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ADMINISTERING THE SPECTRUM OF DEFERENCE IN THE ADMINISTRATIVE AGE

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INTRODUCTION

Few cases in American history have garnered the amount of attention from academics, lawyers, and courts as the Supreme Court's 1984 decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[1] While the decision was initially handed down without much fan-fare, it would eventually emerge as a "revolutionary" precedent for judicial deference that overshadowed the prior Court decisions regarding judicial deference to administrative agencies.[2] Today there is little doubt that few

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[1] 467 U.S. 837 (1984).

[2] Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1279 (2008) ("*Chevron* did spark a genuine revolution—by challenging the reigning principles of certainty and finality in statutory interpretation."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613-14 (1996) ("Exhaustive academic commentary has scrutinized *Chevron*'s legitimacy, and explored the seemingly innumerable questions that arise from its

Supreme Court decisions have been as impactful as *Chevron*.[3] Much of this impact is due to the fact that *Chevron* is often considered by scholars to have supplanted all prior Supreme Court decisions regarding agency deference with a singular protocol for courts to allocate deference. Academic fascination with *Chevron* conjures an image of the sudden emergence of a black hole in the center of a constellation of preexisting deference standards; the weight of the *Chevron* precedent sucked in the older jurisprudence relating to judicial deference and collapsed it into a single, uniform deference regime. That narrative, however, is incomplete. Numerous stars in the pre-*Chevron* galaxy continue to serve as centers of gravity separate and apart from the *Chevron* black hole. That narrative also fails to consider if and when alternative deferential standards should be applied to agency determinations.[4] In light of this reality, the Supreme Court should develop a robust but flexible system for applying the appropriate level of judicial deference.

Since the Supreme Court decided *Chevron* in 1984, it has continued to apply several alternative forms of deference in a number of cases. The most commonly discussed alternative

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application."); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) ("[T]he importance of the case far exceeds that of the Supreme Court's more celebrated constitutional rulings on the subject of separation of powers in the 1980s, probably even if all of these are taken together."); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 307 (1986) ("*Vermont Yankee* and *Chevron* have nonetheless produced a revolution in administrative law. They have not only changed and refined particular doctrines, but, more importantly, they have changed—and will continue to change—the way courts conceive of their relationship to administrative agencies.").

[3] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 823 (2006) (proclaiming *Chevron* to be the "most cited case in modern public law").

[4] *See* United States v. Mead, 533 U.S. 218, 237 ("The Court, on the other hand, said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on statutory circumstances and agency action; *Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference.").

deference standard was first articulated in *Skidmore v. Swift & Co.*,[5] where the deference afforded to an agency's decision is limited to that decision's "power to persuade."[6] *Skidmore's* continued prominence is due to *United States v. Mead*,[7] wherein the Supreme Court explicitly (re)established *Skidmore* deference as an exception to *Chevron* deference when the agency interpretation does not carry the binding force of law.[8] *Skidmore* deference, however, is not the only form of agency deference that has survived the purging weight of *Chevron*. In their 2008 empirical study of post-*Chevron* Supreme Court decisions addressing judicial deference, Professors William N. Eskridge and Lauren Baer found that courts continue to apply a variety of distinct deference regimes which predate *Chevron*.[9] Professors Eskridge and Baer grouped each of these deference standards into categories of deference named after the originating case and placed them on a continuum of deference according to the level of scrutiny applied by the courts.[10] This continuum of deference is reproduced below and arranged from least deferential to most deferential:

- "Anti Deference": While not associated with any particular case, these cases involve the Court adopting a canon of construction that cuts against the litigation position of the agency in question. This may occur in criminal cases when the rule of lenity is applied as well as in certain cases where the canon of constitutional avoidance defeats the government's proposed interpretation of a statute. Anti-deference also occurs

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[5] 323 U.S. 134 (1944).
[6] *Id.* at 140.
[7] 533 U.S. 218 (2001).
[8] *Id.* at 235.
[9] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008).
[10] *Id.* at 1098.

when the Court finds that the "extraordinary case" exception to judicial deference applies.

- No Deference: Unlike anti-deference where the Court will analyze the statute in ways that frequently cut against the interpretation of federal agencies, under the "extraordinary case" exception to judicial deference, the court engages in *de novo* review of the statute at issue.
- *Skidmore*: [11] The deference afforded to an agency interpretation expands and contracts based on the agency decision's persuasive power.
- *Chevron*:[12] Establishes two-step analysis providing for deference to reasonable agency interpretations if statutory language is first found to be ambiguous.
- *Beth Israel Hospital v. National Labor Relations Board*:[13] A labor-specific deference regime similar to *Chevron* wherein courts defer to reasonable agency interpretations found to be consistent with the statute.
- *National Muffler* and *Fawcus*:[14] A tax-specific deference regime that affirms agency interpretations of the statute if they implement a Congressional mandate in some reasonable manner.
- *Seminole Rock*:[15] A relatively strong form of deference afforded to agency interpretations of their own regulations.
- *Curtiss-Wright*:[16] The strongest form of deference. It is afforded to executive actions on foreign affairs and national security.

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[11] *Skidmore*, 323 U.S. at 134.
[12] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
[13] Beth Isr. Hosp. v. Nat'l Labor Relations Bd., 437 U.S. 483 (1978).
[14] Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979); Fawcus Mach. Co. v. United States, 282 U.S. 375 (1931).
[15] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

These deference regimes have given rise to largely self-contained strands of Supreme Court jurisprudence related to judicial deference. For instance, while the *Beth Israel* and *National Muffler* deference appear similar to that of *Chevron*, cases involving actions by the National Labor Relations Board ("NLRB") cite almost exclusively to *Beth Israel* rather than *Chevron*.[17] Similarly, *National Muffler*, another example of a deference standard that imposes a "reasonability" standard on agency interpretations, stood alone as the source of deference afforded to the Internal Revenue Service (IRS) and Treasury Department when interpreting portions of the tax code.[18] Despite the "revolutionary" nature of Chevron, many of these deference standards continue to be implemented by the Court.[19] These deferential standards are largely cordoned off from one another with cases under one deferential standard rarely citing to cases from other standards.[20] The boundaries between these deference silos, however, remains largely unclear and many agencies are left with little guidance on what form of deference their action will receive from a reviewing court.

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[16] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

[17] Eskridge & Baer, *supra* note 9, at 1106 (citation omitted) ("Although the Court has sometimes invoked *Chevron* deference for NLRB orders, it did not do so in *Auciello Iron Works, Inc. v. NLRB* . . . Instead, the Court briefly noted the 'considerable deference' it has long accorded the Board's judgments pursuant to 'its charge to develop national labor policy.' Its primary citation was to *Beth Israel Hospital v. NLRB*.'").

[18] *Id.* at 1108-09 ("[T]he Court rarely applies *Chevron* to IRS interpretations. If a deference regime is applied, it is usually the pre-*Chevron* regime associated with *National Muffler Dealers v. United States*.").

[19] *E.g.*, Auer v. Robbins, 519 U.S. 452, 461 (1997) (relying on a line of cases based on *Seminole Rock* deference and citing to *Chevron*); Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) (citing *Curtiss-Wright* to support the Court's deference to the Secretary of State on the issue of listing "Israel" as a place of birth on a U.S. passport).

[20] *See, e.g.*, Auciello Iron Works, Inc. v. Nat'l Labor Relations Bd., 517 U.S. 781, 787-88 (1996) (relying on *Beth Israel* deference to uphold an NLRB order requiring employer to cease and desist from unfair labor practices and omitting any discussion of *Chevron*).

This note argues that not only should these different deference standards persist, but also that courts must develop a system for applying the different deference standards. The note ends by proposing a balancing test that takes into consideration the private interests affected and the agencies' authority and expertise in the issue under consideration, among other factors.

This paper is divided into three sections. The first section discusses the history and reasoning of the Court before and during the administrative revolution of the 1930's and 1940s. The section discusses the history and origins of these deference standards in order to better understand the Court's original reasoning. In the second section, those historical trends are contrasted with the deference cases of the 1970s and 1980s. While the Court's deference jurisprudence did not develop as quickly during these later decades, the Court did begin to coalesce around relatively new justifications for deference that were in sharp contrast to the reasoning of earlier courts. The third section argues that there are valid reasons for the continued existence of these multiple deference regimes and that courts need to establish clear principles for applying different deference standards which appropriately address the size and complexity of the modern administrative state. Given the reality of the modern administrative state, often referred to sardonically as the federal government's "fourth branch,"[21] and the improbability of its disappearance, it is absurd that the entirety

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[21] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 669 n.16 (1984) ("[Administrative bodies] have become a veritable fourth branch of Government, which has deranged our three-branch legal theories."); Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190 (2011) ("[S]ome have called the independent agencies a 'headless fourth branch' of government."); Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1221 (2014) ("The statutes, judicial decisions, and executive directives that perform these functions make up an unwritten constitution that governs the fourth branch of government not contemplated by the written Constitution.").

of agency action can be accounted for in a single standard, or even in two standards (*Chevron-Mead* or *Chevron-Skidmore*). The traditional justifications for deference may no longer be the sole justifications, but they remain valid in certain circumstances. To this end, the Court should develop a balancing test for determining the proper application of these deference standards. Such a test that considers the private interests affected by the decision as well as the government's interest and agency expertise and congressional delegation of authority allows for a courts to be flexible and responsive to the wide range of agency actions.

