned. Federal courts commonly vindicate not a general nondelegation doctrine, but a series of more specific and smaller, though quite important, nondelegation doctrines."); *see also* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 22–23 (2010) (arguing that the "elephants in mouseholes" doctrine is a "ghost of the nondelegation doctrine").

83. *See, e.g.*, United States. v. Mead Corp., 533 U.S. 218, 229–31 (2001) (requiring agencies to act pursuant to lawmaking authority in order to get *Chevron* deference); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000) (declining to give the FDA *Chevron* deference because Congress could not possibly have implicitly delegated such a salient policy issue); *see also* Bressman, *supra* note 13, at 2019–21 (discussing *Mead*).

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

85. *Id.* at 842.

86. *Id.* at 843; *see also* Freeman & Rossi, *supra* note 8, at 1207 (discussing how courts determine whether an agency's interpretation is reasonable).

87. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098–1120 (2008).

88. BRESSMAN ET AL., *supra* note 11, at 679.

89. *See* Criddle, *supra* note 31, at 1283–84 (discussing various rationales commentators have proposed to justify *Chevron* deference).

central pillars: agency expertise and political accountability.[90] Writing for a unanimous Court, Justice Stevens laid out the now widely cited foundation for *Chevron* deference:

> 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. In contrast, an 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.[91]

Thus, the Court has been more likely to apply broad deference to agency interpretations when doing so would promote agency expertise and political accountability, as Congress would have intended.[92]

### 3. *Chevron* Deviations

In recent years, the Court has shied away from automatically applying *Chevron* and has shown signs that it will examine the particular statutory regime and Congress's institutional-design choices before affording deference to an agency interpretation.[93] Two examples stand out. First, *United States v. Mead Corp.*[94] created what has been termed *Chevron* "Step Zero"[95] by adding a threshold question to the traditional two-step *Chevron* test: did the agency action bind with the force of law pursuant to a congressional delegation of

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90. *See* Bressman, *supra* note 13, at 2030–33 (noting that when the Court determines questions of congressional delegation, it considers the agency's policymaking expertise as well as its political accountability); Criddle, *supra* note 31, at 1286–89 (discussing arguments for and against justifying *Chevron* deference based on agency expertise and political accountability); Stack, *supra* note 36, at 305 (stating that the *Chevron* Court explicitly considered agencies' expertise in a given field as well as their political accountability as compared to federal judges).

91. *Chevron*, 467 U.S. at 865–66.

92. *See, e.g.*, Eskridge & Baer, *supra* note 87, at 1157 (finding that the Court was more deferential to agencies when agency expertise was a salient factor in the interpretive process and when the agency interpretation remained consistent over time).

93. *See* Bressman, *supra* note 13, at 2012 (noting that since *Mead*, the Court will look at "other indications in the statutory context and the legislative history, asking whether Congress reasonably intended to delegate interpretive authority."); *see also* Eskridge & Baer, *supra* note 87, at 1179 (discussing the Court's ad hoc approach that takes into account statutory context).

94. 533 U.S. 218 (2001).

95. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 187 (2001).

authority to the agency to bind with the force of law?[96] The essential thrust of Step Zero is that an agency must use formal procedures with a "lawmaking pretense" in order to be afforded *Chevron*'s presumption of deference.[97] If an agency did not act pursuant to such authority, then the Court merely considers its persuasiveness under the less deferential standard of *Skidmore v. Swift*.[98] Thus, *Mead* identifies certain circumstances under which courts do not afford interpretive deference to an agency because of the nature of the agency's authority or the agency's exercise of that authority.[99] The Court will thereby afford agencies less deference in circumstances where agency interpretations are associated with actions that are not "lawlike" or do not stem from the agency's authority to bind with the force of law.[100]

*Mead* implicitly recognizes that Congress delegates in a variety of ways and that *Chevron* deference does not apply in certain contexts.[101] This idea is at odds with *Chevron*'s broad presumption of deference,[102] and it has empowered courts to examine the specific context of congressional delegation before automatically affording deference to the agency.[103]

A second circumstance in which the Court has undertaken an in-depth analysis of what Congress actually intended[104]—as opposed to simply employing *Chevron*—is when an agency asserts authority over a salient issue that Congress very likely did not intend to punt to the agency.[105] In *FDA v. Brown & Williamson*, the Court declined to give the Food and Drug Administration ("FDA") *Chevron* deference in the realm of tobacco regulation, despite the agency's strong textual argument.[106] Although the language of the Food, Drug & Cosmetic Act

96. Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1444 (2005).

97. *Mead*, 533 U.S. at 233; *see also* Bressman, *supra* note 13, at 2021 (discussing *Mead*'s effect on the *Chevron* regime); Matthew P. Downer, Note, *Tentative Interpretations: The Abracadabra of Administrative Rulemaking and the End of* Alaska Hunters, VAND. L. REV. (forthcoming Apr. 2014) (discussing the *Mead* and *Skidmore* glosses on *Chevron*).

98. *Mead*, 533 U.S. at 227, 234–35; Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

99. 533 U.S. at 226–27 (holding that Congress needs to delegate authority to bind with the force of law and the agency needs to act pursuant to that authority in order for the Court to grant the agency *Chevron* deference in its interpretation of the statute).

100. *Id.*

101. Bressman, *supra* note 13, at 2012.

102. *See id.* (discussing how the particularized inquiry rebuts the *Chevron* presumption).

103. Bressman, *supra* note 96, at 1469.

104. Bressman, *supra* note 13, at 2010.

105. *Id.* at 2018–20.

106. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (noting that "[the Court] must be guided to a degree by common sense as to the manner in which Congress is likely

seemed to clearly authorize FDA regulation, the Court highlighted Congress's history of tobacco-related legislation as evidence that Congress did not want to cede control of that arena to the FDA.[107] Finally, the Court noted that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[108] This presumption—that Congress would not delegate authority in such a major policy arena without explicit indication—has come to be called the "elephants-in-mouseholes doctrine."[109]

These two twists on the traditional *Chevron* framework show that the Court is willing to police whether an agency action warrants deference in the first place.[110] Thought of in this way, these doctrines alter the amount of judicial deference given to agencies to ensure that they exercise their interpretive authority in accordance with congressional intent. The Court's willingness to deviate from traditional *Chevron* deference implies that the Court is willing to examine *how* Congress delegated authority in determining the appropriate level of deference.[111] In fact, recent empirical research shows that the Court employs a variety of deference doctrines, but seems to decide what level of deference is appropriate based on the way in which Congress delegated authority and how that authority was exercised, as explained in the following Section.[112]

### 4. A Spectrum of Deference

Despite its various tests and frameworks, which is often couched in formalistic language, the Supreme Court has taken a practical approach to questions of agency deference. While *Chevron* is typically the prism through which scholars examine judicial deference to agencies, William Eskridge and Lauren Baer have demonstrated empirically that the Court does not invoke *Chevron* nearly as often as many believe. Instead, they found that the Court actually employs a variety of deference doctrines, depending on the "statutory subject

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to delegate a policy decision of such economic and political magnitude to an administrative agency."); *see also* Loshin & Nielson, *supra* note 82, at 30–33 (discussing the elephants-in-mouseholes doctrine).

107. *Brown & Williamson*, 529 U.S. at 157–59.

108. *Id.* at 159.

109. Loshin & Nielson, *supra* note 82, at 21, 24.

110. Bressman, *supra* note 13, at 2012.

111. *See id.* at 2018–19 (discussing how the Court undertook a particularized inquiry into the statutory context rather than presuming delegation and deference).

112. Eskridge & Baer, *supra* note 87, at 1179.

matter" and "institutional context."[113] Their research indicates that, in fact, the Court takes a particularized look at a given agency rule or interpretation before deciding what level of deference to afford the agency.[114] The authors note that "statutory subject matter and institutional context appear to be more important in the Justices' own evaluation of agency action than the rhetorical 'deference' regime the Justices attach to the case."[115] This conclusion suggests that the Court is frequently conducting a "particularized inquiry," despite the common assumption that the *Chevron* framework governs the vast majority of cases.[116] Eskridge and Baer criticize the Court for its overly complicated approach, but they also note that the "subject-matter-driven ad hoc approach has not been a disaster and might charitably be considered a practical success."[117]

Thus, it turns out that the answer to the question of how much deference the Court is willing to give an agency also has a simple answer: it depends. It depends on the institutional design chosen by Congress and the extrajudicial checks it imposed on the agency.[118] If Congress grants broad, informal rulemaking authority to an agency to promote agency expertise and ensure political accountability, then courts should be more willing to defer. Based on the research by Eskridge and Baer, this seems to be what the Court has actually been doing, despite its veritable grab bag of deference rules.[119] Normatively, this trend is exactly what we would hope to see if we continue to adhere to the central pillars of *Chevron*.[120] If the *Chevron* doctrine exists to promote agency expertise and ensure political accountability, the Court should review rules more deferentially when those factors are at play.

Rules promulgated by multiple coordinated agencies, however, have not yet been reviewed by the Supreme Court. Moreover, its past cases involving multiple agencies charged with implementing a

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113. *Id.*

114. *See id.* at 1090–91 (describing how the Court often takes an ad hoc approach based on agency expertise and the particular statutory context).

115. *Id.*

116. *See* Bressman, *supra* note 13, at 2010 (discussing the particularized inquiry).

117. Eskridge & Baer, *supra* note 87, at 1179.

118. *Id.*

119. Eskridge and Baer identify at least seven different deference regimes and conclude that the Court employs an ad hoc approach—invoking none of the regimes—in the majority of cases in which it reviews agency action. *Id.* at 1098–117.

120. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (discussing the role of the judiciary in reviewing challenges to agency action).

statute leave great doubt as to whether the Court would be willing to grant broad deference to a *group* of agencies.[121]

## III. *CHEVRON* IS A ONE-AGENCY MODEL & CONGRESS'S BURGEONING USE OF MULTIAGENCY DELEGATIONS PRESENTS A PROBLEM

When the Court grapples with multiagency rules under current administrative law doctrine, it will run into trouble. The Court's treatment of agency interpretations of general statutes and statutes that delegate to more than one agency strongly suggest that *Chevron* is a one-agency model. Even when the Court takes a nuanced approach to *Chevron* by carefully examining the context of a delegation, it still chooses to defer or not to defer to a single agency. Congress has increasingly delegated to multiple agencies under the same statute; the Court's current doctrine is inadequate.

### *A.* Chevron*: A One-Agency Model*

While legal scholars disagree over why Congress gives agencies overlapping delegations,[122] they broadly agree that the practice occurs regularly. However, the *Chevron* framework implicitly presumes that only *one* agency—if any at all—should be accorded deference in statutory interpretation. Accordingly, courts have been forced to make dubious assumptions about congressional intent in order to review conflicting statutory interpretations by different agencies within the traditional *Chevron* framework.[123] The Court has yet to hear a case, however, that directly confronts whether a multiagency interpretation of a statute under a jointly promulgated rule should be granted deference and, if so, which standard should apply.[124] But such a case may soon be heard. Through its previous treatments of multiagency

121. *See* Cooney, *supra* note 2, at 8–9 (discussing cases in which the Court has attempted to pick a single agency to accord deference, in the context of multiagency statutes).

