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# The Rest Is Silence: Chevron Deference, Agency Jurisdiction and Statutory Silences

Jonathan H. Adler

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# **THE REST IS SILENCE: *CHEVRON* DEFERENCE, AGENCY JURISDICTION, AND STATUTORY SILENCES**

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CASE WESTERN RESERVE  
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**The Rest Is Silence:  
Chevron Deference, Agency Jurisdiction,  
and Statutory Silences**

**Nathan Alexander Sales  
and Jonathan H. Adler**

**Case Research Paper Series in Legal Studies**  
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# THE REST IS SILENCE: *CHEVRON* DEFERENCE, AGENCY JURISDICTION, AND STATUTORY SILENCES

Nathan Alexander Sales\*

Jonathan H. Adler\*\*

*Should agencies receive Chevron deference when interpreting the reach of their own jurisdiction? This Article argues that, in general, they should not. The authors begin by identifying and detailing the various different types of “jurisdictional questions” that may arise in statutory interpretation. The Article then surveys how courts have analyzed these different aspects of the jurisdiction problem, with a particular attention directed to statutory silences. The Court’s Chevron jurisprudence strongly suggests that deference to agency determinations of their own jurisdiction should be disfavored, particularly where a statute is silent (and not merely ambiguous) about the existence of agency jurisdiction. In particular, the authors argue that courts should deny Chevron deference regardless of whether an agency is asserting or disclaiming jurisdiction. This no-deference rule should apply in both existence-of-power and scope-of-power cases, but courts should show deference where agencies assert the existence of a factual predicate that triggers jurisdiction. The authors support their proposal with arguments drawing on both traditional administrative law norms and public choice analyses of the incentives faced by agencies and other relevant actors. While there are strong counterarguments to their proposal—particularly the potential difficulty in distinguishing between jurisdictional and nonjurisdictional questions—this Article maintains that denying deference in the jurisdictional context is desirable and consistent with Chevron principles.*

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## INTRODUCTION

The American Bar Association did not take kindly to the idea that the Federal Trade Commission (FTC) could regulate lawyers and law firms as “financial institutions.”<sup>1</sup> The FTC asserted such authority under the Gramm-Leach-Bliley Financial Modernization Act.<sup>2</sup> According to the FTC, the law—which was designed to foster competition among banks, insurance companies, and other institutions—applied to all “entities engaged in ‘financial activities.’”<sup>3</sup> Therefore, the Commission rea-

1. The FTC adopted regulations defining a “financial institution” as “an institution the business of which is engaging in financial activities.” 16 C.F.R. § 313.3(k)(1) (2008).

2. Pub. L. No. 106-102, 113 Stat. 1338 (1999).

3. *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 466–67 (D.C. Cir. 2005) (quoting correspondence from FTC Director of the Bureau of Consumer Protection). The Act defined a “financial institution” as “any institution the business of which is engaging in financial activities,” and further defined as “financial in nature” a wide range of activities, including “real estate settlement services,” and “tax planning

soned, insofar as some private attorneys provide “financial services,” such as tax and estate planning or real estate settlement services, they were subject to FTC regulations implementing the Act’s privacy provisions.<sup>4</sup>

The United States Court of Appeals for the District of Columbia Circuit made short work of the FTC’s position—that the Act delegated broad authority over all entities engaged in financial activities and contained no exemption for attorneys;<sup>5</sup> and that, insofar as the statute was “silent or ambiguous” on whether it applied to lawyers, courts should defer to the Commission’s reasonable interpretation of its authority under “step two” of the *Chevron* doctrine.<sup>6</sup> According to the D.C. Circuit, Congress did not grant the FTC such authority.<sup>7</sup> The court denied that “*Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power.”<sup>8</sup> A statutory silence on the delegation of power to a federal agency is not an ambiguity about the existence of that power.<sup>9</sup> Rather, the court held, it is a failure to delegate that power. Deference would only be called for if there had been “an implicit delegation of authority” to the FTC.<sup>10</sup>

Is *American Bar Ass’n v. FTC* consistent with the *Chevron* doctrine? *Chevron* treats statutory silences as ambiguities that trigger judicial deference to an agency’s reasonable statutory interpretation.<sup>11</sup> But ambiguity by itself does not give rise to *Chevron* deference, and a statutory silence is not in itself an ambiguity. Before deferring, a court must first locate other evidence that Congress meant to grant such interpretive

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and preparation services,” in addition to many activities more commonly considered financial. *Id.* at 467.

4. See 12 C.F.R. § 225.28(b)(2)(viii), (b)(6)(vi) (2008).

5. *Am. Bar Ass’n*, 430 F.3d at 468 (“The Commission apparently assumed—without reasoning—that it could extend its regulatory authority over attorneys engaged in the practice of law with no other basis than the observation that the Act does not provide for an exemption.”); *id.* (“[T]he Commission repeatedly repairs to the position that no language in the statute exempts attorneys from regulation.”).

6. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

7. *Am. Bar Ass’n*, 430 F.3d at 471.

8. *Id.* at 468 (quoting *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)).

9. *Id.* at 471 (“[I]f there is the sort of ambiguity that supports an implicit congressional delegation of authority to the agency make a deference-worthy interpretation of the statute, we must look elsewhere than the failure to negate regulation of attorneys.”); *id.* at 469 (“Mere ambiguity in a statute is not evidence of congressional delegation of authority.” (quoting *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001))).

10. *Id.* at 469 (quoting *Sea-Land Serv., Inc. v. Dep’t of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998)).

11. *Chevron*, 467 U.S. at 843 (“[I]f the statute is *silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” (emphasis added)).

power to the agency.<sup>12</sup> This initial inquiry—what Professors Merrill and Hickman termed *Chevron* “step zero”<sup>13</sup>—must come first. Without a delegation, an agency’s statutory interpretation is not due *Chevron* deference, no matter how ambiguous the statute. Further, a statutory silence, without more, is not an implicit delegation. Understanding *Chevron* as a doctrine grounded in a legislative delegation reconciles the apparent conflict and illustrates why the D.C. Circuit’s approach was correct—and why deference to agency jurisdictional determinations is unwarranted.

This Article seeks to contribute to the definition of “*Chevron*’s domain”<sup>14</sup> and the so-called step zero analysis by examining how courts should address disputes over agency jurisdiction, particularly disputes involving statutory silences. The Supreme Court has yet to resolve whether *Chevron* deference should apply when an agency is interpreting the reach of its own jurisdiction,<sup>15</sup> and academic opinion is similarly unsettled.<sup>16</sup> However, principles drawn from the Court’s *Chevron* jurisprudence and familiar public-choice considerations both suggest that deference to agency determinations of their own authority should be disfavored—especially when an agency invokes a statutory silence as a basis for exercising jurisdiction.

Part I explains that what are commonly, and simplistically, grouped together as “jurisdictional questions” actually come in a wide variety of different forms. For example, agencies may *assert* jurisdiction or they may *disclaim* it. A case might concern the *existence* of jurisdiction, the

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12. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836–37 (2001).

13. See *id.* at 836 (defining the “step zero” inquiry as “the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all”); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207–11 (2006) [hereinafter Sunstein, *Step Zero*].

14. Merrill & Hickman, *supra* note 12, at 833.

15. See, e.g., *Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990) (“The Supreme Court cannot be said to have resolved the issue definitively.”); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 812 n.151 (2007) (“The question of whether *Chevron* deference applies to the resolution of ‘jurisdictional’ issues has proved troublesome to courts.”); Merrill & Hickman, *supra* note 12, at 844 (“The Court has never resolved whether there should be a ‘scope of jurisdiction’ exception to *Chevron* deference . . .”). But see, e.g., *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); 1 RICHARD PIERCE JR., *ADMINISTRATIVE LAW TREATISE* § 3.5, at 157–58 (4th ed. 2002) (suggesting the “pattern” of the Court’s decisions suggests “*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers”).

16. Compare, e.g., Sunstein, *Step Zero*, *supra* note 13, at 234–36 (courts should apply *Chevron* to jurisdictional questions), and Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency’s Jurisdiction*, 61 U. CHI. L. REV. 957, 958 (1994) (same), with Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 992–93 (1999) (*Chevron* is inapplicable to certain types of jurisdictional questions), and Merrill & Hickman, *supra* note 12, at 837 (same), and Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1466–67 (2000) (same), and Torrey A. Cope, Note, *Judicial Deference to Agency Interpretations of Jurisdiction After Mead*, 78 S. CAL. L. REV. 1327 (2005) (same).

*scope* of jurisdiction, or the presence of a *factual predicate* necessary to trigger jurisdiction. And an agency might interpret a *statutory silence* as a conferral (or, less often, a denial) of jurisdiction. Part I then explores how courts have analyzed these different aspects of the jurisdiction problem, with a special focus on the question of statutory silences.

Part II places this discussion in the broader context of the *Chevron* doctrine as explicated in subsequent cases. As clarified by a near-unanimous Court in *Mead*, agencies are entitled to deference when there is evidence that Congress has delegated them certain powers. The issue of whether power has been conferred at all is thus antecedent to the issue of whether deference is appropriate; the second question arises only when the first question is answered in the affirmative.

In Part III, we apply the presumption against deference to agency constructions of their own jurisdiction to the various categories identified in Part I. In particular, courts should deny *Chevron* deference regardless of whether an agency is asserting or disclaiming jurisdiction. This no-deference rule should apply in both existence-of-power and scope-of-power cases, partly because the line that distinguishes those two categories can be difficult to discern. The one area where courts should grant deference (albeit not *Chevron* deference) is where agencies assert the existence of a factual predicate necessary to trigger jurisdiction. As with other factual determinations agencies make in the course of administering legislatively authorized programs, such conclusions merit ample deference from the courts.

Part IV offers a number of arguments in favor of our proposal. The first set of arguments derives from familiar administrative law norms. *Chevron* itself implies that jurisdictional interpretations are not entitled to judicial deference (delegation is antecedent to deference), and the no-deference rule likewise follows from the nature of administrative agencies as creatures of statute that lack any inherent powers. In addition, agencies are no more expert than courts are in resolving jurisdictional disputes, and the Administrative Procedure Act instructs that courts—not agencies—are responsible for resolving issues of this sort. Finally, our proposed no-deference rule is akin to a canon of avoidance that prevents agencies from making jurisdictional claims that might implicate separation-of-powers concerns.

A second set of arguments is informed by public choice principles. Denying *Chevron* deference to agencies' jurisdictional interpretations helps preserve the legislative "deal" that was struck within Congress. A no-deference rule likewise creates desirable incentives for Congress to resolve a greater number of policy matters itself, leaving fewer to agencies and the courts. Finally, independent judicial resolution of agency ju-



jurisdiction is necessary to guard against agency self-aggrandizement and self-interested behavior.

Part V concludes by discussing potential objections to our proposal. The strongest counterargument is that a no-deference rule increases courts' decision costs: Courts cannot coherently draw a line that demarcates jurisdictional agency actions (which are eligible for *Chevron* deference) from nonjurisdictional ones (to which *Chevron* does not apply). While it may well be prohibitively difficult to say whether a particular agency action implicates the *existence* of a power or the *scope* of a power, in most cases the boundaries between jurisdictional and nonjurisdictional actions will be less fuzzy, less frequent, and no more difficult than the sorts of question courts must answer all the time. Another significant objection is that a decision whether or not to invoke agency jurisdiction inevitably involves policy determinations that should be left to accountable agency officials, not to unaccountable judges. But this is question-begging. Agencies only have authority to make policy determinations if Congress has delegated them that power, and the issue in a jurisdictional case is precisely whether that delegation has taken place.

## I. DEFERENCE, JURISDICTION, AND STATUTORY SILENCES

### A. Analytical Categories

Almost invariably, when courts (and academics) grapple with whether an agency's views on the extent of its own powers should merit *Chevron* deference, they refer to such issues, without differentiation, as "jurisdictional."<sup>17</sup> In fact, these cases can be broken down into a number of analytically distinct categories. Certain cases involve agency *assertions* of jurisdiction, while others present *disclaimers* of jurisdiction. Some disputes concern the *existence* of agency jurisdiction, others the *scope* of jurisdiction. Still others concern the presence (or lack) of a *factual predicate* necessary to trigger agency jurisdiction. A final type of case involves an agency interpreting a *statutory silence*—i.e., a statute's failure to expressly grant or deny a proposed power—as a congressional conferral of jurisdiction. In this Section we identify the various types of jurisdictional cases and discuss the unique concerns that each raises. The lines dividing the various categories are not always perfectly clear, but we nevertheless attempt to draw them, both to improve analytical clarity and because we

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17. *But cf.* Crawford, *supra* note 16, at 970 (recognizing that there are "two types of jurisdictional interpretations: those in which the agency is interpreting language directly entrusted to the agency and those assertions of authority that are not grounded in the statutory text").

argue that whether deference is appropriate depends on the nature of the given jurisdictional dispute.

The first category of jurisdictional questions concerns whether the agency's interpretation expands or contracts its authority. Most cases involve an agency's assertion of jurisdiction; that is, the agency interprets a statute as evincing Congress's design to confer on it a particular power.<sup>18</sup> For instance, the Office of Management and Budget (OMB) read the Paperwork Reduction Act to give it authority to review agency rules requiring regulated entities to disclose information to third parties,<sup>19</sup> and the U.S. Postal Service interpreted the Postal Reorganization Act to grant it the unilateral power to set rates for international mail service.<sup>20</sup> The danger posed by an agency's jurisdiction-asserting interpretation is aggrandizement: the risk that the agency will exercise a power Congress did not intend for it to have, or that it will extend its power more broadly than Congress envisioned.<sup>21</sup> Aggrandizement not only raises the risk that an agency might wield excessive power, but that it might disrupt Congress's intended distribution of power.

In a smaller set of cases, an agency interprets a statute to disclaim jurisdiction; that is, the agency affirmatively renounces a power arguably granted to it, or concludes that an undisputedly granted power does not extend as far as it might. For instance, the Federal Communications Commission (FCC) concluded that it lacked authority to regulate broadband cable Internet service under Title II of the Communication Act.<sup>22</sup> The Federal Maritime Commission likewise interpreted the Maritime Labor Agreements Act to prevent it from considering labor policy when determining the validity of tariff rules.<sup>23</sup> When interpreting the Migratory Bird Treaty Act, the Secretary of the Interior excluded mute swans from the bird species subject to the Act's protection, thereby limiting his own regulatory authority.<sup>24</sup> In perhaps the most famous, and controversial, recent example, the Environmental Protection Agency (EPA) claimed it lacked statutory authority to regulate emissions of greenhouse gases under the Clean Air Act.<sup>25</sup>

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18. See Gellhorn & Verkuil, *supra* note 16, at 992 (“[E]xcept in highly unusual circumstances, agencies read their authority expansively and often pursue agendas far beyond that envisioned when the agencies were created.”).

19. Dole v. United Steelworkers of Am., 494 U.S. 26, 34–36 (1990).

20. Air Courier Conference of Am., Int'l Comm. v. U.S. Postal Serv., 959 F.2d 1213, 1223 (3d Cir. 1992).

21. See generally Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203 (2004); see also *infra* Part IV.B.2.b.

22. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 974 (2005).

23. N.Y. Shipping Ass'n v. Fed. Mar. Comm'n, 854 F.2d 1338, 1348 (D.C. Cir. 1988).

24. Hill v. Norton, 275 F.3d 98, 99 (D.C. Cir. 2001).

25. See *Massachusetts v. EPA*, 549 U.S. 497, 511–12 (2007).

Jurisdiction-disclaiming interpretations pose the risk of abrogation: the possibility that an agency might fail to discharge the duty with which Congress has charged it, perhaps because of policy disagreements with the legislature or because it fears public disapproval for taking politically unpopular actions. Even after the Supreme Court held that the EPA did in fact have authority to regulate greenhouse gases under the Clean Air Act, the Bush Administration resisted exercising this authority.<sup>26</sup> Presidential administrations are not always eager to implement congressional commands.

Abrogation is not the only risk. Power-disclaiming interpretations sometimes pose a danger of agency aggrandizement, though of a different sort. Agencies might focus on matters that advance their own institutional interests, as distinct from the interests Congress tasked them with serving. Hence, they may resist devoting resources to projects they see as outside their core missions. For years, J. Edgar Hoover's FBI resisted efforts by Congress to give it responsibility for investigating narcotics offenses and organized crime.<sup>27</sup> Officials feared that the new responsibilities would distract the Bureau from fulfilling its preferred mission—solving kidnappings and bank robberies—and also might expose it to criticism for failing to fix the problems.<sup>28</sup> The Army Corps of Engineers likewise resisted calls to regulate wetlands under the Clean Water Act, going so far as to deny that it had the statutory authority to regulate the filling of wetlands.<sup>29</sup> Implementing a wetland permitting regime would require the Corps to develop a new regulatory focus, arguably at odds with its traditional development-oriented mission of maintaining the navigability of waterways. It took an adverse court ruling that the agency *did* in fact have authority before the Corps began regulating wetlands.<sup>30</sup>

A second jurisdictional category concerns the quantity of power an agency claims. The boldest assertions of jurisdiction appear in existence-of-power cases, where an agency seeks to exercise a novel power unrelated to the authority with which Congress has entrusted it. The agency does not just apply the authority the legislature undisputedly delegated it, but extends its jurisdiction “to a broad area of regulation, or to a large category of cases.”<sup>31</sup> In effect, the agency creates a power for itself *ex ni-*

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26. See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,355 (proposed July 30, 2008).

27. RICHARD GID POWERS, *BROKEN: THE TROUBLED PAST AND UNCERTAIN FUTURE OF THE FBI* 262 (2004).

28. *Id.*

29. *Permits for Activities in Navigable Waters or Ocean Waters*, 39 Fed. Reg. 12,118, 12,119 (Apr. 3, 1974).

30. See *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

31. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2100 (1990) [hereinafter Sunstein, *Law and Administration*].

*hilo* (or categorically disclaims any power whatsoever). A celebrated existence-of-power issue arose when the Commodity Futures Trading Commission (CFTC), which was charged with adjudicating violations of federal commodities law, asserted its jurisdiction to resolve related state-law issues as well.<sup>32</sup> The Federal Election Commission (FEC) likewise asserted, out of whole cloth, the power to place in the public record confidential information about an ongoing investigation.<sup>33</sup>

Occupying the middle ground are scope-of-power cases, in which Congress has delegated an agency a certain quantity of authority but has left its magnitude and reach somewhat unclear. In such cases, the agency interprets its grant of jurisdiction to entail another power, or to permit it to exercise its power in a particular way. For instance, the Department of Health and Human Services cited its power under the National Childhood Vaccine Injury Act to revise the “Vaccine Injury Table” as the basis for its claimed authority to change the definition of a disease listed in the Table.<sup>34</sup> Similarly, the Interstate Commerce Commission concluded that its power to convert railroad right-of-ways into nature trails permitted it to authorize only voluntary transfers between railroads and trail operators, not compelled ones.<sup>35</sup> These cases may be the most difficult to identify; it can be particularly challenging to draw the line between expanding the scope of an existing power and asserting an entirely new power.

The least dramatic assertions occur in cases where an agency proposes that the presence of a certain factual predicate triggers its delegated jurisdiction. In the typical factual-predicate case there is no dispute as to whether Congress has delegated power to an agency; indeed, some factual-predicate cases do not involve interpretation of a statutory grant of power at all. Rather, the question is whether a given set of facts necessary for the exercise of power exists. For example, the Federal Energy Regulatory Commission (FERC) concluded that a quantity of natural gas was transported in interstate commerce, thus triggering its jurisdiction under the Natural Gas Act.<sup>36</sup> The Interstate Commerce Commission likewise asserted its jurisdiction over a freight company because it found that the company’s shipments were transported on public highways.<sup>37</sup> In these cases, Congress has identified the general conditions under which the agency can exercise its regulatory authority, but has dele-

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32. Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 844–45 (1986).

33. *In re Sealed Case*, 237 F.3d 657, 662–63 (D.C. Cir. 2001).

34. O’Connell v. Shalala, 79 F.3d 170, 174–75 (1st Cir. 1996).

35. Nat’l Wildlife Fed’n v. Interstate Commerce Comm’n, 850 F.2d 694, 696 (D.C. Cir. 1988).

36. Okla. Natural Gas Co. v. Fed. Energy Regulatory Comm’n, 28 F.3d 1281, 1283 (D.C. Cir. 1994).

37. P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc., 856 F.2d 546, 551 (3d Cir. 1988).

gated the agency responsibility for determining when the relevant conditions are met.