I. ORIGIN OF THE MODERN ADMINISTRATIVE STATE: DEVELOPMENT OF AGENCY DEFERENCE BETWEEN THE 1920S-40S

The 1930s and 1940s witnessed a revolution in the administrative state. By the 1940s, the Court presumed that administrative agencies should be afforded some form of deference, even if it had not settled on any single system or standard of deference. [22] This presumption of deference, however, was an evolution in Supreme Court jurisprudence that stood in sharp contrast to pre-New Deal precedent.[23]

A. PROTO-DEFERENCE IN THE PRE-NEW DEAL ERA

The jurisprudence on the relationship between courts and agencies prior to the New Deal is unclear. While statutes that

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[22] Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 433-34 (2007) ("Indeed, by the end of the 1940s, the Court viewed deferring on these types of issues as an unremarkable and self-evident principle of administrative law . . . .").

[23] *Id.* at 402 ("Progressives and their New Deal-era descendents [sic] demanded that courts stay out of the administrative process. Judges, they argued, did not possess the expertise necessary to understand the issues that agencies had to address, issues like the hydrological features of the Ohio River Valley.").

established administrative agencies frequently provided for some judicial review of final administrative action, there was no single statute or legal theory that clearly articulated this relationship.[24] In reviewing these early cases, the Supreme Court's approach was often inconsistent with precedent and the statutes' text. On several occasions, the Supreme Court ignored key language from enacting statutes that limited the Court's jurisdiction and reviewed the administrative action *de novo*.[25] The law provided little guidance to the courts in determining the nature of this relationship; in the wake of this ambiguity, the courts attempted to adapt common law doctrines to the review of agency decisions.[26] The rise of the administrative state thrust courts into the midst of heated political debates where their precedent provided incomplete and contradictory guidance.[27]

The courts in this decade began to tentatively apply judicial deference to certain forms of agency action, but often retreated to presumptions of judicial supremacy. In *Ohio Valley Water Co. v. Ben Avon Borough*,[28] the Court considered the Ohio Valley Water

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[24] The Administrative Procedure Act did not come into existence until 1946.

[25] *E.g.*, Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 423 (1920) (holding that courts, not the Federal Trade Commission, were to define unfair trade practices despite language in the Federal Trade Commission Act of 1914 establishing that agency findings of fact are to be deemed "conclusive" when "supported by testimony").

[26] Schiller, *supra* note 22, at 407 ("Contemporary scholars including Ernst Freund, the *pater familias* of the discipline we now call administrative law, recorded the use of a host of common law doctrines to challenge agency actions: damage actions in tort or contract; writs of mandamus, certiorari, *quo warranto*, prohibition, and habeas corpus; as well as injunctions and declaratory judgments.").

[27] Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 21 (2006) ("Before the massive increase in the administrative structure, courts were the clear interpreters of statutory mandates. The courts resolved ambiguity, filled gaps in legislation, and ultimately created a common law. The New Deal sought to change the existing power structure of interpretation, moving authority to resolve ambiguous law from the judiciary to the newly minted administrative structure."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 19 (2006).

[28] 253 U.S. 287 (1920).

Company's determination of property values for the purpose of setting rates.[29] The Supreme Court held that since an improper valuation of property could result in a constitutional violation, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own *independent judgment* as to both law and facts."[30] Despite the complexity of property valuation, the Court determined that agency expertise did not warrant judicial deference because constitutional rights may be implicated in the agency action.[31]

The Court's apprehension towards agency deference was not limited to judicial review of actions by state agencies. In *Crowell v. Benson*, [32] when reviewing the actions of the Employees' Compensation Committee, a federal agency, related to a system of worker's compensation for injuries of longshoremen and harbor workers, the Court once again held that the implication of a petitioner's constitutional rights warranted judicial review and prohibited granting any deference to the agency.[33] While the majority opinion discussed the need for judicial deference to administrative fact findings on certain issues, it relegated this

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[29] *Id.* at 288-89.

[30] *Id.* at 289 (emphasis added).

[31] *Id.* ("Here the insistence is that the Public Service Company Law as construed and applied by the [Pennsylvania] Supreme Court has deprived plaintiff in error of the right to be so heard."); *see also* Borough of Ben Avon v. Ohio Valley Water Co., 103 A. 744, 745 (Pa. 1918) (citing language from state precedent about the complexity of establishing schedules of rates or tolls), *rev'd*, 253 U.S. at 287. The Court has maintained elements of this skepticism towards agencies when civil rights are implicated. *See, e.g.*, Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 193 (1989) (Marshall, J., dissenting) ("The majority's derogation of this dual agency interpretation leaves one to wonder why, when important civil rights laws are at issue, the Court fails to adhere with consistency to its so often espoused policy of deferring to expert agency judgment on ambiguous statutory questions.").

[32] 285 U.S. 22 (1931).

[33] *Id.* at 60 ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

deference to peripheral matters and retained the role of fact-finder for the most "fundamental or jurisdictional" facts.[34] Unlike the modern *Chevron* standard where ambiguity or silence in the statute is interpreted as delegation to the agency, the Court in *Crowell* held that the task of considering cases belonged to the courts *unless* a statute explicitly required deference be afforded to the agency.[35] As agency deference initially developed, the Court was wary of the implications for the protection of individuals' constitutional rights.

B. RANGE OF AGENCY DEFERENCE IN THE NEW DEAL

Following the explosion of federal agencies during the New Deal, the Court explored different strategies for allocating deference to agency decisions. Between 1931 and 1946, the Court applied four distinct forms of judicial deference that remain relevant today. The eponymous cases for these deference regimes include *Fawcus Machine Co. v. United States*,[36] *Skidmore v. Swift & Co.*,[37] *Bowles v. Seminole Rock & Sand Co.*,[38] and *United States v. Curtiss-Wright Export Corp.*[39] The uncertainty experienced by courts grappling with competing deference regimes continues today.

The Court's reasoning for granting deference to agency decisions in this period was premised on a variety of justifications. One early justification for judicial deference relied on the temporal origination of the agency action. Much like the Court applies the First Congress Canon by considering the actions of the early

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[34] *Id.* at 46.
[35] *Id.* ("Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted.").
[36] 282 U.S. 375 (1931).
[37] 323 U.S. 134 (1944).
[38] 325 U.S. 410 (1945).
[39] 299 U.S. 304 (1936).

Congress to be especially informative of the Framers' intent,[40] the Court would often grant deference to agency regulations that were "contemporaneous constructions" with the statutes that enabled the agency action.[41] Courts also valued consistency in the agency regulations.[42] In contrast to modern precedent that considers agencies as more democratically accountable than courts, these cases from the New Deal era emphasized agencies' expertise and insulation from the democratic process.[43] Absent from the jurisprudence of this period is the notion of Congressional delegation of authority to agencies; the Court's opinions remained largely silent with regard to delegation theories as a justification for judicial deference until 1944.[44]

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[40] Michael Bhargava, Comment, *The First Congress Canon and the Supreme Court's Use of History*, 94 CALIF. L. REV. 1745, 1746 (2006) ("The *Eldred* decision is only the most recent example of the Supreme Court's use of a method of constitutional interpretation that looks to the actions of the First Congress as weighty or even dispositive evidence of the meaning of the Constitution. The Court has sporadically trotted out this First Congress canon of constitutional interpretation in more than thirty decisions over the last 200 years.").

[41] *E.g.*, Comm'r v. S. Tex. Lumber Co., 333 U.S. 496, 501 (1948) ("This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons.").

[42] *Id.*

[43] Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 453-54 (2013) ("These conflicting views of agencies—as technocratic experts insulated from political pressure in the minds of the Roosevelt Democrats and as antithetical to individual freedom in the minds of the Republicans and the Southern Democrats—shaped the Court's view of agencies from the late 1930s through the early 1960s.").

[44] *See* Yakus v. United States, 321 U.S. 414, 425-26 (1944) ("Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.").

