I. INTRODUCTION

The pervasive influence of administrative governance is a defining feature of modern American life. Indeed, it is hard to find an aspect of daily life that is not regulated by one federal agency or another: the Department of Labor enforces labor laws; the Environmental Protection Agency (“EPA”) manages air and water quality; the Federal Energy Regulatory Commission (“FERC”) regulates electricity; the Food and Drug Administration (“FDA”) monitors the nation’s food supply and ensures the safety of its medicine; the Board of Governors of the Federal Reserve System (“the Fed”) supervises banking institutions; the Consumer Product Safety Commission (“CPSC”) regulates consumer products; and the Federal Communications Commission (“FCC”) oversees radio, television, satellite, and cable communications. With so many agencies minding America, one might ask: who is minding America’s agencies?

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1. As some have put it, “[m]odern government is administrative government.” STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 1 (5th ed. 2002).

For one, courts have a significant supervisory role. They ensure that agency actions meet the Constitution’s due process requirements and individual liberty protections. Yet at the same time, courts give agencies leeway in interpreting the federal statutes they administer. This is because agencies have technical expertise, democratic credentials, and flexibility that courts do not. There is an inherent tension between these two opposing forces—a need for control and a need for deference. Courts must balance these forces whenever they review challenges to administrative action.

For over twenty years, Chevron, U.S.A., Inc. v. NRDC has been the starting point for courts trying to strike this balance. Chevron requires courts to defer to an agency’s interpretation when the relevant statute’s meaning is ambiguous and the agency’s interpretation “is based on a permissible construction of the statute.” Chevron deference is ostensibly quite forceful. On its own terms, it applies when an agency has interpreted a “statute which it administers” and requires the court to defer even if the agency’s construction is not the one “the court would have reached.” Courts have cited Chevron nearly 8000 times, a testament to both the ubiquity of administrative government and the extensive scope of Chevron’s reach.

Faced with such a potentially powerful deference doctrine, courts and commentators alike have proposed exceptions to the Chevron rule. One
problematic situation for courts arises when agencies interpret the scope of their own jurisdiction. Some have called this a “most important—and vexing—question”\(^{10}\) because \textit{Chevron} demands deference, but the rule of law includes the idea that “those limited by law are generally not empowered to decide on the meaning of the limitation.”\(^{11}\) The Court has never explicitly addressed the issue, though Justice Brennan has argued against deference in this context,\(^{12}\) and Justice Scalia has championed a deferential approach.\(^{13}\)

Justice Breyer, while serving as a judge in the First Circuit Court of Appeals, articulated a rationale for a more intermediate position in all cases implicating deference, one that neither requires nor denies \textit{Chevron} deference except on the specific facts of cases presented to the court. He reasoned, “there are too many different types of circumstances . . . to allow ‘proper’ judicial attitudes about questions of law to be reduced to any single simple verbal formula.”\(^{14}\) A significant step toward such an

\(^{10}\) Merrill & Hickman, \textit{supra} note 9, at 909.


\(^{12}\) See Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting) (“I cannot, however, agree . . . that courts must defer to an agency’s statutory construction even where, as here, the statute is designed to confine the scope of the agency’s jurisdiction to the areas Congress intended it to occupy.”). Other commentators have provided additional reasons for rejecting \textit{Chevron} in these cases. See Lars Noah, \textit{Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law}, 41 WM. & MARY L. REV. 1463, 1516–29 (2000) (stating that courts have expertise in interpreting enabling acts, are insulated from the political consequences of the interpretation, and have a broad perspective of agency action); Sunstein, \textit{supra} note 11, at 2097–2100 (explaining that Congress would not want agencies to interpret their own jurisdictions because they are susceptible to bias and self-dealing); John E. Taylor, Note, \textit{AT&T Corp. v. Iowa Utilities Board}: The Supreme Court Recognizes Broad FCC Jurisdiction over Local Telephone Competition, 78 N.C. L. REV. 1645, 1697–98 (2000) (stating that agencies have a biased self-interest in the interpretation of jurisdictional issues).

\(^{13}\) See Miss. Power & Light Co., 487 U.S. at 381 (stating that \textit{Chevron} deference is “necessary because there is no discernible line between” jurisdictional and nonjurisdictional interpretations, and it is “appropriate because it is consistent with the general rationale for deference”). Several others have supported this view. See Cass R. Sunstein, \textit{Is Tobacco a Drug? Administrative Agencies as Common Law Courts}, 47 DUKE L.J. 1013, 1058–64 (1998) (arguing that agencies are “America’s common law courts” because they have the power to “update” statutory terms, they have better fact-finding power than courts, and they have more electoral legitimacy); Quincy M. Crawford, Comment, \textit{Chevron Deference to Agency Interpretations That Delimit the Scope of the Agency’s Jurisdiction}, 61 U. CHI. L. REV. 957, 968–82 (1994) (arguing that courts cannot distinguish jurisdictional interpretations from nonjurisdictional interpretations but the rationales for \textit{Chevron} deference apply to jurisdictional interpretations).

\(^{14}\) Stephen Breyer, \textit{Judicial Review of Questions of Law and Policy}, 38 ADMIN. L. REV. 363, 373 (1986). Before \textit{Mead} was decided, some commentators suggested such a middle-of-the-road approach for agencies’ interpretations of their own jurisdictions. See Ernest Gellhorn & Paul Verkuil, \textit{Controlling Chevron-Based Delegations}, 20 CARDOZO L. REV. 989, 1007–17 (1999) (describing a “peripheral jurisdictional limitation” that denies \textit{Chevron} deference when the agency acts clearly outside its primary regulatory assignment, considering the distance of the asserted jurisdiction from that primary area, the importance of the issue, and related regulatory schemes assigned to other agencies); Merrill & Hickman, \textit{supra} note 9, at 912 (arguing that courts should inquire “whether Congress would
intermediate approach came just a few years ago in United States v. Mead Corp.\textsuperscript{15} There, the Court announced that Chevron does not apply unless the agency’s interpretation is made with sufficient procedural formality that it has “force of law.”\textsuperscript{16} Despite its particular application to the procedure used by the agency, Mead paints with broad strokes. It suggests that (1) Chevron applies only when it is likely that Congress delegated with the intent that the agency’s interpretation would be authoritative, and (2) courts should consider factors that weigh against that likelihood.\textsuperscript{17}

This Note is the first to approach the question of whether Chevron deference applies to agencies’ interpretations of their own jurisdiction since Mead’s sanction of such a multifactored approach. After a more thorough introduction to the modern deference approach of Chevron and Mead in Part II, Part III assesses the most common argument for deference in this context and the vague notions that are cited to support arguments for rejecting deference. This discussion critically analyzes the commonly stated claims that agency aggrandizement and biased self-interest are important reasons to be wary of deferring to agencies when they interpret the scope of their own authority. These concerns are important, but Part III shows that they do not justify rejecting Chevron deference for all jurisdictional cases.

Given this conclusion, it is vitally important that courts are able to identify cases in which these concerns make deference to an agency’s jurisdictional interpretation problematic. Thus, Part IV examines specific factors that indicate when agency aggrandizement or self-interest is present. In turn, those concerns indicate that Chevron deference is inappropriate because they make it unlikely that Congress intended for the agency’s interpretation to be authoritative.\textsuperscript{18} Not only does this analysis survey the current split in circuit court authority\textsuperscript{19} and assess which

\textsuperscript{15} United States v. Mead Corp., 533 U.S. 218 (2001).
\textsuperscript{16} Id. at 226–27.
\textsuperscript{17} See infra Section II.B. See also Elizabeth Garrett, Legislating Chevron, 101 Mich. L. Rev. 2637, 2648–51 (2004) (offering a post-Mead analysis suggesting factors that might be relevant for determining when Chevron deference is due). Cf. Eric M. Braun, Note, Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A., Inc. v. NRDC, 87 Colum. L. Rev. 986, 996–99 (1987) (offering a pre-Mead analysis suggesting the use of “deference factors” for determining when Chevron should be applicable).
\textsuperscript{18} Congress’s intent can also be ascertained more directly, as discussed infra in Section IV.A.2.
\textsuperscript{19} Previous analyses have explicitly noted this split in authority. See, e.g., Sunstein, supra note 11, 2097–99 (noting conflicting Supreme Court authority on the matter); Crawford, supra note 13, at 960–67 (noting Supreme Court cases and conflicting circuit court opinions). The analysis here suggests that whatever courts may say about their position on jurisdictional interpretations, there are specific concerns that cause them to withdraw deference in some, but not all, cases in which an agency has
position is best justified, but it also identifies factors that many courts have focused on, showing that they started developing a multifactored approach long before *Mead*.

Part IV closes with a description of how these factors can be fashioned into a *Mead*-inspired analysis that determines whether *Chevron* is applicable in each specific case where the agency’s interpretation relates to its jurisdiction. Part IV also addresses the potential criticisms of this approach. Part V summarizes the analysis, concluding that the multifactored approach presented here helps preserve the advantages of *Chevron* deference where possible, avoids the error costs of a rule-based approach that would deny *Chevron* deference in all jurisdictional cases, and promotes certainty by clarifying the analysis that courts already conduct.

II. THE MODERN APPROACH TO AGENCY INTERPRETATIONS OF LAW

The contours of judicial deference to agency interpretations of law have developed and changed over time. As this part explains, deference has always been based on the institutional competencies that agencies have when it comes to interpreting regulatory statutes: technical expertise, political accountability, and an ability to adapt their interpretations over time. Historically, deference was given only after consideration of many factors. *Chevron* revolutionized administrative law by requiring deference for all agency interpretations of ambiguous regulatory statutes. *Mead*, however, recently signaled a return to the pre-*Chevron* multifactored analysis.

This history highlights two key points. First, because deference recognizes the considerable value of agency expertise, political accountability, and flexibility, courts should be cautious when replacing agency interpretations with their own. Second, *Mead* suggests that the strong medicine of *Chevron* deference should apply only after courts have considered whether Congress intended an agency’s interpretation to be authoritative.

...interpreted its jurisdiction. For example, even though the Court has never stated that *Chevron* is inapplicable to jurisdictional cases, it does not cite *Chevron* when an agency’s jurisdictional interpretation implicates federalism. *See infra* notes 180–204 and accompanying text. This suggests that the reasons *Chevron* is inappropriate in those cases actually have to do with federalism, not the fact that the agency’s interpretation is jurisdictional.
A. DEFERENCE, THE DELEGATION RATIONALE, AND COMPARATIVE
INSTITUTIONAL COMPETENCY

In the early years of the regulatory state, courts took an inconsistent
approach to judicial review of agency interpretations of law. Sometimes
agencies were entitled to great deference,20 and sometimes their
interpretations were entirely dismissed by courts. The only unifying
principle during this time was articulated in Skidmore v. Swift & Co.21 An
agency was entitled to so-called Skidmore deference only to the extent that
a court found its reasoning persuasive, considering “the thoroughness
evident in its consideration, the validity of its reasoning, its consistency
with earlier and later pronouncements, and all those factors which give it
down to persuade, if lacking power to control.”22

Chevron changed this by announcing a simple two-step approach.23 At “step one,” the court looks to the statute itself to see if “the intent of
Congress is clear.”24 If, however, “Congress has not directly addressed the
precise question at issue,” then “step two” requires the court to defer to the
agency’s interpretation as long as it “is based on a permissible construction
of the statute.”25 This was revolutionary because it required deference, and
seemed to apply to all cases. Some subsequent decisions, however,
indicated that Chevron applied only to cases involving mixed questions of
law and fact.26 Even though this potential limit did not take hold27 and
Chevron’s history “has been one of triumphal expansion,” questions about
its applicability in specific cases persist.28

In the cases in which Chevron does apply, however, it is a powerful
rule that assigns a significant amount of interpretational power to agencies.

22. Id. at 140. See also Eric R. Womack, Into the Third Era of Administrative Law: An Empirical
Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead, 107 DICK. L.
standards to determine the degree of deference required to be given to agency interpretations”).
23. See Womack, supra note 22 at 295–301 (stating that Chevron marked a decisive break from
Skidmore because it established “a determinative test that, at least procedurally, appears to be a simpler
inquiry for courts to follow in a consistent manner” and “a background presumption of deference”).
25. Id. at 843.
2084–85.
27. Sunstein, supra note 11, at 2084–85.
28. Merrill & Hickman, supra note 9, at 838. See generally id. at 848–52 (analyzing fourteen
unresolved questions about Chevron’s applicability to certain cases).
Thus, it challenges the traditional role of courts to “say what the law is.”

The Court has since made clear, however, that *Chevron* actually rests on this bedrock principle and does not undercut it. That is, courts are really giving effect to congressional intent when they defer to agencies on the meaning of ambiguous statutory provisions because “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.”

Thus, because courts are giving effect to what Congress intended when it enacted the law in the first place, they are still interpreting the law.