Any candid attempt to distinguish existence-of-power from scope-of-power from factual-predicate cases must acknowledge that the boundaries between them are not always precisely demarcated. For instance, OMB's conclusion that it had the authority to review a Labor Department regulation under the Paperwork Reduction Act could be described as an existence issue (asserting *ex nihilo* the power to review third-party disclosure rules) or a scope issue (asserting that the power to review information-gathering rules entails the power to review disclosure rules). Some suggest that this difficulty makes incoherent the enterprise of identifying a class of "jurisdictional" issues to which *Chevron* is inapplicable.<sup>38</sup> We discuss this problem at length below,<sup>39</sup> but for now it is sufficient to note that (a) despite occasionally blurred lines, most jurisdictional cases can be assigned to one of these three categories quite comfortably; and (b) occasional difficulties in discerning boundaries does not, in itself, invalidate the entire categorization enterprise. We can still tell the time without identifying the precise moment at which day becomes dusk.

A final category, which is a subset of jurisdiction-asserting cases, involves statutory silences. Statutory-silence cases present an evidentiary question: How does one know whether Congress intended the agency to wield a particular power? Is the fact that a statute is silent on the conferral of a proposed power—i.e., the fact that the statute neither grants nor denies it—evidence that Congress anticipated that the agency would exercise that power? Could it be evidence that Congress anticipated that the agency would *not* exercise it? Or, as the FTC argued in the *American Bar Ass'n* case,<sup>40</sup> is it somehow evidence that Congress delegated the jurisdictional decision to the agency?

This issue arose when the National Mediation Board asserted its authority *sua sponte* to investigate representation disputes among railway employees, based in large part on the failure of the Railway Labor Act to expressly deny that power.<sup>41</sup> Similarly, the Department of Transportation (DOT) located its authority to impose money damages against bus companies that failed to comply with the Americans with Disabilities Act (ADA) in the statute's failure to expressly deny that power.<sup>42</sup> In each case, the agency asserted that Congress's failure to address the scope-of-

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38. See, e.g., *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 676–77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting); Crawford, *supra* note 16, at 968–69.

39. See *infra* Part V.A.

40. See *supra* text accompanying notes 1–10.

41. See *Ry. Labor Executives' Ass'n*, 29 F.3d at 662.

42. *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 1 (D.C. Cir. 2000).

power question left the matter up to the agency within the bounds of *Chevron* step two.

Statutory silences are vital to the analysis that follows and to our proposal to restrict the availability of judicial deference to agencies' jurisdictional interpretations. This is so because statutory silences vividly frame the central problem common to all jurisdiction cases: What is the proper allocation of responsibility among Congress, agencies, and the courts for determining the scope of agency authority?

### B. *Jurisdictional Questions in Court*

As more than one court of appeals has lamented, “[t]he Supreme Court cannot be said to have resolved the issue definitively” whether agencies' jurisdictional interpretations are entitled to *Chevron* deference.<sup>43</sup> While the Court on occasion has implied that an agency's views on the scope of its jurisdiction command the judiciary's deference, it also has implied the contrary.<sup>44</sup> When the Court has addressed the issue, it has not been with a single voice. And just as frequently, the Court has failed to speak at all, sidestepping obvious opportunities to illuminate the extent to which jurisdictional questions ought to be analyzed under the *Chevron* framework.

The question received its fullest treatment in Justices Scalia and Brennan's dueling opinions in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.<sup>45</sup> That case upheld the FERC's jurisdiction to require that a Mississippi utility company purchase power from a nuclear plant, thereby preempting a state agency from determining whether those costs were prudently incurred.<sup>46</sup> Justice Stevens's majority opinion did so, however, without addressing the deference question. It did not so much as cite *Chevron*.

In a separate concurrence, Justice Scalia argued that “the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction.”<sup>47</sup> He identified three reasons. First, Justice Sc-

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43. *Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990); *see also* *O'Connell v. Shalala*, 79 F.3d 170, 176 n.6 (1st Cir. 1996); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 911 F.2d 993, 1002 (5th Cir. 1990); *Merrill & Hickman*, *supra* note 12, at 835.

44. *Compare* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that “considerable weight must be accorded the CFTC's position” that “it has the power to take jurisdiction over [state-law] counterclaims” (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984))), *with* *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (recognizing that “agency determinations within the scope of delegated authority are entitled to deference,” but reiterating the “fundamental” principle “that an agency may not bootstrap itself into an area in which it has no jurisdiction” (quoting *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973))).

45. 487 U.S. 354 (1988).

46. *Id.* at 369–70.

47. *Id.* at 381 (Scalia, J., concurring in the judgment).

lia denied “that agencies can claim no special expertise in interpreting their authorizing statutes if an issue can be characterized as jurisdictional.”<sup>48</sup> The implication is that agencies are experts in determining whether they have jurisdiction, if for no other reason than they are expert in the general subject matter of their regulatory authority. This is a plausible argument, since agencies are sometimes responsible for drafting and pressing the legislative proposals they are later charged to implement; that in turn suggests agencies know what at least some statutes were intended to authorize and accomplish. Second, Justice Scalia argued that Congress “would naturally expect” agencies to determine whether an ambiguous statute grants them jurisdiction.<sup>49</sup> In other words, courts should presume Congress has delegated agencies the power to resolve jurisdictional ambiguities. These two reasons—agency expertise and the presumption of congressional delegation—are of course consistent with various commonly accepted rationales for *Chevron* deference.<sup>50</sup>

By far the most important (and most frequently echoed) of Justice Scalia’s objections is a prudentialist one: courts’ asserted inability to distinguish jurisdictional issues from nonjurisdictional issues.<sup>51</sup> “[T]here is no discernable line,” he argued, “between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority.”<sup>52</sup> Instead, one can describe a given question alternately as “jurisdictional” or “nonjurisdictional” simply by manipulating the level of generality at which one poses it.<sup>53</sup>

Justice Scalia’s claim hangs by an empirical thread: the proposition that it is impossible (or prohibitively difficult) to identify a jurisdictional question as jurisdictional. There is nothing intrinsically wrong, so the argument seems to go, with courts resolving jurisdictional matters *de novo*; it just so happens that they cannot recognize a jurisdictional matter when it comes before them. As a consequence, courts will have a difficult time

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48. *Id.*

49. *Id.* at 381–82.

50. *See id.* at 381 (identifying Congress’s expectation as “the general rationale for deference”); *see also, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that an agency interpretation “qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law”); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) (“[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference.”).

51. *See, e.g.*, *Okla. Natural Gas Co. v. Fed. Energy Regulatory Comm’n*, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (stressing “the difficulties of drawing a manageable and principled line between jurisdictional and other issues”); *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 676–77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting) (“Indeed, any issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed.”); Sunstein, *Law and Administration*, *supra* note 31, at 2097 n.124, 2099 nn.132–33; Crawford, *supra* note 16, at 968–69.

52. *Miss. Power & Light*, 487 U.S. at 381 (Scalia, J., concurring).

53. *Id.* (“Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the ‘authority.’”).

confining themselves to truly jurisdictional questions. It is inevitable that reviewing courts will stray into the substance of the agency action, thereby intruding on areas that, for Justice Scalia, should be the exclusive domain of politically accountable agencies. If courts had that capacity to recognize jurisdictional disputes, Justice Scalia's objection would be less weighty.

Although his *Mississippi Power & Light* concurrence does not flesh out the argument, Justice Scalia's concern appears to be with ensuring that courts decide cases according to principled, non-arbitrary standards and that judges avoid the policymaking that resolving statutory ambiguities may entail.<sup>54</sup> A related idea animates his opinion for the Court in *Michael H. v. Gerald D.*,<sup>55</sup> where he argued that, when considering whether a claimed right is in fact protected by the Fourteenth Amendment's Due Process Clause, a court should describe that right at the most specific level of generality.<sup>56</sup> Allowing courts to play fast and loose with the level of abstraction "ha[s] the virtue (if it be that) of leaving judges free to decide as they think best" and indeed "permit[s] judges to dictate rather than discern the society's views."<sup>57</sup> Instead, "if arbitrary decision making is to be avoided," courts must be constrained "to adopt the most specific tradition as the point of reference."<sup>58</sup> No less in the context of agency powers, courts' ability to manipulate the generality at which they frame a jurisdictional question poses the risk that they will do so in a way that enables them to reach a desired result.<sup>59</sup>

Dissenting from his colleagues' conclusion that FERC had jurisdiction, Justice Brennan took special exception to Justice Scalia's reasons for extending *Chevron* deference to jurisdictional questions. Justice Brennan did not dispute his rival on all fronts, but rather advanced a more modest proposition. He argued not that *Chevron* is categorically inapplicable to jurisdictional disputes, but only that courts should not defer to an agency's interpretation of a statute that "is designed to confine the scope of the agency's jurisdiction to the areas Congress intended it to

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54. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–87 (1989).

55. 491 U.S. 110 (1989).

56. *Id.* at 111, 127 n.6.

57. *Id.* at 127 n.6.

58. *Id.*

59. Whatever its basis, Justice Scalia's concern with judicially manageable line-drawing, particularly in the *Chevron* context, is an oft-repeated one. Notably, it informed his lone dissent in *United States v. Mead*, in which the Court declined to afford *Chevron* deference to Customs Service tariff designations that were made in a fairly informal manner. 533 U.S. 218, 258 n.6 (2001) (Scalia, J., dissenting) ("The *authoritativeness* of the agency ruling may not be a bright-line standard—but it is infinitely brighter than the line the Court asks us to draw today . . ."); see also *id.* at 236 (majority opinion) ("Justice Scalia's first priority over the years has been to limit and simplify.").



occupy.”<sup>60</sup> Justice Brennan’s dissent leaves untouched the question whether *Chevron* ought to apply to jurisdictional questions that do not involve statutes specifically enacted to restrict agency authority. It further raises the question whether any statute that enumerates limited regulatory jurisdiction can be said to “restrict” agency authority.

Justice Brennan’s reasons for denying *Chevron* deference to jurisdiction-curtailing statutes speak with broader force and counsel against deferring to *any* agency jurisdictional interpretation. First, deference poses an unacceptable risk of agency aggrandizement: Congress’s evident policy “in favor of limiting the agency’s jurisdiction” might be frustrated by “the agency’s institutional interests in expanding its own power.”<sup>61</sup> Second, and contra Scalia, “agencies can claim no special expertise in interpreting a statute confining its jurisdiction.”<sup>62</sup>

Justice Brennan’s third and most powerful concern derives from the nature of administrative agencies: “Agencies do not ‘administer’ statutes confining the scope of their jurisdiction, and such statutes are not ‘entrusted’ to agencies.”<sup>63</sup> In other words, *Chevron* deference only applies when an agency is tasked with administering the statute in question, because only then can it be presumed that Congress delegated the relevant authority. Just as the FERC would not be entitled to deference for its interpretations of the Clean Water Act (since that statute is administered by the EPA),<sup>64</sup> neither would it receive deference when issuing a jurisdictional interpretation (since the agency does not administer such matters). Like Justice Scalia, Justice Brennan adopts a presumption about Congress’s likely intent: “[W]e cannot presume that Congress implicitly intended an agency to fill ‘gaps’ in a statute confining the agency’s jurisdiction . . . .”<sup>65</sup> Justice Brennan’s dissent thus anticipates the *Mead* Court’s subsequent clarification that the *Chevron* regime is based on a presumption about Congress’s intent to delegate interpretive and policymaking powers to agencies.<sup>66</sup>

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60. *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting).

61. *Id.* at 387.

62. *Id.* Neither opinion musters any evidence for, and does no more than baldly assert, its claim about agency expertise.

63. *Id.* at 386–87.

64. *See Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 297 n.9 (D.C. Cir. 2003) (indicating that the court will not defer to FERC’s interpretation of CWA because “it is EPA—and not FERC—that administers the CWA”).

65. *Id.* at 387.

66. *See United States v. Mead*, 533 U.S. 218, 226–27 (2001) (concluding that *Chevron* deference applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”); *see also infra* notes 186–89 and accompanying text.

Justices Scalia and Brennan's *Mississippi Power & Light* schism is not developed in later cases. But the competing considerations their opinions sounded—difficulty of identifying jurisdictional questions vs. risk of aggrandizement, presence vs. absence of expertise, presumed delegation vs. presumed denial of authority—have since been echoed by those grappling with the issue.

One of the best-known discussions appears in *CFTC v. Schor*,<sup>67</sup> which antedates *Mississippi Power & Light* by two years. Pro-deference courts and commentators often invoke *Schor* as an example of the Supreme Court's willingness to defer to agency views on the extent of their own jurisdiction. Indeed, Justice Scalia's *Mississippi Power & Light* concurrence cited it for the proposition that an agency's entitlement to such deference is "settled law."<sup>68</sup> A close reading, however, reveals that *Schor* stands for no such thing.

*Schor* is a pure existence-of-power case. The issue was whether the CFTC, which had the undisputed power to adjudicate violations of the Commodities Exchange Act, rightly interpreted that statute as granting the CFTC jurisdiction over related state-law counterclaims. The Court held that it did.<sup>69</sup> Although the *Schor* Court upheld the CFTC's assertion of jurisdiction, it did so without deferring to the agency's interpretation. Rather, it decided the issue de novo, time and again mustering evidence to support its conclusion that the Act unambiguously evinced Congress's design to grant the Commission authority over state-law counterclaims. The Court specifically found that "Congress plainly intended the CFTC to decide counterclaims";<sup>70</sup> Congress's intent was "evident on the face of the statute";<sup>71</sup> the legislative history "unambiguously demonstrates that . . . Congress intended to vest in the CFTC the power to define the scope of the counterclaims";<sup>72</sup> the statute "clearly authorizes . . . adjudication of common law counterclaims";<sup>73</sup> and "abundant evidence" revealed Congress's intent that the CFTC hear state-law counterclaims.<sup>74</sup> This is not the language of deference.

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67. 478 U.S. 833 (1986).

68. *Miss. Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment); see also, e.g., *Okla. Natural Gas Co. v. Fed. Energy Regulatory Comm'n*, 28 F.3d 1281, 1283 (D.C. Cir. 1994); *Air Courier Conference of Am., Int'l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223–24 & n.8 (3d Cir. 1992); Crawford, *supra* note 16, at 961–62.

69. *Schor*, 478 U.S. at 835–36, 847. After resolving the statutory question, the Court then considered whether the CFTC's assertion of jurisdiction—or Congress's delegation of that power—offended Article III of the Constitution. *Id.* at 847–58. This latter question is beyond the scope of this Article.

70. *Id.* at 841.

71. *Id.* at 841–42.

72. *Id.* at 842.

73. *Id.* at 843.

74. *Id.* at 847.

Of course, *Schor* cited *Chevron* for the proposition that “considerable weight must be accorded the CFTC’s position.”<sup>75</sup> The Court explained that such deference was due in part because of the CFTC’s expertise: “An agency’s expertise is superior to that of a court when a dispute centers on whether a particular regulation is ‘reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes’ of the Act the agency is charged with enforcing . . . .”<sup>76</sup> But this discussion comes on the heels of the Court’s holding that the Act unambiguously granted the CFTC jurisdiction over state-law counterclaims. There was no need to defer to the CFTC’s “reasonable interpretation” because Congress had settled the matter itself. The *Schor* Court’s feint toward extending *Chevron* to jurisdictional questions is therefore dicta.<sup>77</sup>

The Supreme Court upheld the CFTC’s assertion of authority in *Schor*, but it also has invalidated agencies’ jurisdictional interpretations. In *Dole v. United Steelworkers of America*, the Court struck down the OMB’s assertion of jurisdiction, under the Paperwork Reduction Act, to review the Labor Department’s “hazard communication standard.”<sup>78</sup> That regulation required manufacturers to disclose information about hazardous workplace chemicals directly to their employees, rather than to the government.<sup>79</sup> It was undisputed that the OMB had jurisdiction to review “information-gathering rules”—i.e., rules requiring regulated ent-

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75. *Id.* at 844.

76. *Id.* at 845.

77. This is a common strategy, not just at the Supreme Court, but among the lower courts as well: Courts regularly conclude that an agency’s jurisdictional interpretation is or is not eligible for *Chevron* deference after finding that the relevant statute unambiguously settles the issue. In effect, courts discuss the possibility of deferring to an agency’s views only after deciding, de novo, whether those views are meritorious. For instance, in evaluating the Postal Service’s assertion of authority to set international mail rates, a court concluded that Congress unambiguously delegated that power, and went on to state that its holding was “buttressed” and “strengthened” by the deference to which the agency was entitled. *Air Courier Conference of Am., Int’l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1215, 1217–23 (3d Cir. 1992). Another court held that an act of Congress “strongly, if not conclusively” evinced the legislature’s design to grant the Interior Department authority to take certain lands into trust for Indian tribes, and went on to extend the agency’s interpretation *Chevron* deference— “[i]nsofar as agency deference remains appropriate in this case.” *Connecticut ex rel. Blumenthal v. U.S. Dep’t of the Interior*, 228 F.3d 82, 89, 93 (2d Cir. 2000). The same pattern holds true for courts declining to defer to an agency’s assertion of jurisdiction. *See, e.g., United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) (concluding that the Board unambiguously had jurisdiction over a set of railroad track, but stating that “an agency’s determination about the scope of its own jurisdiction indeed does receive de novo review and not *Chevron* deference”); *United Transp. Union*, 169 F.3d at 477 (taking the same approach). This approach is consistent both with *Chevron*, *see Crawford, supra* note 16, at 965, and with the proposition that *Chevron* is inapplicable to jurisdictional questions. When courts conclude that a given statute unambiguously grants or denies an agency a proposed power, they are deciding, consistent with *Chevron* step one, that Congress’s intent is clear. But they are also engaging in the sort of de novo analysis they would be obliged to undertake if *Chevron* deference were unavailable. Hence, the fact that a court strikes an agency’s assertion of jurisdiction on the grounds that Congress unambiguously foreclosed it should not be seen as a tacit holding that *Chevron* applies to jurisdictional questions.

78. 494 U.S. 26, 42–43 (1990).

79. *See id.* at 28–29 (citing 29 C.F.R. § 1910.1200 (1984)).

ities to collect data and submit it to the agency. What was uncertain was whether the Act authorized the OMB to review “disclosure rules”—i.e., rules requiring regulated entities to collect data and make it available, not to the agency, but to third parties.

The Court recognized that the Paperwork Reduction Act did not expressly deny the OMB the power to review disclosure rules.<sup>80</sup> But it nevertheless held that the agency lacked jurisdiction since “the statute, as a whole, clearly expresses Congress’ intention” to deny the OMB such authority.<sup>81</sup> As in *Schor*, the Court found *Chevron* inapplicable and declined to consult the agency’s views. Justice White, joined by Chief Justice Rehnquist, dissented, arguing that the majority improperly withheld *Chevron* deference from the OMB’s interpretation.<sup>82</sup> Justice White also approvingly cited Justice Scalia’s *Mississippi Power & Light* concurrence to disparage the assertion that “*Chevron* should not apply” to agency regulations that “determine the scope of its jurisdiction.”<sup>83</sup>

On its face, *Dole* appears to present an existence-of-power question: Does the OMB have authority to review disclosure rules? But, perhaps illustrating Justice Scalia’s concern about manipulating the level of generality, the OMB cast the issue as concerning the scope of its jurisdiction. The OMB argued that it had the authority to review disclosure rules since they are a specific type of information-gathering rule.<sup>84</sup> As the OMB saw things, it undisputedly held power *X*; it asserted power *Y*; the issue was whether power *Y* was no more than an application of power *X*. Ultimately, the possible distinction in *Dole* between the existence of a power and its scope was irrelevant, since the Court concluded that the Paperwork Reduction Act unambiguously denied the agency that power.

A particularly noteworthy example of the Supreme Court invalidating an agency’s jurisdictional interpretation is *FDA v. Brown & Williamson Tobacco Corp.*, a scope-of-power case in which the FDA argued that its power under the Food, Drug, and Cosmetic Act (FDCA) to regulate “drugs” and “devices” entailed the power to regulate tobacco products.<sup>85</sup> The FDCA defines “drug” to include “articles (other than food) intended to affect the structure or any function of the body.”<sup>86</sup> Pointing to

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80. *Id.* at 34.

81. *Id.* at 42–43 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)); see also *Dole*, 494 U.S. at 35 (explaining that “the language, structure, and purpose of the Paperwork Reduction Act reveal that . . . Congress did not intend the Act to encompass these or any other third-party disclosure rules”).