122. *Compare* Freeman & Rossi, *supra* note 8, at 1137 (discussing the benefits of overlapping delegation), *with* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 198–218 (2011) (arguing that duplicative delegations are inefficient and suggesting ways to avoid them).

123. *See* Gersen, *supra* note 8, at 220 ("[A]gency expertise has regularly been used as a justification for not giving deference to agency views of shared jurisdiction statutes.").

124. Cooney, *supra* note 2, at 7. The Court addressed a joint regulation in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 275 (2011), but it analyzed the interpretation as if it had been issued solely by one of the agencies, affording no weight in the deference inquiry to the fact that the agencies involved had issued the regulation together. *Id.* *See also* Freeman & Rossi, *supra* note 8, at 1204 (discussing *Coeur* and noting that "the majority appeared to apply the relevant standards of review precisely as it would have done had the case involved a single agency acting independently").

statutes in other contexts, however, the Court has implied that it will only give interpretive deference to one agency under *Chevron*.

The way that the Court has interpreted the doctrinal foundations of *Chevron* and applied them to cases involving multiple agencies with shared regulatory authority strongly suggests that *Chevron* is a one-agency model.[125] At times, Congress passes general statutes to be implemented by multiple agencies, raising the question of which agency, if any, deserves *Chevron* deference from the courts.[126] Congress also passes statutes that delegate overlapping regulatory authority to different agencies within a specific policy area.[127] Both of these scenarios present courts with the problem of whether to employ *Chevron* deference, since the traditional rationales behind the doctrine may or may not apply in these cases.[128] While expertise and accountability could conceivably justify granting *Chevron* deference to multiple agencies,[129] the Court has not applied *Chevron* in this way.[130] Instead, the Court has implicitly added a presumption to the *Chevron* framework that, when Congress delegates interpretive authority, it delegates it to a single agency.[131]

### 1. Statutes of General Applicability

In some instances, the Court will not afford judicial deference to any agency at all. For instance, courts do not afford *Chevron*

125. Gersen, *supra* note 8, at 222–25. Gersen asserted that the Court uses an "exclusive jurisdiction canon." *Id.* at 224. Whether it should be considered a separate canon or just an explanation of *Chevron* itself, the Court has employed a one-agency framework when deciding issues of interpretive deference when overlapping agency jurisdiction complicated the *Chevron* question.

126. *See id.* at 221–22 (discussing Bowen v. Am. Hosp. Ass'n., 476 U.S. 610, 642 (1986)); *see also* Cooney, *supra* note 2, at 7 (noting that "Congress directed as many as seven agencies to issue joint regulations implementing" Dodd-Frank and "repeatedly declined to give any one agency primacy").

127. Freeman & Rossi, *supra* note 8, at 1146 (discussing the overlapping authority between the FTC and DOJ).

128. Daniel Lovejoy, Note, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 882–84 (2002).

129. When Congress delegates to multiple agencies with similar comparative expertise—as in the Dodd-Frank Act—the rationales behind the *Chevron* presumption of delegation would be just as strong, so long as the Court believed that political accountability would not be hindered under such a regime.

130. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 266 (2006) ("[W]e presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.").

131. *See* Gersen, *supra* note 8, at 223, 237–39 (discussing Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1990), and *Gonzales*, 546 U.S. at 243).

deference at all to laws of general applicability.[132] For example, agency interpretations of statutes like the Freedom of Information Act, the National Environmental Protection Act, and the APA are not given *Chevron* deference.[133] If no agency is charged with rulemaking or adjudicatory duties under a statutory scheme, then deference to agency interpretations of that statute is not warranted because Congress did not delegate interpretive authority to any specific agency.[134] It is presumed that courts, not agencies, are the institutions to which Congress delegated interpretive authority in that context.[135]

2. *Chevron* Deference & Agencies with Overlapping Jurisdictions

Even where Congress clearly delegates interpretive authority to the executive branch, the Court has strongly implied that *Chevron* deference carries with it a presumption that such authority is granted to just one agency, if at all. *Martin v. Occupational Safety and Health Review Commission*[136] and *ETSI Pipeline Project v. Missouri*[137] both serve as helpful examples. In *Martin*, the Court addressed two conflicting agency interpretations of a provision in the Occupational Safety and Health Act.[138] Both the Secretary of Labor and the Health Review Commission were delegated authority under the statute, but the Court framed the question as follows: "The question before [the Court] in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this 'interpretive' lawmaking power under the OSH Act."[139] The Court's question implicitly assumes

132. Cooney, *supra* note 2, at 8 ("Federal Courts traditionally have refused to grant *Chevron* deference to agency interpretations of laws of general applicability, such as the Freedom of Information Act or the National Environmental Protection Act, that no specific agency is granted authority to implement." (citing Grand Canyon Trust v. FAA, 290 F.3d 339, 341–42 (D.C. Cir. 2002))).

133. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 894 (2001).

134. *Id.* at 894–95.

135. BRESSMAN ET AL., *supra* note 11, at 140; Lemos, *supra* note 8, at 373–80 (discussing the choice between agencies or courts administering statutes).

136. 499 U.S. at 146.

137. 484 U.S. 495 (1988).

138. 29 U.S.C. § 654 (2012).