In addition to this congressional intent rationale, *Chevron* deference is predicated on characteristics that make agencies better qualified than courts to interpret the federal statutes they administer. First, agencies possess technical expertise in the areas they regulate. This expertise is a key reason for delegating complex problems to agencies in the first place. Moreover, Congress often delegates via complex legislative schemes, and an agency that deals with such a scheme on a day-to-day basis can have invaluable insight into its meaning. Agency expertise is especially relevant considering the vast array of complicated areas subject to regulation, ranging from automobile safety to nuclear power.

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29. Marbury v. Madison, 5 U.S. 137, 177 (1803). See also Sunstein, *supra* note 11, at 2075 (calling *Chevron* a “counter-Marbury for the administrative state”).


33. The text expands on only three comparative advantages that agencies have over courts when it comes to interpretation. Other commentators have noted additional advantages, such as the fact that agencies can more readily promote national uniformity. This is because there are many courts of appeals, all of which can come up with varying judicial interpretations. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 926–27 (2003).

34. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984) (“[T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever . . . a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matter subjected to agency regulations.”) (internal quotations omitted).

35. The idea that solutions to social and economic problems require technical expertise, and that agencies are well suited for developing that expertise, has its roots in the New Deal Era. See Sunstein, *supra* note 11, at 2072.

36. See Merrill & Hickman, *supra* note 9, at 861 (“[T]he statutory programs have become so complex that it is beyond most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them.”).

37. STRAUSS, *supra* note 4, at 163. Ironically, it is the vast complexity of the modern administrative state that partly justifies *Chevron* deference, as explained here, but also cautions against universal application of deference, as mentioned *supra* in the text accompanying note 14.
Second, agencies have democratic credentials superior to those of courts because agencies are indirectly accountable to the electorate through the President.\textsuperscript{38} This is important because ambiguous statutory language often calls for a result that best fits the overall policy of the legislation.\textsuperscript{39} The judicial branch is certainly competent to make such policy decisions,\textsuperscript{40} but there is “a deep-seated conviction, rooted in our constitutional format of separation of powers, that the courts should not take control of public policy from the two political branches.”\textsuperscript{41} Further, agencies’ democratic ties do not end with the President.\textsuperscript{42} For example, Congress confirms the President’s nominees for agency leadership, conducts oversight of agency action and review of agency budgets, and cooperates with agencies to implement new legislation.\textsuperscript{43} Accountability to the President and Congress makes agencies particularly “accurate barometer[s] of current political preferences,”\textsuperscript{44} and thus, stronger institutional actors for making policy decisions than courts.

A third and especially important comparative reason for judicial deference is that there is more flexibility in an approach that assigns interpretative power to agencies.\textsuperscript{45} This is partly due to the inherent

\textsuperscript{38} Mechanisms by which the President controls administrative policy include appointment and removal of agency officials, requests for written justification of agency action, communication of policy priorities through the Vice President and other White House staff, and coordination of agency budgets through the Office of Management and Budget. See generally Strauss, supra note 4, at 87–112 (discussing the validity of the President’s claim to authority over executive agencies and how the President exercises that authority).

\textsuperscript{39} Sunstein, supra note 11, at 2086–87.

\textsuperscript{40} See Scalia, supra note 31, at 515.

\textsuperscript{41} Patricia M. Wald, Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On, 32 TULSA L.J. 221, 230 (1996). Chevron itself expresses a preference for leaving policy decisions to the agency. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy . . . the challenge must fail.”). See also Merrill & Hickman, supra note 9, at 861 (arguing that one value of a “robust deference doctrine” is that it reduces the possibility that the unaccountable judiciary will impose its policy views on the public); Sunstein & Vermeule, supra note 33, at 927 (“The resolution of statutory ambiguities must, in many cases, depend on judgments of fact and value. . . . It is reasonable to think that by virtue of their specialized competence and relative accountability, agencies are in a better position to make these decisions than courts.”).

\textsuperscript{42} Some have argued that Congress plays a key role in indirectly shaping agency decisions. See Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 COLUM. L. REV. 2027, 2149 (2002) (citing “extensive literature showing that agencies in fact are subject not only to presidential influence, but to various forms of influence by Congress and outside political groups”).

\textsuperscript{43} Id. at 2127.

\textsuperscript{44} Id.

\textsuperscript{45} As the following discussion makes clear, the term “flexibility” is used throughout this Note to describe an agency’s ability to adapt its understanding and interpretation of its legislative mandate over time, as circumstances change and knowledge increases. Agencies can also be said to have flexibility in the sense that they have numerous options for articulating decisions, such as through
differences between agencies and courts because courts deal with statutory ambiguity through the case-by-case litigation context only. This time- and effort-intensive process necessarily limits the degree to which courts can understand and respond to the wide variety of situations that arise in the administration of federal law. Agencies, on the other hand, deal with the day-to-day implementation of the statutes they administer and, thus, they have a much better sense of the intricacies of those statutes and an ability to tailor their application to specific instances.

Judicial doctrine also contributes to the relative flexibility of agencies when it comes to statutory interpretation. Under Skidmore, courts gave deference only when an agency interpreted the statute consistently over time. Chevron, however, recognized the value of flexibility by holding that “[a]n 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.”46 Thus, agencies can change their interpretations over time under Chevron.47 In contrast, both agencies and courts are bound by judicial interpretations under the principle of stare decisis. While stare decisis does not inexorably bar courts from reconsidering decisions from the past, there is a “super-strong” presumption that past statutory interpretations are correct.48 Therefore, courts are unlikely to revisit those interpretations.49

Justice Scalia has aptly described this effect, stating that “[w]here Chevron applies, statutory ambiguities remain ambiguities subject to the agency’s ongoing clarification . . . . Once the court has spoken, it becomes unlawful for the agency to take a contradictory position.”50 The ultimate effect of judicial interpretations, then, is “ossification” of administrative

notice-and-comment rulemaking or case-by-case adjudication. For a discussion of the relevance of this second meaning of agency flexibility, see infra notes 53–57, 75 and accompanying text.

46. Chevron, 467 U.S. at 863–64.
47. But see infra Section IV.A.1 (discussing ways that courts view agencies’ changed interpretations with suspicion, even under Chevron).
48. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 252–53 (1994) (discussing liberal, legal realist, and legal process theories of stare decisis and the Court’s endorsement of the idea that “statutory decisions are entitled to extra stare decisis deference because Congress is more institutionally competent than the Court to make policy corrections”).
49. See, e.g., Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990) (“Congress has not diverged from [our] interpretation and we decline to revisit it ourselves.”); Steven Croley, The Scope of Chevron 5–6, ABA Administrative Procedure Act Project, July 2001, at http://www.abanet.org/adminlaw/apa/chevronscopecjuly.doc (noting that Chevron deference does not apply “for statutes whose clear meanings the Court has supplied prior to an agency’s interpretation”). This result of stare decisis has led to another difficult question about Chevron’s scope: whether courts should give deference to agency interpretations that are inconsistent with judicial precedent predating Chevron. See Merrill & Hickman, supra note 9, at 915–20.
Moreover, once a court has interpreted the statute, the agency’s expertise and democratic credentials will likely never be brought to bear on the statutory question. Thus, to preserve these comparative advantages, judicial interpretation at step one should be made with caution.  

B. **Mead: Toward a Nuanced Chevron Analysis**

For all its apparent simplicity, many questions about *Chevron*’s scope have appeared in the academic literature and judicial opinions. One theme underlying these questions is that agencies interpret their enabling statutes through so many different procedures—all with varying degrees of formality—that it is hard to view all interpretations as being equally worthy of judicial respect. For example, with notice-and-comment rulemaking, an agency’s interpretation typically follows formal study and public participation, and is set forth with detailed reasoning. Alternatively, the agency may simply state its position in a letter to one regulated entity.  

*United States v. Mead Corp.* addressed this procedural variety. There, Mead challenged a United States Customs Service (“Customs”) interpretation of the Harmonized Tariff Schedule of the United States (“Tariff Schedule”). Mead was importing day planners, which Customs had categorized under heading 4820.10 of the Tariff Schedule, which read
“Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles.” Customs had further categorized the day planners under the subheading “Other.” In January 1993, Customs issued a ruling letter to Mead, explaining that it was changing the classification to the subheading “Diaries, notebooks and address books, bound.” This change subjected Mead to the four percent tariff imposed under the “Diaries . . . , bound” category, while it had previously been subject to no tariff under the “Other” category.

The specific interpretational issue in Mead was whether day planners could be legitimately classified as “Diaries . . . , bound,” but the Court took the opportunity to make a much broader statement about deference. First, Congress had not delegated to Customs the power to make classification decisions with broad application; instead, Customs’s ruling letters could only bind the specific parties involved. Second, the interpretation was sent only to Mead and had not been subject to any kind of public deliberation. Thus, the Court looked both to the nature of the agency’s delegation and its actual practice before holding that there was “no indication that Congress intended such a ruling to carry the force of law.”

This holding suggests that Chevron deference is due if and only if Congress would have wanted the agency’s position to be authoritative. More explicitly:

[A]dministrative 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. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

58. Id. at 224.
59. Id. at 225.
60. Id. Ruling letters issued by Customs are binding only on the party to whom they are issued (and on Customs personnel), and only for the particular transaction they address. Id. at 222–23.
61. Id. at 224–25.
62. See id. at 231–32.
63. See id. at 233. The Court further observed that “46 different Customs offices issue 10,000 to 15,000” ruling letters a year, suggesting that the Court was especially concerned about giving deference to such a casual agency action. See id.
64. Id. at 221.
65. Id. at 226–27. See also Michael P. Healy, Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity, 54 ADMIN. L. REV. 673, 678 (2002) (“[D]eference will be accorded to agency decisions only when a court concludes that Congress ‘expect[ed]’ Chevron-type deference based on ‘statutory circumstances.’”) (alterations in original).
Thus, *Mead* is a decisive shift from *Chevron*. No longer is every agency interpretation assumed to be worthy of deference. Instead, a court must first perform a “step zero” analysis to determine if *Chevron* applies. This is ultimately a matter of deciding whether Congress intended to delegate to the agency the authority to say what the law means; in *Mead*’s terms, whether Congress intended the agency’s interpretations to have “force of law.” *Mead* also made clear that even if *Chevron* is not applicable, *Skidmore* still applies. Thus, even if the agency has not acted with force of law, a court may still determine that deference is warranted by looking “to the agency’s care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency’s position.”

The problem after *Mead* is that it is unclear exactly what the agency must do to act with “force of law.” *Mead* has been criticized because it articulated an open-ended standard—in contrast to the bright-line rule of *Chevron*—that has been difficult for lower courts to apply. Given the

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66. Put simply, *Mead* “reverses [Chevron’s] global presumption. Rather than taking ambiguity to signify delegation, Mead establishes that the default rule runs against delegation. Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency . . . *Chevron* deference is not due.” Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 Geo. Wash. L. Rev. 347, 348 (2003). Ironically, despite the dramatic impact *Mead* has had on administrative law in these respects, its result could not have meant less for its actual parties. On remand, the Federal Circuit ruled for Mead just as it had before the Supreme Court case, finding that Customs’s classification of loose leaf day planners as bound diaries did “not persuade under the *Skidmore* standard.” Mead Corp. v. United States, 283 F.3d 1342, 1344 (Fed. Cir. 2002). Today, the classification dispute would seem insignificant because the Tariff Schedule does not impose a duty on either the “Diaries, notebooks and address books, bound” subheading or the “Other” subheading in Chapter 48, which deals with tariffs on paper products. See 19 U.S.C. § 1202 (2000); U.S. Int’l Trade Comm’n, Harmonized Tariff Schedule of the United States, ch. 48, Subheading 4820.10.20 (2004), available at http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0510/0510C48.pdf.

67. Commentators Thomas W. Merrill and Kristin E. Hickman proposed an approach very similar to the one actually adopted in *Mead* just a few months before that decision came down, stating that it “might be called ‘step zero’ in the *Chevron* doctrine: the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo.” Merrill & Hickman, *supra* note 9, at 836.

68. At the most basic level, this requires finding that “the agency has been delegated relevant decision making authority and reached its decision through a decision making process giving the decision procedural legitimacy.” Healy, *supra* note 65, at 679.


70. See, e.g., Healy, *supra* note 65, at 679 (criticizing *Mead* because it makes deference hinge on “indeterminate, inconsistent, and ambiguous factors”); William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 Admin. L. Rev. 719, 725–26 (2002) (summarizing “the *Mead mess*” and concluding that “[w]e will be arguing for decades . . . just what sort of agency decision is entitled to *Chevron* deference”); Womack, *supra* note 22, at 291 (stating that “one unmistakable result [of *Mead*] has been short-term confusion on the part of courts”).