82. *Dole*, 494 U.S. at 53 (White, J., dissenting).

83. *Id.* at 54. Justice Scalia joined the *Dole* majority, presumably on the *Chevron* step one ground that the statute unambiguously foreclosed OMB jurisdiction. See *id.* at 27, 42–43 (Scalia, J.).

84. *Id.* at 34–35.

85. 529 U.S. 120, 125 (2000).

86. 21 U.S.C. § 321(g)(1)(C) (2006).

its obvious pharmacological effects on the body, the FDA determined that nicotine is a “drug” and that tobacco products are delivery “devices,” and it promulgated a rule restricting the sale of tobacco to children and adolescents.<sup>87</sup>

A sharply divided Supreme Court struck down the agency’s assertion of jurisdiction, concluding, at *Chevron* step one, that Congress unambiguously meant to exclude tobacco from the FDA’s purview.<sup>88</sup> The legislature had revealed that intent in two ways. First, it undeniably meant for the sale of tobacco to remain legal. But if the FDA were to regulate tobacco products, it would have to ban them.<sup>89</sup> This is so because the FDCA requires that a regulated product be deemed “safe” and “effective” for its intended use, and the agency has consistently maintained that tobacco products are unsafe, indeed deadly.<sup>90</sup> Second, Congress enacted a number of tobacco-specific statutes since 1965, creating a distinct regulatory scheme and effectively “ratif[ying] the FDA’s long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products.”<sup>91</sup>

In dissent, Justice Breyer argued that a literal reading of the FDCA’s text, its purpose, and its legislative history all pointed in favor of FDA jurisdiction over tobacco products.<sup>92</sup> He also disputed the majority’s conclusions that, were the FDA to regulate tobacco products, it would have no alternative but to ban them as not “safe,” and that Congress’s tobacco legislation reflected its intent to deny jurisdiction to the FDA.<sup>93</sup> According to Justice Breyer, the FDCA grants the FDA wide latitude on how to protect consumers from unsafe products; an outright ban would not be required.<sup>94</sup> Moreover, Congress’s enactment of tobacco-specific laws does not demonstrate that it meant to deny the FDA jurisdiction over tobacco; such laws are perfectly consistent with an intent to allow the FDA to regulate with whatever authority it might otherwise hold.<sup>95</sup>

It would be difficult to imagine a case that more clearly presented the question whether *Chevron* applies to agencies’ jurisdictional interpretations. Indeed, several amici urged the Court to hold that an agency’s

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87. *Brown & Williamson*, 529 U.S. at 125.

88. *See id.* at 159–60.

89. *Id.* at 137.

90. *Id.* at 136.

91. *Id.* at 144.

92. *Id.* at 161–67 (Breyer, J., dissenting).

93. *Id.* at 174–87.

94. *Id.* at 174–81.

95. *Id.* at 181–86.

assertion of jurisdiction is not eligible for deference.<sup>96</sup> Yet the Court punted—neither majority nor dissent grappled with the question. Without so much as acknowledging the issue, let alone providing a reason, the majority simply announced that *Chevron* was the appropriate framework.<sup>97</sup> At the same time, the Court signaled that the scope of the *Chevron* inquiry in a given case, as distinguished from whether *Chevron* applies at all, depends upon “the nature of the question presented.”<sup>98</sup> The majority stopped short of holding that *Chevron* is inapplicable to certain disputes, but it implied that courts should be quick to find a clearly expressed congressional intent in “extraordinary cases,” such as when an agency asserts regulatory jurisdiction of unprecedented scope.<sup>99</sup> In effect, the Court puts a finger on the scale so that an otherwise comparatively vague statute may be read as though its meaning were clear.

The Court was confronted with additional opportunities to weigh in on the applicability of *Chevron* to jurisdictional questions in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,<sup>100</sup> and again in *Massachusetts v. EPA*.<sup>101</sup> As in *Brown & Williamson*, both cases involved scope-of-power disputes. The wrinkle is that *Brand X* and *Massachusetts v. EPA* are rare examples of agencies disclaiming powers arguably conferred on them by Congress.

*Brand X* concerned Title II of the Communications Act, which grants the FCC authority to regulate entities that offer “telecommunications service.”<sup>102</sup> Among other requirements, these regulated carriers must charge rates that are just and reasonable, allow other carriers to interconnect with their networks, and make payments to the federal universal service fund.<sup>103</sup> The FCC concluded that broadband Internet services offered by cable companies were not “telecommunications service” within the meaning of the Act.<sup>104</sup> In other words, the FCC reasoned that the scope of its undisputed power to regulate providers of “telecommu-

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96. See, e.g., Brief for Pacific Legal Foundation as Amici Curiae Supporting Respondents, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (No. 98-1152), 1999 WL 712594, at \*16–20; Brief for Product Liability Advisory Council, Inc. as Amicus Curiae Supporting Respondents, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (No. 98-1152), 1999 WL 712593, at \*13–17.

97. *Brown & Williamson*, 529 U.S. at 132 (remarking that the Court’s analysis is governed by *Chevron* since the case “involves an administrative agency’s construction of a statute that it administers”).

98. *Id.* at 159.

99. *Id.* (“[T]here may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”).

100. 545 U.S. 967 (2005).

101. 549 U.S. 497 (2007).

102. 47 U.S.C. § 153(46) (2006).

103. *Id.* §§ 201, 251(a)(1), 254(d).

104. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4823–24 (2002).

nications service” did not extend to the broadband services offered by cable companies.

Five years after *Brown & Williamson*, the Court was handed another chance to offer guidance on whether and why *Chevron* might or might not apply to jurisdictional questions. Yet the analysis was equally unsatisfactory. The Court announced that *Chevron* was the appropriate framework, determined that the Communication Act’s reference to “telecommunications service” was ambiguous, and concluded that the FCC reasonably interpreted that term to exclude broadband offered by cable companies.<sup>105</sup> To its credit, the *Brand X* Court *did* undertake a “step zero” inquiry: It considered whether *Chevron* deference is appropriate notwithstanding that the FCC’s deregulatory approach to cable companies represented a reversal of past agency practice, and that the FCC’s interpretation of “telecommunications service” was inconsistent with prior Ninth Circuit precedent.<sup>106</sup> But the Court missed the most obvious “step zero” inquiry of all. It simply declared that “[t]he *Chevron* framework governs our review of the Commission’s construction”<sup>107</sup> without even noticing the jurisdiction issue.

Like the majority, Justice Scalia’s *Brand X* dissent sidesteps the jurisdiction question, and goes on to argue that cable companies’ broadband services are unambiguously “telecommunications service[s]” within the meaning of the Act.<sup>108</sup> Yet his opinion still comes as something of a surprise. Two decades earlier, while a law professor, he penned an anonymous article in the journal *Regulation* criticizing the D.C. Circuit’s conclusion that the National Highway Traffic Safety Administration improperly rescinded a requirement that automobile manufacturers equip their cars with air bags or automatic seat belts.<sup>109</sup> According to Professor Scalia, courts should apply a more relaxed version of arbitrary and capricious review to agencies’ *deregulatory* initiatives than to *regulatory* initiatives:

Granted that a rulemaking proceeding must be conducted to impose regulation and to eliminate regulation alike, it does not necessarily follow that in both types of proceeding the burden of justification rests on the proponent of change. As far as the *substantive* inertia of our laws is concerned, that favors not the status quo but private autonomy, whether or not that be what the status quo pre-

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105. *Brand X*, 545 U.S. at 986–1000.

106. *Id.* at 980–86. Citing *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court concluded that deference was in order. *Brand X*, 545 U.S. at 980–81.

107. *Brand X*, 545 U.S. at 980.

108. *Id.* at 1006–15 (Scalia, J., dissenting).

109. See *State Farm Mut. Auto. Ins. Co. v. Dep’t of Transp.*, 680 F.2d 206, 242 (D.C. Cir. 1982), *vacated sub nom.* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

scribes. That is to say, private freedom can neither be constrained *nor continue to be constrained* without good reason.<sup>110</sup>

One might have predicted that Justice Scalia would want to facilitate agency deregulation under *Chevron* in the same way that Professor Scalia wanted to facilitate it under the Administrative Procedures Act's arbitrary and capricious standard. In other words, for Justice Scalia, agency efforts to disclaim jurisdiction might not just be eligible for *Chevron* deference, but might qualify for even more relaxed judicial scrutiny under *Chevron*. Yet Justice Scalia's *Brand X* dissent derides "the Commission's self-congratulatory paean to its deregulatory largesse,"<sup>111</sup> and instead applies the *Chevron* analysis at full strength.

The Court's most recent foray into questions of agency jurisdiction came in *Massachusetts v. EPA*.<sup>112</sup> In 2003, the EPA concluded it lacked jurisdiction to regulate greenhouse gases as "air pollutants" under the Clean Air Act.<sup>113</sup> According to the EPA, the statute simply did not confer such authority.<sup>114</sup> A 5-4 majority rejected the agency's claim, ruling that the Act's "sweeping definition" of "air pollutant"—"any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air"<sup>115</sup>—was broad enough to embrace "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons."<sup>116</sup> As in *Brown & Williamson*, the Court did not consider whether *Chevron* deference should apply to the EPA's opinion that it lacked jurisdiction; perhaps the reason it failed to do was its conclusion that the plain language of the Clean Air Act "without a doubt" and "unambiguous[ly]" conferred such authority on the agency.<sup>117</sup> The Court did manage to cite *Chevron*, but only for the boilerplate proposition that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."<sup>118</sup>

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110. *Active Judges and Passive Restraints*, REGULATION, July–Aug. 1982, at 10, 13.

111. *Brand X*, 545 U.S. at 1013 (Scalia, J., dissenting); see also *id.* at 1005 ("[I]t might be more accurate to say the Commission has attempted to establish a whole new regime of non-regulation . . .").

112. 549 U.S. 497 (2007).

113. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

114. See *id.* at 52,925–29. It should be noted that one of the authors participated in an *amicus curiae* brief taking this position as well. See Brief for The Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Supporting Respondents, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3043962, at \*20.

115. 42 U.S.C. § 7602(g) (2006).

116. *Massachusetts*, 549 U.S. at 529.

117. *Id.*

118. *Id.* at 527.



Given the Supreme Court's mixed messages, it is not surprising that the lower courts are uncertain whether to extend *Chevron* deference to agencies' interpretations of their own jurisdiction. In all, four courts of appeals have concluded that *Chevron* is fully applicable to jurisdictional interpretations: the Second, Third, Fourth, and Ninth Circuits.<sup>119</sup> The Federal and Seventh Circuits have declined to extend *Chevron* deference.<sup>120</sup> The D.C. and Eighth Circuits appear to have resolved the issue both ways. After initially signaling that *Chevron* is inapplicable to jurisdictional questions, the courts have shown their willingness to extend deference in more recent cases.<sup>121</sup> The question remains unresolved in the remaining circuits.<sup>122</sup>

### C. Statutory Silences

While the *Chevron* Court squarely held that statutory silences can be deference-triggering ambiguities,<sup>123</sup> it has been opaque on whether that rule applies with equal force in all contexts. Hornbook administrative law teaches that an agency deserves deference when interpreting a statute's silence on the manner in which an undisputedly delegated power is to be exercised.<sup>124</sup> But few courts—the Supreme Court included—have considered whether *Chevron* applies to a statute's silence on the existence or scope of a claimed administrative power. Those that have weighed the issue generally have held that Congress's failure to expressly deny a power to an agency is not an ambiguity on whether that power has been delegated.

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119. See *Connecticut v. U.S. Dep't of the Interior*, 228 F.3d 82, 93 (2d Cir. 2000); *Air Courier Conference of Am., Int'l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223–25 (3d Cir. 1992); *Transpacific Westbound Rate Agreement v. Fed. Mar. Comm'n*, 951 F.2d 950, 952 (9th Cir. 1991); *Bd. of Governors of the Univ. of N.C. v. U.S. Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990).

120. See *Tafas v. Doll*, 559 F.3d 1345, 1353 (Fed. Cir. 2009), *reh'g granted*, 2009 WL 1916498 (Fed. Cir. July 6, 2009); *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846–47 (7th Cir. 2002); *United Transp. Union v. Surface Transp. Bd.*, 169 F.3d 474, 477 (7th Cir. 1999).

121. Compare *N.Y. Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1362–63 (D.C. Cir. 1988), and *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (per curiam), with *Conn. Dep't of Pub. Util. Control v. Fed. Energy Regulatory Comm'n*, No. 07-1375, 2009 WL 1754607 (D.C. Cir. June 23, 2009); *Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Energy Regulatory Comm'n*, 475 F.3d 1277, 1279 (D.C. Cir. 2007), and *Okla. Natural Gas Co. v. Fed. Energy Regulatory Comm'n*, 28 F.3d 1281, 1283–84 (D.C. Cir. 1994), and *Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990); compare *Lyon County Landfill v. EPA*, 406 F.3d 981, 983–84 (8th Cir. 2005), with *Missouri v. Andrews*, 787 F.2d 270, 286 (8th Cir. 1986).

122. See *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 936 (6th Cir. 1997); *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996); *Cascade Nat. Gas Corp. v. Fed. Energy Regulatory Comm'n*, 955 F.2d 1412, 1415 n.3 (10th Cir. 1992); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 911 F.2d 993, 1002 (5th Cir. 1990); see also *Teper v. Miller*, 82 F.3d 989, 997–98 (11th Cir. 1996); *id.* at 999 (Carnes, J., concurring) (declining to join the portion of the majority opinion that discusses “the deference that might be due the Commission's regulations and advisory opinions”).

123. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (concluding that deference is due “if the statute is silent or ambiguous with respect to the specific issue”).

124. 1 PIERCE, *supra* note 15, at 143.

The most recent judicial treatment of statutory silences comes in *American Bar Ass'n v. FTC*,<sup>125</sup> but the question was most fully explored in the D.C. Circuit's en banc decision in *Railway Labor Executives' Ass'n v. National Mediation Board*.<sup>126</sup> The Railway Labor Act grants the National Mediation Board power to investigate representation disputes among railway employees "upon request of either party to the dispute,"<sup>127</sup> but the Board asserted the power to initiate such investigations sua sponte. The Board's principal basis for its claimed authority was the failure of the Railway Labor Act to expressly deny it that power.<sup>128</sup>

A divided court invalidated the Board's interpretation, finding "incredible" the suggestion that "the Board has the power to do whatever it pleases merely by virtue of its existence."<sup>129</sup> On the contrary, agencies have no intrinsic authority and wield only the powers that the legislature delegates them.<sup>130</sup> The court expressly declined to apply *Chevron* to the Board's assertion of jurisdiction. Deference is called for only where a statute's meaning is ambiguous, and the Railway Labor Act's silence on the extent of the Board's power was "no ambiguity."<sup>131</sup> Instead, the court surveyed de novo the statute's text and legislative history to reach the "inescapable conclusion" that Congress never meant for the Board to investigate representation disputes sua sponte.<sup>132</sup> Then the court delivered the *coup de grace*:

To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in "thou shalt not" terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent. Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.<sup>133</sup>

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125. See *supra* text accompanying notes 1–10.

126. 29 F.3d 655 (D.C. Cir. 1994); see also *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001) (holding that, because the Federal Election Campaign Act nowhere authorized the Federal Election Commission to "make public an ongoing investigation," the statute's "clear meaning" denied it that power); *Lancashire Coal Co. v. Sec'y of Labor*, 968 F.2d 388, 390–91 (3d Cir. 1992) (finding "considerable support" for the proposition that the Mine Safety and Health Act's failure to grant the agency authority over structures "resulting from" the mining of coal was a denial of power).

127. 45 U.S.C. § 152 (2006).

128. *Ry. Labor Executives' Ass'n*, 29 F.3d at 659 ("[T]he Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power."); *id.* at 661.

129. *Id.* at 659.

130. *Id.* at 670.

131. *Id.* at 664 n.5; see also *id.* at 671.

132. *Id.* at 664–69.

133. *Id.* at 671 (citations omitted).

Several features of the D.C. Circuit's decision merit attention. First, the majority's holding turned on its view that all agency power derives from congressional delegation. Second, the court held that the Board's jurisdictional interpretation was not entitled to *Chevron* deference after concluding, de novo, that the Railway Labor Act unambiguously answered the question. Third, the D.C. Circuit suggested not only that Congress *had not* delegated to the Board the power to define its own jurisdiction, but also that it *could not*. The source of that impediment was "the Constitution," presumably in the form of a judicially enforceable nondelegation doctrine.<sup>134</sup>

Judge Williams's dissent did not engage the majority's specific holding that a statutory silence is not an ambiguity on whether Congress has conveyed a proposed power. Instead, he made the more general claim that agencies are entitled to *Chevron* deference on all jurisdictional questions.<sup>135</sup> His principal reason, echoing Justice Scalia,<sup>136</sup> is the impossibility of identifying a jurisdictional matter as jurisdictional: Courts cannot draw "a manageable line between jurisdictional and other issues" since "any issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed."<sup>137</sup> Judge Williams conceded that courts have the capacity to distinguish jurisdictional questions from nonjurisdictional ones when the powers of the judiciary are at issue.<sup>138</sup> But "the categorization" of such cases "is typically self-evident" because the relevant constitutional and statutory provisions expressly define themselves as jurisdictional.<sup>139</sup>

Despite the apparent en banc resolution of this question, a D.C. Circuit panel blinked at the issue when it was presented again in *American Bus Ass'n v. Slater*.<sup>140</sup> Here, the Department of Transportation (DOT) asserted the authority to impose money damages on bus companies that failed to comply with the Americans with Disabilities Act (ADA).<sup>141</sup> The ADA provides that a violation of its guarantees is to be cured by the same remedies authorized by parts of the 1964 Civil Rights Act,<sup>142</sup> and those parts do not permit plaintiffs to recover damages.<sup>143</sup> The

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134. *See id.*

135. *Id.* at 676–77 (Williams, J. dissenting).

136. *See* *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) ("[T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority.").

137. *Ry. Labor Executives' Ass'n*, 29 F.3d at 676 (Williams, J., dissenting).

138. *Id.*

139. *Id.*

140. 231 F.3d 1 (D.C. Cir. 2000).

141. *Id.* at 2.

142. 42 U.S.C. § 12188(a)(1) (2006).

143. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

statute is wholly silent on agencies' authority to supplement the enumerated remedies with ones of their own devising. The DOT argued, and the district court held, that the ADA's failure to expressly foreclose the possibility of money damages was an ambiguity on the agency's authority to impose them.<sup>144</sup>

In an opinion by Judge Sentelle, the court struck down the agency's rule on the grounds that Congress unambiguously meant to preclude the DOT from authorizing money damages.<sup>145</sup> The panel did not engage the DOT's statutory-silence argument, but the question receives extensive treatment in Judge Sentelle's concurrence to his own majority opinion. According to Judge Sentelle, *Chevron* "is not even implicated in this case."<sup>146</sup> This is because statutory silences, at least for jurisdictional questions, are not deference-triggering ambiguities.<sup>147</sup> In other words, the ADA "is not ambiguous on whether it grants DOT the power to authorize money damages against non-complying bus companies. The statute simply does not grant it that power."<sup>148</sup>

Judge Sentelle derided the DOT's position—"that that which is not forbidden is permitted"—as contrary to the nature of administrative agencies.<sup>149</sup> "Agencies have no inherent powers."<sup>150</sup> "They . . . are creatures of statute . . . [that] may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act."<sup>151</sup> Judge Sentelle concluded by drawing an analogy between the powers of administrative agencies and those of the federal government. In the same way that the "Constitution permits the national government to exercise only those powers affirmatively granted to it by the people of the several states," an agency lacks the power to act unless Congress has conferred authority on it.<sup>152</sup>

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144. See *Am. Bus. Ass'n v. Slater*, 17 NDLR ¶ 166 (D.D.C. Sept. 10, 1999), available at 1999 WL 986849, at \*22 ("The plain language indicates that Congress did not explicitly forbid the Secretary from including a compensation mechanism in the [bus] accessibility regulations.")

145. *Am. Bus.*, 231 F.3d at 4 ("By preceding the words 'remedies and procedures' with the definite article 'the,' as opposed to the more general 'a' or 'an,' Congress made clear that it understood [the enumerated] remedies to be exclusive.")

146. *Id.* at 8 (Sentelle, J., concurring).

147. *Id.* ("Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted. On the contrary, and as this Court persistently has recognized, a statutory silence on the granting of a power is a *denial* of that power to the agency.")