139. *Martin*, 499 U.S. at 151; *see also* Gersen, *supra* note 8, at 242–43 (discussing the way the Court framed the issue and the implications of that fact in support of the proposition that the Court employs an "exclusive jurisdiction canon").

that Congress meant to delegate interpretive authority to only one administrative agency.[140]

More recently, in *Gonzales v. Oregon*, the Court used *Martin* to analyze whether an interpretive rule issued by the U.S. Attorney General warranted deference.[141] Quoting language from *Martin*, the Court relied on *Chevron*'s rationale to suggest that courts should identify *one* agency that Congress intended to delegate lawmaking authority to under a given statute:

> Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.[142]

*Gonzales* demonstrates that once the Court decides that Congress did in fact intend to delegate lawmaking authority to the federal bureaucracy, the question then becomes *to which* agency.[143] Courts have struggled to apply this one-agency model to multiagency delegations;[144] as Congress continues delegating authority to multiple agencies, courts have increasingly strained *Chevron* and the other deference frameworks.[145]

### *B. While the Court Has Taken a More Contextual Approach Since* Chevron, *It Still Defers to a Single Agency*

The additions of the Step Zero inquiry in *Mead* and the doctrinal modifications in other recent cases demonstrate that the Court has eschewed the notion that *Chevron* deference applies across the board and is opting instead for a "subject-matter-driven ad hoc approach."[146] In some cases, the Court has been willing to take a closer look into congressional motives in order to tailor judicial deference to the varied ways in which Congress actually delegates authority.[147]

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140. Gersen, *supra* note 8, at 223. The Court employed a similar rationale in *ETSI Pipeline Project v. Missouri*, when it held that the statute granted one executive actor exclusive authority to resolve claims of concurrent jurisdiction. 484 U.S. at 505–06; Gersen, *supra* note 8, at 223–24.

141. Gersen, *supra* note 8, at 225.

142. Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006) (quoting *Martin*, 499 U.S. at 153) (reasoning that "[t]his presumption works against a conclusion that the Attorney General has authority to make quintessentially medical judgments").

143. Gersen, *supra* note 8, at 242.

144. *See, e.g.*, *Gonzales*, 546 U.S. at 250–75 (interpreting the Controlled Substances Act).

145. Cooney, *supra* note 2, at 7; Freeman & Rossi, *supra* note 8, at 1168 (speaking specifically about the prevalence of these delegations in the Dodd–Frank Act).

146. Eskridge & Baer, *supra* note 87, at 1179.

147. Bressman, *supra* note 13, at 2012.

Justice Breyer seems more willing than his colleagues to differentiate between various types of delegations based on the context.[148] Highlighting the political-accountability rationale for deference in his dissent in *FCC v. Fox Television Stations, Inc.*, Justice Breyer wrote: "[An independent] agency's comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law."[149] While the majority rejected this reasoning,[150] Breyer's dissent matches earlier decisions in which a majority of the Court decided whether or not to accord deference based on the particular nature of the delegation regime.[151]

The Court's departure from automatic *Chevron* deference to a particularized examination of the statute typically suggests that the Court will give *less* deference to an agency.[152] This was the case in *Mead*, which denied deference after establishing the Step Zero departure from *Chevron*, and in *Brown & Williamson*, which denied deference under the elephants-in-mouseholes doctrine.[153] In the latter case, the Court technically used the *Chevron* framework, but it nonetheless plunged into a particularized inquiry at Step One to rebut the presumption of delegation and deny the agency deference.[154]

In some instances, however, the Court has undertaken a particularized inquiry and still finds that *Chevron* should be invoked, even when the agency action seemed to fail Step Zero.[155] In *Barnhart v. Walton*, for instance, the Court found that *Chevron* applied despite the fact that the agency had acted outside of notice-and-comment rulemaking.[156] Writing for the Court, Justice Breyer explained why a particularized inquiry warranted *Chevron* application:

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148. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 546–52 (2009) (Breyer, J., dissenting) (arguing that an agency faces varying degrees of explanation in lawfully justifying a policy change depending on the circumstances).

149. *Id.* at 547.

150. *Id.* at 523.

151. *See, e.g.*, *Barnhart*, 535 U.S. at 221 (finding *Chevron* deference warranted despite the lack of notice-and-comment rulemaking); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (declining to grant *Chevron* deference due to the salience of the issue).

152. *Id.*

153. *See* United States v. Mead Corp., 533 U.S. 218, 227 (2001) (holding the agency failed at Step One); *Brown & Williamson*, 529 U.S. at 161 (holding the same).

154. *See* Bressman, *supra* note 13, at 2018–21 (discussing the particularized inquiry). *Brown & Williamson* is credited with establishing the "elephants-in-mouseholes" doctrine.

155. *Id.* at 2021–22.

156. 535 U.S. at 221–22.

> [T]he 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 all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation.[157]

The Court has also taken into account "[c]onsiderations other than language" to find a statutory provision to be ambiguous and the agency's interpretation reasonable even when the statutory text suggested the agency was incorrect.[158] In *Zuni Public School District v. Department of Education*, the Court held that it was reasonable for the Secretary of Education to interpret a statutory provision as requiring him to equalize expenditures among school districts by creating a formula based on expenditures among students, despite strong textualist arguments that the statute required a formula that distributed expenditures among Local Education Agencies.[159] To Justice Scalia's chagrin, the Court did not engage in a "straightforward matter of statutory interpretation," based first on the text of the statute.[160] *Zuni* shows how the Court sometimes analyzes Step One with the *Chevron* rationales in mind.