1. Fawcus Machine Co. v. United States

In *Fawcus Machine Co. v. United States*,[45] decided the same year as *Crowell*, the Court deferred to an IRS interpretation of the Revenue Act of 1918.[46] Unlike in *Crowell*, however, the Court found that Congress did explicitly delegate authority to enforce the Revenue Act to the Commissioner of the IRS.[47] When such a delegation was explicit, the agency's regulations were "valid unless unreasonable or inconsistent with the statute."[48]

The Court's brief analysis provides little legal justification for the decision to defer to the agency. The standard articulated is similar to the *Chevron* standard for deference, which requires only reasonable agency action in order for deference to inhere.[49] Unlike *Chevron*, however, deference to the agency under *Fawcus* is not contingent on statutory silence or ambiguity. The reviewing courts noted that in deferring to the agency interpretation, the Court did consider whether or not Congress decided to explicitly delegate such authority to the agency in the statute.[50] The Court also reasoned that deference was appropriate in light of regulations' "contemporaneous construction," wherein the agency establishes a regulation interpreting a statute either simultaneously or shortly after the passage of the statute.[51] Also valued were consistency in the application of the statute[52] and agency expertise.[53]

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[45] 282 U.S. 375 (1931).
[46] *Id.* at 378.
[47] *Id.*
[48] *Id.*
[49] *Id.* ("[Agency regulations] are valid unless unreasonable or inconsistent with the statute").
[50] *Id.* (deciding that the agency acted reasonably based on express authority conferred by Congress).
[51] *Id.* ("The United States replies that it is, and since 1914 it has been, required that a taxpayer shall keep his books and make his returns on a basis which will reflect true income . . . The position of the government is sound.").
[52] *Id.*
[53] *Id.*

Despite the similarity to the *Chevron* deference paradigm, *Fawcus* deference initially survived *Chevron*,[54] but was evoked exclusively in cases involving the IRS. The precedent regime derived from *Fawcus* and its progeny ceased to exist in 2011 when the Supreme Court ruled that *Chevron* deference governed cases involving the IRS.[55]

2. Skidmore v. Swift & Co.

The Court's 1944 decision in *Skidmore v. Swift & Co.*,[56] where the deference afforded to an agency action is directly proportional to the agency decision's persuasive power,[57] was explicitly revitalized by the Supreme Court in *United States v. Mead Corp.*[58] In *Skidmore*, the Court found that the Administrator of the Department of Labor's Wage and Hour Division was entitled to deference in his interpretation of the Fair Labor Standards Act.[59] The Administrator first articulated this position in his amicus brief to the suit brought by fire-fighting employees of a Swift and Company packing plant.[60]

In *Skidmore*, the Court explicitly stated a list of characteristics that affected the persuasive authority of agency decisions. These factors included the thoroughness evident in the agency's consideration of the issue, the validity of the agency's reasoning, and the consistency of the action with earlier and later pronouncements.[61] While the Court did not explicitly state that

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[54] *E.g.*, Boulez v. Comm'r, 810 F.2d 209, 214 (D.C. Cir. 1987); Ledbetter v. United States, 792 F.2d 1015, 1018 (11th Cir. 1986); Spears v. Merit Sys. Prot. Bd., 766 F.2d 520, 523 (Fed. Cir. 1985).

[55] Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011).

[56] 323 U.S. 134 (1944).

[57] *Id.* at 140 ("The weight of such a judgment in a particular case will depend upon . . . all those factors which give it power to persuade.").

[58] 533 U.S. 218, 221 (2001) (holding that a tariff classification was not entitled to *Chevron* deference, only *Skidmore* deference).

[59] *Skidmore*, 323 U.S. at 140.

[60] *Id.* at 135-36.

[61] *Id.* at 139.

contemporaneous construction of the regulation was essential to this form of deference, it did continue to discuss the need for continuity in agency regulations as a justification for judicial deference.[62] The list of factors in *Skidmore* was not intended to be comprehensive,[63] and remains incomplete today.[64] Taken together, these factors allow for the deference afforded to the agency to expand or contract depending on the evidence on the agency's reasoning rather than focus on the relationship between the agency's action and the statute or regulation.

3. Bowles v. Seminole Rock & Sand Co.

A year after *Skidmore*, the Court considered what form of deference to grant to agency interpretations of their own regulations in *Bowles v. Seminole Rock & Sand Co.*[65] Specifically at issue in this case was the application of a General Maximum Price Regulation passed by the Office of Price Administrator in an attempt to curb wartime inflation.[66] Seminole Rock & Sand Co., a manufacturer of crushed stone, had a prior contract with Seaboard Air Line Railroad selling crushed stone 60 cents per ton during the period relevant for the price setting.[67] In the negotiations for a new contract with Seaboard, Seminole Rock agreed to sell the crushed stone for 85 cents per ton; it justified this price increase by alleging that it was still below the ceiling price of $1.50 per ton of crushed stone that it had applied in different contracts during the relevant period. [68] Bowles, as representative of the Office of Price

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[62] *Id.*
[63] *Id.* (holding the above listed factors to be relevant to the analysis as well as "all those factors which give it power to persuade").
[64] Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1257 (2007).
[65] 325 U.S. 410 (1945).
[66] *Id.* at 413.
[67] *Id.* at 412.
[68] *Id.*

Administration, contested this interpretation of the General Maximum Price Regulation. [69] The Court held that the administrative interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[70]

Much like the clearly erroneous standard of review applied to district court decisions, this plainly erroneous standard is a strong form of deference which goes beyond *Chevron* in its level of deference to administrative actions. While *Chevron* deference requires both that a statute present some ambiguity and that the agency's interpretation be reasonable, *Bowles* deference merely requires that the agency action not be plainly erroneous, which is to say something beyond unreasonable. Nor is this decision limited by the fact that the regulation in question was a wartime regulation; the Court did not limit its ruling to wartime or emergency powers of the federal government. The Court rested its deference on the agency's inherent authority to interpret its own regulations, which was unaffected by the nature of the regulation, whether wartime or otherwise.[71]

The Court did not explicitly justify its decision to apply this deferential standard; academics contend that this deference is premised on the agency's expertise in applying their own regulations.[72] *Bowles* continues to enjoy favor with the Court and

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[69] *Id.* at 413-14.
[70] *Id.* at 414.
[71] *Id.*
[72] Manning, *supra* note 2, at 614 (citation omitted) ("*Seminole Rock* deference . . . has largely 'gone unquestioned' since 1945, perhaps because of the 'common sense' idea that an agency 'is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule.'").

formed the precedential basis of the Court's decision in the post-*Chevron* case *Auer v. Robbins*.[73]

4. United States v. Curtiss-Wright Export Corp.

The strongest form of deference to agency actions comes under *United States v. Curtiss-Wright Export Corp*.[74] In this case concerning conspiracy charges against the Curtiss Wright Export corporation for attempting to sell arms to a foreign government in violation of a joint resolution of Congress, the Court held that actions of the executive relating to foreign affairs are granted a "degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." [75] The requirement that an exercise of any government power stem from either an act of Congress or from a specifically enumerated power in the Constitution does not apply to issues related to the executive's general foreign relations powers.[76]

This form of deference differs slightly from the other deference paradigms discussed in this paper because the foundation of the agency's authority arises from the executive's inherent authority as the constitutional representative of the United States to foreign nations.[77] This difference can be overstated, however, since most forms of judicial deference to agencies rely on the notion that in the act of enforcing laws provided by congress, an agency inherently

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[73] 519 U.S. 452, 461 (1997); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring) (expressing concern with the Court's continued application of *Bowles*).
[74] 299 U.S. 304 (1936).
[75] *Id.* at 320.
[76] *Id*. at 315-16 (1936) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.")
[77] *Id.*, at 319; Eskridge & Baer, *supra* note 9, at 1100-01.

engages in some degree of statutory interpretation.[78] For this reason, the authority of the agency to interpret a statute almost always derives, albeit indirectly, from Article II.

This extreme form of deference was premised on the inherent and unenumerated power of the executive to conduct foreign affairs.[79] The executive was more efficient at establishing foreign relations goals and policies as well as the most effective in maintaining international relations.[80] *Curtiss-Wright* survived *Chevron* and continues to be applied to this day.[81]

II. THE MATURING ADMINISTRATIVE STATE: DEVELOPMENT OF AGENCY DEFERENCE BETWEEN 1970S-80S

Following the explosion of deference precedents in the 1930s and 1940s, judicial deference jurisprudence developed slowly until the Court issued a series of hugely influential decisions in the 1970s and 1980s. While the 1970s and 1980s did not experience an

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[78] *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

[79] *Curtiss-Wright*, 299 U.S. at 318 (citations omitted) ("The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality.").

[80] *Id.* at 320.

[81] *E.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (holding that the President had exclusive power to recognize foreign nations and governments); Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (holding that the federal government has broad, undoubted power over the subject of immigration and the status of aliens); United States v. Verdugo-Urquidez, 494 U.S. 259, 277 (1990) (holding that the Fourth Amendment does not apply to searches and seizures conducted by U.S. agents on property located abroad).

explosion in the administrative state on the level of the 1930s and 1940s, the Court did begin to reconsider the intellectual basis for deference to agencies. While deference in the first half of the twentieth century was primarily premised on stability and the practical efficiency of administrative actors, courts in the 1970s and 1980s began to justify continuing deference to agency decisions on different grounds - notably, congressional delegation and democratic accountability. This shift in the Court's reasoning has been attributed to a second culture shift that culminated in the Court's decisions of the 1980s.[82]

The change in the judicial justification for deference is reflected in *Mead*.[83] While the factors listed in *Skidmore* and *Mead* are not comprehensive, they do allow us to see what the Justices deemed to be important considerations. While Justice Jackson based *Skidmore* deference on the effectiveness of agency reasoning and its consistency with other pronouncements, Justice Souter, writing in 2001, expanded this list to include consideration of "the merit of [the] writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[84] While the *Skidmore* ruling contained brief mentions of the Administrator of the Department of Labor's Wage and Hour Division experience in applying the statute, this expertise was not an enumerated factor in *Skidmore* deference.[85] The Agency's expertise had become a relevant factor in the analysis of agency deference by the 1980s.[86]

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[82] Hubbard, *supra* note 43, at 452 ("[C]oncerns about judicial activism animated the Court's jurisprudence, culminating in 1984 with *Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.*, in which the Court held that certain agency interpretations warranted controlling deference.").
[83] United States v. Mead Corp., 533 U.S. 218, 220 (2001)
[84] *Id.*; Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
[85] *Skidmore*, 323 U.S. at 138-40.
[86] *See, e.g.*, Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 193 (1989) (Marshall, J., dissenting) ("The majority's derogation of this dual agency interpretation leaves one to wonder why, when important civil rights laws are at issue, the Court fails to adhere with consistency to its so often espoused policy of deferring to expert agency

Congressional delegation as a justification for judicial deference was largely absent from the earlier precedent. While the Court at the beginning of the twentieth century required that statutes expressly limit judicial review in order to defeat the presumption of independent judicial analysis,[87] by 1984 the notion of implicit congressional delegations of authority through legislative ambiguity was an embedded concept in Supreme Court jurisprudence.[88] This was also seen in the context of *Curtiss-Wright* deference. In *Haig v. Agee*,[89] a decision invoking *Curtiss-Wright*, the Court was tasked with determining whether the Passport Act conferred upon the Secretary of State the power to revoke passports.[90] The Court found that the statute was silent on this matter, but Congress had afforded the Secretary broad rule-making authority which implicitly included the authority to revoke passports.[91] Citing *Zemel v. Rusk,*[92] the Court found that "congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy."[93] With this new emphasis on delegation, agencies were expected to be

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judgment on ambiguous statutory questions."); K Mart Corp. v. Cartier, 486 U.S. 281, 322 (1988) (Scalia, J., concurring in part and dissenting in part) ("Which suggests one of the most important reasons we defer to an agency's construction of a statute: its expert knowledge of the interpretation's practical consequences."); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . . .").