148. *Id.* at 9; see also *NRA v. Reno*, 216 F.3d 122, 141 (D.C. Cir. 2000) (Sentelle, J., dissenting) ("The statute is not ambiguous on whether it grants the Attorney General the power to retain the records which the statute empowers her to destroy. The statute simply does not grant her that power.")

149. *Am. Bus.*, 231 F.3d at 9 (Sentelle, J., concurring).

150. *Id.*

151. *Id.*

152. *Id.*

II. *MEAD* AND THE MEANING OF *CHEVRON*

The Supreme Court's 1984 decision in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*<sup>153</sup> did not purport to be a landmark holding, nor was it universally recognized as one when first handed down.<sup>154</sup> The Justices saw the case as involving fairly routine, albeit somewhat technical, questions of environmental law and regulatory application.<sup>155</sup> Relatively quickly, however, the decision was recognized as a canonical statement on how federal courts should interact with federal agencies on questions of statutory interpretation.<sup>156</sup> Since 1984, "the decision has become a foundational, even a quasi-constitutional text . . ." <sup>157</sup> Yet *Chevron* did not resolve all debates about when and how courts should defer to agency statutory interpretations. In the years since, there has been "a doctrinal tug of war within the Supreme Court" and in the pages of law reviews over how broadly the Court's *Chevron* rule should be applied.<sup>158</sup> Whether to extend *Chevron* deference to agency interpretations of jurisdictional provisions is one of the contested realms within *Chevron*'s domain.<sup>159</sup>

As announced by Justice Stevens, *Chevron* outlined a two-step inquiry for courts to apply when evaluating agency interpretations of federal statutes. In step one, the reviewing court considers the statutory text to determine "whether Congress has directly spoken to the precise question at issue."<sup>160</sup> If so, the statute controls, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>161</sup> If the statute is "silent or ambiguous," however, the court proceeds to step two and must defer to the agency's statutory interpretation, so long as it "is based on a permissible construction of the statute."<sup>162</sup> In other words, at step two, the agency's interpretation is given

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153. 467 U.S. 837 (1984).

154. As Eskridge and Baer note, the Supreme Court had been "highly deferential to agency interpretations before *Chevron*." 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, 1120 (2008).

155. See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399, 402 (Peter L. Strauss ed., 2006); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10637, 10644 (2005).

156. See Eskridge & Baer, *supra* note 154, at 1087 ("Almost immediately, Reagan Administration officials and appointees proclaimed a 'Chevron Revolution.'"); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986). As Eskridge and Baer note, even *Chevron*'s early critics recognized its potential impact. See Eskridge & Baer, *supra* note 154, at 1089.

157. Sunstein, *Step Zero*, *supra* note 13, at 188.

158. Eskridge & Baer, *supra* note 154, at 1088.

159. Merrill & Hickman, *supra* note 12, at 835-37.

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

161. *Id.* at 842-43.

162. *Id.* at 843.

“controlling weight” unless it is “arbitrary, capricious, or manifestly contrary to the statute.”<sup>163</sup> Importantly, the agency is not required to follow the statutory interpretation that the reviewing court would adopt if the court were construing the statute on its own. As the Court explained in *INS v. Cardoza-Fonseca*, “the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.”<sup>164</sup>

*Chevron* made clear that courts must defer to reasonable agency interpretations when statutes are unclear or ambiguous. In such cases, courts presume that Congress delegated interpretive responsibility to the implementing agency, even if the delegation was not explicit. The *Chevron* Court stated that statutory ambiguities themselves are evidence that Congress intended an implied delegation of authority.<sup>165</sup> While the Court did not note it at the time, this approach “effected a fundamental transformation in the relationship between courts and agencies.”<sup>166</sup>

Courts and commentators have offered several justifications for deferring to agencies’ statutory interpretations, including agency expertise, political accountability, and a desire for regulatory uniformity. Each of these rationales could be used to justify *Chevron* deference generally, but which one predominates has important implications for whether the scope of *Chevron*’s domain is broad or narrow.

One rationale for *Chevron* deference is that agencies have more familiarity with and expertise in the statute in question and its subject matter.<sup>167</sup> Federal judges are, of necessity, legal generalists.<sup>168</sup> Agency officials are specialists. A court or judge may be asked to interpret a particular statutory provision infrequently, but agency officials can be expected to deal with their implementing legislation every day. In some cases, agencies may have been involved in identifying and defining (and perhaps contributing to) the problems a given statute is designed to address. They also may have participated in the actual drafting of statutory provisions; many regulatory statutes are based on proposals developed

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163. *Id.* at 844.

164. 480 U.S. 421, 448 (1987).

165. *See 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. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” (citations omitted)).

166. Merrill & Hickman, *supra* note 12, at 834.

167. *See, e.g.,* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 589–90 (1985).

168. *See Chevron*, 467 U.S. at 865 (“Judges are not experts in the field, and are not part of either political branch of Government.”).

within federal agencies.<sup>169</sup> Therefore, it would be reasonable to expect that agencies are more likely to adopt the interpretation that is most consistent with the drafters' intent or underlying purpose.

A second rationale is that deference to agency interpretations enhances accountability because federal agencies, as part of the executive branch, are "political."<sup>170</sup> Interpreting statutes requires agencies to make policy judgments. Those decisions should be entrusted to agency officials (who ultimately are accountable to the president), not courts (which, as a matter of institutional design, are insulated and unaccountable).<sup>171</sup> Courts are not to evaluate the relative merits of competing policy proposals when an agency action is challenged in court. "Such policy arguments are more properly addressed to legislators or administrators, not to judges."<sup>172</sup> Agencies can be held accountable if they adopt discretionary policies that are unpopular or inconsistent with the views of elected officials. While this rationale is more attenuated in the context of independent agencies,<sup>173</sup> insofar as such agencies are headed by officials appointed for limited terms and subject to executive and legislative oversight, they are still more likely to be politically accountable than are courts.

Deferring to agency interpretations of federal statutes is also more likely to ensure a degree of uniformity in federal law.<sup>174</sup> Given the complexity of many federal regulatory statutes, it is inevitable that different circuit courts will adopt different interpretations of particular statutory provisions. Agencies thus could find themselves subject to legal constraints in, say, California that do not apply in West Virginia. Eventual

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169. For example, the Occupational Safety and Health (OSH) Act, which led to the creation of the Occupational Safety and Health Administration, was largely based on a proposal developed within the Department of Labor. See RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 10–15 (5th ed. 2006) (summarizing the history of the OSH Act). Indeed, the "initial impetus" for the legislation "came, not from organized labor, but from officials in the Labor Department dissatisfied with the limited scope of their authority to regulate workplace safety." *Id.* at 11.

170. Of course, there is a strong argument that most such decisions should actually be made by the peoples' elected representatives in Congress. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

171. See, e.g., Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (such policy determinations are "not for the courts but for the political branches"); Starr, *supra* note 156, at 309.

172. *Chevron*, 467 U.S. at 864; see also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("[D]eference is not abdication . . .").

173. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 259 n.175.

174. See Peter L. Strauss, *One-Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987). Insofar as the Supreme Court's docket has decreased by almost 50 percent since the time of Strauss' article, the uniformity-reinforcing aspects of *Chevron* deference could be more important. See Merrill & Hickman, *supra* note 12, at 861 n.156.

Supreme Court review can restore uniformity, but in the meantime federal laws will mean different things in different parts of the country.

While *Chevron* is now an established fixture of administrative law, there has been a significant academic debate about its legal pedigree.<sup>175</sup> Some commentators argue that *Chevron* is ultimately grounded in constitutional separation-of-powers principles.<sup>176</sup> Others suggest *Chevron* should be seen as a rule of federal common law.<sup>177</sup> *Chevron* itself may have been somewhat ambiguous on this point,<sup>178</sup> but the Supreme Court has been fairly consistent in recent years in maintaining that congressional delegation is the basis for according deference to agency interpretations of ambiguous statutes. As the Court stated in *Adams Fruit Co. v. Barrett*: “A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”<sup>179</sup> *Chevron* thus is a “legislatively mandated deference doctrine.”<sup>180</sup>

A decade later, in *Christensen v. Harris County*,<sup>181</sup> a majority of the Court held that Congress can only be said to have impliedly delegated the power to interpret ambiguous statutory language when it has granted an agency power to take actions that bind the public with the “force of law.”<sup>182</sup> Other agency interpretations, the Court held, should only receive the lesser form of deference known as *Skidmore* deference.<sup>183</sup> The scope of an agency’s authority to authoritatively interpret ambiguous sta-

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175. For representative critiques of *Chevron*, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 189–90 (1992).

176. See, e.g., Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 26–70 (1988); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2232–34 (1997); Starr, *supra* note 156, at 283.

177. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618–19 (1992); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 345–54 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–17 (2000) [hereinafter Sunstein, *Nondelegation Canons*].

178. Sunstein, *Step Zero*, *supra* note 13, at 195 (“[T]he [*Chevron*] Court “announced its two-step approach without giving a clear sense of the theory that justified it.”); *id.* at 197 (“The *Chevron* Court’s approach was much clearer than the rationale that accounted for it.”).

179. 494 U.S. 638, 649 (1990); see also *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 479 n.14 (1997) (explaining that *Chevron* deference “arises out of background presumptions of congressional intent” (citing *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 740–41 (1996))); Merrill & Hickman, *supra* note 12, at 863 (observing that “[t]he Court . . . has rather consistently opted for the congressional intent theory” as the legal foundation for *Chevron* deference).

180. Merrill & Hickman, *supra* note 12, at 836 (“*Chevron* rests on implied congressional intent.”); *id.* at 869 (“*Chevron* itself and most post-*Chevron* decisions describe the doctrine as flowing from the implicit instructions of Congress.”); see also Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) (“The threshold issue for the court is always one of congressional intent: did Congress intend the agency’s interpretation to bind the courts?”).

181. 529 U.S. 576 (2000).

182. *Id.* at 587–88.

183. *Id.* at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).



tutory text only extends as far as the agency's own authority to take actions with the force of law.<sup>184</sup> Further, since *Chevron* deference is ultimately a function of Congress's intent to delegate interpretive authority to agencies, any presumption in favor of such deference may be rebutted by evidence of congressional intent to the contrary.<sup>185</sup>

Whatever doubt remained about *Chevron*'s foundation after *Adams Fruit* and *Christensen* was quieted by *United States v. Mead Corp.*<sup>186</sup> Concluding that the United States Customs Service's tariff classification rulings were not entitled to *Chevron* deference, the Court made clear that congressional intent is the touchstone for the analysis.<sup>187</sup> *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>188</sup> There are many ways Congress may demonstrate its intention to delegate interpretive authority (including, as in *Mead* itself, by granting authority to engage in notice-and-comment rulemaking).<sup>189</sup> But without such delegation, an agency's decision is not due *Chevron* deference.

The actuality of congressional delegation is often characterized as a "legal fiction,"<sup>190</sup> but grounding *Chevron* deference in congressional intent has several implications. For starters, it means that *Chevron* is not a constitutional doctrine, but rather one rooted in statute and subject to congressional revision.<sup>191</sup> This approach is consistent with the language of the Administrative Procedure Act, which instructs that courts, not agencies, are to decide relevant questions of law.<sup>192</sup> Because *Chevron* deference ultimately rests upon legislative intent, it "should apply only where Congress would want *Chevron* to apply."<sup>193</sup> As Professors Merrill

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184. *Christenson*, 529 U.S. at 587.

185. See Merrill & Hickman, *supra* note 12, at 837. The Court suggested that delegation should be presumed in *Haggar Apparel Co. v. United States*, 526 U.S. 380, 389–90 (1999).

186. 533 U.S. 218 (2001). As Eskridge & Baer observe, "*Mead* appears to have partially settled the debate within the Court about the conditions for triggering *Chevron* deference . . ." Eskridge & Baer, *supra* note 154, at 1123. Their empirical analysis also concludes that the Court's actual practice supports the *Mead* and *Oregon* understanding of *Chevron*. *Id.* (noting, however, that "the Court's practice has been inconsistent").

187. Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002) ("At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent.").

188. *Mead*, 533 U.S. at 226–27.

189. *Id.* at 227.

190. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Scalia, *supra* note 171, at 517; Sunstein, *Step Zero*, *supra* note 13, at 192; see also David J. Baron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–25 (2002).

191. Merrill & Hickman, *supra* note 12, at 863 (observing that the *Chevron* doctrine has "roughly the same status in law as a federal statute").

192. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 23–24 (1996).

193. Merrill & Hickman, *supra* note 12, at 872.

and Hickman observe, this, in turn, “suggests that *Chevron*’s domain should be relatively narrow, rather than broad.”<sup>194</sup> A more sweeping interpretation of *Chevron* “is not faithful to the logic of implied delegation on which *Chevron* rests.”<sup>195</sup>

Another implication of *Chevron*’s legal pedigree is what Professors Merrill and Hickman have termed “step zero”: “[T]he inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all.”<sup>196</sup> According to Professor Sunstein, “If the underlying theory involves implicit (and fictional) delegation, the real question is when Congress should be understood to have delegated law-interpreting power to an agency.”<sup>197</sup> If there has been no delegation of interpretive authority to a federal agency, impliedly or explicitly, then there is no basis to apply *Chevron*, and the Court should either apply the lesser form of deference, known as *Skidmore* deference, or refuse to defer at all.

Congress is (nearly) always free to explicitly delegate interpretive authority. Absent the application of some newly revised nondelegation principle or other constitutional limitation, Congress may expressly authorize federal agencies to provide clarity to and fill the interstices of federal administrative law. Where Congress has not been express, however, courts will only find that Congress has impliedly delegated interpretive power where it has delegated to an agency the authority to adopt regulations or take other actions that bind the public with the force of law.<sup>198</sup> As Professor Herz pointed out, where *Chevron* speaks of “filling gaps” left by Congress, it is “misleading.”<sup>199</sup> It implies that the agency is operating on the same “horizontal plane” as Congress when it is actually acting as Congress’s agent exercising delegated powers.<sup>200</sup>

A third implication of *Mead* is that a statutory ambiguity is no longer, by itself, sufficient evidence of a congressional intent to delegate interpretive responsibility to an agency. After *Mead*, courts must look for other evidence that Congress meant to do so, such as giving the agency power to engage in notice-and-comment rulemaking, or in other (unspe-

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194. *Id.*; see also *id.* at 859 (“[E]xpanding the *Chevron* doctrine to cover most or all of the universe of situations in which deference is possible would constitute an over-application of the notion of mandatory deference, and as a byproduct of over-application, would likely lead to dilution of the practice of deferring to agency interpretations of law.”).

195. *Id.* at 883.

196. *Id.* at 836; see also Sunstein, *Step Zero*, *supra* note 13, at 191.

197. Sunstein, *Step Zero*, *supra* note 13, at 208.

198. See Merrill & Hickman, *supra* note 12, at 837.

199. Herz, *supra* note 175, at 230.

200. *Id.* at 230–31.

cified) ways.<sup>201</sup> Professor Adrian Vermeule, a *Mead* critic, puts it this way:

Rather than taking ambiguity to signify delegation, *Mead* establishes that the default rule runs against delegation. Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency at hand, in the particular statutory scheme at hand, *Chevron* deference is not due and the *Chevron* two-step is not to be invoked.<sup>202</sup>

As such, a reviewing court “must determine whether power has been delegated to an agency before the court can be charged with deferring to the agency’s exercise of that power.”<sup>203</sup> This suggests that certain types of questions are less likely to be subject to the *Chevron* framework. “Step zero” probably means more work for reviewing courts, which cannot simply defer to agencies willy-nilly but now must answer threshold questions about whether *Chevron* applies in the first place.<sup>204</sup>

In determining the nature of the delegation to an agency, courts are essentially determining the scope of an agency’s power—i.e., the scope of agency jurisdiction. The impropriety of deference to agency determinations of their own jurisdiction is grounded in part in the nature of agency authority. Agencies have no inherent regulatory powers, only those powers delegated to them by Congress. Absent a congressional enactment an agency has no regulatory authority.<sup>205</sup> Because it requires affirmative legislative action to create agency power, we should not presume agency authority without clear evidence of such congressional intent. A general presumption against the existence of delegated agency authority would seem to entail a generalized presumption against the delegation of authority for an agency to determine the scope of its own jurisdiction. This is the core of our proposal, and we now turn to its specifics.

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201. See *United States v. Mead Corp.*, 533 U.S. 218, 251 (2001) (“[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”).

202. Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 *GEO. WASH. L. REV.* 347, 348 (2003).

203. Merrill & Hickman, *supra* note 12, at 910–11.

204. See Vermeule, *supra* note 202, at 356–58 (criticizing *Mead* for imposing an unnecessarily complex legal regime on lower courts).

205. At the risk of stating the obvious, we should emphasize that this Article only discusses the scope of agency powers relating to domestic lawmaking. The questions of whether administrative agencies (or the president) have inherent powers in matters of foreign relations and national security, and whether Congress may limit any such powers, are well beyond the scope of this Article. When we write things like “Congress is the source of all agency power,” the reader should mentally supply the phrase “in matters of domestic lawmaking.”

### III. A PROPOSAL FOR JURISDICTIONAL QUESTIONS AND STATUTORY SILENCES

As *Chevron* and its progeny make clear, deference to agency interpretation of the statutes the agency administers is grounded in the idea that Congress has delegated that authority to the agency. This is often a reasonable assumption, as there are many reasons why Congress might prefer that agencies fill the interstices of a given statutory scheme. Congress is not capable of anticipating every eventuality,<sup>206</sup> nor does Congress have the fine-grained expertise agencies may develop over time. But there is no reason to presume that agencies have the same level of expertise in jurisdictional questions as they do in the subject matter of their expertise.

Of course the analysis, and our proposal, is not so simple, for jurisdictional questions come in all shapes and sizes. An agency might interpret a statute to grant it jurisdiction, or it might read the law to deny it jurisdiction. Under our proposal, courts should decline to afford *Chevron* deference regardless of whether an agency is asserting or disclaiming jurisdiction. This is true partly because the nature of the question asked, rather than the agency's answer, is what should determine whether deference is due; and also because there is a risk of aggrandizement even in situations where agencies disclaim regulatory power. At the same time, courts should adopt a rebuttable presumption that an agency lacks the regulatory jurisdiction at issue.<sup>207</sup> Practically, the combination of a no-deference rule with a rebuttable presumption against delegation may make it more difficult, at the margin, for agencies to demonstrate jurisdiction. Yet it will not prevent Congress from giving agencies regulatory authority where Congress wishes to do so.<sup>208</sup>

Courts generally agree, even if only implicitly, that the difference between assertions and disclaimers of jurisdiction is irrelevant to whether an agency interpretation is eligible for *Chevron* deference.<sup>209</sup> The D.C. Circuit has described jurisdiction-asserting and -disclaiming interpretations as "analytically indistinguishable."<sup>210</sup> Indeed, courts seldom distin-

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206. Cf. *Dames & Moore v. Regan*, 453 U.S. 654, 677–78 (1981) (noting that Congress cannot "legislate with regard to every possible action the President" may need to take).

207. See Vermeule, *supra* note 202, at 348 (noting *Mead* established that the default rule runs against delegation).

208. It would, however, make it more difficult for Congress to escape accountability for delegations of jurisdiction by enacting vague statutes and then blaming "out of control" agencies for asserting excessive jurisdiction. See Eskridge & Frickey, *supra* note 177, at 618–19.