71. See, e.g., Vermeule, *supra* note 66, at 356, 361 (observing that *Mead* “overvalues the decisional benefits of standards and undervalues the decisional benefits of rules,” and thus may best be understood as “a failed experiment”). It is somewhat ironic that many disparage *Mead* so forcefully on this point; even though *Chevron* gave courts a rule, problematic questions about its applicability were
complicated state of affairs following Mead’s indefinite approach, the relative merits of rules and standards have become especially relevant to the deference question. 73

Despite confusion about how agencies can go about acting with “force of law” or the relative merits of rules and standards generally, one thing is clear after Mead: the Court has indicated that Chevron should apply only when it is likely that Congress would want it to, and courts should carefully consider factors that weigh against that likelihood. 74 This is a much more nuanced analysis than that prescribed by Chevron. Though Mead was specifically concerned with the type of rulemaking procedure delegated to and exercised by agencies, 75 Part IV of this Note argues that substantive factors relating to agencies’ assertions of jurisdiction are also relevant to Mead’s step zero analysis. Before getting to these factors, however, some additional background on the special nature of agencies’ jurisdictional interpretations is necessary.

III. SPECIFIC CONCERNS: CAN OR SHOULD AGENCIES’ INTERPRETATIONS OF THEIR OWN JURISDICTIONAL LIMITS BE DENIED DEFERENCE?

This part critically examines the leading argument for deference in the jurisdictional context, and the intuitive rule of law counterargument that an agency should not be allowed to interpret the scope of its own jurisdiction.

72. See Vermeule, supra note 66, at 347–55; Womack, supra note 22, at 316–37. Courts have inconsistently applied Mead’s step zero test, having struggled to determine whether Chevron applies, using several different approaches: (1) careful consideration of the type of rulemaking authority delegated to the agency and the procedure the agency actually used, (2) deference to the agency decision if the agency has engaged in notice-and-comment rulemaking or formal adjudication, or (3) examination of whether the agency’s procedure was generally adequate for taking into account the interests of the regulated individuals. Womack, supra note 22, at 318–21 (describing these three differing categories of approaches that courts have taken since Mead).

73. See Merrill, supra note 30; Vermeule, supra note 66, at 355–56. The relevance of the rules versus standards debate on the proposal detailed in this Note is explored supra in notes 230–43 and accompanying text.

74. For an interesting discussion about how Mead is a “signal” to lower courts and the other branches of government, see Womack, supra note 22, at 331–33. Womack asserts that Mead’s critical view of agencies is a “clear signal” that the Chevron “era of broad deference should come to an end.” Id. at 333.

75. This point raises another key criticism of Mead: it places a lot of emphasis on the procedure and form by which the agency has acted. See, e.g., Ronald M. Levin, Mead and the Prospective Exercise of Discretion, 54 ADMIN. L. REV. 771, 773, 787–98 (2002) (discussing this “format doctrine” and concluding that “[t]he ‘format’ or procedural vehicle in which such an administration interpretation appears should not matter”). This Note answers concerns about the standard-like approach proposed in Part IV, but criticism of Mead’s “format doctrine” is inapplicable here because this Note’s approach emphasizes substantive factors (not procedural) that caution against Chevron deference.
In sum, it is likely to be difficult to accurately distinguish jurisdictional interpretations from nonjurisdictional ones. Nonetheless, the argument against deference is compelling in the limited set of cases where agency aggrandizement or self-interest is present, because it is unlikely that Congress intends for courts to defer to agencies in those specific cases. Given these two points, this part shows the need for an analysis that identifies cases where agency aggrandizement and self-interest are present but does not require the difficult task of jurisdictional line-drawing. Such an analysis is consistent with Mead’s general requirement that courts examine factors weighing against the likelihood that Congress intends for Chevron deference to apply in specific cases.

A. THE “CAN” QUESTION: DISTINGUISHING THE “JURISDICTIONAL” FROM THE “NONJURISDICTIONAL”

The most often cited argument that Chevron deference should apply to agencies’ determinations of their own authority is that it is difficult to characterize interpretations as either jurisdictional or nonjurisdictional. Justice Scalia argued this point in Mississippi Power & Light Co. v. Mississippi, stating that giving Chevron deference to the agency when deciding the scope of its jurisdiction is “necessary because there is no discernible line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority. To exceed authorized application is to exceed authority.”

The argument can be made less tautologically by looking at interpretations agencies are typically required to make. For example, in Chevron, the EPA was required to define the term “stationary source” within the meaning of the Clean Air Act. The definition was significant because manufacturing plants had to obtain permits from the EPA before constructing or operating new stationary sources. Thus, even though the case presented a pure issue of statutory construction on one hand, the chosen construction also defined the scope of the EPA’s power to require

76. See, e.g., Okla. Natural Gas Co. v. FERC, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (observing “the difficulties of drawing a manageable and principled line between jurisdictional and other issues”); Croley, supra note 49, at 12.
78. Id. Even though the scope of the agency’s jurisdiction was the “critical issue” in the case for Justice Scalia, id. at 377, the majority simply assumed that the agency’s jurisdiction was “established.” Id. at 374 (majority opinion).
80. See id. at 840.
permits, and hence its jurisdiction.\textsuperscript{81} Generally, this example demonstrates that any time the agency interprets, it is deciding which entities it can regulate, or which tools it can use to regulate.\textsuperscript{82} This indicates that all agency interpretations have at least some jurisdictional impact.\textsuperscript{83}

Nonetheless, those who oppose 
\textit{Chevron} deference in the jurisdictional context argue that even if it is hard to identify jurisdictional questions, courts do it on a regular basis.\textsuperscript{84} Federal courts, for example, examine their own subject matter jurisdiction and mediate “turf battles” between different agencies laying claim to the same regulatory statutes.\textsuperscript{85} Thus, some courts explicitly downplay the difficulty in categorizing agency interpretations as “jurisdictional.”\textsuperscript{86}

Perhaps the difficulty in identifying jurisdictional issues can be managed. Some cases can be easily classified as jurisdictional, such as when an agency interprets a term of its enabling statute that explicitly limits its jurisdiction.\textsuperscript{87} Even though there will be some easy and some hard cases, the next section shows that merely labeling cases as jurisdictional

\textsuperscript{81} This example was chosen for a reason. 
\textit{Chevron} was obviously not premised on an understanding that the EPA’s interpretation was jurisdictional, otherwise this Note would be moot. This emphasizes that all interpretation can be seen as implicating the agency’s jurisdiction to at least some degree.

\textsuperscript{82} “Indeed, any issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed.” Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd., 29 F.3d 655, 676 (D.C. Cir. 1994) (Williams, J., dissenting), amended by 38 F.3d 1224 (D.C. Cir. 1994).

\textsuperscript{83} “[S]ince every regulation implicates the agency’s authority to regulate as to the specific matter involved, all nonjurisdictional interpretations necessarily contain a jurisdictional element.” Crawford, supra note 13, at 972. A related argument is that perhaps courts need not worry at all about whether jurisdictional issues can be properly identified because 
\textit{Chevron}’s deferential step two analysis occurs only after the term is found to be ambiguous at step one. This argument recognizes that 
\textit{Chevron} identifies the cases where policy concerns are likely to be critical because ambiguous cases require interpretation that best fits the overall policy of the statute. Given a general preference for locating policy decisions within the political branches of government, deference is justified in jurisdictional and nonjurisdictional cases alike. See \textit{id.} at 974–75.

\textsuperscript{84} Noah, supra note 12, at 1522. Some have also suggested that the APA requires courts to police an agency’s jurisdictional interpretation, citing the APA’s mandate that “[a] sanction may not be imposed or a substantive rule of order issued except within jurisdiction delegated to the agency and as authorized by law.” See 5 U.S.C. § 558(b) (2000); Gellhorn & Verkuil, supra note 14, at 994 & n.28. See also 5 U.S.C. § 706(2)(C) (2000) (instructing courts to “set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations”). This argument perhaps overlooks the fact that 
\textit{Chevron} itself is in tension with this principle. See, e.g., Merrill & Hickman, supra note 9, at 868.

\textsuperscript{85} See Noah, supra note 12, at 1521–26.

\textsuperscript{86} ACLU v. FCC, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (“[A] pivotal distinction exists between statutory provisions that are jurisdictional in nature—that is, provisions going to the agency’s power to regulate an activity or substance—and provisions that are managerial—that is, provisions pertaining to the mechanics or inner workings of the regulatory process.”) (internal citation omitted).

\textsuperscript{87} In \textit{NLRB v. Hearst Publications, Inc.}, the agency interpreted the term “employee” as that term was used in the National Labor Relations Act. NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 113–14 (1944). The definition clearly defined the agency’s jurisdiction, because it could only require employers to collectively bargain with employees. See \textit{id.} at 114.
does not help identify those that are actually problematic. The section addresses the reasons given for rejecting *Chevron* deference in jurisdictional cases: sometimes agency aggrandizement or self-interest motivates agency assertions of regulatory authority. The analysis shows that these concerns simply are not present in all cases that might be classified as jurisdictional. This underscores the need for the approach described in Part IV, which provides a means of identifying those cases in which self-interest or aggrandizement is present, but does not require the difficult classification of agency interpretations as jurisdictional or nonjurisdictional.\(^{88}\)

**B. THE “SHOULD” QUESTION: AGENCY AGGRANDIZEMENT AND SELF-INTEREST**

The primary argument against *Chevron* deference for interpretations of jurisdictional provisions is that agencies have a self-serving bias in such interpretations. The argument is made in slightly varying terms, but is essentially a warning that courts should guard against “agency aggrandizement,”\(^{89}\) “bias and self-dealing,”\(^{90}\) and “self-interest.”\(^{91}\) These arguments have considerable intuitive appeal,\(^{92}\) but the goal is to challenge these intuitions and understand the core reasons why some call for nondeferential review of agency claims to regulatory power.

Scrutiny of aggrandizement concerns calls for recourse to separation of powers law. At a very basic level, our constitutional form of government is based on the idea that there are three branches of government, each with a specific power.\(^{93}\) When it comes to agencies, it is difficult to apply formalistic notions about these powers because administrative agencies

\(^{88}\) For simplicity throughout the remaining discussion, this Note uses the term “jurisdiction” to refer to the scope of an agency’s delegated authority—both as to the entities or classes of entities an agency may regulate, and as to the particular actions it may take in regulating those entities—and the term “jurisdictional interpretation” to denote those interpretations that define that scope of authority to at least some degree.

\(^{89}\) Braun, supra note 17, at 1005–07. See also Gellhorn & Verkuil, supra note 14, at 1013 (stating that compared to agencies, “courts... do not have the inherent conflict of power aggrandizement”).

\(^{90}\) Sunstein, *supra* note 11, at 2099.

\(^{91}\) Gellhorn & Verkuil, *supra* note 14, at 994.

\(^{92}\) These notions appeal even to courts. See, e.g., *N.Y. Shipping Ass’n v. Fed. Mar. Comm.*, 854 F.2d 1338, 1363 n.9 (D.C. Cir. 1988) (expressing skepticism when “an agency’s assertion of power into new areas is under attack”) (internal citation omitted).

\(^{93}\) U.S. CONST. art. I, § 1 (stating, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States’’); U.S. CONST. art. II, § 1 (stating, “[t]he executive Power shall be vested in a President of the United States of America’’); U.S. CONST. art. III, § 1 (stating, “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”).
exercise executive power through enforcement, legislative powers through rulemaking, and judicial powers through adjudication. Even though there seems to be a textual constitutional basis for strict allocation of legislative, executive, and judicial power in each of those branches, respectively, that approach is generally considered impossible because "in the contested cases, there is no principled way to distinguish between the relevant powers."

All of this does not mean that agency exercise of power is always constitutionally legitimate. Courts may have given up trying to strictly police the type of power agencies exercise, but they can still control the amount of power they exercise. Aggrandizement is a genuine separation of powers concern that occurs when the executive "branch seeks to increase its own power at the expense of another . . . [if] the branch whose power is threatened cannot protect itself." Thus, separation of powers is understood to be more about "the preservation of three roughly ‘balanced’

94. For example, the Department of Agriculture has the prototypical executive power to "investigate private conduct to ascertain probable violations of [a] rule and initiate proceedings before one of its judicial officers." STRAUSS, supra note 4, at 22.


96. E.g., Crowell v. Benson, 285 U.S. 22 (1932) (allowing the Employees’ Compensation Commission to adjudicate employee’s claim under the Longshoremen’s and Harbor Workers’ Compensation Act).

97. Such a textual reading of the Constitution is not as persuasive as it appears: "While the Constitution defines and locates the three characteristic powers of government, . . . it does not define the government itself." STRAUSS, supra note 4, at 20. Thus, the Constitution gives “Congress authority to define the elements of government” although it is “almost devoid of detailed specification of the relationship these elements are to have with the President or Court.” Id. at 21. Notwithstanding these points, it is worth noting that there are two important principles limiting the degree to which Congress may empower executive agencies with legislative or judicial power. Under the nondelegation doctrine, Congress may delegate legislative power only as long as it articulates “an intelligible principle to which [the agency] . . . is directed to conform.” J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). Additionally, “Congress is permitted to delegate adjudicatory functions to an administrative agency if and only if there is judicial review to ensure that the agency has followed the law and found the facts in a reasonable manner.” BREYER ET AL., supra note 1, at 151.