[87] Crowell v. Benson, 285 U.S. 22, 46 (1931).

[88] *Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

[89] 453 U.S. 280 (1981).

[90] *Id.* at 282.

[91] *Id.* at 291.

[92] 381 U.S. 1 (1965).

[93] *Haig*, 453 U.S. at 288.

more responsive to the realities that they were charged with regulating. The need for agency flexibility surpassed the importance of consistency in regulatory policy.[94]

The shift in reasoning with relation to deference to agencies is also seen in the new deference paradigms that developed in this period. In addition to *Chevron*, the Court set out a major precedent setting decision in the area of labor law in the 1978 case *Beth Israel Hospital v. National Labor Relations Board*.[95] It also reified precedent related to judicial deference in tax litigation in the 1979 case *National Muffler Dealers Association, Inc. v. United States*.[96]

1. Beth Israel Hospital v. National Labor Relations Board

In 1978, the shifting rationalization for judicial deference was demonstrated in *Beth Israel Hospital v. National Labor Relations Board*.[97] The Supreme Court considered whether the NLRB acted appropriately in interpreting a 1978 amendment to the National Labors Relations Act to apply to hospital employees. Specifically, the Court was charged with determining whether the amendment supported the NLRB's action prohibiting hospitals from limiting employees' ability to solicit union support and distribute union literature in public hospital spaces without a showing that such actions would negatively affect the delivery of quality health care services.[98] The Court held that "[t]he judicial role is narrow: the rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality . . . ."[99]

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[94] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").
[95] 437 U.S. 483 (1978).
[96] 440 U.S. 472 (1979).
[97] 437 U.S. at 483.
[98] *Id.* at 486.
[99] *Id.* at 501.

Much like *Chevron*, *Beth Israel* does not require the agency's interpretation to be the only interpretation of the statute or the one that a judge would adopt if considering the issue as one of first impression.[100] In contrast, the *Chevron* two-step requires that the Court defer to the agency's interpretation if, after finding the statute to be ambiguous, the agency's interpretation is a "permissible construction of the statute."[101]

Beth Israel deference was premised on both the expertise of the agency and the delegation of authority to the NLRB by Congress.[102] While *Beth Israel* was not the first case in this line of precedent related to deference to NLRB findings, the *Beth Israel* articulation of judicial deference is viewed as the eponymous case in this deference regime.[103] In light of the NLRB's history of enforcing the National Labor Relations Act, the Court noted the substantial statutory expertise developed by the agency as a factor in granting it deference.[104] The judicial deference was also premised on the same notion of congressional delegation of authority that is central to *Chevron*.[105] Six years prior to *Chevron*, the Court was already interpreting statutory silence or ambiguity as congressional delegation of authority.[106] While this may lead one to conclude that *Beth Israel* constitutes a proto-*Chevron* which would likely be

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[100] *Id.* at 504 ("[I]t is the Board upon whom the duty falls in the first instance to determine the relative strength of the conflicting interests and to balance their weight.")

[101] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474 (1951).

[102] *Beth Isr.*, 437 U.S. at 496-98; 501

[103] Eskridge & Baer, *supra* note 9, at 1106-09.

[104] *Beth Isr.*, 437 U.S. at 501.

[105] *Id.* at 500.

[106] Eskridge & Baer, *supra* at note 9, at 1107 ("In forty-nine post-*Chevron* cases, the Court invoked *Beth Israel* deference and refrained from mentioning *Chevron*, any of the post-*Chevron* cases, or the famous two-step formula."); *see, e.g.*, Allentown Mack Sales & Serv., Inc. v. Nat'l Labor Relations Bd., 522 U.S. 359, 389 (1998); Auciello Iron Works, Inc. v. Nat'l Labor Relations Bd., 517 U.S. 781, 787-88 (1996); Nat'l Labor Relations Bd. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990).

consumed in the conflagration of *Chevron*, it continues to be cited as a distinct deference precedent by courts in NLRB cases.

2. Anti-Deference

Despite the various forms of deference discussed thus far, courts continue to express wariness of agency action in certain aspects of the law, namely in criminal cases and in some cases which raise constitutional concerns. Such situations have been dubbed "anti-deference" by scholars.[107] The rule of lenity, wherein a reviewing court interprets an ambiguous criminal statute so as to avoid increasing the penalty placed on an individual, is perhaps the most apt example of this.[108] While not linked to any one case, anti-deference predates *Chevron* and has endured to this day.[109]

Much like deference under *Chevron* and *National Muffler*, the rule of lenity is invoked in light of statutory ambiguity.[110] The difference in application of these deference standards lies in the area of the law at issue in the case. The reason that the rule of lenity applies exclusively to ambiguous *criminal* statutes is that it is intended to protect individual rights and allow for a fair warning to

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[107] Eskridge & Baer, *supra* note 9, at 1115-16; Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 150-57 (2015); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1765 (2010); Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 494 (2015).

[108] Bifulco v. United States, 447 U.S. 381, 386 (1980).

[109] *E.g.*, Yates v. United States, 135 S. Ct. 1074, 1088 (2015) (applying the rule of lenity in light of ambiguity about the meaning of the term "tangible object"); Whalen v. United States, 445 U.S. 684, 695 (1980) (applying rule of lenity to an ambiguous statute that did not clearly address continuous sentencing for convictions for separate statutory offenses arising under the same criminal transaction).

[110] *E.g.*, *Bifulco*, 447 U.S. at 387 (citations omitted) ("[T]he touchstone of the rule of lenity is statutory ambiguity.").

the public that certain conduct is subject to punishment by deprivation of liberty or property.[111]

Anti-deference may also occur where the reviewing court applies the canon of constitutional avoidance in such a way that it cuts against the agency's interpretation.[112] In order to apply the canon of constitutional avoidance, the reviewing court must first conduct a textual analysis of the statute and apply the canon only if multiple statutory interpretations remain. One such example occurred in *Clark v. Martinez*,[113] wherein the Court considered whether constitutional limits to the government's power to detain under the Immigration and Nationality Act applied to inadmissible aliens.[114] Because the Immigration and Nationality Act does not explicitly address the Department of Homeland Security's authority to indefinitely detain inadmissible aliens and such indefinite detention would potentially implicate constitutionally protected rights, the application of canon of constitutional avoidance required an interpretation of the statute that limited this detention authority to that which is reasonably necessary.[115] In this manner, the Department of Homeland Security's interpretation of the statute was defeated by the canon of constitutional avoidance.

3. Non-Deference

In addition to the cases where canons of construction prohibit judicial deference, the Court has implemented another form of anti-deference through its "extraordinary case" exception to judicial deference. Under this exception, the Court engages in *de novo* review of a case if it will have far reaching consequences for an

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[111] Huddleston v. United States, 415 U.S. 814, 831 (1974).
[112] Eskridge & Baer, *supra* note 9, at 1115.
[113] 543 U.S. 371 (2005).
[114] *Id.* at 373.
[115] *Id.* at 385.

industry or significant portion of the economy.[116] The Court, however, has provided little guidance on what cases qualify as "extraordinary cases."[117] The first notable use of this exception occurred in 1994 in *MCI Telecommunications Corp. v. AT&T Co.*,[118] wherein the Court considered the proper construction of the term "modify" in § 203(b) of the Communications Act of 1934.[119] The Court rejected the Federal Communications Commission's ("FCC") interpretation of the term "modify" because it held that Congress likely would not delegate to the FCC the discretion to alter far reaching rate-regulations that affected an entire industry through the use of that term.[120] The Court justified its denial of deference to the FCC by stating that the agency failed step two of the *Chevron* analysis.[121] The Court wrote, "[s]ince an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear, the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement."[122] A similar incorporation of this exception occurred in *Utility Air*

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[116] Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

[117] Chabot, *supra* note 107, at 484 ("As a result, the Court has failed to develop a deference doctrine that provides adequate guidance to lower courts. The Court's recent decisions in *Arlington v. Federal Communications Commission (FCC)*, *Utility Air Regulatory Group v. EPA*, and *King v. Burwell* do not resolve *Chevron*'s problems and seem likely to make them worse.").