These deviations from an absolute *Chevron* presumption, both to deny deference when the statutory language suggests it is warranted and to grant deference in *Zuni* despite language suggesting deference was not warranted, show the Court's willingness to examine the context surrounding a delegation to determine whether to give the agency interpretive deference. Although this approach resulted in various levels of deference to agencies, the common strand through both ultradeferential decisions and less deferential ones is that the Court has always deferred to *one* agency.[161] Coordinated, multiagency rules present problems for the *Chevron* framework, even with the Court's practical, ad hoc approach.[162]

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157. *Id.* at 222.

158. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90 (2007).

159. *See id.* at 109–13 (Scalia, J., dissenting) (discussing how the language of the statute clearly precluded the Secretary's interpretation); *see also id.* at 104–05 (Stevens, J., concurring) (resting his agreement with the majority on an argument that the "literal application of [the] statute [would] produce a result" contrary to congressional intent).

160 *Id.* at 111 (Scalia, J., dissenting).

161. *See, e.g.*, Freeman & Rossi, *supra* note 8, at 1204 n.326 (noting that, although the Court reviewed a joint rule, it "accept[ed] the *EPA*'s interpretation as correct using a traditional test[,]" and "accorded no weight to the mere fact that the agencies had cooperated in producing the regulation" (emphasis added)).

162. Cooney, *supra* note 2, at 7; Eskridge & Baer, *supra* note 87, at 1179 (discussing the Court's ad hoc approach to questions of deference).

### C. The Rise in Multiagency Delegation

Congress often creates shared policy jurisdiction by delegating authority to multiple agencies. Whether Congress uses one statute or many, the delegation of overlapping authority to different agencies pervades congressional lawmaking. Statutes administered by multiple agencies are ubiquitous.[163] The desirability of overlapping policy jurisdiction is widely debated, but it is a hallmark of U.S. regulatory schemes.[164]

There are a number of potential explanations for the proliferation of jurisdictional overlap, including the nature of the congressional committee system,[165] the piecemeal basis upon which different Congresses enact regulatory regimes over time,[166] and deliberate decisions by Congress to delegate to different agencies.[167] While much of the literature is critical of the practice, scholars have presented strong arguments that justify duplicative delegations and overlapping jurisdictions.[168] For example, Professor Jacob Gersen has argued that Congress purposefully employs different types of regulatory overlap to provide institutional checks that help ensure that the statute is administered well and according to Congress's wishes.[169]

Furthermore, Professors Jody Freeman and Jim Rossi have suggested ways to improve agency coordination despite "fragmented overlapping delegations of power to administrative agencies."[170] Freeman and Rossi believe that Congress purposefully creates jurisdictional overlap and "eschew characterizing such delegations as redundant," instead viewing jurisdictional overlap as "shared regulatory space."[171] Further, these scholars have suggested institutional design mechanisms to improve agency coordination to better advance the benefits of jurisdictional overlap, implicitly

163. *See, e.g.*, Gersen, *supra* note 8, at 208 ("[W]e live in an age of overlapping and concurring regulatory jurisdiction." (internal citation omitted)).

164. BRESSMAN ET AL., *supra* note 11, at 140–41.

165. Freeman & Rossi, *supra* note 8, at 1139.

166. *Id.* at 1143.

167. Gersen, *supra* note 8, at 208–09 (explaining how Congress might reason about deciding whether to delegate authority to administer a statute to one or multiple agencies and the variety of schemes it could employ in the latter case).

168. Freeman & Rossi, *supra* note 8, at 1140–43 (discussing reasons Congress might want to use overlapping jurisdictions to control agency behavior); Gersen, *supra* note 8, at 208–09.

169. Gersen, *supra* note 8, at 212–15 (discussing the competing agents framework).

170. Freeman & Rossi, *supra* note 8, at 1134.

171. *Id.* at 1136.

recognizing that some inefficiencies result from shared regulatory space.[172] Whatever the precise nature of jurisdictional overlap and whether the benefits are advanced by increased coordination, joint rules pose a unique challenge for courts applying the one-agency framework from *Chevron*.

### *D. Coordinated Joint-Rulemaking Authority Does Not Fit Within the Current Deference Framework*

Existing theories of judicial deference are not flexible enough to accommodate multiple agencies. Because *Chevron* and other deference frameworks are one-agency models,[173] they do not neatly apply to circumstances where Congress—in a sense—delegated authority to a new entity. When Congress requires agencies to work out their differences and promulgate a rule together, Congress has not simply delegated to one agency individually; it has delegated to the entire group of agencies as a monolith. When Congress mandates coordinated, joint rulemaking, courts cannot possibly presume that Congress intended only one of the agencies to have authority to interpret the statute.[174] But, based on *Martin* and *Gonzales*, the Court seems averse to the idea that multiple agencies could have interpretive authority over the same statute.[175] Even as the Court has taken a more contextualized approach to the issue of deference after *Chevron*, it has never declared that multiple agencies could have interpretive authority as a unit.[176] Coordinated, joint rulemaking presents an opportunity for the Court to apply its contextualized approach and extend interpretive deference to multiple agencies acting as one delegate.

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172. Freeman & Rossi, *supra* note 8, at 1137 ("We argue that, as a general matter, greater inter-agency coordination will be desirable where it helps to maximize the purported strengths of shared regulatory space by preserving 'functional' aspects of overlap and fragmentation, while minimizing its dysfunctions in terms of compromised efficiency, effectiveness, and accountability.").