209. See, e.g., *N.Y. Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1363 n.9 (D.C. Cir. 1988).

210. *Id.*; see also *Air Courier Conference of Am., Int'l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1225 (3d Cir. 1992) (noting the proposition "that deference is inappropriate" when an agency seeks to advance "its own bureaucratic self-interest runs counter to *Chevron*"); cf. *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 663 (D.C. Cir. 1994) (en banc) (remarking, in a related context,

guish between them. There are some notable exceptions, however. A contemporaneous D.C. Circuit case highlighted the “special concerns” posed by an agency’s efforts to “increase its own authority or jurisdiction,” and proposed that less judicial scrutiny is necessary where an agency “disclaims rather than asserts a power.”<sup>211</sup> Another court held that the judiciary ought to be especially vigilant with “statutes enacted specifically to prohibit agency action,” and suggested that “less deference is owed to agency determinations that expand an agency’s jurisdiction.”<sup>212</sup> These holdings implicitly adopt the premise that agency aggrandizement is a particular concern where agencies seek greater authority. While this may be true as a general matter, it is important to recognize that agency refusals to assert jurisdiction can serve agency interests and contravene congressional intent.<sup>213</sup>

Should the strength of our no-deference rule depend on the quantity of power an agency is claiming? A given case may implicate (a) whether jurisdiction exists at all, (b) the scope of existing jurisdiction, or (c) the existence of a factual predicate necessary for the existence of jurisdiction. The rule against deference should prevail when courts resolve questions about the existence or scope of agency regulatory jurisdiction. For the reasons outlined above and elucidated below, courts are in a better position than implementing agencies to determine the extent of jurisdiction. The presumption against delegation of authority is strongest in existence cases, and the case for deference is at its weakest. But deference is also inappropriate in scope cases. Not only are aggrandizement concerns still present, but it is also difficult to draw a line that coherently distinguishes between cases that implicate the existence or the scope of an agency’s jurisdiction.<sup>214</sup>

The one type of jurisdictional question on which an agency should nonetheless receive deference is when a given factual predicate—or “premise fact”<sup>215</sup>—provides the basis for the assertion of jurisdiction.<sup>216</sup>

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that “we find it difficult to support the distinction drawn in our prior cases between Board decisions asserting statutory jurisdiction and those declining to exercise it”).

211. *Nat’l Wildlife Fed’n v. Interstate Commerce Comm’n*, 850 F.2d 694, 699 n.6 (D.C. Cir. 1988) (quoting *Schwabacher v. United States*, 334 U.S. 182, 204 (1948) (Frankfurter, J., dissenting)); *see also* *Kokechik Fishermen’s Ass’n v. Sec’y of Commerce*, 839 F.2d 795, 807–08 (D.C. Cir. 1988) (Starr, J., dissenting).

212. *Connecticut v. U.S. Dep’t of the Interior*, 228 F.3d 82, 93 (2d Cir. 2000) (quoting *Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 838 F.2d 627, 632 (2d Cir. 1988)); *cf.* *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998) (“We also note that ascertaining congressional intent is of particular importance where, as here, an agency is attempting to expand the scope of its jurisdiction.”).

213. *See supra* note 26 and accompanying text.

214. *See infra* notes 289–92 and accompanying text.

215. “Premise facts” are “facts that explicitly or implicitly serve as premises used to decide issues of law.” Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 8 (1988).

The deference an agency receives in this context, however, would not be *Chevron* deference. Rather, an agency determination that a factual predicate has been satisfied would receive the deference that agency factual determinations ordinarily receive under the Administrative Procedure Act; depending on the context, such findings are upheld if they are not “arbitrary and capricious” or are supported by “substantial evidence.”<sup>217</sup> The reasons for deferring on factual predicates are fairly straightforward. Unlike in existence or scope cases, administrative agencies possess a comparative institutional competence in determining the presence of jurisdictional facts.<sup>218</sup> Also, there is a relatively low risk of agency aggrandizement, and the presence of factual predicates is more closely tied to traditional agency expertise and thus is more likely to have been delegated to the agency by Congress.<sup>219</sup> At the same time, where a given legal determination or statutory provision is contingent upon relevant factual predicates, this can itself be the source of a statutory ambiguity that may be left in the agency’s hands. Such a standard for factual predicates or premise facts shows due regard for an agency’s specialized knowledge and expertise without making an agency the judge of its own jurisdictional limits.

A key element of our proposal is that a statutory silence does not, in itself, create an ambiguity about whether power has been sufficiently delegated to trigger *Chevron* deference. As agencies have no inherent authority, it is a reasonable default assumption that they have no more jurisdiction than Congress has clearly provided, explicitly or implicitly.<sup>220</sup> For this reason, where a statute is not ambiguous but is silent on the existence of agency jurisdiction, courts should presume that no jurisdiction exists. As Judge Sentelle argued in *American Bus Ass’n*, where the statute is silent, *Chevron* is not even implicated.<sup>221</sup>

While this aspect of the proposal contradicts the express language of *Chevron* that equates statutory ambiguity and silence,<sup>222</sup> it is entirely

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216. See generally Todd S. Aargaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366 (2009).

217. 5 U.S.C. § 706 (2006).

218. See Aargaard, *supra* note 216, at 22 n.99.

219. *Id.*

220. It is important to emphasize that this is not a proposal to create an anti-regulatory bias in administrative law, nor do we express a preference for private ordering over government regulation. The proposal merely embodies a recognition that agencies lack authority absent a legislative delegation and that such a recognition necessarily entails a “default” of no jurisdiction. Though courts should be wary in discovering previously undiscovered agency jurisdiction, nothing in our proposal would prevent courts from finding that Congress implicitly delegated regulatory jurisdiction to a given agency.

221. See *Am. Bus Ass’n v. Slater*, 231 F.3d 1, 8 (2000).

222. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

consistent with the principles that underlie *Chevron* and its progeny. For if a statute delegates regulatory authority to an agency to address some matters but not others, then it would be inappropriate to presume that Congress has delegated further authority to an agency to assert further authority on its own initiative. As Professor Herz counsels, “Congressional silence should, therefore, be understood to leave this power—the power to say what Congress has done—with the courts, where it has always been.”<sup>223</sup> In simple terms, a statute delegates the authority it delegates, and the rest is silence. Failure to disclaim agency authority to regulate is not, in itself, an ambiguity about whether an agency does or should have regulatory authority.

<b><u>Assertions of jurisdiction</u></b> No deference		<b><u>Disclaimers of jurisdiction</u></b> No deference (though aggrandizement concerns are weaker)	
<b><u>Existence of jurisdiction</u></b> No deference	<b><u>Scope of jurisdiction</u></b> No deference	<b><u>Factual predicate</u></b> Deference (but not <i>Chevron</i> deference)	
<b><u>Statutory Silences</u></b> No deference			

#### IV. THE (IM)PROPRIETY OF DEFERENCE FOR JURISDICTIONAL QUESTIONS

There are many reasons to not extend *Chevron* deference to agency statutory interpretations on the question of whether jurisdiction exists. They fall into two basic categories—one derived from familiar administrative law norms, the other from public choice analysis. The administrative law argument is fairly straightforward. First, it is implicit in *Chevron* and its progeny that jurisdictional questions are not eligible for deference. Second, the no-deference rule is implied by the very nature of administrative agencies—agencies have no inherent powers, and can act only to the extent that Congress has delegated them the power to do so. Third, agencies can claim no special expertise over courts in determining whether Congress meant to grant them particular powers. A fourth reason for denying *Chevron* deference to agency jurisdictional interpretations is that Congress has made plain its intent that courts should resolve those questions. Fifth, the no-deference rule can be justified as a sort of

223. Herz, *supra* note 175, at 203.

“avoidance canon” by which courts can prevent agencies from assertions of jurisdiction that could implicate important separation-of-powers norms.

The lessons of public choice further support our proposal. First, independent judicial review of agency jurisdictional interpretations is necessary to preserve legislative “deals” about the scope of regulatory authority that were struck in Congress. Successful legislative initiatives are almost always the result of compromise, and honoring such compromises requires leaving ultimate control over the scope of agency authority in the hands of Congress rather than agencies. Second, denying *Chevron* deference to agencies’ jurisdictional interpretations will create favorable incentives both within Congress and the agencies themselves to improve the performance of each. Third, and perhaps most importantly, our proposal protects against the threat of agency self-aggrandizement. Just as foxes should not guard henhouses, agencies should not be entrusted to police the limits on their own regulatory authority.

#### A. Administrative Law Norms

##### 1. The Nature of Chevron

One reason courts should refuse to extend *Chevron* deference to agencies’ jurisdictional interpretations follows from the nature of *Chevron* itself: The existence of agency jurisdiction is a precondition of *Chevron* deference, and *Chevron* therefore has no bearing on how that threshold question should be resolved. Only after it is determined that Congress has conferred jurisdiction on an agency does *Chevron* come into play.

This understanding of the *Chevron* framework, implicit in *Chevron* itself,<sup>224</sup> was made explicit in *Mead*. That case clarified that the basis for *Chevron* deference is a presumption about Congress’s intent to delegate policymaking power to an agency.<sup>225</sup> *Chevron* deference is only appropriate where evidence suggests that Congress meant to give the agency in question the authority to undertake legislative-type policymaking—for example, when the agency has been granted and has exercised the power to engage in notice-and-comment rulemaking.<sup>226</sup> Where evidence of such congressional intent is lacking, the agency may not invoke the relatively

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224. See *supra* notes 165–66 and accompanying text.

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

226. See *id.* (stating that *Chevron* applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”); *id.* at 229 (identifying notice and comment rulemaking as “a very good indicator of delegation meriting *Chevron* treatment”).



deferential *Chevron* framework. The best it can hope for is *Skidmore* deference—which is to say no more deference than a given agency argument’s power to persuade.<sup>227</sup>

The question whether Congress has delegated policymaking power to an agency thus is prior to the question whether *Chevron* deference is appropriate. It is *chronologically* prior, in the sense that a court typically will want to know whether an agency has authority at all before it considers what standard of review should be used to assess the agency’s exercise of that authority. More importantly, the jurisdiction question is *logically* prior to the deference question. Because the existence of agency jurisdiction is a precondition of *Chevron* deference,<sup>228</sup> it cannot be the case that the *Chevron* framework should be used to resolve that initial jurisdictional issue. Only after the delegation question has been answered in the affirmative can one move on to address whether deference is warranted. To say that an agency should get the *Chevron* treatment on matters concerning its own jurisdiction is to put the effect (deference) before the cause (jurisdiction).

## 2. *The Nature of Agency Power*

An even more basic reason to deny *Chevron* deference on jurisdictional questions derives from the nature of agencies. Agencies have no inherent powers, only delegated ones.<sup>229</sup> That is why they are called “administrative agencies”—they are created to administer programs established by Congress, and in so doing they act as Congress’s agents. As Professor Monaghan noted, “[T]he universe of each agency is limited by the legislative specifications contained in its organic act.”<sup>230</sup> This means that Congress must delegate an agency the power to act. If Congress did not act, the agency would have no authority. In the absence of some indication that Congress meant to grant an agency a particular power, there is no reason to presume from the agency’s say-so that it properly wields that power—and hence no reason to defer to the agency’s assertion of jurisdiction.<sup>231</sup>

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227. See *id.* at 234–35.

228. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”).

229. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

230. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983).

231. See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1282 (2002) (“If administrators were given ‘final authority on issues of statutory construction,’ this shift in power would substantially undermine our constitutional commitment to representative government.”)

This is why statutory silences pose the problem of agency jurisdiction so starkly. When an agency invokes a statute's silence as a basis for its authority to take a certain action—i.e., when the agency argues that Congress's simple failure to rule the action out amounts to a legislative authorization—it stands these principles on their head. Congress is supplanted in its role under the Constitution as lawmaker-in-chief, and is reduced to reactively “vetoing” through legislation the agency power grabs with which it disagrees. And agencies begin to exercise powers progressively further and further away from their core missions as determined by Congress. Administrative law fairly universally disapproves of agency efforts to “arrogate undelegated power.”<sup>232</sup> This is the very definition of arrogation.

### 3. *Comparative Institutional Competence*

However much expertise agencies may have at answering technical or policy questions, they have no institutional advantage over courts in resolving jurisdictional disputes. To the contrary, courts are required to address jurisdictional questions all the time, including ones that implicate the scope of federal power. An agency may be expert in resolving technical questions within the subject matter of its mission, at understanding how given questions interrelate, or even at resolving factual questions upon which assertions of jurisdiction ultimately may depend. But an agency has no more expertise than courts at figuring out when jurisdiction exists.

Jurisdiction is not the sort of question about which an agency could be expected to have expertise as a general matter. It is not a policy or technical question, but rather, one of statutory intent: Did Congress intend for agency *X* to exercise power *Y*? An obvious counterargument is that agencies have technical expertise that is relevant to the question of whether expanding their jurisdiction will facilitate the broad policy goals enunciated by Congress. This is certainly true, but it sidesteps the relevant inquiry. In enacting statutes, Congress necessarily resolves tradeoffs between competing policy goals and inevitably grants agencies less

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(quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984))). Congress always retains the ability to revise statutes and redefine agency jurisdiction, so an agency can never be said to be the “final authority” on such questions. However, due to the institutional obstacles that inherently slow the legislative process, as a practical matter, agency interpretations that the courts leave undisturbed will often function as the “final” interpretation for some time. *See id.* at 1287–88; *see also id.* at 1278 (“The constitutional structure is squarely at odds with allowing administrators to police boundaries of their own authority.”); Noah, *supra* note 16, at 1492–93 (“Administrative agencies can no more amend their own organic statutes than the President or Congress could unilaterally amend the U.S. Constitution outside the strictures of Article V.”).

232. Noah, *supra* note 16, at 1493–94 (“[A]pparently all [administrative law paradigms] would condemn efforts by agencies to arrogate undelegated power.”).

power than was conceivably possible. Whether or not broader agency jurisdiction would serve the agency's mission does not mean Congress delegated such authority, nor does it mean courts should defer to the agency's interpretation. If Congress desires an agency to have broader jurisdiction, it should make its intent clear. And if necessary, agencies retain the ability to seek greater authority from Congress.

The above argument for deference has it exactly backwards: *Courts* are the ones with a comparative advantage at resolving jurisdictional questions in a consistent and predictable fashion. Judicial perspectives do not swing with each change in presidential administration.<sup>233</sup> And as Professor Molot has pointed out, "Judges . . . are subject to strong institutional norms that render judicial interpretation more stable and consistent over time than interpretation by successive political administrations."<sup>234</sup> However imperfect judicial decisions may be, they are more likely to reflect the faithful application of precedent, applicable legal norms, and canons of construction than equivalent decisions made by agencies headed by executive officials.

It is certainly possible—and in some cases quite likely—that an administrative agency will have greater knowledge or expertise about the legislative intent behind a given administrative statute.<sup>235</sup> Indeed, in some cases the agency may itself have drafted or participated in structuring the statute at issue. The existence of agency expertise, or other institutional competence, does not mean that agencies *should* have the authority to construe statutory provisions limiting their own jurisdiction. As Professor Nelson observes, "To the extent that generalist courts are less prone to tunnel vision than specialist agencies, courts may actually be better positioned to make those judgments than the typical agency."<sup>236</sup> Further, that an agency has some knowledge of the legislative deal that produced a given statute, perhaps even by virtue of its participation in the legislative deal-making process, does not mean that an agency is a reliable source of statutory meaning. The ultimate deal struck is unlikely to match the legislative proposal advanced by the agency, nor is an agency's interpretation likely to be immune from the agency's perceived self-

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233. This is not to deny that the appointing president's ideology or political affiliation may have an effect on judicial behavior. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 824–25 (2006). Even if judges are "political" or "ideological" in this fashion, the overall political orientation of courts changes slowly over time with the gradual replacement of judicial personnel, resulting in fewer dramatic and unpredicted doctrinal shifts, particularly in the Courts of Appeals.

234. Molot, *supra* note 231, at 11.

235. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 215 (2006).

236. Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 359 (2007).

interest. That Congress could well conclude that it would be a good idea to give agencies greater regulatory jurisdiction—or even the authority to define the scope of that jurisdiction—does not mean that Congress can or should be presumed to have done so.

#### 4. *The Administrative Procedure Act*

Another reason to leave jurisdictional questions in the hands of courts is because Congress has made clear its intention to do just that. Under Section 706 of the Administrative Procedure Act (APA), reviewing courts are to decide “all relevant questions of law.”<sup>237</sup> Determining the existence or scope of agency authority, unlike answering a complex technical or scientific question or making a policy judgment about how best to implement a regulatory regime, requires answering a question of law about whether Congress delegated authority to a given regulatory agency.

The APA further recognizes jurisdiction as a distinct legal inquiry.<sup>238</sup> In the APA, the term “jurisdiction” is used to denote the limited sphere of agency power. Section 558(b), for instance, provides that “[a] sanction may not be imposed or a substantive rule or order issued *except within jurisdiction delegated to the agency* and as authorized by law.”<sup>239</sup> Agencies only have authority to implement and enforce a law or regulation when the underlying jurisdiction exists. The implication is that agencies only have authority to interpret statutory ambiguities—i.e., *Chevron* only applies—once it is independently established that the underlying jurisdiction exists. Section 706(2)(C) further provides that courts are to invalidate and set aside those agency actions determined to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>240</sup> However fuzzy or otherwise difficult to apply the concept of jurisdiction may be, Congress clearly saw a distinction between questions of agency jurisdiction and other limitations on agency power.<sup>241</sup>

One response to this argument, suggested by Justice Scalia’s dissent in *Mead*, is that deferring to agency interpretations does not involve displacing courts from their obligation to answer questions of law. It simply changes the legal question that courts are left to answer. When a court defers to an agency, the legal question is no longer what is the proper in-

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237. 5 U.S.C. § 706 (2006).

238. See Noah, *supra* note 16, at 1524.

239. 5 U.S.C. § 558(b) (emphasis added); see also John Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 198–99 (1998).

240. 5 U.S.C. § 706(2)(C).

241. See also Noah, *supra* note 16, at 1524 (noting Congress “considered amending the APA to reinforce the judicial function in reviewing statutory questions, particularly on jurisdictional issues”).

terpretation of the statute, but whether the agency has exceeded the scope of its discretion.<sup>242</sup>

The problem with this argument is that it conflates questions of law and policy. As we have stressed throughout this Article, all agency power comes from Congress. Agencies only have authority to engage in interpretation and exercise interpretive discretion when Congress has already delegated such authority. So to shift interpretive authority to an agency is to presume, as a matter of law, that a delegation occurred and to relieve the courts of determining whether, in fact, such a delegation occurred. Such a move may well make sense on policy grounds. Yet there is no basis for presuming that this is what Congress intended, let alone actually enacted. As Professors Merrill and Hickman note, “Justice Brennan was surely right in principle: Congress cannot be presumed to intend that courts defer to agency judgments about the scope of their jurisdiction.”<sup>243</sup> No doubt Justice Scalia endorses this approach in order to reduce the likelihood that an unelected judge will make policy judgments he believes should remain in the hands of more accountable political branches. But such a move necessarily involves shifting responsibility for answering certain legal questions from courts to administrative agencies—a move contrary to the language of the APA.

The delegation understanding of *Chevron* is also the surest way to reconcile *Chevron* with the language of the APA.<sup>244</sup> The APA’s requirement that courts are to answer questions of law is not an unalterable rule. Rather, like any statutory provision, it may be amended or overridden by Congress. In this way, the APA provides administrative default rules that may be overridden by subsequent Congresses in the context of specific statutory schemes—something the APA itself explicitly contemplates (albeit with the requirement that subsequent statutes supersede the APA’s requirements “expressly”).<sup>245</sup> So, the APA not only reinforces the presumption that agencies should not receive deference when considering jurisdictional questions, but also allows Congress to adopt administrative statutes with different presumptions.

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242. *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001) (Scalia J., dissenting).

243. Merrill & Hickman, *supra* note 12, at 910.

244. See Anthony, *supra* note 192, at 24–27.

245. 5 U.S.C. § 559 (“Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.”).

### 5. *Nondelegation and Constitutional Avoidance*

The doctrine of constitutional avoidance further counsels against deferring to agencies on jurisdictional questions. At the risk of sounding repetitive, our first principle is that agencies only have those powers—and that jurisdiction—which have been conferred by Congress. If an ambiguity, let alone a statutory silence, is sufficient to trigger *Chevron* deference, an ambiguous statute may become license for an agency to control the scope of its own authority, and perhaps even the ability to create regulatory authority where no such authority legitimately existed.<sup>246</sup>

As a general matter, courts seek to avoid statutory interpretations that raise difficult constitutional questions.<sup>247</sup> When Congress enacts a statute, it is presumed to have acted within constitutional bounds. Thus, where there are competing possible interpretations of a given statute, courts should adopt an interpretation that places less pressure of constitutional limits on federal authority. This concern would seem to justify a “nondelegation canon”<sup>248</sup> that would create at least a rebuttable presumption that Congress has not delegated an agency authority to determine the scope of its own jurisdiction. While the nondelegation doctrine lacks much independent force today, it has developed into something akin to an avoidance canon and thus remains influential in statutory interpretation.<sup>249</sup>

This approach is applied quite regularly in the federalism context to avoid the adoption of agency interpretations that might stretch the bounds of federal regulatory authority, even where there is potential statutory ambiguity that would, under normal circumstances, trigger *Chevron* deference. Thus, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos v. United States*—two cases implicating the scope of federal regulatory authority over wetlands and other waters of the United States under the Clean Water Act—the

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246. Such power to create regulatory jurisdiction where none existed is quintessentially “legislative” power. See Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot* 2-4 (San Diego Legal Studies Paper, No. 07-54, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=921743](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921743).