[118] 512 U.S. 218 (1994).

[119] *Id.* at 220 (citation omitted).

[120] *Id.* at 231 ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.").

[121] Chabot, *supra* note 107, at 501 ("Chief Justice Roberts joined this opinion, thus appearing to agree that *Brown & Williamson*'s extraordinary case standard fell within the *Chevron* framework. In *King v. Burwell*, however, Chief Justice Roberts did an about-face and announced an extraordinary case exception to *Chevron*.").

[122] *MCI Telecomms.*, 512 U.S. at 229.

Regulatory Group v. Environmental Protection Agency and *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*[123] The reasoning was that agency actions in areas affecting extraordinary issues within an industry or area of law would exceed the bounds of reasonable interpretations of ambiguous statutes and therefore was not a reasonable interpretation of the statute under *Chevron* step two.[124]

This "extraordinary case" exception was notable in the 2015 *Burwell* decision. The Court engaged in *de novo* review of the Affordable Care Act interpretation after determining that the extraordinary case exception applied to the matter of interpreting a key provision. In *King v. Burwell*,[125] the Court signaled that it was willing to adopt a more robust role with regards to interpreting statutory ambiguity.[126] Upon reviewing the ambiguous statutory language in the Affordable Care Act, the Court acknowledged that *Chevron* deference would normally apply to such situations where a federal agency was interpreting a statute.[127]

While *Burwell* was not the first time the Court had applied this form of "extraordinary issue" exception to judicial deference, it was the first time that the Court had extracted the exception from the *Chevron* analysis. In *Burwell*, the Court never approximated a

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[123] Util. Air Regul. Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."); Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *see* Chabot, *supra* note 107, at 500-01 (2015).

[124] *Util. Air Regul. Grp.,* 134 S. Ct. at 2442.

[125] 135 S. Ct. 2480 (2015).

[126] Abbe R. Gluck et. al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1848 (2015) (citation omitted).

[127] *Burwell*, 135 S. Ct. at 2488-89 (internal citations omitted) ("When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron* . . . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

Chevron analysis. Instead, the Court began its consideration of the language of the Affordable Care Act by determining that, given the far reaching consequences of the statutory interpretation, the IRS was not entitled to any form of deference.[128]

4. National Muffler Dealers Association, Inc. v. United States

One year after *Beth Israel*, the Court again articulated a standard of deference strikingly familiar to *Chevron* deference in *National Muffler Dealers Association v. United States*.[129] However, much like *Beth Israel*, the judicial deference articulated in *National Muffler* is one applied almost exclusively in cases relating to a particular area of the law, in this case tax law.[130] The decision involved the interpretation of the word "business league" for tax exemption purposes.[131] The court decided that judicial deference should be afforded to the agency if the action implements the statute in some reasonable manner.[132] Several factors for determining reasonableness of the regulation were stated, including contemporaneous construction, manner of implementation, length of time the regulation has been in effect, reliance placed on the regulation, consistency in application, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[133]

Once again the Court acknowledged that the agency's interpretation does not need to be the *only* possible interpretation of

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[128] *Id.*
[129] 440 U.S. 472, 476 (1979).
[130] Pietruszkiewicz, *supra* note 27, at 34 ("Scholars, as well as courts, tend to view taxation as a unique area unto itself; as a consequence of its uniqueness, an analysis in a tax case does not translate into defining standards in a non-tax related case. In turn, an analysis applicable outside the tax area does not apply to an analysis in a tax controversy.").
[131] *Nat'l Muffler*, 440 U.S. at 473.
[132] *Id.* at 476.
[133] *Id.* at 477.

a statute, it need be merely a reasonable one.[134] In contrast to earlier precedent, however, what may constitute a reasonable interpretation may evolve over time. While the Court continued to value "contemporaneous construction" and continuity in regulatory enforcement,[135] it also acknowledged the need for agency flexibility. In granting judicial deference, the Court wrote that the IRS Commissioner's interpretation of the term "business league"

> [E]volved as the Commissioner administered the statute and attempted to give to a new phrase a content that would reflect congressional design. The regulation has stood for 50 years, and the Commissioner infrequently but consistently has interpreted it to exclude an organization like the Association that is not industrywide.[136]

Without abandoning its reliance on contemporaneous construction, the Court now allowed deference to be based not on the constant application of agency regulations, but on the necessary evolution of the terms at issue.[137] This flexibility justification was supported by the new framing of congressional delegation of authority; since Congress allocated vast grants of authority to the IRS so that it could enact the appropriate regulations in light of the "limitless factual variations," it stands to reason that the agency needed to be able to evolve its standards.[138]

In contrast to the other deference regimes discussed in this note, *National Muffler* is no longer recognized as a separate deferential standard by the Supreme Court. While the Court did continue to

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[134] *Id*.
[135] *Id.* ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").
[136] *Id.* at 484.
[137] *Id.*
[138] *Id.* at 477.

cite *National Muffler* as a form of deference in several post-*Chevron* Supreme Court cases,[139] this line of precedent became muddled as the Court began citing to *Chevron* in several cases involving regulations by the Treasury Department.[140] In 2011, the Court definitively overruled *National Muffler* in *Mayo Foundation for Medical Education & Research v. United States*,[141] finding that there was no reason for continuing to apply a different deference standard to the Treasury Department than was applied to other federal agencies.[142] While *National Muffler* may no longer carry precedential weight, the demise of the *National Muffler* deference standard may serve as a window into the mind of the Court on how to apply the other deference standards. *Mayo Foundation* stands for the proposition that all agencies should be subject to a uniform deference standard.

III. ADOPTING A DEFERENCE HIERARCHY

A. ARGUING FOR MULTIPLE DEFERENCE REGIMES

The Court in *Mayo Foundation* suggested a willingness on the part of the Supreme Court to fold all pre-existing deference regimes into the *Chevron-Mead* (or *Chevron-Skidmore*) dichotomy.[143] In its effort to push the precedent towards a uniform deference regime,

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[139] *E.g.*, United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001); United Dominion Indus., Inc. v. United States, 532 U.S. 822, 840 (2001); Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560-61 (1991).

[140] United States v. Boyle, 469 U.S. 241, 247 (1985) (citing *Chevron* exclusively when considering Treasury regulation); Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 387 (1998) (citing both *Chevron* and *Cottage Savings Association*, the latter being a case that relied exclusively on *National Muffler*).

[141] 562 U.S. 44 (2011).

[142] *Id.* at 56 (holding that post-*Chevron* citations of *National Muffler* did not justify its continued existence).

[143] *Id.* at 55 (internal quotation marks omitted) ("[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action.").

the Court in *Mayo Foundation* cited to precedent from over half a century prior, from a time where there was nothing approaching a singular deference regime, to argue that the Court had long since pursued a policy of deference uniformity and suggest that such a goal is desirable.[144]

The reality of the deference precedent, however, remains a quagmire as the Court is far from establishing a single *Chevron-Skidmore* deference regime.[145] The continued citation of other standards following *Chevron* may be explained away by the fact that the Court did not initially view the case as establishing any type of revolution in administrative law; such reasoning suggests that since *Chevron* was not initially considered paradigm shifting precedent, the Court would choose whether to invoke *Chevron* in the same manner it chose whether to invoke other pre-existing forms of deference.[146] If this were true, then one would expect that once the "revolutionary" implications of *Chevron* were recognized

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[144] *Id.* (citing Dickinson v. Zurko, 527 U.S. 150, 154 (1999); Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 222-223 (1989)).

[145] *See* Eskridge & Baer, *supra* note 9, at 1127 (calculating that the Court cited to pre-*Chevron* deference regimes with equal frequency both before and after the Court's decision in *Mead*); Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1350-51 (2013) ("[E]ven when a court purports to operate within a given deference regime, it is not clear that the standards are applied consistently from case to case. Empirical work has confirmed that courts often fail to apply deference standards in circumstances where their own doctrine indicates they should. Moreover, courts continue to apply other deference doctrines in special contexts, driving the predictability of judicial practice further down.").

[146] Mathews, *supra* note 145, at 1360 ("Chevron attracted limited notice at first, but after its enthusiastic adoption by the D.C. Circuit and its increasing popularity on the Supreme Court itself, its potential to broaden the scope of deference and simplify the analysis quickly became apparent."); Criddle, *supra* note 2, at 1279 ("Chevron's two-step formula apparently was not a source of contention among the Justices; no concurring or dissenting opinions accompanied the decision, and the best available evidence suggests that it was not even discussed during the Court's internal deliberations. Thus, there is little reason to believe the Supreme Court envisioned Chevron's two-step formula as anything more than a modest restatement of the Court's deference doctrines.").

by the Court, it would cease citing to pre-*Chevron* precedent as time went on. Yet this has not been the case.[147] Alternatively, it may be that these deference standards continue to be cited in specialized practice areas, like labor, treaty interpretation, and criminal sentencing, because practitioners continue to cite them, and the reviewing courts follow suit.[148]

Regardless of the reason for the continuing reliance on pre-*Chevron* precedent, courts are correct to do so. Judicial review of agency actions is an essential check on the bureaucratic power of the administrative state.[149] While there are several reasons to support judicial deference, these justifications do not all warrant applying a uniform deference regime to the vast universe of different agencies' actions.[150] The modern administrative state is a constellation of independent and executive agencies with expansive and overlapping portfolios.[151] The varied justifications for judicial deference do not apply uniformly to all actions taken by the administrative state for three significant reasons discussed in detail below. First, agency expertise is not uniformly distributed between agencies in all issue areas. Agency expertise, which is largely

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[147] *See* Eskridge & Baer, *supra* note 9, at 1098-1120 (discussing the continued and consistent application of several different forms of deference post-*Chevron*).