When the executive issues a check to pay for a federal road authorized by a statute, that, most would agree, is the exercise of executive authority. When Congress approves the underlying statute authorizing that road expenditure, most would agree that that is the exercise of legislative authority. . . . [But, c]ould Congress, instead of deciding by statute where roads should be built, authorize the executive to design an efficient and useful national transportation infrastructure}? . . . [Situations like this last example do not involve] the uncontested core of the government functions. Yet, if one is committed to functional separation, these cases must be properly sorted into one category of power or another.

Id. at 614–15.

branches of government” than strict adherence to formalistic rules about which branches can exercise which powers.

Approaching an agency’s interpretation of its own jurisdiction from this institutional perspective, intuitive notions about agency aggrandizement do withstand scrutiny in all cases. As Part IV demonstrates, there are specific cases in which agency aggrandizement—in the form of over-reaching by agencies into the turf of Congress or the judiciary—does make Chevron deference inappropriate. However, when agencies claim authority over areas where neither Congress nor the judiciary already exercises power, they are not increasing their own power at the other branches’ expense. They are simply increasing their own power relative to the universe of previously unregulated entities. Thus, since aggrandizement is not present in these cases, even though agency jurisdiction is expanded, it does not provide a reason to reject deference in all jurisdictional cases.

Alternatively, concerns about self-dealing or self-interest speak to a fear that agencies will assert too much power over the entities they regulate. Implicit in these particular claims is the assumption that agencies are systematically biased toward increased regulation. There

100. Magill, supra note 98, at 626. Magill goes on to critique this current conception, arguing that “the notion of balance is both conceptually underdeveloped and flawed,” id. at 627, because (1) normatively, “[w]e are unlikely ever to reach agreement on some ideal distribution of authority among the branches,” id. at 634; (2) descriptively, it is difficult “to discern the quantum of power held by an institution and to compare it to the amount of power held by other institutions,” id. at 635, 635−39; and (3) prescriptively, “we cannot predict with any confidence whether outcomes will be changed as the result of . . . new arrangement[s],” id. at 640.

101. As an example of this approach, the Supreme Court struck down the one-house legislative veto in INS v. Chadha, 462 U.S. 919 (1983). There, the Immigration and Nationality Act (“INA”) had provided that certain deportation decisions made by the Attorney General could be reversed by a majority vote of either the Senate or House of Representatives. Id. at 923. Striking down this provision of the INA, the Court’s reasoning was syllogistic: congressional reversal of the Attorney General’s decision was legislative in nature, congressional legislative actions must follow the “finely wrought and exhaustively considered” constitutional procedure of bicameralism and presentment to the President, and thus congressional reversal of the Attorney General’s decision must be achieved by the procedure of bicameralism and presentment. Id. at 951, 951−59. Because the INA provided for a legislative procedure that did not require either bicameralism or presentment, it was held to be an unconstitutional violation of separation of powers principles. See id. at 959. Aggrandizement was clearly at play because Congress was attempting to control administrative decisionmaking. Thus, the Court “downplayed the difficulties inherent in distinguishing legislative from executive actions and struck down [a] procedure that [came] close to the [legislative] line.” Garrett, supra note 99, at 883.

102. Agencies may exercise too much power by either regulating entities that Congress did not intend for them to regulate, or implementing regulatory tools that Congress did not intend for them to implement.

103. See, e.g., Noah, supra note 12, at 1519 (characterizing these arguments as being about “an agency’s vested interest in expanding its jurisdiction”). Another commentator states, “[a] statute survives its enacting coalition and is binding law unless and until amended or repealed. We count on courts to respect this principle; we have suspicions as to whether agencies will do so.” Michael Herz, The Legislative Veto in Times of Political Reversal: Chadha and the 104th Congress, 14 CONST.
are valid reasons why such an assumption might be warranted.\footnote{104} First, some commentators directly challenge the idea that agencies, as institutions, are held sufficiently accountable through the democratic process. For example, it may not actually be very easy for the President and Congress to correct agency action they view as problematic.\footnote{105} If this is true, then agencies might act in ways that serve only their own interests, regardless of what other governmental actors would want them to do.

Moreover, agencies are susceptible to “tunnel vision.”\footnote{106} According to this observation, agencies and agency employees may become so focused on pursuing one particular regulatory goal that they “bring[] about more harm than good.”\footnote{107} Tunnel vision is one specifically identified way in which agencies over-regulate, so the observation supports a general conclusion that agencies will exercise too much power if they are not sternly supervised by courts. By analogy, if agency employees regularly ignore harmful effects of their own regulation, they may also ignore the legislated bounds of their authority when pursuing their regulatory goals.\footnote{108}

Yet there are also reasons why agencies might not systematically expand the boundaries of their own authority. Most importantly, agencies have limited resources and must prioritize their regulatory goals according to what they can feasibly accomplish.\footnote{109} For example, agencies may exercise discretion not to pursue enforcement of a particular regulatory requirement.\footnote{110} The fact that agencies do in fact decline to use the full

\footnote{104}{The following analysis maps some of the reasons why there might indeed be important and systematic differences between a world where jurisdictional decisions are assigned to agencies and a world where they are assigned to courts. Interestingly, Magill’s critique of current separation of powers thinking, see supra note 100, points to the need for a similar analysis. She states, “[t]he key to understanding concerns about aggrandizement and the preservation of balance is to notice when we would not care about it. To risk stating the obvious, we would not be concerned about the balance of authority among the [different branches of government] if there were no salient differences among them.” Magill, supra note 98, at 629. Thus, even under Magill’s rejection of current ideas about separation of powers, the analysis here is still relevant.}

\footnote{105}{See Sunstein & Vermeule, supra note 33, at 930.}

\footnote{106}{STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993).}

\footnote{107}{Id.}

\footnote{108}{See Breyer, supra note 14, at 371.}

\footnote{109}{See generally CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 6–10 (2002) (discussing a general need for cost-benefit analysis and the specific need for agencies to pursue “least-cost methods of achieving regulatory goals”).}

\footnote{110}{See STRAUSS, supra note 4, at 310–12 (discussing the fact that “decisions not to prosecute or enforce” are generally left to an agency’s discretion). Some commentators have argued that}
power of their authority in such cases reinforces the conclusion that it is impossible to confirm that agencies are likely to systematically overstate their own jurisdiction.\textsuperscript{111}

There are some reasons why agencies might overstate their power and some why they might understate it; the point is simply that there is no theoretical reason to assume that agencies will overstate their authority in all cases.\textsuperscript{112} Thus, because the comparative advantages of agency expertise, democratic accountability, and flexibility over time can be brought to bear on statutory interpretation questions when self-interest is not a problem, it makes little sense to reject \textit{Chevron} deference in all jurisdictional cases.

\section*{IV. IDENTIFYING THE PROBLEMATIC CASES}

An approach for identifying cases where aggrandizement or self-interest is present is needed because these are the cases where Congress would not likely intend for courts to defer to agencies’ interpretations of their own jurisdiction. This part offers such an approach by analyzing factors that courts often mention while reviewing agencies’ jurisdictional interpretations, and explaining how they can be molded into a \textit{Mead}-like step zero inquiry. Courts currently analyze these factors without stating how they relate to the overall \textit{Chevron} doctrine, so the approach here mainly clarifies the existing jurisprudence. This part’s approach helps courts identify, at step zero, the cases in which courts have legitimate reason to deny deference, by explicitly seeking to identify cases where aggrandizement or self-interest is present. This approach does not impose significant decision costs because it utilizes factors courts already consider.

\textit{Denunciation} of regulatory jurisdiction should be reviewed carefully: “[A]gencies [should] not receive deference when they are denying their authority to deal with a large category of cases. . . . Here too there is a risk of bias, in the form not of self-dealing, but instead of an abdication of enforcement power.” Sunstein, \textit{supra} note 11, at 2100.

\textsuperscript{111} In fact, some commentators have devoted considerable analysis to the proposition that “the existence of systematically different incentives . . . [among actors in the three branches of government] is likely to fail given the monumental complexity of the task.” Magill, \textit{supra} note 98, at 631, 644–49. Thus, it is likely to be impossible to prove that judges will rein in agency jurisdiction any more rigorously than agencies themselves will.

\textsuperscript{112} In addition to the reasons mentioned in the text, Nina Mendelson has made the interesting point that the “risk of an agency power grab” is higher in specific cases where interested parties in favor of agency regulation are more organized than interested parties against regulation. Nina A. Mendelson, \textit{Chevron and Preemption}, 102 MICH. L. REV. 737, 796 (2004). Of course, the converse is also true, so there is no reason why this observation leads to the logical conclusion that agencies will more often than not overstate their jurisdictions.

\textsuperscript{113} See also id. at 799 (noting that “the extent to which an agency decision may be biased by an agency desire to increase its own authority” is an unresolved empirical question). But see Gelthorn & Verkuil, \textit{supra} note 14, at 992 (“History clearly shows that, except in highly unusual circumstances, agencies read their authority expansively and often pursue agendas far beyond that envisioned when the agencies were created.”).
It also avoids the error costs of having an underinclusive and overinclusive general rule that would either grant or deny *Chevron* deference to all jurisdictional cases. Overall, the approach clarifies existing *Chevron* doctrine by explicitly connecting the factors courts already consider with their function of identifying aggrandizement or self-interest.

A. FACTORS INDICATING THAT *CHEVRON* DEFERENCE IS INAPPROPRIATE

This section identifies four factors that are often cited by courts as they conduct *Chevron* step one analysis of agencies’ jurisdictional interpretations. The factors all relate to the nature of the agencies’ actions rather than whether the statutory text is clear, so they seem to have little to do with the stated purpose of step one. This analysis, however, shows that these factors serve a different, yet important purpose: they help identify cases where aggrandizement or self-interest is present, exactly the cases where Congress would be unlikely to intend for courts to defer to the agency. Additionally, this section presents a factor that courts look to as a means of directly ascertaining congressional intent: Congress’s own actions. This analysis explains the details of how courts already consider these factors, paving the way for a description in Section IV.B of how they are the building blocks of an explicit step zero inquiry, aimed at determining whether *Chevron* deference should apply to an agency’s interpretation of its own jurisdiction.

114. Additional factors likely exist. Courts have already implemented Mead’s inquiry into the procedural formality of agency action, denying deference to jurisdictional interpretations not made through notice-and-comment rulemaking. See, e.g., NRDC v. Abraham, 355 F.3d 179, 200–01 (2d Cir. 2004). As indicated supra in note 110, agency interpretations of jurisdiction are also problematic when they implicate *abdication* of regulatory responsibility. Since such cases implicate an entirely different set of concerns about agency action than those addressed in this Note, they are not addressed in detail here.

115. As indicated supra in note 19 and accompanying text, this analysis does not explicitly take into account the split in circuit court authority as to whether *Chevron* deference applies to agencies’ jurisdictional interpretations. Instead, this Note suggests that this distinction is neither necessary nor helpful. It is not necessary because differentiating “jurisdictional” from “nonjurisdictional” cases does not accurately identify the cases where aggrandizement, self-interest, or other concerns are present. It is not helpful because regardless of a circuit’s stated position on the jurisdictional controversy, courts often decide cases at step one. See Levin, supra note 75, at 780 (“[S]tep one is frequently the most important phase of a judicial review proceeding—a make-or-break event for the challenging party.”). This part suggests that the agency’s interpretation is usually rejected when it implicates either aggrandizement or self-interest, and accepted when it implicates neither; in both cases, however, the analysis is often passed off as textual interpretation at step one. Thus, because courts essentially tailor the “textual” analysis in order to evaluate the substantive aggrandizement and self-interest issues (in ways described throughout this part), it makes little difference whether or not the court has expressly decided if *Chevron* deference applies to jurisdictional questions.
1. Change in Agency Interpretation of the Scope of Agency Authority

Analysis of the first factor presented here begins with *FDA v. Brown & Williamson Tobacco Corp.*,\(^{116}\) the case in which many expected the Supreme Court to decide whether *Chevron* does in fact apply to agency interpretations of their own jurisdiction.\(^{117}\) Even though the Court passed on that opportunity, *Brown & Williamson*’s significance on the resolution of this question is underscored by its application to several factors discussed in this section.