173. *See supra* Part III.A (discussing *Chevron*'s development as a one-agency model).

174. Such a view would be out of line with the approach the Court has taken to finding contextual indicators that Congress did in fact intend to delegate interpretive authority. Based on *Mead* and *Barnhart*, informal notice-and-comment-rulemaking authority seems to be the clearest indicator of interpretive authority. In the case of mandated joint-rulemaking, a *group* of agencies has been delegated interpretive authority by Congress.

175. Gonzales v. Oregon, 546 U.S. 243, 266 (2006) ("Congress intended to invest interpretive power in the administrative actor in the best position to develop [policymaking expertise]." (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1990))).

176. *See supra* Part III.B.

## IV. ULTRA DEFERENCE FOR COORDINATED, MULTIAGENCY RULES

The Court should alter its current approach to judicial review by according a high level of deference to the amalgams of coordinated agencies that promulgate rules together. This approach breaks from past judicial treatment of agencies with overlapping jurisdiction, but according the fused agencies heightened deference stays true to the central pillars of *Chevron* and respects Congress's choice of delegate—the fused agencies.

When Congress grants authority to multiple agencies to promulgate joint rules interpreting a vague statute, it has not delegated interpretive authority to just one agency. Rather, it has vested interpretive authority in an amalgam of agencies, acting in coordination. When Congress delegates in this fashion, it carefully designs extrajudicial checks—including coordination and deliberation requirements—to capitalize on agency policy expertise and increase political accountability.[177] Congress legislates against the backdrop of *Chevron* and the APA, so when it chooses to delegate broad authority to an agency to promulgate rules, it also grants the agency authority to carry out the provisions of the statute and resolve the meaning of ambiguous terms.[178] This reasoning applies with even more force when Congress carefully designs a regulatory regime that delegates joint-rulemaking authority to coordinated agencies. The only step the Court needs to take is to recognize the choice Congress is making and afford the amalgam of agencies deference when they are granted coordinated, joint-rulemaking authority under statutes like Dodd-Frank.

### *A. Congress Spoke Clearly*

Statutes delegating broad joint-rulemaking authority are "elephant holes." For example, the Volcker Rule is a big deal, but the statutory grant of authority is broad, and Congress used institutional checks, including deliberation and coordination requirements, to

177. *See* Gersen, *supra* note 8, at 208–10 (discussing how Congress purposefully designs overlapping delegation regimes); Katyal, *supra* note 57, at 2317 (discussing the benefits of multiple agency perspectives).

178. *See* Lemos, *supra* note 8, at 370–73 (discussing the choice of delegating to agencies or courts); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 955 (discussing how Congressional staffers write legislation understanding the implications of *Chevron*).

ensure that the resulting rules are good ones.[179] Indeed, it is hard to imagine a statutory scheme that delegates more broadly and with such strong extrajudicial checks as the joint-rulemaking delegations in Dodd-Frank.[180] Clearly, the scheme passes the Step Zero inquiry of *Mead*,[181] and it even goes further by requiring consultation and other procedures before rules are promulgated.[182]

A broad statutory mandate to multiple agencies and the requirement of joint promulgation of rules indicate that Congress intended to delegate interpretive authority to agencies, not courts.[183] By requiring coordinated, joint rulemaking to implement a vague provision of a statute, Congress requires the multiple agencies to use their varying expertise to come to a consensus. This coordination requirement is a powerful check, which further indicates that Congress wants the agencies to have the final word on interpreting the statute. When Congress gives this type of clear indication of to whom it wants to delegate interpretive authority to implement the statute, Courts should be ultradeferential to the agencies' resulting interpretations.[184] As the Court noted in *Mead*, "[G]enerally . . . 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."[185] In cases of coordinated, joint rulemaking, Congress not only provides formal administrative procedures, but it also requires coordination and consensus-building, facilitating even more fairness and deliberation.[186]

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179. Furthermore, the fact that Congress has continued to monitor the process through oversight hearings suggests that the political accountability rationale for *Chevron* is apparent. *See* Patterson & Solomon, *supra* note 3 ("At a tense congressional hearing in June 2012, [a Senator] showed his impatience [with the rulemaking process].").

180. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. (2012)); *see also* Freeman & Rossi, *supra* note 8, at 1168 (discussing the potential increase in joint rulemaking and the mandate of consultation in Dodd-Frank).

181. BRESSMAN ET AL., *supra* note 11, at 718.

182. Dodd-Frank Wall Street Reform and Consumer Protection Act § 619; Cooney, *supra* note 2, at 7; Freeman & Rossi, *supra* note 8, at 1168.

183. *See* Lemos, *supra* note 8, at 369–72 (discussing the factors that go into choosing whether courts or agencies will implement a statute).

184. *See id.* at 364–65 (discussing the choice between courts and agencies).

185. 533 U.S. 218, 230 (2001).