[148] Banks Miller & Brett Curry, *Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making*, 38 LAW & SOC. INQUIRY 55, 56-67 (2013) (finding that judges familiar with the subject matter at issue are more likely to question the decision of the agency and they are more willing to defer when they lack expertise).

[149] *Id.*

[150] *See* Steven J. Cleveland, *Resurrecting Court Deference to the Securities and Exchange Commission: Definition of "Security"*, 62 CATH. U.L. REV. 273, 276 (2013) ("Congress empowered each agency differently and statutory evidence of the powers delegated to a particular agency informs the analysis of whether Congress granted that particular agency the authority to speak to its own jurisdiction.").

[151] *See* Fed. Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights.").

premised on the agencies' familiarity with the provisions it is regularly tasked with administering, is not innate to the institution. In many circumstances, the agency is interpreting and applying provisions that the agency has relatively little experience in administering. Second, administrative agencies' actions frequently lie at the intersection of various deference regimes, which warrants judicial consideration of several factors when determining the appropriate form of deference. And finally, there are substantial structural differences between independent and executive agencies that undermine (or increase) their level of democratic accountability, a major factor in the Court's recent deference jurisprudence.

1. Agency Expertise

Courts and academics alike frequently cite the relative expertise of the agency as a justification for deference.[152] Agency expertise was a prominent justification in *Beth Israel*,[153] *Skidmore*,[154] *Fawcus*,[155] and *Chevron*.[156] The Court reified this emphasis on agency expertise in *Mayo Foundation*, where it wrote that, "[w]e see no reason why our review of tax regulations should not be guided by agency

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[152] *E.g.*, Pietruszkiewicz, *supra* note 27, at 28 (internal citations omitted) ("The rationale for deference is based on the standing of the administrative agency. An agency determination serves not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it.").
[153] Beth Isr. Hosp. v. Nat'l Labor Relations Bd., 437 U.S. 483, 501 (1978).
[154] Skidmore v. Swift & Co., 323 U.S. 134, 137-38 (1984).
[155] Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931).
[156] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").

expertise pursuant to *Chevron* to the same extent as our review of other regulations."[157] This quote encapsulates the Court's notion that agency expertise, viewed as equally consistent among agencies, entitles agencies to equal deference.

Such expertise, however, does not exist in all the areas of law where agencies act. Given the sheer quantity of tasks assigned to agencies, it is impossible for them to be an expert in all of it. In *San Francisco v. Sheehan*,[158] the Court was tasked with determining whether two San Francisco Police officers and the City of San Francisco violated the Americans with Disabilities Act by subduing a woman suffering from schizoaffective disorder in a manner that did not reasonably accommodate her disability.[159] In order to resolve this case, the Court first had to determine whether Title II of the Americans with Disabilities Act applied to officers' on-the-street responses to reported disturbances.[160] In the process of discerning the ambiguity in the statute, the Court made no mention of deference to the City of San Francisco's interpretation of the Americans with Disabilities Act. Another example highlights that federal agencies are not afforded judicial deference in their duties to create reasonable accommodations under the ADA. In the class-action lawsuit *Franco-Gonzalez v. Holder*,[161] a district court afforded no deference of any kind to an agency interpretation of "reasonable accommodations" under the Rehabilitation Act.[162] The court found that the plaintiff class, which was comprised of detained immigrants identified to have a serious mental disorder or defect which rendered them incompetent to represent themselves, suffered irreparable harm as a consequence of not being afforded

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[157] Mayo Found. for Med. Educ. & Research v. United States, 562 U.S.44, 56 (2010).
[158] 135 S. Ct. 1765 (2015).
[159] *Id.* at 1769-72.
[160] *Id.* at 1772.
[161] No. 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).
[162] *Id.*, at *3.

mental health screening and legal representation.[163] The agency, Immigration and Customs Enforcement, which was tasked with detaining and screening the detained immigrant population, had interpreted the Rehabilitation Act in requiring legal representation for individuals who are not competent to represent themselves.[164] While ICE regularly apprehends and detains individuals under various statutes of the Immigration and Nationality Act, it does not regularly interpret and apply the Rehabilitation Act, even as the latter statute also governs its practices.

The Americans with Disabilities Act and Rehabilitation Act are not the only statutes created by Congress to redress discrimination. Since the 1960s, Congress has enacted statutes such as the Civil Rights Act of 1964, [165] Voting Rights Act of 1965, [166] Age Discrimination in Employment Act of 1967,[167] and the Pregnancy Discrimination Act of 1978.[168] While many of these civil rights statutes were specifically tasked to particular agencies for their implementation, several also imposed requirements on all government agencies.[169] Unlike other areas of law where courts are more willing to defer to the technical knowledge of industry experts,[170] in the civil rights context, the expertise lies with the

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[163] *Id.*, at *2.
[164] *Id.*, at *3.
[165] Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 1981 to 2000h-6).
[166] Pub. L. No. 89-110, 79 Stat 437 (codified at 42 USC §§ 1973-1973bb-1).
[167] Pub. L. No. 90-202, 81 Stat 602 (codified at 29 USC §§ 621-34).
[168] Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k)).
[169] *E.g.*, Title VI of the Civil Rights Act, 42 U.S.C.A. § 2000d (prohibiting racial discrimination in "any program or activity receiving Federal financial assistance"); *see generally* Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. CHI. LEGAL F. 223, 226 (2014) (discussing the agencies primarily responsible for enforcing major Civil Rights legislation).
[170] *See* Ass'n of Irritated Residents v. Envtl. Prot. Agency, 423 F.3d 989, 997 (9th Cir. 2005) ("This is a determination that is scientific in nature and is entitled to the most deference on review."); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental*

courts and not with the agencies. In cases involving issues of civil rights under such statutes, reviewing courts apply judicial deference inconsistently.[171] The courts' concern with the relative lack of agency expertise is not limited exclusively to civil rights cases. In *Beth Israel*, for instance, two concurring minorities expressed concern with perceived limitations in the NLRB's understanding and analysis of the employee labor-management problems at hospitals generally.[172] While the majority of the Court decided that the NLRB's expertise in labor-management issues was sufficient justification, this valuation of the NLRB's respective expertise was contentious.

Furthermore, if expertise is truly a determinative of deference, it would suggest that specialized courts should defer to agency determinations either less frequently or in some dissimilar manner than generalist courts. Under this logic, Federal Tax Court and Federal Claims Court would be either exempt from applying deference in tax cases, where both courts have substantial expertise, or expected to apply a different form of deference.[173] Such a system

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Law, 79 U. COLO. L. REV. 767, 823 (2008) ("The circuits have shown, however, a strong willingness to defer, under any doctrine or framework, to agency action when environmental scientific expertise is required.").

[171] Ross, *supra* note 169, at 226.

[172] Beth Isr. Hosp. v. Nat'l Labor Relations Bd., 437 U.S. 483, 509 (1978) (Blackmun, J., concurring) ("I entertain distinct doubts about whether the Board, in its preoccupation with labor-management problems, has properly sensed and appreciated the true hospital operation and its atmosphere and the institution's purpose and needs."); *id.* at 514-15 (Powell, J. concurring) (citations omitted) ("In my view, the Board's 'accommodation' of the competing interests in *St. John's* fails to give appropriate weight to the unique characteristics of a hospital. It amounts to no more than an application of the *Republic Aviation* rule to certain areas of a hospital but not others, despite the fact that members of the public are present and potentially affected even in areas of a hospital not characterized as 'strictly patient care' areas.").

[173] *See* Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1070 (1995) ("[T]he IRS is more expert in the tax law than are judges, with the obvious exception of Tax Court judges (and any other judges who may happen to have substantial tax practice experience)."). A similar logic could be applied to the D.C. Circuit court, which considers more administrative

was arguably in place with the unique *Fawcus-National Muffler* deference regime which was applied to tax cases. The Supreme Court, however, disavowed such practices in *Mayo Foundation.*[174] Moreover, the Court has policed the boundaries of agency expertise with regards to tax statutes. In *Burwell*, the Court partially justified its decision not to grant the IRS any deference on the notion that it was "especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."[175] Therefore, whether or not Congress delegated authority to an agency in a statute is dependent on the agency's expertise in administering such statutes.

2. Intersecting Deference Regimes

While the Court in *Chevron* considered an agency action in an area of law that was clearly within Environmental Protection Agency's purview, such clear demarcations of legal issues and practice areas are not always present. The portfolios of duties and responsibilities tasked to federal agencies are vast and can often overlap with various legal areas and responsibilities tasked to other agencies.[176] This legal overlap has led to inconsistent applications of

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cases than any of the other federal circuits in the country as a proportion of cases heard by the court. *See* Eric M. Fraser et. al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 132 n.3 (2013) ("Although the percentage of administrative law cases nationwide has declined somewhat in recent years, petitions for review of administrative decisions filed in the D.C. Circuit have increased from twenty-eight percent of the national total in 1986 to a high of thirty-eight percent in 2007 and thirty-six percent in 2010.").