247. See *Solid Waste Agency N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988).

248. See Sunstein, *Nondelegation Canons*, *supra* note 177, at 331–35.

249. Manning, *supra* note 173, at 223 (“The nondelegation doctrine . . . now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions.”).

Court refused to defer to the Army Corps' and the EPA's interpretation of the Act because the agencies' interpretation would push the outer bounds of the federal government's power to regulate commerce "among the several states."<sup>250</sup> Rather than delineate the precise bounds of the federal government's authority to regulate interstate commerce, the Court adopted an interpretation of the Act that left federal regulatory authority safely within its constitutional limits.<sup>251</sup>

When applying an avoidance canon, courts presume that if Congress wants to change the extent of its own powers, it will do so directly, and will not delegate such questions to an executive agency.<sup>252</sup> So, for instance, where federalism questions are present, a court will stay at *Chevron* step one and resolve ambiguities itself. The presence of a constitutional question provides sufficient grounds for presuming that Congress did not delegate to an agency the relevant authority to resolve ambiguities in the statute. For the same reason, courts should embrace a "non-delegation canon" that presumes Congress did not delegate an agency autonomous authority over its own jurisdiction unless a statute explicitly so provides. "Delegations may have run riot, but deference should not, even in the name of respect for such delegations."<sup>253</sup>

### B. Public Choice Principles

Our proposal finds support not only in administrative law norms and conventions of statutory interpretation. Public choice principles and concern for the incentives under which agencies operate further reinforce the case for limiting deference in the jurisdictional context and recognizing that statutory silences are, in fact, silent. In particular, denying *Chevron* deference to agency jurisdictional interpretations will help preserve the legislative deals upon which statutes are based, provide Congress and agencies alike with favorable incentives, and mitigate the risk of agency self-aggrandizement.<sup>254</sup>

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250. *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *Solid Waste Agency*, 531 U.S. at 173.

251. See Jonathan H. Adler, *Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 81 (L. Kinvin Wroth ed., Vermont Law School, 2007).

252. See Manning, *supra* note 173, at 223.

253. Herz, *supra* note 175, at 187.

254. Some of the arguments we make in this Section might be read as more ambitious pleas for *Chevron* to be discarded root and branch, and replaced with a regime of de novo judicial review for all agency statutory interpretations. We make no such argument. Our aim is to domesticate *Chevron*, not to bury it. Nor does our no-deference rule for jurisdictional questions necessarily entail the proposition that *Chevron* should be abolished even in nonjurisdictional cases. If one were designing a deference regime from the ground up, one would want to weigh (among many other considerations) the risk that a rule of judicial deference to agency statutory interpretations might make it prohibitively difficult for courts to resolve legal disputes (i.e., the risk of excessive decision costs), as well as the likelihood that courts might arrogate to themselves policymaking powers that properly lie with the politi-

### 1. *Preserving the Deal*

From a public choice perspective, legislation is a “deal” among competing interests, each vying for advantage through the legislative process.<sup>255</sup> Various interest groups with different goals, priorities, and “interests,” seek to assemble coalitions sufficient to enact legislation. In the process, groups with competing priorities make compromises with one another. On any given issue, interest groups with strong or “extreme” positions make compromises with those that are more “moderate.” Rarely does any group get everything it wants, especially not without providing something of value to other interest groups.<sup>256</sup> As Professors Rodriguez and Weingast explain, “[T]o understand the contours of the ultimate legislative bargain, it is important to understand the nature and scope of the compromise that enabled the bargain to pass Congress.”<sup>257</sup>

The scope of a statute is a key component of a legislative deal. Restricting the scope of a statute can be an important compromise mechanism, as it blunts the impact of the statutory measure.<sup>258</sup> The prospect that courts might defer to agency constructions of their own jurisdiction threatens to take such measures of compromise off the table.<sup>259</sup> It also can make it more difficult for legislators to engage in rent extraction.<sup>260</sup>

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cal branches (i.e., the risk of judicial aggrandizement). Both risks seem likely to be greater where courts are called upon to review agencies’ nonjurisdictional interpretations *de novo* and weaker where they review jurisdictional interpretations without deference. Partly, this is because jurisdictional cases probably occur less frequently than nonjurisdictional ones. More to the point, because courts have less expertise in figuring out how to administer an agency’s regulatory program than they do in resolving questions of statutory interpretation and jurisdiction, *see supra* Part IV.A.3, it seems that decision costs would be substantially higher in nonjurisdictional cases. In addition, there are probably more opportunities for courts to smuggle their policy preferences into disputes about an agency’s administration of a regulatory program than disputes about the scope of the agency’s jurisdiction; it is likely that judicial aggrandizement would occur more frequently in nonjurisdictional cases. In short, nonjurisdictional cases present unique risks of excessive decision costs and judicial aggrandizement, which justify retaining the *Chevron* framework in that context even as we call for it to be abandoned for jurisdictional questions. (Of course, this argument depends on the ability to distinguish meaningfully between jurisdictional and nonjurisdictional cases, a topic to which we return in Part V.A *infra*.)

255. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 876 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); *see also* DANIEL A. FARBER & PHILIP A. FRICKEY, LAW & PUBLIC CHOICE 12–37 (1991).

256. The one exception to this may be “logrolling,” in which interest groups agree to support each others’ priorities—such as spending requests—without needing to compromise any of their own.

257. Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1210 (2007).

258. *Id.* at 1216.

259. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983) (“What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.”).

260. On the importance of rent extraction in describing political behavior, *see generally* FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997). According to McChesney, one form of rent extraction occurs when politicians promise *not* to



Just as overly expansive (or restrictive) readings of legislation by courts may discourage future compromises, allowing agencies to expand (or contract) the scope of their own jurisdiction beyond the terms of the original legislative deal may impede future deals.<sup>261</sup> If those moderates whose concurrence is necessary to reach a majority compromise cannot be assured that the deal will be kept, they will forego future compromises.

Because legislative deals are not self-enforcing, the existence of an independent judiciary helps cement the deal by providing an independent enforcement mechanism.<sup>262</sup> One purpose of judicial review of agency action is to ensure that agencies do not stray too far from the legislative deal they are entrusted to enforce.<sup>263</sup> Indeed, notwithstanding any risk that the judiciary may upset the legislative deal, “the independent judiciary is not only consistent with, but essential to, the interest-group theory of government.”<sup>264</sup>

If one presumes that agencies may be prone to expand their own jurisdiction, one should not also presume that a statutory ambiguity constitutes an implicit delegation of authority to an agency to expand its authority in the future. Enacting a statute both confers and restricts jurisdiction, and it cannot be presumed that legislators always prefer more of a good thing. Legislation confers limited authority because there are tradeoffs and diminishing marginal returns in pursuing a single policy goal to the exclusion of all other concerns.<sup>265</sup> Judge Easterbrook has emphasized that “[l]egislators seeking only to further the public interest may conclude that that provision of public rules should reach so far and no farther,” whether due to political compromise or inherent economic tradeoffs.<sup>266</sup> While judges may not be in a better position to identify the precise stopping point in every instance in which the statutory text is unclear, it is implausible to believe that administrative agencies prone to “tunnel vision” would be consistently better.

Interest groups certainly have incentives to defer some decisions, and punt such questions to agencies or the courts. A legislative compromise may well include the decision to leave some questions unre-

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take action that will harm interest groups. *Id.* at 25. If administrative agencies are capable of expanding their own jurisdiction, it is more difficult for politicians to give the assurances necessary for rent extraction to be successful.

261. See Rodriguez & Weingast, *supra* note 257, at 1209 (“Expansionary reading of existing statutes by judges inhibits congressional passage of new progressive legislation.”).

262. Landes & Posner, *supra* note 255, at 879.

263. See *id.* at 888.

264. *Id.* at 877.

265. Easterbrook, *supra* note 259, at 541 (“No matter how good the end in view, achievement of the end will have some cost, and at some point the cost will begin to exceed the benefits.”).

266. *Id.*

solved.<sup>267</sup> At the margin, this tendency may even have increased in recent years. Professors Macey and Miller observe that increased interest group specialization and influence has made legislative consensus more difficult, prompting Congress to enact “increasingly broad and amorphous enabling legislation that delegates controversial matters to administrative agencies.”<sup>268</sup> Nonetheless, it is likely that such deliberate ambiguity is more often concerned with the way jurisdiction is to be exercised than with the existence of jurisdiction in the first place. Congress is more likely to leave unresolved “pure” policy questions about how agency jurisdiction is exercised than the fundamental question of whether agency jurisdiction exists at all.

If agencies are the ultimate source of authority over their own jurisdiction, this can create instability that undermines legislative interest-group deals. Among other things, it puts the extent of a deal up for grabs every time a political administration shifts.<sup>269</sup> Interest groups that believed their interests were “protected” by a prior deal have less such assurance if an agency may redefine its own jurisdiction upon the discovery of a statutory gap or ambiguity. Indeed, such threats are inevitable insofar as any administrative statute will, inevitably, be found to have an ambiguity of one sort or another.<sup>270</sup> While Congress retains substantial oversight authority with regard to how agencies exercise their regulatory jurisdiction, such oversight may be less effective in controlling an agency’s assertion of jurisdiction.

## 2. *Deference and Incentives*

Denying *Chevron* deference to agencies’ jurisdictional interpretations is desirable for another reason: A no-deference rule creates positive incentives for Congress and agencies alike and also mitigates the negative incentives that would prevail in a regime where deference is available (or where there is uncertainty as to whether deference is available).

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267. *Id.* at 540 (“Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.”).

268. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 666 (1992).

269. Change in legislative majorities can also threaten prior interest-group deals, but only to a lesser extent due to the various “vetogates” that make it difficult to pass superseding legislation. See Landes & Posner, *supra* note 255, at 878. On “vetogates,” see William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretations*, 66 U. CHI. L. REV. 671, 677 n.13 (1999) (defining “vetogate” as “a place within a process where a statutory proposal can be vetoed or effectively killed”).

270. See Landes & Posner, *supra* note 255, at 879 (“[T]he limits of human foresight, the ambiguities of language, and the high cost of legislative deliberation combine to assure that most legislation will be enacted in a seriously incomplete form, with many areas of uncertainty left to be resolved by the courts.”).

## a. Congress

A no-deference rule would incentivize Congress to legislate with greater precision. Specifically, denying *Chevron* deference to agency jurisdictional interpretations would mitigate at least some of Congress's incentives to enact ambiguous statutes that do not clearly answer whether an agency is to wield a particular power or not. A no-deference rule thus would help discipline Congress, encouraging it to resolve more of the questions that a deference regime would leave to administrative agencies to decide.

Our first principle is that, in matters of domestic lawmaking, congressional action is preferable to agency action for the simple reason that Congress is more accountable to voters than agencies are. This is not to deny that agencies can be held to account. Plainly they can, especially executive agencies that are answerable to the president, who in turn is answerable to voters. Indeed, *Chevron* itself is premised on the notion that agencies are subject to democratic checks, at least compared to federal judges: "Judges . . . are not part of either political branch of the Government. . . . 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 . . . ." <sup>271</sup>

Yet Congress as an institution is even more responsive to voters' policy preferences for any number of familiar reasons. First, while agency officials are indirectly accountable through the president, Representatives and Senators are directly accountable in that they regularly must take their records to their constituents and run for reelection. Another important difference has to do with the frequency of elections. Voters only have the opportunity to register their disapproval of agency policy choices in quadrennial presidential elections. By contrast, a new Congress is constituted every two years. Finally, Congress's smaller constituencies ensure a tighter nexus between the representative and the represented. The typical Congressman serves a constituency of around 600,000, give or take,<sup>272</sup> and a single Senator's constituency can range from nearly 500,000 to almost 34 million.<sup>273</sup> But an agency official (like the president she serves) counts as her constituency the nation's entire

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

272. See Jim Abrams, *House Restores Partial Vote to Nonstate Delegates*, ORLANDO SENTINEL, Jan. 25, 2007, at A3.

273. In the 2000 census, the least populous state, Wyoming, had a population of 493,782. California, the nation's most populous state, boasted a population of 33,871,648. U.S. CENSUS BUREAU, POPULATION, HOUSING UNITS, AREA, AND DENSITY: 2000, available at [http://factfinder.census.gov/servlet/GCTTable?\\_bm=n&\\_lang=en&mt\\_name=DEC\\_2000\\_SF1\\_U\\_GCTPH1R\\_US9S&format=US-9S&box\\_head\\_nbr=GCT-PH1-R&ds\\_name=DEC\\_2000\\_SF1\\_U&geo\\_id=01000US](http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_SF1_U_GCTPH1R_US9S&format=US-9S&box_head_nbr=GCT-PH1-R&ds_name=DEC_2000_SF1_U&geo_id=01000US).

population of 300 million.<sup>274</sup> An individual voter's preference thus has less weight with an agency official than with a Senator or member of the House. Further, insofar as agencies are politically accountable, it is often a consequence of legislative oversight and control.

The question then becomes which legal rules would channel the maximum amount of policymaking responsibility to Congress and away from agencies. One obvious candidate is the nondelegation doctrine, but modern courts have shown little appetite for applying that principle in a meaningfully robust way.<sup>275</sup> A no-deference rule may be a plausible substitute. Denying *Chevron* deference to agencies' views on the magnitude of their own jurisdiction would, in at least some circumstances, allocate to Congress more responsibility for making basic policy calls.

In a system that extends *Chevron* deference to agency jurisdictional interpretations, Congress might write vague laws for any number of reasons. A statute might be ambiguous for the simple reason that Congress had no view on whether a given agency should have jurisdiction over a given matter, or could not have foreseen that the agency conceivably might exercise jurisdiction over the matter.<sup>276</sup> Less creditable reasons exist as well. Congress might enact ambiguous legislation because its members could not reach a consensus on a hotly disputed issue, and a vague generality was the most they could agree on.<sup>277</sup> Next, Congress might be able to agree, but it fears its decision to extend or withhold agency jurisdiction will prove unpopular. Ambiguity lets Congress pass the buck to the agency. Vague legislation can help mask legislative policy choices and thus insulate members from anticipated public backlash; ambiguity externalizes at least some of the costs of adopting controversial policies.<sup>278</sup> Finally, Congress might be vague because it wants to maintain its future flexibility in overseeing the executive branch. Laws

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274. Further, insofar as administrative agencies are subject to capture, they are likely to be more responsive to concentrated interests, economic and otherwise, and even less responsive to broader public concerns.

275. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

276. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) (“The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.”).

277. See Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 9–10 (2007) (“Congress may choose to enact an ambiguous statute as a compromise to ensure the statute’s passage; by being purposely vague, legislative drafters can generate sufficient support for a statute that would fail to become law were sensitive issues definitively resolved through clear and detailed statutory language.”).

278. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2155 (2002) (emphasizing that “ambiguity allows Congress to evade accountability,” and to “shift the dirty work of legislation to the courts”).

that are ambiguous give Congress the discretion to decide, at some point in the future, whether to praise or condemn an agency for asserting or disclaiming jurisdiction depending on which way the (currently unknowable) political winds are blowing at the time.<sup>279</sup> In each of these circumstances, Congress is effectively delegating to implementing agencies the responsibility for making policy determinations that the statute could, but does not, resolve.

Our proposal would make it more difficult for Congress to shirk its policymaking responsibilities, and thereby encourage greater legislative precision, in at least some cases. Denying *Chevron* deference on jurisdictional questions would not prevent statutes whose ambiguity is caused by Congress's failure to express any intention on, or anticipate any disputes involving, the bounds of an agency's authority. By definition, Congress is not deciding whether a given agency should possess a given power, so the future availability of judicial deference will not influence that decision making in the present day.

The no-deference rule is likely to prove more valuable when ambiguity results from a lack of congressional consensus. Where policy differences prevent agreement, legislators might see statutory indeterminacy as a second-best alternative: Members on both sides of the question can hold out hope that an agency or court will construe the ambiguity in a way that achieves their hoped-for policy goals. And legislators know that they will be able to pressure an agency to adopt the "right" construction by holding a well-timed oversight hearing, sending a letter to the agency head, and so on.<sup>280</sup> If, on the other hand, members of Congress know that agencies' jurisdictional interpretations will not receive judicial deference—and, therefore, that agencies will have less room to maneuver when making policy choices—they are likely to invest more resources in trying to achieve the previously elusive consensus. (Or, where reaching agreement would be prohibitively costly, they may not legislate on the question at all.) In other words, the no-deference rule alters the cost-benefit calculus for enacting ambiguous legislation. It reduces the benefits that legislators can expect to gain from writing laws that fail to resolve whether an agency is to wield a particular power.

The same is true of ambiguities deriving from Congress's efforts to shield unpopular jurisdictional decisions from public view. Imagine that Congress secretly hopes the FDA will exercise jurisdiction over tobacco products, but wants the agency to take any political heat for doing so. One way to accomplish that is to enact laws that are ambiguous regard-

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279. See MCCHESNEY, *supra* note 260, at 37.

280. See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 641 (2002).

ing the boundaries of FDA power, and then quietly prod the agency to act. Our no-deference rule would make that strategy less attractive. Denying *Chevron* deference to the FDA's assertion of jurisdiction over tobacco products reduces the FDA's ability to initiate the expansion of its own regulatory authority, thereby decreasing the benefits that Congress can expect to gain from the ambiguity-and-prod two-step. For similar reasons, the no-deference rule reduces Congress's incentives to enact ambiguous legislation that preserves its ability to denounce agencies' jurisdictional choices at a later date. Staying with our example, the FDA will not be making jurisdictional choices, so Congress has little, if anything, to gain from keeping its powder dry today and opening fire on the FDA tomorrow.

Candidly, there is some risk that a no-deference rule will produce negative legislative incentives of its own. Our proposal would extend deference (albeit not *Chevron* deference) to agency jurisdictional interpretations involving factual predicates. In effect, we are establishing a safe harbor, and Congress naturally will want to take advantage of it. A legislature that is determined to punt jurisdictional questions to agencies thus will have an incentive to write statutes that are framed in factual-predicate terms—thereby restoring at least some of the benefits Congress can expect to gain from ambiguous legislation.

We acknowledge the force of this concern, and we share it. But we do not believe it represents a fatal flaw in our proposal. First, the same interests that motivate legislators to enact ambiguous laws—a lack of consensus, the desire to hide unpopular decisions, a wish to pivot in future political winds—also might dissuade them from specifying in a statute the predicates necessary to trigger agency jurisdiction. Suppose Congress wants to avoid deciding whether or not the CFTC may, in the course of adjudicating violations of federal commodities law, decide related state-law counterclaims.<sup>281</sup> Congress could write a statute identifying predicates whose presence would establish CFTC counterclaim jurisdiction—for example, “The Commission may exercise jurisdiction if the cost of litigating the counterclaim separately would exceed \$100,000”—thereby leaving the ultimate decision whether to exercise jurisdiction up to the agency. But doing so would defeat Congress's reasons for preferring ambiguity. Statutorily specifying the predicates would draw attention to the issue, thereby limiting legislators' ability to escape responsibility both for their own choices and for the agency's subsequent implementation of those choices. In short, a no-deference rule might create an incentive for Congress to frame legal problems as factual predi-

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281. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 835–36 (1986).

cates, but Congress also will have a countervailing incentive to refrain from drawing attention to the issue, which is exactly what a factual-predicate statute would do.

Second, even if our proposal does not eliminate the incentive to enact ambiguous statutes in every single instance, it will still have a beneficial effect in at least some cases. If nothing else, our proposal would make Congress work harder to write statutes framed in factual-predicate terms. Instead of simply saying that the Commission may issue an order awarding actual damages proximately caused by a violation of the Commodity Exchange Act,<sup>282</sup> Congress would need to expend scarce legislative resources to come to consensus on a more detailed list of jurisdictional triggers. That would marginally increase the costs of enacting laws that punt jurisdictional questions to agencies. In some unknown number of instances, the additional costs would be enough to outweigh the expected benefits of ambiguity and thus dissuade Congress from enacting a vague law. Our no-deference proposal might not be a complete solution, but it does a better job of maximizing congressional control over policy-making than a rule of jurisdictional deference.

#### b. Agencies

A no-deference rule would not just encourage Congress to shoulder greater responsibility for making basic policy choices. It also would reduce opportunities for agencies to improperly arrogate policymaking power to themselves.