186. *See* Cooney, *supra* note 2, at 7 (discussing the consultation and coordination procedures in Dodd-Frank); *see also infra* Part IV.B.2 (discussing how political accountability is enhanced by broad deference for joint rules). That section suggests that since more parties are involved in the process, there is more political accountability and salience. Thus, the final rules will be more

### *B. The Twin Rationales Behind* Chevron *Support Broad Deference for Jointly Promulgated Rules*

Although *Chevron* has so far been a one-agency model, the twin rationales behind *Chevron* deference—agency expertise and political accountability—counsel in favor of deference to multiple agencies promulgating joint rules in coordination. First, Congress capitalizes on more and different kinds of agency expertise when it requires multiple agencies to promulgate rules together. This kind of delegation also improves agency coordination, a good in and of itself.[187] The benefits of agency expertise are enhanced when Congress requires coordination among multiple agencies.[188] By bringing regulators with multiple areas of expertise to the table to fill in the gaps of a vague statute, coordinated, joint rulemaking likely produces better policy.[189] While some have similar areas of expertise, agencies have unique statutory and institutional missions. So when Congress compels agencies to coordinate in promulgating rules, a combination of expert perspectives forms the basis of the resulting rule.[190] This both ensures that the rule takes into account the various interests served by the different agencies and reduces the likelihood of negative consequences. This process also ensures that the joint rules are well-reasoned. When Congress delegates authority to a group of agencies to issue joint rules, it creates a foundation for regulations built upon super-expertise. The presence of increased agency expertise counsels in favor of judicial deference.

In addition to increased expertise, delegation to multiple agencies also enhances political accountability for the resulting policy choices. Congress will likely require more agency process, coordination, and deliberation for important policy issues.[191] The fact

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likely to take a broader range of views into account and be more "fair" in terms of notice to those affected by them.

187. *See* Freeman & Rossi, *supra* note 8, at 1211 ("[G]iven their benefits, coordination tools merit a place alongside other, more conventionally-studied administrative procedures.").

188. *See* Katyal, *supra* note 57, at 2317 (discussing the benefits of having more regulators at the table negotiating a decision).

189. *See* Freeman & Rossi, *supra* note 8, at 1184 (discussing the impact of coordination on agency expertise and the quality of agency decisionmaking).

190. BRESSMAN ET AL., *supra* note 11, at 40, 139–42 (discussing how career civil servants can influence policymaking within an agency and how statutory delegations differ).

191. This makes intuitive sense. If the issue is salient, Congress will likely devote more time to it. If it requires expertise, Congress will be more likely to delegate authority to fill in the gaps to an agency or agencies. If both of these factors are at play, Congress will likely pay close attention to the institutional design and extrajudicial checks on the delegates to ensure that the final policies reflect Congress's intention in passing the statute.

that multiple agencies are pouring time and energy into a rule increases the salience of the issue because more stakeholders will be aware of and invested in the decisionmaking process. Further, when some of the coordinated agencies are executive and others are independent—as is the case in the Volcker Rule delegation—both Congress and the President will exert some amount of influence over different agencies within the monolith that will eventually promulgate the rule.[192] Thus, a more deferential approach will also serve *Chevron*'s goal of political accountability.

### *C. The Court Should Limit Judicial Review to Ensuring that Agencies Comply with the Extrajudicial Checks Congress Included in the Statute*

When Congress delegates joint-rulemaking authority to a group of agencies and includes a coordination requirement, courts should limit review in a way analogous to the arbitrary and capricious standard under the APA.[193] In doing so, the Court would recognize the fact that Congress spoke clearly and would avoid reviewing the substance of the rule. Instead, the Court would simply ensure that the agencies complied with the procedures mandated by Congress (i.e., the consultation and coordination requirements in the case of joint rules).

Given Congress's delegation to an amalgam, careful institutional design, and extrajudicial checks, courts should have little role, if any, in reviewing the substance of joint rules. Rather, courts should merely ensure that the agencies, acting together, complied with the mandatory procedural requirements of the APA and the delegating statute. In this way, courts will defer to agencies when they have particular expertise and remain politically accountable—the rationales embraced in *Chevron*[194]—but the courts will remain the

192. *See, e.g.*, Barkow, *supra* note 44, at 25 (discussing how Congress chooses whether to create an independent or executive agency based on the relative control the legislative and executive branches exercise over each); *see also* Patterson & Solomon, *supra* note 3 (discussing how Treasury Secretary Jack Lew prodded the agencies to finalize a rule in early 2013).

193. 5 U.S.C. § 706(1), (2)(A) (2012) ("[T]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). Section 706 goes on to include other specific ways for courts to review agency procedures. *Id.* § 706(2)(B)–(F).

194. *See, e.g.*, Merrill & Hickman, *supra* note 133, at 866 ("[*Chevron*] argues that agencies typically have greater expertise about technical and specialized subjects than do courts, and that agencies are indirectly accountable to the public through the elected President, whereas federal courts are not.").

vanguard of procedural and constitutional protections.[195]

The Supreme Court should adopt an ultradeferential standard for judicial review of multiagency rules with consultation requirements. Whether this means the Court applies *Chevron* deference to the amalgam of agencies charged with coordinating and issuing rules or one of its many other deference regimes,[196] the Court should give greater deference because of the statutory context in which coordinated, joint rules arise. This contextual approach is consistent with how the Court has approached deference in the past,[197] and it respects clear indications from Congress that it wants to delegate broad policymaking authority to an amalgam of agencies.[198]

Granting broad deference for congressional delegations of joint-rulemaking authority would also recognize the nuance with which Congress delegates to agencies and provide a more realistic framework for courts to evaluate agency decisions.[199] This approach could prompt an increase in agency coordination,[200] which would effectuate better policy. More broadly, increased deference would be a signal to Congress that the Court is paying attention to how and to whom Congress delegates authority.[201] This signal could prod Congress to be even more willing to provide extrajudicial checks on delegation regimes, which could improve agency coordination, accountability, and efficacy on a larger scale.[202] The more attentive the Court, the more likely Congress will carefully structure delegations to give expert agencies sufficient authority while still ensuring an

195. BREYER, *supra* note 24, at 110–11 ("Courts are more likely to have experience with procedures, basic fairness to individuals, and interpreting the Constitution . . . . Agencies, however, are more likely to have experience with facts and policy matters related to their administrative missions.").