[174] Mayo Found. for Med. Educ. & Research v. United States, 562 U.S.44, 55 (2010).

[175] King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (citing Gonzales v. Oregon, 546 U.S. 243, 266–267 (2006)).

[176] Melanie E. Walker, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1364 (1999) ("As the federal government attempts to cut down on the size of the administrative state by dismantling duplicative agencies and concentrating authority over statutes concerning a similar subject matter in one agency, it sometimes transfers authority over a statute from one agency to another.").

the deference regimes in certain circumstances, leaving reviewing courts to parse out which form of deference to afford the agency.[177] One such example is in the context of detention of non-citizens. Since immigration policy is recognized as having substantial implications for U.S. foreign relations and national security, *Curtiss-Wright* deference is frequently employed in immigration cases.[178] Immigration, however, also frequently implicates human rights and criminal justice issues, which tend towards less deferential standards, as evidenced by the rule of lenity.[179] This overlap between national security, foreign affairs, criminal law, and immigration law is captured in cases such as *Hamdan v. Rumsfeld*,[180] where the Supreme Court was tasked with determining whether an alien held under charges of terrorism could apply for habeas relief.[181] Justice Stevens, writing for a heavily divided Court, concluded that the government's argument regarding the jurisdiction-stripping nature of the Detainee Treatment Act was unconvincing.[182] Despite the executive's authority over foreign affairs, which might suggest *Curtiss-Wright* deference applied, the

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[177] *E.g.*, Pauley v. Beth Energy Mines, Inc., 501 U.S. 680 (1991) (holding that when agencies are tasked with interpreting a statute at different points in time, deference is afforded to the more recent agency interpretation).

[178] *E.g.*, Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); Toll v. Moreno, 458 U.S. 1, 10 (1982) (internal quotation marks omitted) ("Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power to establish a uniform Rule of Naturalization, its power to regulate Commerce with foreign Nations, and its broad authority over foreign affairs."); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.").

[179] Eskridge & Baer, *supra* note 9, at 1102.

[180] 548 U.S. 557 (2006).

[181] *Id.* at 557.

[182] *Id.* at 575-584.

Court's majority granted no deference to the Secretary of Defense's interpretation of the statute.[183] Justice Thomas, writing for three members of the Court in dissent, argued for the Court's application of *Curtiss-Wright*.[184]

As immigration status is increasingly tied to individuals' criminal history, immigration cases also frequently give rise to both civil and criminal issues. A substantial portion of the Department of Homeland Security's work consists of categorizing criminal convictions, from both state and federal courts, within the parameters established in the Immigration and Nationality Act in order to determine the immigration consequences of prior convictions.[185] In *Leocal v. Ashcroft*,[186] the Court was tasked with determining whether a conviction for driving under the influence constituted an "aggravated felony" under the Immigration and Nationality Act.[187] The Court restricted its analysis to the language of the federal statute.[188] The Court did not grant deference to the government's position (nor address it in any meaningful manner) and briefly mentioned that the rule of lenity is applicable if a statute has criminal applications, even if the statute is being applied in an immigration case, which proceedings are considered civil in nature.[189] This application of anti-deference in civil cases is not limited to immigration cases; the Court in *Leocal* cited to a case

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[183] *See id*. at 603-04 (discussing implications of international law and treatises related to the law of war for the matter at issue; this portion of Justice Stevens' opinion, however, was not binding); *id*. at 640 (Kennedy, J., concurring in part) (concluding that some degree of deference, albeit a low form of deference, was appropriate to the executive's interpretation of the statute).
[184] *Id.* at 718-19 (Thomas, J., dissenting).
[185] *See* Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (discussing the analytical method by which an agency determines whether a conviction is a qualifying offense for immigration purposes).
[186] 543 U.S. 1 (2004).
[187] *Id.* at 4-5.
[188] *Id*. at 6-13.
[189] *Id.* at 11 n.8.

where the Court applied the rule of lenity to a tax statute in a civil setting on the theory that the same statute has criminal applications and must be enforced consistently.[190]

3. Independent and Executive Agencies

Just as not all agencies are equally competent, not all agencies are equally accountable to the public. In *Chevron*, the Court deferred to the EPA over its definition of a "stationary source" as used in the Clean Air Act.[191] The decision relied heavily on the fact that the EPA could be held democratically accountable through the executive, a mechanism that did not apply to courts.[192] The Court's emphasis on political accountability, as indicated by the agency's relationship to the executive branch, suggests that the same calculus for deference may not apply in the context of independent agencies, where this relationship is skewed towards insulating the agency from political pressure.[193] The Securities and Exchange Commission ("SEC"), for instance, is an independent agency directed by a bipartisan panel of five commissioners serving staggered, five-year terms.[194] Executive agencies, in contrast, frequently have a single executive appointed by the president and subject to removal with or without cause.[195] The SEC structure is intended to limit the ability of political parties and the executive to influence the actions of the SEC.[196] While there remain indirect mechanisms for the executive to

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[190] *Id.* (citing United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–518 (1992) (plurality opinion)).
[191] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).
[192] *Id.* at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.").
[193] Cleveland, *supra* note 150, at 286.
[194] *Id.* at 287.
[195] *Id.*
[196] *Id.*

exert authority over independent agencies, this executive accountability is significantly attenuated.[197]

The Court has considered whether to afford independent and executive agencies the same level of deference. In *Federal Communications Commission v. Fox Television Stations, Inc*.,[198] Justice Scalia wrote that diminished agency accountability to the president is often accompanied by increased accountability to the legislature, and that the Court should not recognize any distinction between these two types of agencies with regards to deference.[199] This was, however, the only section of Justice Scalia's opinion that failed to garner sufficient votes to constitute binding precedent.[200] The failure to clearly establish this distinction has important implications for *Beth Israel* deference since the NLRB is also an independent agency. The structure of the NLRB, which is similar to that of the SEC, is a likely explanation for the continued existence of *Beth-Israel* deference post-*Chevron*. Under Scalia's proposed conceptualization of deference, however, there would be little grounds for differentiating the NLRB from other executive agencies.

For the foregoing reasons, rather than expand the *Mayo Foundation* to eradicate all pre-*Chevron* deference regimes, the Court should recognize, as it did in *Mead*, that there are legitimate reasons

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[197] *Id.* at 288-92 (discussing mechanisms for executive influence over the Securities and Exchange Commission, which include control over the government's position in lawsuits reaching the Supreme Court, informal collaborative relationship in rulemaking, and presidential proposal of budget allocation to agencies); *see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248, 2281-2315, 2376 (2001) (discussing the increased use of executive branch agencies as an extension of the President's own policy and political agenda to argue for distinguishing between executive and independent agencies' actions).

[198] 556 U.S. 502 (2009) (plurality opinion).

[199] *Id.* at 525 (plurality opinion) (citations omitted) ("Regardless, it is assuredly not 'applicable law' that rulemaking by independent regulatory agencies is subject to heightened scrutiny. The Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency, nor in the standards for reviewing agency action.").

[200] *Id*. at 523-29.

for recognizing the continued existence of multiple deference standards. While the current status of these various deference standards remains murky and confused, this does not support the conclusion that the pre-*Chevron* deference regimes should be abandoned in favor of a uniform standard. Instead, this confusion is presented to argue that these various deference regimes continue to have legitimate reasons for existing and the courts must develop a system of applying them consistently.

In determining which deference regimes should apply, it is important that the Court first determine which regimes it believes should continue to exist. To this end, the Court should consider which deference regimes continue to be appropriate. The Court has identified delegation of authority, agency expertise, efficiency, agency accountability and legal stability as justifications for the different deference regimes it has adopted over the years. These justifications remain valid in certain circumstances for agency action. For instance, agency expertise does not exist in the adjudication of constitutionally protected issues but it does exist when the agency is interpreting its own regulations. Similarly, the need for consistency may be stronger when constitutionally protected areas are at issue and may be weaker when an entire industry is affected.[201] The presence of constitutionally protected rights elevates the courts' expertise relative to the agency and counts against the continued application of anti-deference regimes under the rule of lenity and constitutional avoidance. With the exception of *Fawcus* deference, these justifications support the continued application of all of the deference regimes discussed thus far. Conversely, the agency expertise is perhaps greatest when it is

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[201] *See e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 238 (1994) (holding that an extraordinary case exception applied to the agency interpretation of the term because it held that Congress likely would not delegate to the FCC the discretion to alter far reaching rate-regulations that affected an entire industry through the use of that term.)

interpreting a regulation that it itself implemented and should therefore be afforded *Bowles* deference in such circumstances. The needs of national security often overlap with the exigencies of foreign policy and demand efficiency and responsiveness that supports the deferential regime under *Curtiss-Wright*. A combination of the agency expertise, need for efficiency, and agency accountability justify the application of *Chevron* and *Skidmore* deference regimes.