Beginning with the history leading up to the case, the Food, Drug and Cosmetic Act ("FDCA") was passed in 1938 and gave the FDA authority to regulate “drugs.”\(^{118}\) Drugs are defined as “articles (other than food) intended to affect the structure or any function of the body.”\(^{119}\) Until the mid-1960s, it was merely assumed that tobacco products did not qualify as “drugs” under the FDCA.\(^{120}\) As evidence of the harmful health effects of smoking became available, however, FDA involvement in the regulation of tobacco became plausible.\(^{121}\) Nonetheless, the FDA explicitly denied that tobacco qualified for regulation under the FDCA and even rejected a request by an antismoking group that it regulate cigarettes.\(^{122}\) During this same period, Congress considered, and rejected, a proposal for explicitly giving the FDA authority to regulate tobacco, ultimately assigning “regulatory responsibility elsewhere.”\(^{123}\) By 1992, Congress enacted “five statutes addressed specifically to the contents, advertising, or labeling of cigarettes and smokeless tobacco products.”\(^{124}\)

By the 1996 presidential election, the government’s role in regulating tobacco products was the subject of intense debate.\(^{125}\) In light of “new evidence about the effects of nicotine and the intentions of the tobacco industry” in marketing tobacco products, the FDA was already reconsidering its jurisdiction.\(^{126}\) President Clinton announced “he would

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118. *Brown & Williamson*, 529 U.S. at 126. Technically, the FDCA delegates this authority to the Secretary of Health and Human Services, who has in turn redelegated the authority to the Commissioner of Food and Drugs. See 21 U.S.C. §§ 321(d), 371(a) (2000); 21 C.F.R. § 5.10(a) (2004).
121. Sunstein, *supra* note 13, at 1024.
122. Id. at 1024–25.
123. Merrill, *supra* note 120, at 1080.
124. Id.
126. Id. at 1025.
restrict the marketing of cigarettes through FDA regulations,"\(^{127}\) even as the Republican-controlled Congress “could not muster the votes necessary either to grant or deny the FDA the relevant authority.”\(^{128}\) Amid this political stalemate, the FDA concluded that it did have jurisdiction to regulate tobacco products.\(^{129}\)

The FDA’s new position was challenged up to the Supreme Court. The Court began simply by assuming that *Chevron* applied because the “case involve[d] an administrative agency’s construction of the statute that it administers.”\(^{130}\) The Court then resolved the case at step one, concluding that “[r]ead[ing] the FDCA as a whole, as well as in conjunction with Congress’s subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority” to regulate tobacco.\(^{131}\) Even though tobacco clearly fit into the definition of “drug,” the Court noted that the FDCA also requires the FDA to ban “unsafe” products that it regulates.\(^{132}\) Thus, because tobacco is unsafe, the FDA would have been forced to ban tobacco altogether if it asserted regulatory jurisdiction.\(^{133}\) Since “a ban would contradict Congress’s clear intent as expressed in its more recent, tobacco-specific legislation . . . there [was] no room for tobacco products within the FDCA’s regulatory scheme.”\(^{134}\)

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129. Sunstein, *supra* note 13, at 1025 (noting that the FDA’s decision was made in a 700-page report).
130. *Brown & Williamson*, 529 U.S. at 132. This move suggests that *Chevron* deference applies regardless of whether the agency’s interpretation implicates jurisdictional issues. Two caveats against this reading of the case, however, are in order. First, *Brown & Williamson* was decided over a year before *Mead*, when *Chevron* deference was presumably applicable to all cases. It is quite plausible that the Court appreciated the need for a nuanced approach in both *Brown & Williamson* and *Mead*, but considered *Mead* a more appropriate vehicle for revamping the *Chevron* framework because the circumstances of *Mead* were far less politically charged. Second, this section also argues that the Court’s step one analysis in *Brown & Williamson* actually was tailored to address specific concerns implicated by the fact that the FDA’s interpretation was primarily jurisdictional. This section addresses the Court’s concern that the jurisdictional position was radically different from what it had previously asserted. Section IV.A.2 discusses how the Court was also concerned about how the FDA’s interpretation represented encroachment on Congress’s role in resolution of the tobacco controversy. Finally, Section IV.A.4 addresses the interpretation’s inconsistency with legislative action taken since initial passage of the FDCA.
131. *Id.* at 161.
132. *Id.* at 133–34.
133. *Id.* at 134–37.
134. *Id.* at 143. To support its conclusion that Congress had “foreclosed the removal of tobacco products from the market,” the Court cited authorities such as a provision in the United States Code stating that “‘the marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.’” *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (2000)).
The Court also observed that the step one “inquiry into whether Congress has directly spoken to the precise question at issue is shaped at least in some measure, by the nature of the question presented.” More specifically, the Court stated that courts should “hesitate before concluding that Congress has intended” to delegate interpretative power to the agency in “extraordinary cases.” While the Court was not specific as to what makes a case “extraordinary,” it was clear that Brown & Williamson was not “ordinary.” The Court stated, “[c]ontrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.” This indicates that the Court was clearly concerned with the agency’s shift away from its longstanding position.

Reference to this concern was not novel. Even as courts pay lip service to the idea that consistency is not required under Chevron, they have often incorporated analysis of the agency’s interpretation over time into the step one inquiry. Yet, courts must look at more than the fact that

135. Id. at 159.
136. Id.
137. Though the history presented supra in notes 118–29 and accompanying text began with passage of the FDCA in 1938, the Court was here referring to the position taken by the FDA’s predecessor agency, the Bureau of Chemistry, on tobacco after adoption of the FDCA’s predecessor act, the Pure Food and Drug Act of 1906. See Brown & Williamson, 529 U.S. at 146.
138. Id. at 159. In contrast, the four-member dissent in Brown & Williamson emphasized the legitimacy of this change because “scientific evidence of adverse health effects [had] mounted,” and the FDA’s “regulatory attitude” had simply, and permissibly, changed. Id. at 188–89 (Breyer, J., dissenting).
139. Indeed, consistency over time is a key factor in determining whether, and to what degree, deference to an agency’s position should be granted under Skidmore. See supra text accompanying note 22.
140. The Court even devoted some discussion to refute the claim that it was contorting this principle in another section of the opinion, even as it clearly relied on this factor in its “extraordinary case” discussion. Compare Brown & Williamson, 529 U.S. at 156–57, with id. at 159–60.
141. Compare, e.g., Mr. Sprout, Inc. v. United States, 8 F.3d 118, 122, 128 (2d Cir. 1993) (applying Chevron deference, but rejecting an interpretation of the Interstate Commerce Commission (“ICC”) where it was contrary to “the ICC’s longstanding interpretation of its jurisdiction”), and Lancashire Coal Co. v. Sec’y of Labor, Mine Safety & Health Adm’r, 968 F.2d 388, 392–93 & n.5 (3d Cir. 1992) (finding statutory language “conclusive” while noting that “the Act ha[d] not been interpreted consistently” by the Mine Safety and Health Administration), and Adams House Health Care v. Heckler, 817 F.2d 587, 593–94 (9th Cir. 1987) (citing the fact that the Provider Reimbursement Review Board “ha[d] not consistently adhered to a single interpretation of its jurisdictional authority” as a reason for denying Chevron deference), vacated sub nom. by Bowen v. Adams House Health Care, 485 U.S. 1018 (1988), and St. Luke’s Hosp. v. Sec’y of HHS, 810 F.2d 325, 331 (1st Cir. 1987) (holding that “the reasons for giving great weight to an agency’s interpretation [were] absent” because “the agency ha[d] changed its views”), with Reiter v. Cooper, 507 U.S. 258, 269 (1993) (suggesting that the agency’s interpretation could be upheld at step two when “the ICC ha[d] long interpreted its statute as giving it no power”), and Tex. Utilities Elec. Co. v. FCC, 997 F.2d 925, 930 (D.C. Cir. 1993) (finding the statute ambiguous at step one while noting the agency’s argument that its view was “longstanding”), and Air Courier Conference/Int’l Comm. v. USPS, 959 F.2d 1213, 1223 (3d Cir. 1992) (stating that Chevron deference was all the more applicable in view of a “long-standing interpretation”).
an agency has changed its position in deciding whether to give *Chevron* deference to the agency’s interpretation.\(^\text{142}\) There will be some cases in which the agency has legitimately changed its mind because values or “facts have changed or have been understood in a new way”\(^\text{143}\) and others where aggrandizement or self-interest is the impetus for change.

Courts often refer to this factor, and the Supreme Court’s recently announced “extraordinary case” idea implicates its relevance. Thus, change in the agency’s position should have some place in a step zero framework for determining when *Chevron* deference should be rejected. Mere change, however, should not be an independently sufficient condition for rejecting *Chevron*, because it does not necessarily mean that the agency has changed its position due to aggrandizement or self-interest. This section now turns to other factors that are capable of identifying cases where those concerns are present.

2. Encroachment on Other Institutional Actors in the Administrative State

Aggrandizement is directly implicated when agencies assert jurisdiction over areas where Congress or the Judiciary has traditionally exercised power. This section details the specific circumstances that help courts identify cases where this type of aggrandizement is present.

a. Congress

Courts may reject *Chevron* deference for “major, politically salient issues, even if the statutory language is unclear.”\(^\text{144}\) Using this as a criterion for rejecting *Chevron* fits the rationale of Mead’s step zero approach if “Congress is more likely to have focused upon, and answered,  

\(^\text{142}\) Other commentators have suggested a similar inquiry. Cass Sunstein, for example, has argued that courts should not give *Chevron* deference when the agency’s changed interpretation gives it jurisdiction over a new class of cases:

Probably the best reconciliation of the competing considerations of expertise, accountability, and partiality is to say that no deference will be accorded to the agency when the issue is whether the agency’s authority extends to a broad area of regulation, or to a large category of cases, except to the extent that the answer to that question calls for determinations of facts and policy.

Sunstein, *supra* note 11, at 2100. Some courts have taken this approach. See, e.g., Fleischmann v. Dir., OWCP, 137 F.3d 131, 136 n.2 (2d Cir. 1998) (rejecting the argument that *Chevron* should not apply because the agency’s “interpretation tend[ed] to expand the scope of coverage of” the relevant act because the “agency [did] not seek to extend its authority to a large category of cases”). See also Gellhorn & Verkuil, *supra* note 14, at 1011, 1015 (arguing that it is unlikely that Congress would have wanted the agency to regulate its “core regulatory assignment,” and that courts should assess the “distance between the agency’s core jurisdiction and the proposed extension of its authority”); Merrill, *supra* note 120, at 1089–90 (suggesting that agency changes in position are problematic when the impact on previously unregulated entities is significant).

\(^\text{143}\) Sunstein, *supra* note 13, at 1030.

major questions“ and less likely to have intended that an agency decide politically controversial questions. Viewed from this perspective, the agency’s attempt to decide the question is a case of aggrandizement because it usurps Congress’s (and the President’s) role in resolving a controversial social problem.

On the other hand, it is plausible that Congress intended for the agency to resolve even politically difficult issues. First, even though an issue may have political ramifications, the agency’s expertise is still relevant to the problem. In fact, Congress may have a strong reason to defer to the agency in “politically significant” cases if the agency’s expertise helps identify the best answer to a difficult problem. Second, as the dissent in Brown & Williams pointed out, controversial decisions are those “for which th[e] administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision . . . means that the public is likely to be aware of it and to hold those officials politically accountable.” In short, perhaps courts need not worry about agencies making politically significant decisions because they are sufficiently accountable to the overall political process.

Additionally, Congress delegates to agencies knowing that it will be easier for them, as actors capable of acting unilaterally and autonomously, to respond decisively to political issues. Congress may also sometimes get the result it wants, even though an executive agency has made the political decision, because agencies “are subject not only to presidential influence but to various forms of influence by Congress,” as well.

Even though it may be difficult to determine in the abstract what Congress’s intent as to political issues would be, courts may be able to look at objective evidence indicating that Congress would like to resolve the political issue itself, but cannot. For example, in Brown & Williamson, Congress could not gather the necessary majority vote to pass legislation regarding the FDA’s jurisdiction. This suggests that courts could look at an inability to muster enough votes to either (1) pass a bill granting or denying the agency jurisdiction, or (2) override a presidential veto of such a bill.

146. See Gellhorn & Verkuil, supra note 14, at 1008–10.
148. Elhauge, supra note 42, at 2149.
149. Additionally, the Brown & Williamson court looked hard at the legislative history after Congress passed the FDCA to find “clear congressional intent” on the controversy at issue there. Herz, supra note 144, at 10,158. This emphasizes the potential interrelatedness of the factors presented here because courts could look at subsequent legislative history, discussed in further detail infra in Section IV.A.3, to see if Congress has indicated that it expects to resolve a particular issue itself. Even if full
These situations present clear cases of aggrandizement because Congress cannot act to protect its own interests.

Other circumstances point toward agency aggrandizement. This can be seen, for example, in Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System.\textsuperscript{150} Prior to Independent Insurance Agents, Congress passed a provision of the Banking Act, the Bank Holding Company Act (“BHCA”), which imposed a one-year moratorium on the acquisition of state-chartered banks offering certain insurance services.\textsuperscript{151} Before the moratorium went into effect, the Fed approved the very type of transaction the moratorium prohibited—a bank holding company’s acquisition of two Indiana banks that provided insurance to customers.\textsuperscript{152} In order to expedite processing of the acquisition, however, the Fed required the state banks to limit their insurance services, pending subsequent approval.\textsuperscript{153} After the moratorium went into effect, the Fed approved the state banks’ insurance activities.\textsuperscript{154} The Fed claimed that the moratorium did not apply because the Fed had technically approved the acquisition before the moratorium came into effect.\textsuperscript{155}

On its terms, the BHCA only covered approval of “the acquisition” itself, and the Fed had a plausible textualist argument that the acquisitions were approved “before the beginning of the moratorium, [thus] approval of the subsequent application to resume suspended insurance activities [was] not subject to [its] terms.”\textsuperscript{156} Rejecting this argument, the court put much emphasis on the purpose of the BHCA provision: “Congress enacted the . . . moratorium . . . so that Congress itself could have the opportunity to decide how to resolve certain controversies in the banking field.”\textsuperscript{157} One of those controversies was whether bank holding companies could own banks offering insurance services at all.\textsuperscript{158} Since the court rejected the agency’s interpretation of an ambiguous statute, Independent Insurance Agents shows that courts should reject the agency’s interpretation when Congress

\textsuperscript{150} Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System, 838 F.2d 627 (2d Cir. 1988) [hereinafter \textit{Independent Insurance Agents I}].