In a system that extends *Chevron* deference to agency jurisdictional interpretations, agencies will have strong incentives to exercise powers Congress did not intend for them to wield, or to extend their powers beyond what Congress envisioned.<sup>283</sup> Imagine an agency that is deciding, in a deference regime, whether to assert jurisdiction over a given matter. (The calculus would be the same for an agency choosing whether to disclaim jurisdiction, but for now we will focus solely on the former choice.) The agency will claim jurisdiction if it expects the benefits of doing so to exceed the costs. The benefit of asserting jurisdiction will be equal to the value of the claimed power (e.g., its usefulness in achieving the agency's regulatory priorities) discounted by the probability that a court will strike it down as *ultra vires*. (The agency may use other factors to discount the value of the claimed power, including the probability that an assertion of

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282. Cf. 7 U.S.C. § 18(a)(1)(A) (2006).

283. See *supra* notes 21–30 and accompanying text; see also Gellhorn & Verkuil, *supra* note 16, at 996 (arguing that the availability of *Chevron* deference encourages agencies to make “broad claims of jurisdiction into areas long thought to be outside their jurisdiction”).

jurisdiction would produce unwelcome political controversy.) A deference rule reduces the probability of judicial invalidation. That in turn increases the anticipated benefit to the agency of aggrandizement, thereby increasing the incidence of aggrandizement. And we believe that agency aggrandizement is undesirable for the same accountability-based reasons that we prefer congressional policymaking.

The argument in favor of a no-deference rule is fairly straightforward. By denying *Chevron* deference to agency jurisdictional interpretations, our proposal helps minimize these natural incentives to aggrandize. In particular, refusing to analyze jurisdictional questions under the *Chevron* framework increases the likelihood that courts will invalidate an agency's claim of authority to regulate a particular field, thereby decreasing the benefits the agency can expect to gain from asserting jurisdiction. In at least some cases, that will reduce the agency's expected benefits to a value less than the anticipated costs. And that means less aggrandizement. It is important to emphasize, again, that a no-deference rule would not necessarily create an anti-regulatory bias. Agency aggrandizement can take any number of forms. Sometimes it comes as a wolf in the form of assertions of jurisdiction. But sometimes it comes in the sheep's clothing of jurisdictional disclaimers.<sup>284</sup> Our proposal to deny *Chevron* deference would alter the cost-benefit calculus for agencies considering disclaimers of jurisdiction as well as assertions. A no-deference rule would help curb *aggrandizement* (whatever form it may take), not *assertions of jurisdiction as such*.

While a no-deference rule helps mitigate the tendency to aggrandize, there is also a possibility that it could create unfavorable incentives in agencies similar to the ones that might materialize in Congress. Specifically, agencies might try to take advantage of the safe harbor by attempting to characterize any given dispute as a factual-predicate case instead of an existence or scope case. Restoring *Chevron* deference to this subset of jurisdictional disputes would result in (at least some) opportunities to aggrandize.

Yet our sense is that agencies would enjoy only modest success at dressing up existence or scope cases in the garb of factual predicates. This is so because whether a given dispute plausibly can be described in factual-predicate terms will depend, not just on the agency's determination and ingenuity, but on the way the specific underlying statute is written. And that is largely beyond the agency's control. Some statutes

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284. Compare *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (FDA asserts authority to regulate tobacco products under the FDCA), with *Massachusetts v. EPA*, 549 U.S. 497, 504 (2007) (EPA asserts that it lacks statutory authority to regulate greenhouse gases under the Clean Air Act).



present factual-predicate problems quite clearly—for example, a statute that calls on an agency to determine whether a quantity of natural gas moved from one state to another,<sup>285</sup> or a statute that directs an agency to decide whether certain goods were transported on public highways.<sup>286</sup> Other statutes, because of the way Congress has chosen to write them, cannot easily be pegged into the factual-predicate hole. These difficulties are especially pronounced in statutory-silence cases. If a statute is silent on the existence of jurisdiction, by definition it cannot include predicates whose presence will trigger jurisdiction. One would struggle mightily to describe the failure of the Railway Labor Act to expressly deny the National Mediation Board the power to investigate railway employees' representation disputes as conditioning agency jurisdiction upon the presence of certain factual predicates.<sup>287</sup> Likewise, the silence of the ADA on whether the DOT had authority to impose money damages on noncompliant bus companies cannot plausibly be described as presenting a factual-predicate problem.<sup>288</sup> In short, an agency's ability to take advantage of the factual-predicates safe harbor is limited by the terms of the statutes Congress has enacted. An agency might pressure Congress to rewrite the underlying statute in terms more amenable to factual-predicate analysis, but as discussed above there are limits to Congress's willingness to do so.

Even if agencies were successful in recasting a not-insignificant number of jurisdictional matters to take advantage of the safe harbor, that would not fatally undermine our case for a no-deference rule. A little aggrandizement is better than a lot of aggrandizement. Agencies already have an incentive to accumulate new powers. Our proposal would channel that incentive into a single category—factual predicate cases—and thereby reduce the opportunities for it to be expressed. In a system where courts announce that they will defer to agencies' jurisdictional interpretations (or where there is uncertainty about whether they will do so), whether an agency is able to aggrandize will depend upon little more than the agency's desire to aggrandize. Under our proposal, an agency's ability to aggrandize is a function not just of the agency's druthers but of how Congress has written its organic statute. Because that will be largely out of agencies' control, even an imperfect no-deference regime will mean less aggrandizement.

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285. See *Okla. Natural Gas Co. v. Fed. Energy Regulatory Comm'n*, 28 F.3d 1281, 1284 (D.C. Cir. 1994).

286. See *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 548–49 (3d Cir. 1988).

287. *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 658, 671 (D.C. Cir. 1994) (en banc).

288. *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 3 (D.C. Cir. 2000).

### 3. *Agency Self-Aggrandizement*

That brings us to a third reason why courts should decline to afford *Chevron* deference to agencies' jurisdictional interpretations—"foxes should not guard henhouses."<sup>289</sup> In the broadest terms, "In Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation."<sup>290</sup> As we have seen, entrusting agencies with the responsibility of determining the extent of their powers poses too great a risk of aggrandizement.<sup>291</sup> For that reason, as Professor Sunstein and others have argued, it is unreasonable to suppose that Congress meant to give agencies such authority: "Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers."<sup>292</sup>

There are two discrete ideas here. The first is a guess about Congress's probable intentions—namely, it would not have meant to grant agencies the authority to determine the extent of their jurisdiction. No evidence is mustered to support that conjecture, but at least it's in good company; disputes over the proper scope of *Chevron*'s domain are rife with competing undefended presumptions.<sup>293</sup> The second idea is that, irrespective of what Congress may have expected, courts should not acquiesce to agencies' efforts to define their own powers. Again, the source of such a norm is not identified, but a few obvious candidates spring to mind: judicially defined and policed functionalist principles (themselves derived from Anglo-American legal traditions) designed to

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289. Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989).

290. Sunstein, *Law and Administration*, *supra* note 31, at 2097; *see also* NORMAN J. SINGER, 3 STATUTES AND STATUTORY CONSTRUCTION § 65.2 (2001) ("[T]he general rule applied to statutes granting powers to [agencies] is that only those powers are granted which are conferred either expressly or by necessary implication.").

291. *See Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("[D]etermination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."); *see also* Armstrong, *supra* note 21.

292. Sunstein, *Law and Administration*, *supra* note 31, at 2099; *see also* Gellhorn & Verkuil, *supra* note 16, at 994 ("When agency self-interest is directly implicated, such as when it must decide whether an area previously unregulated by the agency should now come within its jurisdiction, the justifications for deference fade. . . . It is here that concern about agency aggrandizement is at its highest."); Merrill & Hickman, *supra* note 12, at 867 ("If Congress describes the agency's mandate in a way that contains gaps or ambiguities (which is inevitable), and *Chevron* requires courts to defer to any reasonable interpretation of these gaps and ambiguities, then *Chevron* seems to offer an opening for agency aggrandizement (or abrogation), without any effective judicial check.").

293. *See, e.g.,* *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring in the judgment) (presuming, without citing evidence, that "Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction"); *id.* at 387 (Brennan, J., dissenting) (arguing, without citing evidence, that "we cannot presume that Congress implicitly intended an agency to fill 'gaps' in a statute confining the agency's jurisdiction"); *cf.* Sunstein, *Step Zero*, *supra* note 13, at 235 (acknowledging that "the claim about what 'Congress would naturally expect' is a fiction").

check the exercise of power; or an “administrative common law”<sup>294</sup> that, for similar reasons, seeks to constrain agency discretion; or perhaps even a court-enforced nondelegation doctrine.

In its crude form, the argument about foxes and henhouses is not especially persuasive.<sup>295</sup> An initial observation is that analyzing jurisdictional questions under the *Chevron* framework does not allow agencies to “decide” conclusively the extent of their own powers. Agencies do not have the last word; their jurisdictional interpretations are still subject to judicial review under *Chevron* step two. And while *Chevron*’s reasonableness requirement does not have much bite, it is possible to imagine agency assertions of jurisdiction that would plainly run afoul of it<sup>296</sup>—for example, if the FDA asserted authority to regulate tractor-trailers that haul medications as “devices” under the FDCA, on the ground that the trucks are “machine[s]” that are “intended for use in the . . . cure, mitigation, treatment, or prevention of disease.”<sup>297</sup>

A more fundamental problem with the foxes-and-henhouses argument is that government actors in many other circumstances have the final say on whether or not they may wield a particular power. Federal courts routinely decide whether they have subject-matter jurisdiction to decide a particular case—i.e., whether Article III of the Constitution confers that power on them. The abstention doctrines also give courts the last word on whether to exercise their jurisdiction in a variety of disputes, for example, ones involving the constitutionality of a state law whose meaning is unclear,<sup>298</sup> or a state law that is particularly complex.<sup>299</sup> Likewise, the political question doctrine gives Congress free rein to decide the extent of certain of its powers. The Senate enjoys unchecked discretion on how to exercise its authority to try impeachments,<sup>300</sup> and each house is solely responsible for carrying out its power to expel a

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294. Cf. *Webster v. Doe*, 486 U.S. 592, 607 (1988) (Scalia, J., dissenting).

295. That may be one reason why Professor Sunstein appears to have overcome his previous skepticism of entrusting jurisdictional questions to agencies. In his most recent discussion of the issue, Professor Sunstein argues that “any exemption of jurisdictional questions” from the *Chevron* framework “is vulnerable on two grounds.” Sunstein, *Step Zero*, *supra* note 13, at 235. First, echoing Justice Scalia, “the line between jurisdictional and nonjurisdictional questions is far from clear.” *Id.* Second, agency assertions of jurisdiction typically are due to the influence of “democratic forces” or the agency’s “own specialized competence”—which of course are two classic rationales for *Chevron* deference. *Id.*

296. See *Am. Bus. Ass’n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring) (“We would not, of course, be obliged to rubber-stamp an agency’s interpretation of those, or any other, statutory silences; any such interpretation would still have to satisfy the reasonableness test of *Chevron* step two.”).

297. 21 U.S.C. § 321(h) (2006).

298. See, e.g., *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500–01 (1941).

299. See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 332–34 (1943).

300. See *Nixon v. United States*, 506 U.S. 224, 229–34 (1993).

member.<sup>301</sup> Why should federal courts and Congress be trusted to guard henhouses, but not administrative agencies?

A somewhat more refined version of the argument would begin with the proposition that judges and legislators are less likely to succumb to aggrandizement than administrative agencies. Allowing courts to decide the extent of their own jurisdiction raises weaker aggrandizement concerns because they are constrained by Article III's case or controversy requirement. By their very nature, courts are reactive. A court cannot initiate a proceeding to assert jurisdiction over a given field or activity, and it cannot issue an advisory opinion. It must wait for parties with standing to put forward a justiciable claim. Even courts that are determined to expand their powers thus are limited in their ability to do so.<sup>302</sup> Justiciability requirements therefore can be seen as a means by which the court-as-fox problem is managed.<sup>303</sup>

The same can be said of Congress, though to a lesser extent. Congress likewise appears to be reactive, at least with respect to impeachment, expulsion, and other areas where its ability to define its powers is largely unchecked (though certainly not with respect to the enactment of substantive legislation). In recent American history, Congress has not used its impeachment or expulsion powers to advance broad policy objectives—for example, removing officeholders whose policies are abhorrent to a congressional majority.<sup>304</sup> Instead, Congress typically commences impeachment proceedings or seeks to expel a member only after an independent investigation has uncovered plausible evidence of criminal wrongdoing.<sup>305</sup> Unlike the federal courts, Congress is not bound by formal doctrine that requires it to exercise its impeachment and expulsion powers in a reactive way. Yet in practice, that is exactly what it does, and the risk of aggrandizement is therefore somewhat lessened.

In contrast to the passivity that characterizes the courts and (in relevant respects) Congress, administrative agencies are proactive. Agen-

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301. *Powell v. McCormack*, 395 U.S. 486, 506–12 (1969). The political question doctrine does not, of course, insulate a decision by Congress to *refuse to seat* a member. *See id.* at 548–49.

302. *See Molot*, *supra* note 231, at 1304 (“[I]n an important respect, the institutional setting within which judges operate renders them less likely than political actors to be motivated predominantly by a desire merely to implement their own political ideology.”).

303. This rationale may pose problems for Professor Sunstein in particular, who has taken a rather broad view of standing and justiciability requirements. *See, e.g.*, Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 180 (1992).

304. The Reconstruction Congress's efforts to remove President Andrew Johnson from office are an obvious counterexample.

305. For instance, Congress refused to seat Representative Adam Clayton Powell—as distinct from expelling him—after he was accused of corruption. President Nixon was threatened with impeachment after an independent counsel uncovered evidence of his complicity in the Watergate break-in. Federal judge Alcee Hastings was impeached and removed after he was indicted for (and later acquitted of) accepting a bribe and committing perjury. And President Clinton was impeached after an independent counsel uncovered evidence of alleged perjury and obstruction of justice.

cies are “policy entrepreneurs.”<sup>306</sup> Not only do they propose solutions to commonly recognized social problems, but they also sometimes seek to persuade the public that there is a problem that needs solving in the first place. This entrepreneurship is facilitated by the extraordinarily broad statutory charges that agencies often are given: The FCC is to regulate the airwaves in a way that serves the “public convenience, interest, or necessity,”<sup>307</sup> the EPA is to protect air quality with an “adequate margin of safety,”<sup>308</sup> and so on. Agencies thus enjoy fairly wide discretion to decide whether to initiate proceedings to assert jurisdiction over particular sectors of the economy or particular activities.

In these circumstances, where neither hard legal rules nor soft institutional norms constrain the assertion of agency jurisdiction, there is a greater risk of aggrandizement. One solution is for courts to refuse to apply the *Chevron* framework to questions involving agency jurisdiction, and instead resolve such matters independently. (Another would be a judicially enforced nondelegation doctrine, but courts have shown little interest in reviving that principle.<sup>309</sup>) In effect, a rule that denies *Chevron* deference to agency jurisdictional interpretations is a substitute for the justiciability doctrines that constrain courts from arrogating power to themselves and for the institutional culture that prevents Congress from using impeachment and expulsion as policymaking instruments.

## V. THE OBJECTIONS

There are several potential objections to our proposal. Some of them have been addressed above. Here we seek to respond to the two most prominent—and in our view most difficult—objections. First and foremost, there is the difficulty (some would say impossibility) of distinguishing jurisdictional from nonjurisdictional questions. In other words, a no-deference rule increases courts’ decision costs. This objection is both strong in its own right, and strengthens other objections when considered in combination with them. Second is the possibility that denying *Chevron* deference in the jurisdictional context will force courts to engage in policymaking, which is one of the outcomes the *Chevron* doctrine is intended to avoid. In addition, some contend, denial of deference in the jurisdictional context threatens to undermine the principles upon which *Chevron* depends. While we believe each of these objections has

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306. See JAMES Q. WILSON, *THE POLITICS OF REGULATION* 370 (1980).

307. See 47 U.S.C. § 303 (2006); see also *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

308. See 42 U.S.C. § 7409(b)(1) (2006) (requiring the EPA to set national ambient air quality standards at a level “requisite to protect the public health” with “an adequate margin of safety”).

309. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

some merit, we do not believe that either is fatal to our proposal. Warts and all, a no-deference rule is superior to the available alternatives.

*A. Distinguishing Jurisdictional Actions from Nonjurisdictional Actions*

Perhaps the most compelling objection to our proposal comes from Justice Scalia's concurrence in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.<sup>310</sup> Courts lack the ability to distinguish the jurisdictional actions that would be subject to a no-deference rule from other types of actions; they simply do not know it when they see it. According to Justice Scalia, "[T]here is no discernable line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."<sup>311</sup> "Virtually any administrative action can be characterized" as either jurisdictional or nonjurisdictional "depending upon how generally one wishes to describe the 'authority.'"<sup>312</sup> At best, Scalia suggests, denying *Chevron* deference to agency jurisdictional interpretations would be futile, since courts cannot identify the class of disputes that would be subject to the rule. At worst, a no-deference rule would make it possible for courts to predetermine outcomes in particular cases by manipulating the standard of review. Under this view, refusing to extend *Chevron* to jurisdictional questions does not prevent aggrandizement. It simply substitutes the risk of judicial aggrandizement for the risk of agency aggrandizement.<sup>313</sup>

These criticisms have considerable force, but are ultimately unpersuasive. For starters, we suspect that it will be quite easy for courts to

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310. 487 U.S. 354, 377–81 (1988).

311. *Id.* at 381 (Scalia, J., concurring in the judgment).

312. *Id.*; see also, e.g., *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 676–77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting) ("Indeed, any issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed."); Cope, *supra* note 16, at 1340–42; Crawford, *supra* note 16, at 968–69.

313. Professor Vermeule similarly argues that the entire "step zero" project—including, by implication, this Article's efforts to cordon off jurisdictional questions from *Chevron's* domain—is fatally flawed. According to Professor Vermeule, "step zero" replaces *Chevron's* simple rule-like approach with a standards-based, "fine-grained jurisprudence of deference." Vermeule, *supra* note 202, at 347. By moving from a rule to a standard, "step zero" analysis makes it more costly for courts to reach decisions, increases uncertainty for litigants, forces judges and lawyers to devote more resources to litigating over standards of review, and externalizes the costs of decisionmaking from the Supreme Court to lower courts. See *id.* at 356–58. We do not deny that our no-deference rule poses at least some risk of greater decision costs (though, as the rest of Part V.A explains, these costs are likely to be smaller than critics fear). More importantly, we have a fundamentally different understanding of what *Chevron* is trying to accomplish. Professor Vermeule and other "step zero" critics (including Justice Scalia) see *Chevron* primarily as a tool for minimizing judicial discretion and promoting efficiency. They therefore are more willing to tolerate the risk of agency aggrandizement. We see *Chevron* (as clarified in *Mead*) as a partial solution to the problem of excessive agency discretion. We therefore are more willing to tolerate the risk of decisional inefficiencies (though we share the concern about possible judicial overreach). To put it somewhat crudely, we worry more about agency aggrandizement than we do about judges and lawyers working harder.

classify as jurisdictional those cases that involve agency claims about statutory silences.<sup>314</sup> Concerns about the slippery boundary between an agency that “exceed[s] its authority” as such and an agency that “exceed[s] authorized application of its authority” are weak when the agency cannot point to any statutory basis to support what it has done.<sup>315</sup> When a statute is silent—i.e., when Congress has failed to authorize an agency to act—there can be no “authorized applications” of a particular agency power, because the agency simply does not have that power. Even if one shares Justice Scalia’s aversion to courts playing with the level of generality at which an agency’s authority is described, one could still embrace a no-deference rule for statutory-silence cases that—by definition—involve Congress *denying* authority to the agency.

In other jurisdictional cases, ones that do not involve statutory silences, critics might be overestimating the magnitude of the decision costs. Our sense is that the challenge of distinguishing jurisdictional actions from nonjurisdictional ones is unlikely to arise in most cases. The line-drawing problems that most readily come to mind involve uncertainty over whether a particular agency action implicates the *existence* of power or the *scope* of power, not whether it is properly classified as jurisdictional. One might dispute whether the FDA’s claim of authority to regulate tobacco products is better described as an existence problem (“the FDA is asserting power to regulate an entire industry”) or as a scope problem (“the FDA’s power to regulate drugs and devices is being extended to particular types of drugs and devices”).<sup>316</sup> But there does not appear to be much doubt that the FDA’s claim is a jurisdictional one. Likewise, reasonable minds can differ on whether the FCC’s refusal to regulate cable companies’ broadband Internet services was a denial of the existence of jurisdiction (“the FCC is disclaiming power to regulate an entire industry”) or a restriction on the scope of jurisdiction (“the FCC’s power to regulate telecommunications services does not reach cable broadband”).<sup>317</sup> But, again, it is pretty easily classified as a jurisdictional case (and our proposal would deny *Chevron* deference in either event).