The continued application of *Beth Israel* and *Fawcus* deference, however, warrant greater examination because of their striking similarity to *Chevron*. One notable factor in this consideration is the fact that public accountability of the agency has been identified by the Court as a justification for deference.[202] While *Chevron* was articulated in the context of an executive agency, *Beth Israel* is a deference standard that has been applied exclusively to the NLRB, an independent agency. By expanding *Beth Israel* and applying it to all independent agencies, the Court could incorporate its valuation of democratic accountability into the deference regime. While the *Beth Israel* standard is similar to *Chevron*, the Court could further develop its conception of "consistency" and "rationality" within the *Beth Israel* regime in order to expand or contract the level of deference accordingly and distinguish it further from *Chevron*.[203] There is, however, no such justification for continuing to apply a separate deference regime to interpretations of tax statutes, which are predominately interpreted by the IRS and Treasury Department, both executive agencies. Nor do these agencies' expertise support

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[202] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.").

[203] Beth Isr. Hosp. v. Nat'l Labor Relations Bd., 437 U.S. 483, 501 (1978) ("The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality.").

the continuation of a separate deference regime.[204] To the contrary, given the creation of specialized tax courts, agency expertise may actually suggest that these agencies should be afforded *less* deference when interpreting tax statutes.

B. SYSTEMATIZING THE DIFFERENT DEFERENCE REGIMES

If the Court recognizes the need for multiple deference standards outside of *Mead* and *Chevron*, it will need to articulate a clear system for applying the different standards. Currently, *Chevron* step zero is applied to determine whether *Chevron* or *Mead* deference applies but this analysis should be expanded to incorporate the nuance of the current deference regimes.[205] The Court should expand *Chevron* step zero so that the reviewing court considers a variety of factors to determine which of the remaining deference regimes should apply. The different regimes reflect different interests that agency decisions frequently affect whether they are the interests of the individual, regulated corporation, or government itself. While *Mead* provides clear guidance to courts for determining whether to apply *Skidmore* or *Chevron*, there has been little discussion of how the other standards interact with one another. The continued existence of deference standards that predate *Chevron* suggests that courts do not believe the same justification for judicial deference are present in all of the cases considered. In order to properly address any competing interests, the Court should apply a balancing test to determine which deference regime best addresses the interests at stake. Such a test

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[204] *Chevron*, 467 U.S. at 865 (suggesting that Congress intentionally left statutory provisions vague so that administrators with expertise and indicating that, in the Court's view, judges are not experts in the various fields of law addressed by agency action).

[205] Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

would allow for the flexibility necessary to address the wide range of variability in agency actions.[206]

In order to effectively accomplish this, the Court should expand its analysis during what academics have referred to as *Chevron* step zero, wherein the court determines whether or not *Chevron* deference would be appropriate in the first instance.[207] Rather than continue the current, basic analysis wherein courts choose between two competing alternatives under *Chevron* step zero, the Court would instead apply a five-prong balancing test to determine which form of deference is most appropriate. This balancing test would be a variation of the *Mathews v. Eldridge* balancing test for procedural Due Process protections.[208] The *Mathews* balancing test requires that courts consider (1) the private interest affected, (2) risk of erroneous deprivation, and (3) the government's interest at stake.[209] In the context of administrative action, these prongs are tailored to reflect the varied emphases of the deference regimes and would include:

1. The constitutionally protected interest, if any, that is implicated in the issue before the court
2. The private interests affected
3. Agency expertise in the matter
4. Congressional delegation of authority
5. Agency exercise of its delegated authority

Much like *Mathews*, the focus of this analysis is on the constraints imposed on governmental decisions which often deprive individuals of liberty or property interests.[210] The difference

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[206] *See generally* Wilkinson v. Austin, 545 U.S. 209, 224 (2005) ("[W]e generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures.").
[207] Sunstein, *supra* note 205, at 191.
[208] 424 U.S. 319, 335 (1976).
[209] *Id.*
[210] *Id.* at 332-33.

lies in the fact that while *Mathews* addressed the procedural due process protections involved in the context of administrative hearings, the proposed balancing test is concerned with the level of judicial scrutiny attached to an agency's actions. Despite this, many of the interests involved in the analysis are quite similar. In *Mathews*, the first factor considered is the "private interest that will be affected by the official action."[211] In the context of an agency action, the "private" interest can be quite varied and quite far reaching. To this end, this consideration can appear in two different manners, as either a constitutionally protected interest of the individual or as a significant decision that impacts several individuals. As discussed in Section II, the Court has been somewhat wary to afford any deference to agency actions that have significant implications for constitutionally protected interests. For this reason, if a protected interest is significantly implicated, the Court and not the agency has the relative expertise and the agency should be afforded little to no deference. Conversely, if the issues discussed in the case touch upon issues of foreign policy, it is likely to demand a greater level of deference from the Court as is found in *Curtiss-Wright* deference.[212] While a constitutional right may not necessarily be directly implicated in the case, this is not to say that the private interests of the individual are unaffected. As the Court has discussed in the "extraordinary case" exception, agency decisions that will have lasting effects on entire industries likely require a more nuanced and careful analysis by the court. This often supports the decision to review the issues *de novo*.[213]

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[211] *Id.* at 335.

[212] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (allowing for a "degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").

[213] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 234 (1994) (holding that the FCC's actions should not be afforded any deference because its actions would substantially alter the rate-regulated market); Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 163-64 (2000) (holding that FDA did not

The interests of the non-governmental actors, however, must be weighed against the government's interest in the litigation, including "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [214] In an analysis of an agency's action, the "government's interest" is largely reflected in the interests of the agency as well as in the agency's expertise in the subject of the litigation. An agency tasked with implementing a statute has a vested interest in its correct implementation; this interest is increased when the agency has engaged in the act of applying its own regulation, which results from the agency's prior interpretation of the statute. This interest, however, is diminished in cases where the agency is not as expert. For instance, in *Franco-Gonzalez*, the reasonable accommodations requirement under the Americans with Disabilities Act were not a central issue that the ICE dealt with regularly in the course of its detention of immigrants and therefore had little expertise in considering. [215] For this reason, given that these requirements frequently appeared as ancillary issues in their operations, ICE had relatively little interest in the proper implementation of the statute and therefore should not be afforded a great deal of deference. [216]

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have the authority to regulate tobacco industry because of the long history of non-regulation and the jarring change to the industry that would result from FDA regulation); King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (holding that no deference is afforded to agency actions that have significant "economic and political significance").

[214] *Mathews*, 424 U.S. at 335.

[215] *See* Franco-Gonzalez v. Holder, No. 10-02211, 2013 WL 3674492, at *9 n.12 (C.D. Cal. Apr. 23, 2013) (noting that even lawyers regularly assigned to represent mentally impaired clients in immigration proceedings may lack the professional expertise and accountability to adequately represent their client's needs).

[216] *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., POLICY MANUAL (2016), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume1-PartA-Chapter11.html (outlining the agency's policy for complying with the Rehabilitation Act; no such manual exists for U.S. Immigration and Customs Enforcement, which is a separate subdivision of Department of Homeland Security).

Similarly, the agency's interest in the subject of the litigation is affected by the nature of the agency as either an independent or executive agency. The central difference between these two different categories of agencies is their responsiveness to the desires of the executive branch, which stands as a proxy for democratic accountability. The assumption in the decision between executive and independent agencies is that the relationship of the agency to the executive branch, or lack thereof, affects the objectives and interests of the agency.[217] Assuming that the agency's interest plays some role in its ultimate actions, the different interests that guide independent agencies and executive agencies would support two different types of deference standards for these two types of agencies.

The final prong in this analysis is the current *Chevron* step zero analysis. Given that the types of agency actions governed by *Mead* and *Chevron* reflect different levels of structural decision making on the part of the agency, these different types of actions affect the risk of error and erroneous deprivation. *Chevron* applies when a rule carries the force of law (i.e. the agency acted on the Congressionally delegated discretionary authority).[218] In order for a rule to carry the force of law, it must be developed according to certain procedures which requires greater consideration on the part of the agency than nonbinding rules.[219] For this reason, the risk of error, which is affected by the amount of forethought put into a decision is less when an agency action carries the force of law than when it does not and thus supports the granting of a stronger form of deference to the agency.

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[217] Peter P. Swire, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1767-69 (1985) (discussing the history of agency independence as a mechanism for political impartiality).
[218] United States v. Mead Corp., 533 U.S. 218, 237-38 (2001).
[219] Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 569 (2012).

CONCLUSION

The Court's approach to agency deference has had an inverse relationship with the development of the administrative state; as agencies continued to grow in size and complexity, the Court has attempted to simplify the rubrics by which it analyzes agencies' actions into a single standard. The supposed *Chevron* revolution discussed in academic literature has yet to fully accrete the prior constellation of jurisprudence, but it has pushed around these other bodies of precedent.[220] Agencies and courts, in turn, are left adrift in empty space with little to guide them between deference standards that continue to exist in the precedent of the Supreme Court. The Court should acknowledge the current reality that judicial deference is *not* dominated by any single deference standard, nor is any single deference standard sufficient to address the wide ranging needs of the modern administrative state. In a complex, globalized society, agencies must be allowed to exercise their expertise without inordinate judicial interference, but the judicial deference regimes must be consistently and systematically applied.

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[220] *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980 (1992) ("On the one hand, *Chevron* clearly has resulted in a significant shift in the deference doctrine. On the other hand, *Chevron* has not produced anything like a complete revolution in the Court's jurisprudence. On the whole, the overall picture suggests that the judicial understanding that informs the deference question is probably more confused today than it has ever been.").