\textsuperscript{151} Id. at 629.

\textsuperscript{152} Id. at 631.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 632.

\textsuperscript{156} Id. at 633.

\textsuperscript{157} Id. at 632.

\textsuperscript{158} Id. at 630.
has explicitly reserved an issue for its own consideration and the agency takes its own position on the issue in the meantime.\textsuperscript{159}

In all cases in which agency aggrandizement with respect to Congress is implicated, the agency’s accountability to Congress will mitigate complete usurpation of Congress’s desires. Rejection of the agency’s position is appropriate, however, when Congress either (1) cannot pass a bill accepting or rejecting the agency’s position, (2) is deadlocked with the President on such a bill, or (3) has explicitly reserved the issue for its own consideration, and the agency has issued its interpretation in the meantime.

b. The Judiciary

Courts have also carefully reviewed agencies’ assertions of authority when agencies make inroads on traditional judicial territory. For example, in \textit{Gorbach v. Reno},\textsuperscript{160} the court rejected the Attorney General’s assertion that she had the power to denaturalize citizens.\textsuperscript{161} The Attorney General based her interpretation on the fact that Congress granted the Attorney General the power to naturalize persons, arguing “that the power to denaturalize [was] ‘inherent’ in the power to naturalize.”\textsuperscript{162} The Attorney General also relied on a portion of the relevant statute, which provided that “[n]othing contained in this section shall be regarded as limiting, denying or restricting the power of the Attorney General to . . . vacate an order naturalizing [a] person.”\textsuperscript{163}

The court refused to apply \textit{Chevron} deference to the Attorney General’s interpretation. In performing a step one-type analysis,\textsuperscript{164} the court observed that “[p]art of the context in which the statute must be

\begin{itemize}
\item \textsuperscript{159} In a subsequent proceeding, the court also ruled on the controversial issue that sparked this case in the first place: whether the Bank Holding Company Act allowed bank holding companies to own banks offering insurance services. See \textit{Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 890 F.2d 1275 (2d Cir. 1989) [hereinafter \textit{Indep. Ins. Agents I}], This time, \textit{Chevron} deference was given, and the court apparently resolved the case at step two. \textit{Id.} at 1284 (“[T]he Board, acting within its sphere of competence, . . . made a reasonable interpretation.”). In \textit{Independent Insurance Agents II}, the court observed that Congress had let “[t]he moratorium expire[,] without the passage of new legislation.” \textit{Id.} at 1284. This reinforces the idea that aggrandizement was a key concern in \textit{Independent Insurance Agents I}: once Congress was no longer considering the issue, there was no need to continue denying deference to the agency.
\item \textsuperscript{160} \textit{Gorbach v. Reno}, 219 F.3d 1087 (9th Cir. 2000) (en banc).
\item \textsuperscript{161} \textit{Id.} at 1089.
\item \textsuperscript{162} \textit{Id.} at 1095.
\item \textsuperscript{163} 8 U.S.C. § 1451(b) (2000). See \textit{Gorbach}, 219 F.3d at 1094.
\item \textsuperscript{164} The \textit{Gorbach} court was not clear which step proved fatal for the Attorney General. In a single paragraph, the court said both that the “construction urged is not a permissible one,” indicating step two was determinative, and that “the statute is unambiguous in not conferring upon the Attorney General the power to denaturalize citizens administratively,” indicating that step one controlled. \textit{Gorbach}, 219 F.3d at 1093. It seems that this is a relatively common move for courts, either because they are not clear themselves which step is determinative, or because obfuscation allows them to decide the case without explicitly deciding whether \textit{Chevron} applies to an agency’s jurisdictional claims.
\end{itemize}
construed is . . . the long history of . . . denaturalization procedures.” 165 The court emphasized the traditional role courts have had in making denaturalization decisions, and that “[c]itizenship in the United States of America is among our most valuable rights.” 166 Second, the court detailed the relative institutional competencies of agencies and courts in this context, concluding that “administrative action is to be deemed less secure than judicial” in denaturalization proceedings. 167 Finally, the court noted that the statute expressly granted the denaturalization power to the courts. In contrast, the statutory provision the Attorney General relied on was merely a “saving clause” that did “not create anything [or] . . . expressly grant any power.” 168 The court tied these three points together, concluding that such a “silent and subtle implication [was] too weak to support” the argument that Congress intended to shift “so weighty a matter” from the courts to the Attorney General. 169

_Gorbach_ is a good example of agency aggrandizement with respect to the judiciary because the administrative actor was attempting to exercise power traditionally deployed by courts. _Mead_’s litmus test is congressional intent, however, so courts should not automatically reject _Chevron_ deference simply because an agency seeks to exercise a power traditionally held by the judiciary. 170 Taking _Gorbach_ as a guide, courts should also look to whether there are (1) institutional concerns indicating that the judiciary is a comparatively better actor for exercising the authority, or (2) express indications from Congress that it intended for the judiciary to exercise the authority. As for the first factor, Congress is not likely to delegate authority to an agency when that authority has been historically placed in the judiciary because of its expertise. 171 With the second factor, it is unlikely that Congress would make the effort to expressly provide a power to the judiciary without also expressly providing it to the agency.

165. Id. (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), for its observation that the “words of a statute must be read in context with a view to their place in the overall statutory scheme”).

166. Id. at 1096–98.

167. Id. at 1098. As evidence for this claim, the court stated that the “administrative agency is useful for performing large numbers of repetitive, routine tasks . . . such as naturalization, that do not take away important liberties from individuals.” Id. at 1095.

168. Id. at 1094.

169. Id. at 1091, 1095.

170. For a similar approach to questions of agency aggrandizement with respect to other agencies, see infra note 229.

171. The court’s expertise in _Gorbach_ had to do with its traditional role of protecting personal liberty. Cases that raise constitutional questions are generally thought to be best resolved by the courts. See Merrill & Hickman, _supra_ note 9, at 914 (“The agency is supposed to be responsible for making policy under the statute, . . . but the Court has anointed itself the chief policymaker under the Constitution.”).
3. Implications of Federalism Concerns

In many ways, federalism concerns present issues that are the most difficult for courts to resolve. There is considerable scholarship devoted to the intersection of federal regulatory action and state authority, with little consensus on how federalism concerns should fit within or alongside the Skidmore/Chevron/Mead framework. This Note provides the basic contours of this work, and describes two Supreme Court cases indicating that Chevron deference does not apply when an agency’s interpretation of its own jurisdiction implicates federalism concerns. The Court has not explicitly stated that such a rule exists or how it might operate. Nonetheless, the rule can be justified because it helps courts identify cases where self-interest might be at play. Therefore, it should be implemented into the step zero framework established in this part.

When federal administrative action conflicts with state regulatory authority, there are two primary concerns. First, as always, the judge seeks a result that best implements the federal regulatory scheme. Clearly an agency’s expertise is of great value here because the scheme is often “technical in nature.” Second, federalism values and state prerogatives should be preserved “for their own sake.” These values include the increased government responsiveness, public participation, and efficiency presumed to inhere in allocating power in smaller, localized state governments. Similarly, there are more general values of federalism, such as having states act as policy “laboratories” and maintaining a reasonable balance of power between federal and state governments. Generally, courts have greater expertise relative to agencies in evaluating these values, because they relate to general governmental structure and other concepts outside the scope of agencies’ specialized technical knowledge.

172. See, e.g., Jack W. Campbell IV, Regulatory Preemption in the Garcia/Chevron Era, 59 U. PITT. L. REV. 805, 805–08, 845 (1998) (emphasizing the differences between federal supremacy and preemption principles and arguing that “some Chevron deference is due to the agency’s interpretation of its preemptive power”); Mendelson, supra note 112, at 742 (arguing that “a preferable regime would not include Chevron deference,” but courts should retain “the discretion to take account of an agency interpretation on preemption under a regime such as Skidmore v. Swift”); Damien J. Marshall, Note, The Application of Chevron Deference in Regulatory Preemption Cases, 87 GEO. L.J. 263, 264 (1998) (arguing that “Chevron deference should not apply to regulatory preemption”).

173. See Mendelson, supra note 112, at 755.

174. Id.

175. Id. at 779–80.

176. Id. at 756.

177. Id.

178. Id. at 779–91. Mendelson addresses, in considerable detail, the relative institutional competencies of courts and agencies when it comes to federalism values, and cites additional reasons why courts are much better actors for evaluating them, most significantly: (1) courts are generalized
Cases that involve federalism require courts to balance these dual concerns, determining which interpretation best implements the regulatory scheme and best promotes federalism values. Congress would likely want courts to defer to an agency on its determination of how the regulatory scheme can best be implemented because that is the agency’s area of expertise. Congress, however, would likely want a court to make its own determination as to whether federalism values are sufficiently preserved because that is the court’s area of expertise. As consideration and balancing of both of these concerns is required, the court cannot choose to defer to one but not to the other.\footnote{179}

Given this catch-22, it seems that the Supreme Court has sided against application of \emph{Chevron} deference when the agency’s interpretation implicates federalism concerns. In \textit{AT&T Corp. v. Iowa Utilities Board},\footnote{180} the Court did not even cite \emph{Chevron} when determining “whether the Federal Communications Commission [had] authority to implement certain pricing . . . provisions of the Telecommunications Act of 1996.”\footnote{181} The Telecommunications Act required local telephone service providers to give competitors access to their local networks at prices that were “just, reasonable, and nondiscriminatory.”\footnote{182} When the FCC asserted authority to regulate those prices, the local telephone providers objected.\footnote{183} They argued that the FCC’s jurisdiction was only over interstate matters, and that the FCC’s local network rules related to pure intrastate matters.\footnote{184} Thus, they maintained that only the states could set the access prices.\footnote{185}

The majority rejected this argument, citing the FCC’s broad authority to “prescribe such rules and regulations as may be necessary . . . to carry
out the provisions” of the Act.\textsuperscript{186} It proceeded with a textual analysis of the Act, concluding that this provision “explicitly gave the FCC jurisdiction to” set prices,\textsuperscript{187} even though the dissenters read other provisions of the Act to limit its jurisdiction to interstate and foreign commerce.\textsuperscript{188} More important than the details of the Court’s construction of the Act, however, is the fact that none of the eight Justices\textsuperscript{189} who participated in AT&T suggested that deference was appropriate for the FCC’s interpretation of its jurisdiction.\textsuperscript{190} The majority and dissent disagreed only as to the Act’s correct meaning.

The Court took a similar approach in a more recent case, \textit{New York v. FERC}.\textsuperscript{191} There, the FERC asserted authority over electricity transmissions between local utility companies and their retail customers.\textsuperscript{192} Because such transmissions had traditionally been regulated by the states,\textsuperscript{193} the state of New York filed for review of the FERC’s jurisdiction.\textsuperscript{194} The majority opinion found that the “plain language of the [Federal Power Act] readily support[ed] FERC’s claim of jurisdiction,” which gave the FERC jurisdiction over “the transmission of electric energy in interstate commerce.”\textsuperscript{195} Even though the transmissions were technically local, they were part of interstate commerce because all electricity in the United States is delivered over three major grids,\textsuperscript{196} and even local transmissions are

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  \item \textsuperscript{186} \textit{Id.} at 377 (quoting § 201(b) of the Telecommunications Act, 47 U.S.C. § 201(b) (1994)) (internal quotations omitted).
  \item \textsuperscript{187} \textit{Id.} at 380.
  \item \textsuperscript{188} \textit{Id.} at 402–12 (Thomas, J., dissenting), 412–27 (Breyer, J., dissenting).
  \item \textsuperscript{189} Justice O’Connor did not participate in the decision. \textit{Id.} at 369.
  \item \textsuperscript{190} It is especially significant that Justice Scalia, who was the sole dissenter in \textit{Mead}, wrote the majority opinion. \textit{See United States v. Mead Corp.}, 533 U.S. 218, 220 (2001). Justice Scalia protested the \textit{Mead} opinion’s “avulsive change in judicial review of federal administrative action,” emphasizing \textit{Chevron}’s “general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce.” \textit{Id.} at 239 (Scalia, J., dissenting). Apparently even he thought that this presumption did not apply in a case where federalism was involved.
  \item \textsuperscript{191} \textit{New York v. FERC}, 535 U.S. 1 (2002).
  \item \textsuperscript{192} \textit{See id.} at 11–12.
  \item \textsuperscript{193} \textit{Id.} at 5 (noting that the states’ authority to regulate these transactions was limited only by the dormant commerce clause requirement that “prohibit[ed] state regulation that directly burdens interstate commerce”). \textit{See also} Nicholas W. Fels & Frank R. Lindh, \textit{Lessons from the California “Apocalypse”: Jurisdiction over Electric Utilities}, 22 \textit{Energy L.J.} 1, 2–4 (2001) (describing this dual scheme of regulation where “individual states are empowered to regulate essentially all retail and local distribution services involving electric power and natural gas, while the federal government, through the authority delegated to the FERC, has exclusive jurisdiction to regulate interstate transmission and sales-for-resale of electricity and natural gas in interstate commerce”).
  \item \textsuperscript{194} \textit{New York}, 535 U.S. at 16.
  \item \textsuperscript{195} \textit{Id.} at 16–17 (quoting the Federal Power Act, 16 U.S.C. § 824(b) (2000)) (internal quotations omitted).
  \item \textsuperscript{196} \textit{See id.} at 17.
\end{itemize}
“part of a vast pool of energy that is constantly moving in interstate commerce.”