196. Eskridge & Baer, *supra* note 87, at 1098–100.

197. *Id.* at 1179; *see also* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89–90 (2007) ("[W]e depart from a normal order of discussion . . . that first considers Zuni's statutory language argument. Instead, because of the technical nature of the language in question, we shall first examine the provision's background and basic purposes.").

198. *See* BRESSMAN ET AL., *supra* note 11, at 140 (discussing the choice to delegate to either courts or agencies); *see also supra* Part IV (discussing how Congress sometimes delegates to an entity comprised of multiple agencies).

199. *See supra* Part II.A.2 (discussing congressional delegation regimes).

200. In a recent article, Professors Jody Freeman and Jim Rossi discussed how such a shift in judicial review could potentially promote agency coordination, but they stopped short of suggesting that courts take that approach. Freeman & Rossi, *supra* note 8, at 1168, 1205.

201. *Cf.* Merrill & Hickman, *supra* note 133, at 836, 872 (2001) (discussing the importance of signaling between the Court and Congress).

202. *See* Freeman & Rossi, *supra* note 8, at 1209–10 (discussing the coordination tools that Congress, the President, and agencies can use as well as their relative strengths).

appropriate measure of political accountability.[203]

By requiring interagency collaboration and consultation, Congress provides a powerful check to ensure that the rules promulgated under the statute are good ones.[204] Well-crafted delegations utilize agency expertise to fill in the statutory gaps and ensure enough political accountability to prevent agencies from subverting the popular will.[205] This Note argues that coordinated, joint rules should warrant less judicial scrutiny than traditional, single-agency rules, and the Court should alter its approach to judicial deference when Congress delegates interpretive authority to multiple agencies.[206] The initial rationales offered for providing *Chevron* deference to a single agency are all the more prominent when Congress delegates joint-rulemaking authority to coordinated agencies.[207]

## V. CONCLUSION

This Note offers a relatively simple suggestion to a complex problem: courts should apply an ultradeferential standard—outside of the traditional, one-agency *Chevron* framework—to review joint rules promulgated by multiple agencies according to a statutory mandate. Clearly, Congress issued broad interpretive authority to a *group* of agencies under Dodd-Frank.[208] But the Court's precedents to date

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203. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (discussing the potential reasons for Congress's lack of specificity in delegating).

204. *See* Freeman & Rossi, *supra* note 8, at 1165–66 ("Perhaps the best example of such [a joint policymaking] instrument is joint rulemaking, which typically involves two or more agencies agreeing to adopt a single regulatory preamble and text."); *see also id.* at 1168–72 (discussing the potential positive effect of increased joint rulemaking on agency coordination).

205. Based on the rationales for courts deferring to agencies given in *Chevron* and the subsequent contextual inquiries into congressional intent to see if the rationales were present in later cases, this is what the Court is looking for when it analyzes agency actions. This is correct in the sense that "good" delegations are ones in which agencies promulgate rules capitalizing on their expertise and staying politically accountable.

206. Bressman, *supra* note 13, at 2015–16 (explaining the Court's two-step approach to reviewing agency interpretations).

207. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. (2012)); *see, e.g.*, Katyal, *supra* note 57, at 2317 (discussing the principle that better decisions result when more agencies are involved in the decisionmaking process).

208. Thus, the Rule will certainly pass *Chevron*'s Step Zero. But, the possibility that courts could undertake a particularized inquiry at Step One could still plague the regulatory regime created by the agencies, collectively, to whom Congress delegated power. *See* Bressman, *supra* note 13, at 2018–19 (discussing how the Court has taken a hard look at the statutory regime to avoid giving deference).

have not provided deference to multiple agencies' joint interpretation of a statute. It is therefore unclear how courts will review these jointly promulgated rules going forward.[209]

Adopting an ultradeferential standard for joint rules will show that courts are willing to defer to Congress's choice of agent even when Congress delegates in new and innovative ways. It will also preserve a role for courts to ensure that agencies act fairly and comply with procedural requirements. Thus, this ultradeferential approach to jointly-promulgated rules will allow courts and agencies to do what they each do best.[210] Agencies will leverage their varied expertise to resolve complex issues of policy and remain politically accountable to their principals (Congress and the President). And courts will ensure that the procedures employed by the agencies comply with the statutes under which Congress delegated the authority.

The Court will likely have a chance to apply an ultradeferential standard of review for coordinated joint-rules in the relatively near future. The Volcker Rule was promulgated in December 2013, and it is the product of five agencies negotiating within their areas of expertise over how to best implement the broad provisions of Dodd-Frank.[211] Many stakeholders weighed in through the notice-and-comment process. Both Congress and executive branch officials attended multiple meetings and hearings with the regulators to hash out the details. The stakes are high, and some financial institutions made worse off by the Rule will likely seek redress through the judicial system. Courts will not be able to just "pick an agency" because it is clear that Dodd-Frank delegated interpretive lawmaking authority to all five agencies as a collective.[212] When that day comes, courts should respect Congress's choice and apply an ultradeferential standard of review to the agencies' final rule.

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209. *But see* Freeman & Rossi, *supra* note 8, at 1204–05 (suggesting that agency rules promulgated jointly after inter-agency consultation would be likely to receive deference under *Chevron*).

210. *See* BREYER, *supra* note 24, at 110–11 (discussing courts' and agencies' comparative expertise).

211. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. (2012)).

212. Cooney, *supra* note 2, at 7.

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