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314. See, e.g., *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) (“The Commission apparently assumed—without reasoning—that it could extend its regulatory authority over attorneys engaged in the practice of law with no other basis than the observation that the Act did not provide for an exemption.”); *Am. Bus Ass’n v. Slater*, 17 NDLR ¶ 166 (D.D.C. Sept. 10, 1999), available at 1999 WL 986849, at \*22 (“The plain language indicates that Congress did not explicitly forbid the Secretary from including a compensation mechanism in the [bus] accessibility regulations.”).

315. *Miss. Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment).

316. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

317. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 989–99 (2005).

To be sure, in some cases the line demarcating existence from scope could be quite difficult to draw with any precision—perhaps prohibitively so. This is a principal reason why we argue that courts should analyze scope questions the same way they analyze existence questions; *Chevron* should not apply to either.<sup>318</sup> But the boundaries between jurisdictional and nonjurisdictional actions ordinarily will be considerably less murky. Indeed, Justice Scalia's *Mississippi Power & Light* concurrence seems to acknowledge this. That case—in which the Court held that the FERC could require a Mississippi utility to purchase power from a nuclear plant—did not involve any dispute over whether, “in reviewing the wholesale rates charged to the participants in such a[n electricity pooling] venture, FERC has jurisdiction to determine whether the venture was prudent as a whole.”<sup>319</sup> Nor, according to Justice Scalia,

is it seriously contested that in general FERC has jurisdiction to determine a fair allocation of the cost of the facility among the utilities in the pool. . . . The central controverted issue in the present case is whether FERC has jurisdiction to determine the prudence of a particular utility's participation in the pool.<sup>320</sup>

Not only was Justice Scalia able to successfully identify the issue in the case as a jurisdictional one, but he also managed to distinguish among a number of possible jurisdictional disputes that might conceivably be presented to the Court. We suspect that, in many cases, courts will find it just as easy to tell a jurisdictional action from a nonjurisdictional one.

What about the hard cases? Even here, we suspect the difficulties are exaggerated. The fact that judges may have trouble drawing lines does not mean that it is impossible to do so. Nor, more importantly, does it relieve them of their responsibility of doing so. It might be difficult to determine the precise boundaries dividing jurisdictional actions from nonjurisdictional ones, but that does not mean that they are one and the same—the categories are still analytically valid even if their borders are “fuzzy.”<sup>321</sup> As Deborah Jones Merritt has argued in the Commerce Clause context, the exact position of the line is often unclear, but some things are closer to interstate commerce than others.<sup>322</sup> The category of jurisdictional questions, like interstate commerce, “birds and baldness, is not a crisp set.”<sup>323</sup> But that does not make it inherently unsuitable to judicial enforcement.

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318. See *supra* Part III.

319. *Mississippi Power*, 487 U.S. at 378 (Scalia, J., concurring in the judgment).

320. *Id.*

321. See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 739–50 (1995) (applying concept of “fuzzy logic” to question of what constitutes “commerce”).

322. Indeed, this is part of the reason that the pre–New Deal Court's Commerce Clause decisions are so routinely criticized for their inconsistencies. See *id.* at 684–85.

323. *Id.* at 742.



In administrative law (as in other contexts), courts are called upon to draw fuzzy lines all the time, including jurisdictional ones. Professor Noah has observed that courts sometimes “have to mediate ‘turf battles’ between agencies with apparently overlapping jurisdiction.”<sup>324</sup> If courts are competent to determine (without repairing to *Chevron*) that, for example, the SEC lacks authority to regulate a financial instrument because the CFTC has that power,<sup>325</sup> there is no reason to believe it will be more difficult to say whether the SEC has jurisdiction in the absence of another agency’s claim of authority. Similar line-drawing problems arise in other administrative law contexts. It may not be immediately obvious whether an agency rule is legislative (requiring the agency to engage in notice-and comment-rulemaking) or interpretive (and therefore exempt from the APA’s notice and comment requirements).<sup>326</sup> It might be unclear whether an agency action is properly classified as a rule at all, and not an adjudication.<sup>327</sup> And courts might struggle to determine whether a particular action is committed to agency discretion by law (and hence immune from judicial review under the APA).<sup>328</sup> Yet the courts manage to soldier through. The distinction between a jurisdictional and nonjurisdictional agency action does not appear in principle to be any more elusive than the distinction between, say, a legislative rule and an interpretive rule. Courts have managed successfully to draw lines between these and other categories, and there is no reason to suspect they will find it any harder to distinguish jurisdictional from nonjurisdictional actions.

Professor Eskridge and Lauren Baer suggest another basis for contrasting jurisdictional from non-jurisdictional interpretations: “wholesale” and “retail” applications.<sup>329</sup> “When an agency expands its regulations to a new category of applications, it is interpreting its own jurisdiction[,]” and is engaging in a “wholesale application of a statute.”<sup>330</sup> On the other hand, when the agency is applying its regulations or inter-

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324. Noah, *supra* note 16, at 1524.

325. See *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989) (holding that “index participations” were a type of futures contract that therefore were subject to the CFTC’s jurisdiction and not the SEC’s).

326. See, e.g., *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 236–37 (D.C. Cir. 1992).

327. For instance, the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763, 769 (1969), disagreed on whether the Board had engaged in rulemaking or adjudication when, in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), it required an employer to provide a union with the names and addresses of its employees. Compare *Wyman-Gordon*, 394 U.S. at 765 (plurality opinion) (the *Excelsior Underwear* order was a rule), and *id.* at 777 (Douglas, J., dissenting) (same), and *id.* at 780 (Harlan, J., dissenting) (same), with *id.* at 770 (Black, J., concurring in the judgment) (the *Excelsior Underwear* order was an adjudication).

328. See, e.g., *Webster v. Doe*, 486 U.S. 592, 597 (1988).

329. Eskridge & Baer, *supra* note 154, at 1130.

330. *Id.*

preting a statutory provision “to a matter of detail,” it is not engaging in a jurisdictional interpretation and is engaged in a “retail application of a statute.”<sup>331</sup> Likewise, when an agency focuses on factual predicates or premise facts in determining the application of its regulatory authority, it is engaged in “retail application.”<sup>332</sup> Eskridge and Baer conclude, and we concur, that courts generally have the capacity to distinguish between such “wholesale” and “retail” applications.<sup>333</sup>

This is not to deny that it may be quite difficult in some cases to say whether an agency’s action was jurisdictional or not. When courts confront such circumstances, they may incur significant “predecision costs”<sup>334</sup> in ascertaining whether the action was jurisdictional or nonjurisdictional. Even worse, there is at least some risk that—whether deliberately or unconsciously—courts might choose whether to apply the deferential *Chevron* standard of review based on their sense of whether the agency’s action ought to be sustained. In the close cases that do arise, courts might use any number of factors to more systematically distinguish jurisdictional actions from nonjurisdictional ones. The list could include the following (by no means exhaustive) considerations:

- Is the agency invoking a statutory silence as the basis for its decision? Or is it able to point to some specific (albeit perhaps ambiguous or inconclusive) statutory language to justify what it has done? If the agency is unable to point to any authorization for its action other than Congress’s failure to rule it out, chances are greater that the action is jurisdictional.
- How large is the class that is affected by the agency decision? Does it concern an entire field or industry, or only a few discrete players? An action that affects the rights and responsibilities of many entities is more likely to be jurisdictional than an action that only concerns a few.<sup>335</sup> So, for instance, an agency decision that has ramifications for farmers, manufacturers, and distributors—not to mention users!—of tobacco and tobacco-related products is more likely to be jurisdictional.<sup>336</sup> The same goes for a decision on whether the Clean Air Act has anything to say about the emission of greenhouse gases from automobiles, power plants, factories, and other facilities used by virtually every

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331. *Id.*

332. *Id.*

333. *Id.*

334. Vermeule, *supra* note 202, at 356–57.

335. See Gellhorn & Verkuil, *supra* note 16, at 1009 (arguing that *Chevron* should not apply to agency assertions of jurisdiction that are “likely to have a major impact on the regulatory program and those being regulated”).

336. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–30 (2000).

American.<sup>337</sup> By contrast, an agency decision that a particular importer's day planners are "bound diaries" that are subject to tariffs is more likely to be nonjurisdictional.<sup>338</sup>

- Is the agency acting for the first time after a lengthy period in which it indicated, either expressly or by implication, that it lacked authority to do what it does now? Not all policy shifts herald that the agency's action is a jurisdictional one. The DOT's decision to rescind a requirement that automobile manufacturers install automatic seatbelts or air bags in their cars was not an effort to disclaim jurisdiction over vehicle safety.<sup>339</sup> But some policy shifts do—for example, when the Army Corps of Engineers finally began to regulate wetlands under the Clean Water Act after a federal court ruled that it did in fact have statutory authority to do so.<sup>340</sup> The fact that an agency suddenly makes a choice it previously thought it legally could not make, when coupled with other factors, is a sign that the action may be jurisdictional.<sup>341</sup> The reverse would also be true, as when the Bush administration's EPA concluded that it lacked the authority to regulate greenhouse gases under the Clean Air Act, despite the Clinton administration's contrary view.<sup>342</sup>
- Is there any independent evidence, other than the agency action being challenged, that the agency might be seeking to aggrandize? The textbook example of a jurisdictional problem involves an agency asserting (or disclaiming) authority to regulate a given activity, industry, or field in order to pursue its own institutional interests.<sup>343</sup> Needless to say, agencies can aggrandize in less dramatic ways than by claiming (or denying) jurisdiction, but the

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337. See *Massachusetts v. EPA*, 549 U.S. 497, 528–30 (2007).

338. See *United States v. Mead Corp.*, 533 U.S. 218, 224–26 (2001). There are some obvious counterfactuals here. *Chevron* itself involved an agency decision (endorsing the "bubble approach" under the Clean Air Act) that affected an entire industry (coal-fired power plants). See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Yet we would not suggest that the EPA's action was on that account jurisdictional and subject to our no-deference rule. Rather, the size of the affected class is only one of several factors that, taken together, help draw the line between jurisdictional and nonjurisdictional actions.

339. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983).

340. See *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 687 (D.D.C. 1975).

341. See Gellhorn & Verkuil, *supra* note 16, at 1012 (suggesting that *Chevron* deference may not be appropriate "if the agency has not previously regulated the product or service, or asserted the power to do so").

342. See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,355 (proposed July 30, 2008).

343. In *Massachusetts v. EPA*, the agency denied that it had jurisdiction to regulate greenhouse gases in part because acknowledging that greenhouse gases contributed to climate change could have led the EPA to take actions that conflicted with agency leadership's preference for market-based solutions to environmental problems. 549 U.S. 497, 533–34 (2007).

presence of aggrandizement concerns is at least some indication that the dispute can fairly be described as jurisdictional. Evidence of aggrandizement could come in any number of forms, such as signs that an agency official is pursuing an initiative to build goodwill with stakeholders whose support she needs for future projects,<sup>344</sup> or indications that the agency disagrees with its congressional overseers on the priorities it should be focusing on.

*B. Jurisdictional Questions and Policy Considerations*

The potential difficulty in distinguishing jurisdictional from non-jurisdictional questions may be the most serious objection against denying *Chevron* deference in the jurisdictional context, but it is hardly the only criticism of our proposal. Another argument is that the various rationales proffered for the *Chevron* rule itself—such as agency expertise and separation of powers—counsel in favor of extending *Chevron* deference to jurisdictional questions.<sup>345</sup>

Some may object that questions of regulatory jurisdiction are themselves policy questions that are better made by politically accountable branches than by the judiciary. Justice Scalia has been a particularly forceful spokesman for this vision of agency action: “Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it much be answered by the Executive.”<sup>346</sup> If Congress has failed to resolve a jurisdictional question, the argument goes, then it is preferable to allow a politically accountable agency to resolve the matter in lieu of leaving the matter to unelected judges.

The claim that jurisdictional questions are themselves merely policy questions of another sort is somewhat question-begging. Agencies have the authority to set policies only if Congress has delegated them that power, and the ultimate issue in a jurisdictional case is precisely whether that delegation has taken place. Whether to assert federal regulatory jurisdiction in any given context is itself a policy determination that must precede the existence of any agency authority to resolve the question. If an agency lacks the authority to exercise jurisdiction, how could it have

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344. For instance, FTC Chairman Michael Pertschuk claimed authority to regulate television advertisements directed at children in part because: “I had come as the candidate of the consumer groups. And I had to do something early to establish my good faith with them, because they were easily dissatisfied, and I felt it was important to maintain their trust.” JOHN F. KENNEDY SCH. OF GOV'T, MIKE PERTSCHUK AND THE FEDERAL TRADE COMMISSION 13 (1981).

345. See, e.g., Crawford, *supra* note 16, at 958 (“A rule of deference both recognizes the problems in distinguishing jurisdictional and nonjurisdictional interpretations and best upholds the policies behind *Chevron*.”).

346. Scalia, *supra* note 171, at 515.

the power to resolve ambiguities about such jurisdiction? One policy question is clearly antecedent to the other—and the jurisdictional determination is antecedent to the existence of agency power to resolve any ambiguity. To presume a delegation of authority to resolve jurisdictional questions when there is no indication that Congress has granted such authority in the first place would undermine the underlying requirement of a legislative delegation—which is the ultimate basis of the *Chevron* doctrine.

In other words, whether a federal agency should have certain powers is certainly a policy question, but it is a policy question that ultimately must be resolved by the legislature. Absent a legislative determination that produces a delegation, there is no agency authority at all. This is why statutory silences constitute the *absence* of agency authority, and such silences do not, taken alone, constitute the sort of ambiguities that would trigger *Chevron* deference. It is but a small extension to conclude that true ambiguity about the existence of jurisdiction is presumptive evidence of the absence of such jurisdiction, and not an implicit delegation of authority.

If this approach requires Congress to speak more clearly on such questions, so be it. This is hardly a significant burden on the legislature. Indeed, given the weakness of the nondelegation doctrine—and the absence of any meaningful limit on Congress's ability to delegate authority to administrative agencies—it is hardly too much to ask that Congress actually make such a delegation. Indeed, the existence of such a default rule—a presumption that the failure to delegate is, in fact, a failure to delegate—serves to lessen the risk that courts will engage in impermissible policymaking.<sup>347</sup>

Advocates of deference may argue that the existence of an ambiguity in the jurisdictional context is no different than that in any other context. Such an ambiguity exists either because Congress was insufficiently clear about its intent, or because Congress had no intent other than to leave the question at issue to the relevant agency.<sup>348</sup> Under *Chevron*'s progeny, there is little problem with this argument once it is established that a delegation to an agency has actually occurred. Again, however, absent the determination that such a delegation has been made, there is

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347. Of course it is an overstatement to suggest, as some deference advocates do, that courts can never engage in policy determinations. To the contrary, courts can and must make policy determinations with an eye toward potential policy consequences. Indeed, as Scalia notes, "Policy evaluation is . . . part of the traditional judicial tool-kit that is used in applying the first step of *Chevron* . . ." *Id.*

348. *Id.* at 516 ("An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency.").

no basis for deferring to the agency in question. It is no answer that *Chevron* assures Congress that ambiguities will be resolved by politically accountable administrative agencies, rather than courts, as Congress must know that it has delegated such authority to an agency for this question to be an issue. Moreover, where Congress enacts statutes outside of the administrative law context, it does so knowing full well that any ambiguities in such statutes will be resolved by courts, so there is no reason to presume that Congress inevitably prefers leaving such questions in the hands of agencies rather than judges.

Other objections are no more fatal to our proposal. Quincy Crawford argues that deference on jurisdictional questions is necessary for predictability and uniformity.<sup>349</sup> Yet there are good reasons to wonder whether *Chevron* does in fact produce such predictability. *Chevron* certainly may contribute to *geographic* uniformity—the meaning of “stationary source” under the Clean Air Act will mean the same thing in Los Angeles as in New York. But *Chevron* may also undermine *temporal* uniformity—it enables agencies to change the meaning of statutory terms over time.<sup>350</sup> Courts, particularly the lower courts that hear the bulk of cases in which agency claims are heard, are bound by precedent and institutional constraints that tend to produce a given degree of consistency and predictability. Agencies themselves face fewer such constraints, as they may change their position whenever a change in political context or administration warrant. Indeed, while Congress may have more ability to mau-mau agencies, agencies control changes more often than the judiciary. In both *Brown & Williamson* and *Massachusetts v. EPA*—jurisdictional cases in which the Supreme Court refused to defer to the relevant agency’s statutory interpretations with regard to their own jurisdiction—political changes produced vast changes in agencies’ assessments of their own jurisdictions, and the changes that occurred did so without any formal delegation from Congress.<sup>351</sup> Maybe that flexibility is good, maybe not. But at a minimum, it weakens the argument that *Chevron* is needed to ensure consistency in the law.

A related critique is that vesting interpretive authority in courts rather than agencies will lead to ossification of regulatory law. Leaving interpretive decisions in the hands of agencies, on the other hand, allows agencies to revise their interpretations as circumstances or understanding of a given regulatory matter change. This argument provides a strong

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349. Crawford, *supra* note 16, at 968.

350. Cf. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) (rejecting the notion “that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance”).

351. See *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998).

justification for deferring to agency interpretations of ambiguous substantive provisions, but is more problematic when applied to jurisdictional determinations. Indeed, in the jurisdictional context, “judicial ossification is in fact desirable and warranted . . . .”<sup>352</sup> Agency authority only extends as far as the legislative delegation of authority, and such delegation “has outer parameters that courts should enforce.”<sup>353</sup> Not only is this an underlying axiom of administrative law, but it is also evident in the APA requirement that courts invalidate agency actions “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>354</sup>

### CONCLUSION

Nearly a quarter-century after the Supreme Court unwittingly proclaimed a “*Chevron* Revolution,”<sup>355</sup> fundamental questions still linger about that decision’s basis, scope, and implications. With *Mead*, we have an answer to at least one of them: The *Chevron* framework is not based so much on agency expertise or on the need for nationwide regulatory uniformity, as it is based on a presumption about the circumstances in which Congress would want to delegate policymaking responsibility to an agency. In particular, agencies are entitled to the *Chevron* treatment when there is evidence Congress has granted them interpretive authority—and statutory ambiguities, by themselves, do not count as the requisite evidence. The question whether Congress has conferred power on an agency at all thus is prior to the question of whether deference is due to that agency’s statutory interpretation.

That basic insight has important consequences for the perennially contested, and perpetually unresolved, question of whether agencies should receive *Chevron* deference when interpreting statutes that speak to the reach of their own jurisdiction. For if delegation really is antecedent to deference, as *Mead* insists, it cannot be that courts should defer to an agency’s views on whether a delegation has taken place. Deference comes into play only *after* a court convinces itself that Congress meant for a given agency to wield interpretive power. That means courts must answer the threshold jurisdictional questions on their own, without letting agencies do their dirty work for them.

*Mead* and other familiar administrative-law norms are not the only reasons courts should be wary of extending *Chevron* deference to jurisdictional questions. Knowledge that agencies’ jurisdictional interpreta-

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352. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 712 (2007).

353. *Id.* at 713.

354. 5 U.S.C. § 706(2)(C) (2006); *see also* Foote, *supra* note 352, at 713.

355. Eskridge & Baer, *supra* note 154, at 1085 (internal quotations omitted).

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tions will be subject to *Chevron* could impede legislative deal-making in Congress. A rule of deference creates incentives for Congress to enact vague laws that allow it to evade responsibility for its policy choices. It also incentivizes the agencies themselves to aggrandize by decreasing the likelihood that courts will blow the whistle on their power-grabs. By contrast, denying *Chevron* deference on jurisdictional questions would help facilitate legislative deals, encourage Congress to play a leading role in making basic policy choices, and frustrate imperial agencies' ambitions to accumulate more and more power. *Chevron's* domain may be wide indeed, but that does not mean it should displace Congress and the courts from their traditional policymaking and adjudicative responsibilities.