Again, the technical details of the Court’s interpretations are secondary to the fact that all nine Justices apparently agreed that *Chevron* had no bearing on the FERC’s jurisdictional interpretation. Even though the lower court would have deferred to the FERC’s interpretation, the Supreme Court conducted its review without even citing *Chevron*.

The Court resolved both cases through relatively straightforward interpretations of the statutory text, without engaging in analysis of the federalism issues discussed above. Perhaps, then, *AT&T* and *New York* were simple step one cases. If that is true, however, there was no apparent reason why the Court did not simply cite *Chevron*. Moreover, if the Court was not concerned about federalism values (the Court’s area of expertise), there was good reason to defer to the agencies’ understandings of the statutes, because they were related to the complex technical fields of telecommunications and electricity regulation (the agencies’ areas of expertise).

Significantly, these were both cooperative federalism cases: the relevant federal statutes contemplated roles for both state and federal actors in implementing the federal regulatory programs. Cooperative federalism is the use of federal regulatory schemes that “charge state agencies—as well as federal ones—with the responsibility of interpreting and implementing federal law.”

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197. *Id.* at 7.

198. The lower court also found that FERC’s authority was clear under the Federal Power Act. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000), *aff’d sub nom.* *New York v. FERC* 535 U.S. 1 (2002). The court also stated, however, that “even if we independently concluded that the statute’s text was less than clear, it is the law of this circuit that the deferential standard of *Chevron* . . . applies to any agency’s interpretation of its own statutory jurisdiction.” *Id.* (internal citations omitted). Given this aspect of *Transmission Access*, some commentators thought that the Supreme Court would resolve the question addressed by this Note when it took up review of the case. See, e.g., Fels & Lindh, *supra* note 193, at 21 n.100.

199. The Court simply noted that the case presented the question of “whether federal power may be exercised in an area of pre-existing state regulation” and that the best way to resolve that question was to “determine whether Congress [had] given FERC the power to act as it [had].” *New York*, 535 U.S. at 18. This analysis seems indistinguishable from the typical inquiry into an agency’s jurisdiction, so the Court gave no convincing justification for proceeding without a reference to *Chevron*.

200. Others have challenged the very idea that *AT&T* could be considered a step one case. See *Taylor*, *supra* note 12, at 1697 (2000) (arguing that the statutes at issue in *AT&T* were ambiguous). Taylor makes the point rather bluntly: “[T]he legislative history and the text of the [Telecommunications Act] are systematically ambiguous. . . . The Court’s appeal to plain meaning suppresses these ambiguities, thereby providing another example of the Rehnquist Court’s penchant for pulling the rabbit of plain meaning from the hat of statutory ambiguity.” *Id.* at 1703.

201. Considering this, it is interesting to note that the Court did affirm the agencies’ positions in both cases. Cf. *id.* at 1697–98 (suggesting that the Court was correct to omit discussion of *Chevron* deference because “*Chevron* should not apply to jurisdictional questions”).

202. Cooperative federalism is the use of federal regulatory schemes that “charge state agencies—as well as federal ones—with the responsibility of interpreting and implementing federal law.” Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L. Rev. 1, 3 n.6 (1999).
federalism cases likely will be plentiful in the years ahead due to the rise of this technique as a means of regulating. Thus, it seems likely that the Court was aware of the complicated federalism concerns that could inhere in future cooperative federalism cases, and was thus wary of establishing precedent that could make resolution of these cases problematic. Because there is already considerable question as to whether *Chevron* applies when federalism issues are present, the cases may be seen as simply reserving that question for later resolution.

Reading *AT&T* and *New York* as withdrawing *Chevron* deference from a class of cases where federalism concerns are likely to be prevalent makes sense because those seem to be situations where it is especially difficult to ascertain whether Congress intended either agencies or courts to provide the definitive interpretation. These might be thought of as cases of “innocent” self-interest because the agency may be exercising more power than Congress intended, simply because it is not attuned to the boundaries that federalism values define. Even without *Chevron*, a court can look to an agency’s interpretation as persuasive authority under *Skidmore*. Thus, denying deference also makes sense in these cases because it provides courts leeway in deciding how to balance federalism values against issues that lie within the agency’s field of expertise.

4. Inconsistency in Congressional Action Taken Since the Enabling Legislation Enactment

*Mead* focuses the step zero inquiry on what Congress likely intended. Thus, it seems logical for courts to look at Congress’s own actions to determine if an agency’s position is contrary to Congress’s intent.

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203. See id. at 21. This trend can be contrasted with the New Deal Era, during which “[i]n [t]he authority traditionally enjoyed by states was rapidly transferred to the national government.” BREYER ET AL., supra note 1, at 22.

204. Interestingly, this may also explain one aspect of *Mississippi Power & Light Co. v. Mississippi*, in which the Court considered whether FERC’s proceedings related to the construction of a new power plant preempted state regulation. *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 356–77 (1988). Avoiding a question about whether *Chevron* deference applied, the majority stated only that FERC’s jurisdiction had “been established.” *Id.* at 374. Other courts have expressly noted that the Supreme Court was avoiding *Chevron* questions by finding the agency’s authority to be clearly based on the applicable statute. *See, e.g.*, *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1415 n.3 (10th Cir. 1992) (“[T]hese cases do not discuss the potential application of the analysis outlined by the Supreme Court in *Chevron*. . . . Because we can safely hold that the Commission properly asserted jurisdiction in this case, even without deferring to the Commission’s own interpretation, we will not inquire further into that question.”); *Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990) (questioning whether *Chevron* was applicable, but finding that the court did not have to decide the issue because it was clear that the SEC was attempting to regulate in an area traditionally left to the states).

205. This section offers an approach that attempts to ascertain Congress’s intent directly by looking at its own actions, rather than identifying cases where aggrandizement or self-interest is present.
Notwithstanding this point, reference to subsequent congressional action is problematic. First, there are difficult conceptual questions: Why should the action of subsequent or current legislatures affect our understanding of what past legislatures intended when they delegated to the agency in the first place? Conversely, what relevance does the past legislature’s intent have at all, if one purpose of delegation is to empower government to adapt quickly when circumstances and knowledge change? These issues aside, there are still practical questions: What level of congressional action is sufficient to constitute an expression of Congress’s intent? Approval of a bill by both houses? Debate in one or both houses? Debate in congressional committees? The interest of a single representative or senator? Is there even a single congressional intent that can be discerned, given that so many individuals (each with different interests) make up “the” Congress? Finally, can we infer intent from inaction, as well as positive action, by Congress?

While it is beyond the scope of this Note to address all of these issues, they inform a critical approach to the consideration of subsequent congressional action. Generally, they show that there are two concerns when courts look at subsequent legislative action: (1) the reliability of the action as an indicator of what Congress intends or intended, and (2) the relevance of the subsequent action as to the statute’s actual meaning. Statements of individual legislators or congressional committees are unreliable “given the passage of time, the incentive for strategic deception of others and of oneself, the absence of any check on or consequences from what is said, the possibility of individual changes of mind, and the fact that no one is listening.” Courts are also concerned about the reliability of inferences made from inaction because “legislative inaction can have all sorts of explanations . . . including ignorance, the press of other business, disagreement as to what should replace the prevailing error, confusion over what the status quo is, filibuster or other minority procedural maneuver, fear of a presidential veto, or all manner of political calculations.” In the case of congressional inaction, another primary concern is relevance, because “a legislative atmosphere is not a law, unless it is embodied in a statutory word or phrase.”

206. See Herz, supra note 144, at 10,155–158.
207. Id. at 10,156.
208. Id.
209. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 191 (2000) (Breyer, J., dissenting). There is no clear-cut answer as to whether this view is correct. As Michael Herz notes, the “debate over later legislative developments is itself part of a larger debate about whether statutory meaning and statutory interpretation can be, should be, or unavoidably are, dynamic.” Herz, supra note 144, at 10,157.
Notwithstanding these difficulties, both Brown & Williamson and the more recent case Nutritional Health Alliance v. FDA held that Chevron deference was not owed to the FDA’s interpretation when it conflicted with congressional action taken after passage of the FDCA. In Brown & Williamson, the Court reviewed “the tobacco-specific legislation that Congress ha[d] enacted over the past 35 years.” Noting that the FDA had expressly denied authority over tobacco products at the time the legislation was passed, the Court stated that “Congress’ tobacco-specific legislation . . . effectively ratified the FDA’s previous position that it [lacked] jurisdiction to regulate tobacco.” The Court apparently concluded that concerns about reliability were minimal because it had numerous examples of congressional action from which it could infer intent. Also key was the fact that Congress had “considered and rejected several proposals to give the FDA the [express] authority to regulate tobacco.” Implicit in this analysis was the Court’s conclusion that subsequent legislative history was also relevant to the meaning of the FDCA.

210. Nutritional Health Alliance v. FDA, 318 F.3d 92 (2d Cir. 2003).
211. See id. at 102–03. In comparison, numerous cases have given deference when subsequent legislation confirmed, or at least acquiesced to, see infra note 228 and accompanying text, the agency’s interpretation. See, e.g., Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 844–46 (1986) (finding that Chevron deference was “especially warranted” for the CFTC’s assertion of jurisdiction over counterclaims because “Congress [had] twice amended the [Commodity Exchange Act] since the CFTC declared by regulation that it would exercise [such] jurisdiction . . . but has not overruled the CFTC’s assertion of jurisdiction”); Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1250 (10th Cir. 2004) (finding FTC is entitled to deference under Chevron and that “even if some doubt once existed, Congress erased it through subsequent legislation”); Tex. Utils. Elec. Co. v. FCC, 997 F.2d 925, 927, 930 (D.C. Cir. 1993) (finding an agency’s interpretation reasonable under Chevron step two and noting that Congress “was surely aware of the agency’s longstanding view” when it passed the statutory provision at issue).
212. Brown & Williamson, 529 U.S. at 143.
213. As indicated supra in note 140, the Court expressly denied that it was scrutinizing the agency’s interpretation simply because it had changed its position:

The consistency of the FDA’s prior position is significant in this case for a different reason: It provides important context to Congress’s enactment of its tobacco-specific legislation. . . . Although not crucial, the consistency of the FDA’s prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position.

Id. at 157.
214. Id. at 156.
215. Id. at 147.
216. Commentators have thus noted that this represents a very broad application of Chevron step one, an application that went “far beyond the language of the text.” Herz, supra note 144, at 10,155. Thus, Brown & Williamson can be seen as “a significant step toward a dynamic understanding of statutes,” an understanding that assumes that subsequent legislative history is at least sometimes relevant to the proper construction of the statute. Id. at 10,158. Lest one doubt the persuasiveness of this reading of Brown & Williamson, Herz also notes that the majority was comprised of Justices (most notably Rehnquist, Scalia, and Thomas) who tend to advocate that “the only constitutionally relevant action [Congress] can take is to make laws” and thus “take a rather formal view of what constitutes
Brown & Williamson, however, was exceptional because the Court was looking at numerous congressional actions, taken over a span of years. Judges rarely have so many materials with which to decide whether subsequent action is relevant. In this vein, Nutritional Health Alliance is more typical. There, the FDA issued a rule requiring the makers of iron-containing drugs and dietary supplements to package them in a certain way. Concerned that children were getting “acute iron poisoning[]” after finding bottles of medications containing iron, the FDA wanted manufacturers to package them in nonreusable containers, each holding only a single dose.

Interestingly, the court rejected the agency’s interpretation at step two. Citing Brown & Williamson’s proposition that “subsequent acts can shape or focus” the meaning of a statute, the court examined the Poison Prevention Packaging Act (“PPPA”) and the Consumer Product Safety Commission Act (“CPSA”), both passed after the FDCA. The PPPA explicitly granted authority to the FDA to “enforce regulatory standards for the ‘special packaging’ of any ‘household substance’ found to be a hazard to children.” More importantly, the CPSA transferred this authority from the FDA to the CPSC. The FDA based its assertion of authority on a reading of the FDCA’s general provisions about “adulterated” products, giving the FDA authority to regulate a product “packed . . . under insanitary conditions whereby it may have . . . been rendered injurious to health.” The court held that the subsequent legislation controlled: “[E]ven assuming arguendo that the [FDCA was] ambiguous, we would binding statutory law and are reluctant to look beyond the applicable statutory text itself.”

217. Nutritional Health Alliance v. FDA, 318 F.3d 92, 94 (2d Cir. 2003).
218. Id. at 95–96.
219. The court also performed a step one analysis and concluded that “the plain language of [the FDCA fails] to delegate to the FDA authority to require manufacturers of iron-containing products to use unit-dose packaging in the absence of any showing by the FDA that iron-containing product may be adulterated without such packaging.” Id. at 101. It is not clear why the court then also needed to conduct a lengthy analysis of step two. See id. at 101–05. While it is interesting to note that the court was apparently more comfortable dealing with subsequent legislative history at step two, one wonders if the court was entirely convinced by its own holding that the FDCA was “clear” on this issue.
220. Id. at 102.
223. Id.
224. Id. at 103 (quoting the PPPA, 15 U.S.C. § 1472(a) (2000)) (internal footnotes and quotations omitted).
225. Id. at 104.
find the FDA’s interpretation of those provisions impermissible because... the [PPPA] specifically and unambiguously targets the accidental poisoning problem.”

These general observations from Brown & Williamson and Nutritional Health Alliance can be fashioned into a workable analysis. As a first step, when presented with an agency interpretation that arguably conflicts with congressional action taken since the statute’s enactment, courts should deal with reliability concerns. The cases seem to require enactment of a bill as a reliable indication of Congress’s position. It is also likely that Congress intends the agency’s interpretation to be authoritative when it reenacts a provision that the agency has already interpreted. Because Congress has already made the effort to reenact the statute, it likely considered whether changes were necessary, even if it did not actually make them.

Next, courts must deal with relevance concerns. In a case in which numerous congressional actions can be evaluated, Brown & Williamson suggests that relevance can be assumed and judges can focus on making sense of those enactments. Where there are fewer provisions, however, the approach will likely need to mirror that of Nutritional Health Alliance. The court may look to whether Congress has either (1) expressly given the disputed power to another agency, or (2) enacted a subsequent provision that squarely covered the subject matter over which the agency was asserting jurisdiction. This latter circumstance is even more persuasive when the agency’s interpretation is based on a provision only vaguely related to the subject matter.

B. IMPLEMENTING THE MULTIFACTOR APPROACH

This section summarizes the analysis of the factors presented here, showing how they fit the approach already suggested by Mead. Taking Mead one step further, however, this multifactor approach enables courts to determine at step zero whether Congress would likely have wanted the agency to receive deference by looking at both the procedure the agency used to make its interpretation, as Mead already requires, and the substantive characteristics of the interpretation that suggest the presence of

227. Id. at 104.
228. See Herz, supra note 144, at 10,157 for a fuller discussion of how reenactment of a statute already subject to administrative interpretation diminishes reliability and relevance concerns.
229. In this sense, the Nutritional Health Alliance court may also have been concerned with interagency aggrandizement. Thus, the point made supra in the text accompanying note 170 is applicable: while such aggrandizement does not in itself indicate that the agency is acting contrary to Congress’s intent, it can be inferred that Congress would not expressly delegate an authority to one agency and implicitly delegate to another at the same time.
agency aggrandizement or self-interest. The section concludes by defending this approach against potential criticism and showing that it is largely a clarification of existing *Chevron* doctrine.

The overall purpose of a step zero analysis would be to identify cases in which Congress would not likely intend for the agency to get full *Chevron* deference. The presence of agency aggrandizement or self-interest makes it unlikely that Congress would have wanted courts to defer to the agency, as does a reliable and relevant statement from Congress itself, indicating that the agency’s position is incorrect.

The first factor for a court to consider in making this determination is whether the agency’s interpretation represents a change from its previous position. This factor signals that the agency’s interpretation may be the result of self-interest or aggrandizement. Another possible explanation of change, however, is that new facts, expertise, or policy considerations have become available, so this factor is not sufficient for proving that self-interest or aggrandizement is present. Second, courts can look to see if aggrandizement is present in the form of agency encroachment on Congress or the judiciary, with respect to the relevant statute. Third, the court should determine if there are federalism implications of the agency’s interpretation because these may be cases of innocent self-interest. Finally, the court should evaluate whether the agency’s position is inconsistent with congressional action taken since the agency’s enabling statute was enacted. Courts should be careful to ensure that the subsequent legislative activity is both a reliable and a relevant indicator of Congress’s intent.

*Mead* instructs courts to give *Skidmore* deference if the agency’s interpretation is persuasive, even if *Chevron* deference is not warranted. Thus, the presence of one or more of these factors may trigger a *Skidmore* analysis of the agency’s interpretation. Interestingly, the Supreme Court precedent affords no deference to the agency’s position when federalism is implicated. To the extent that judges have expertise in dealing with federalism concerns, this makes some sense. The better view, however, is that *Skidmore* deference should be afforded because one goal of statutory interpretation is to achieve the best execution of the federal regulatory scheme, and the agency’s expertise in that vein cannot be denied.

Courts have never articulated, however, what amount of weight should be given to each factor, nor whether any one factor is independently sufficient to trigger *Skidmore* deference. Thus, a notable feature of this analysis is that it is more indeterminate and complicated than the present rule of *Chevron* deference for all agency interpretations of law that meet the procedural requirements of *Mead*. The *Mead* approach has itself been
criticized for being unworkable and confusing, providing strong arguments against the approach presented here.

Primarily, these concerns go to the decision costs of the post-Mead deference analysis because they emphasize the time, difficulty, and expense that will be associated with considering multiple factors. The more rule-like nature of *Chevron* offers the advantage of simplicity because rules are generally “more predictable and easier to enforce than standards.”

Specifically, rules help reduce uncertainty for courts and litigants, as well as agencies and Congress. Second, rules can help reduce decision costs for courts. Both of these effects stem from the fact that rules “reduce the range of facts and questions that are legally relevant.” Finally, rules may reduce error costs. This is especially true when judges “have identified a set of circumstances in which certain outcomes are nearly always justified . . . [and] the rule identifies the appropriate circumstances in a consistent and predictable fashion.”

Yet a debate about whether rules or standards are better is “impossible to resolve . . . in the abstract.” The most important weakness of rules is that they are usually overinclusive or underinclusive. Because rules “attempt to specify outcomes before particular cases arise,” there is an inherent danger that a rule will “produce arbitrariness and errors . . . [because] the justifications that underlie the rule will not support all instances to which the rule applies.” Thus, rules are inappropriate when judges are “ignorant about relevant facts, values, and future developments or circumstances.”

Given these considerations, there are several reasons why the multifactor approach suggested by *Mead* and developed here will minimize error costs and promote certainty without significantly increasing these costs. To begin, Section IV.A presented a largely descriptive analysis of

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232. *Id.*
233. *Id.*
234. Merrill & Hickman, *supra* note 9, at 863.
236. Merrill, *supra* note 30, at 826.
238. *Id.* at 992. This point goes to the problem of overinclusiveness. Conversely, rules can be considered underinclusive to the extent that the justification for a rule calls for a particular outcome, but the terms of the rule itself do not apply to the case at hand.
239. *Id.* at 958. See also Sunstein & Vermeule, *supra* note 33, at 948 (arguing that judges “might reasonably limit their decisions to particular facts for fear that broad decisions will have unfortunate systematic effects and prove too crude to handle situations not yet subject to briefing and argument”).
how *Chevron* is applied when agencies’ jurisdictional interpretations are challenged. The analysis showed that courts are often concerned about more than whether the statutory text is clear at step one.\textsuperscript{240} Thus, the courts seem unwilling to give up searching review in some cases, even if they are also unwilling to admit that they are not following the *Chevron* deference-or-no-deference paradigm.\textsuperscript{241} Since courts are already analyzing the factors discussed in this Note, it is unlikely that expressly evaluating them in a step zero analysis will considerably increase decision costs.

Consideration of error costs also suggests that this multifactor analysis will be significantly better than the current default rule of *Chevron*. A default rule is inappropriate in this context because judges cannot identify a single general circumstance that makes *Chevron* deference unjustified. A general rule that excludes “jurisdictional” cases from *Chevron* deference would result in a high rate of error. It would be underinclusive because it is difficult to distinguish between cases that are jurisdictional and those that are not, and courts may not correctly label problematic cases as jurisdictional.\textsuperscript{242} Even assuming this line could be drawn, the rule would still be overinclusive because the real concerns are agency aggrandizement and self-interest; these concerns are not present in all cases that can be classified as jurisdictional.

Finally, the multifactor analysis promotes certainty. Indeed, there is little certainty now because the question of whether *Chevron* deference should be given to agency interpretations of their own jurisdiction is as yet unanswered. Moreover, the fact that courts already consider the factors described here makes the *Chevron* doctrine a prime exemplar of the principle that rules tend to drive discretion “underground.”\textsuperscript{243} Thus, there is

\textsuperscript{240} Other commentators have observed that because courts consider “common sense, and legal context” in the step one inquiry, the “[h]ow clear is clear” standard under *Chevron* varies from case to case. Herz, supra note 144, at 10,154–155. Herz made this point quite forcefully, saying that “[t]here is no metric for quantifying the statutory clarity and no mechanism for policing judicial assertions that a disputed text is ‘clear.’ Judges tend to be, or at least pretend to be, pretty confident in their conclusions.” Id. at 10,155.

\textsuperscript{241} Even though the *Chevron* “rule” is still the law, this Note confirms that courts often find themselves agreeing with Breyer’s position on deference, discussed supra in note 14. Others have stressed that a universal *Chevron* rule will likely “lead to over-application and hence dilution of the idea of mandatory deference.” See Merrill & Hickman, supra note 9, at 859.

\textsuperscript{242} The converse is also true, meaning that a jurisdictional rule could be overinclusive for the same reason. See Mendelson, supra note 112, at 796 (“[W]ithdrawing *Chevron* deference from jurisdiction-related interpretations might create . . . overly high costs [such as when courts] might erroneously identify a run-of-the-mill interpretive question as a jurisdiction-related question not deserving of deference.”).

\textsuperscript{243} See, e.g., Sunstein, supra note 235, at 994–95. Sunstein offers a parallel to the “underground” discretion discussed in this part, noting that “[j]ury nullification of broad and rigid rules is a familiar and often celebrated phenomenon.” Id. at 995 (internal quotation omitted). The use of factors is often the chosen antidote to a rule that functions poorly in practice. Id. at 996–1003. Sunstein
considerable uncertainty, given that courts currently use discretion to take into account aggrandizement and self-interest concerns in the step one inquiry. Using a more explicit step zero analysis better informs agencies and courts as to what the critical issues in litigation are, because it identifies the relevant factors and makes analysis overt.

V. CONCLUSION

Mead takes Chevron’s congressional intent rationale seriously, requiring courts to consider factors that weigh against the likelihood that Congress would have wanted the agency’s interpretations to be authoritative. When agency aggrandizement or self-interest is present, there is reason to doubt that Congress intends for courts to defer to the agency. Since these concerns may be present when an agency interprets its own jurisdiction, courts and commentators are right when they declare that Chevron deference should not apply to an agency’s interpretation of its own jurisdiction—at least partially.

A general rule ignores the realities of administrative interpretation. First, it is difficult to classify agency interpretations as either jurisdictional or nonjurisdictional, and there are aspects of most agency interpretations that implicate the agency’s jurisdiction. Second, not all interpretations with a significant jurisdictional impact implicate aggrandizement or self-interest. Aggrandizement is only present when the agency seeks to increase its own power at the expense of another institutional actor in the federal government, and self-interest only when the agency attempts to assert more power over the entities it regulates than Congress intended.

Because expertise, democratic accountability, and flexibility greatly enhance an agency’s ability to interpret regulatory statutes, courts need to carefully limit the cases where deference is rejected to those where aggrandizement or self-interest is actually present, or where courts can directly determine that the agency’s interpretation is contrary to congressional intent. In order to identify these cases, a court must look at the substance of the interpretation in an expanded step zero analysis. The analysis should focus on indicators that aggrandizement or self-interest are present, such as the presence of a change from the agency’s previous interpretation, encroachment on traditional congressional or judicial roles, significant federalism concerns, or conflicts with congressional action taken since the agency’s enabling statute was enacted. Courts should also

also notes that “[t]he line between rules and factors is one of degree rather than kind. . . . [R]ules are rarely or never unbending . . . [and] factors are not open-ended grants of discretion.” Id. at 996.
evaluate subsequent legislation that might express Congress’s intent as to
the particular interpretation involved.

Adoption of this multifactor approach should not significantly
increase decision costs for courts because they already take these concerns
into account at step one. The step zero approach addresses the core
concerns animating the call for a rule against deference for jurisdictional
interpretations, but avoids the error costs of a general rule by focusing on
identifying cases where aggrandizement, self-interest, or agency action
contrary to Congress’s intent are actually implicated. The approach also has
the ultimate benefit of promoting certainty for both courts and agencies
because the step zero inquiry requires direct analysis of identified factors.
Thus, this is a considerably clearer approach than the indirect analysis of
unarticulated factors that courts currently perform at step one.