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

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ABSTRACT

Should agencies receive *Chevron* deference when interpreting the reach of their own jurisdiction? This article argues that, in general, they should not. We begin by identifying and detailing the various different types of “jurisdictional questions” that may arise in statutory interpretation. The article then surveys how the Supreme Court and lower federal courts have analyzed these different aspects of the jurisdiction problem, with a particular attention to statutory silences. The Court’s *Chevron* jurisprudence strongly suggest 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, we 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- and scope-of-power cases, but courts should continue to show deference where agencies assert the existence of a factual predicate that triggers jurisdiction. We support our 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 our proposal – particularly the potential difficulty in distinguishing between jurisdictional and non-jurisdictional 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 (ABA) did not take kindly to the idea the Federal Trade Commission (FTC) could regulate lawyers and law firms as “financial institutions.”¹ The FTC maintained it had such authority under its regulations implementing the Gramm-Leach-Bliley

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¹ The Federal Trade Commission 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).

Financial Modernization Act (GLBA)² that require financial institutions to safeguard private customer information. According to the FTC, the law applied to all “entities engaged in ‘financial activities.’”³ Therefore, the Commission reasoned, insofar as some private attorneys provide “financial services,” such as tax and estate planning or real estate settlement services, such attorneys were subject to the GLBA privacy regulations.⁴ The ABA and New York Bar Association sued, alleging the FTC had exceeded its statutory grant of authority.⁵

The FTC argued the GLBA delegated its broad authority over all entities engaged in financial activities, and that the law provided no exemption for practicing attorneys.⁶ Further, the FTC maintained, insofar as the statute was “silent or ambiguous” on the extent to which it could apply to attorneys, courts should defer to the Commission’s reasonable interpretation of its authority under “step two” of the *Chevron* doctrine.⁷

The U.S. Court of Appeals for the District of Columbia Circuit soundly rejected the FTC’s position, finding that Congress did not delegate any such authority.⁸ Despite *Chevron*’s admonition that courts are to defer to an agency’s statutory interpretation where “the statute is silent or ambiguous with respect to [a] specific issue,”⁹ the court refused to accept the FTC’s position. The D.C. Circuit rejected the notion that “*Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power.”¹⁰ A statutory silence on the delegation of power to a federal agency is not an ambiguity about the existence of such power.¹¹ Rather, the court held, it is a failure to delegate such power. Deference would

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

³ See 12 C.F.R. § 225.28(b)(2)(viii), (b)(6)(vi).

⁴ *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 GLB 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 and preparation services,” in addition to many activities more commonly considered financial.

⁵ *Id.*

⁶ *Id.* 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.* (“the Commission repeatedly repairs to the position that no language in the statute exempts attorneys from regulation.”).

⁷ *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (“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.”).

⁸ *ABA*, 40 F.3d. at ____.

⁹ *Chevron*, 467 U.S. at 843.

¹⁰ *ABA*, 40 F.3d at 468 (citing *Ry. Labor Exec. Ass’n v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994)).

¹¹ *Id.* (“if there is the sort of ambiguity that supports an implicit congressional delegation of authority to the agency

only be called for if there had been “an implicit delegation of authority” to the FTC.¹²

It may appear that the D.C. Circuit’s approach to statutory silences in *ABA v. FTC* conflicts with *Chevron*. After all, *Chevron* speaks of statutory silences as ambiguities that trigger judicial deference to an agency’s reasonable statutory interpretation.¹³ But it is not the existence of statutory ambiguity, in itself, that gives rise to *Chevron* deference; and a statutory silence is not in itself a statutory ambiguity. Before deferring to an agency, a court must first locate other evidence indicating that Congress intended to delegate such interpretive authority to the agency. This initial inquiry—what Professors Merrill and Hickman termed *Chevron* “step zero”¹⁴—must come first. Without such 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 jurisdictional determination is unwarranted.

This article seeks to contribute to the definition of “*Chevron*’s domain”¹⁵ and the so-called “step zero” analysis by detailing how courts should address disputes over agency jurisdiction, particularly those 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,¹⁶ and academic opinion is just as unsettled.¹⁷ However, principles drawn from

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))).

¹² *Id.* at 469 (quoting *Sea-Land Serv., Inc. v. Dep’t of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998)).

¹³ *Chevron*, 467 U.S. at ___ (“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” (emphasis added)).

¹⁴ See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L. J. 833, 836 (2001) (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 (2006).

¹⁵ Merrill & Hickman, *supra* note ____.

¹⁶ See, e.g., *Business Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990) (indicating that “[t]he 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 ___, at 844 (“The Court has never resolved whether there should be a ‘scope of jurisdiction’ exception to *Chevron* deference.”). But see, e.g., *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); 1 RICHARD PIERCE JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 157-58 (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.”).

¹⁷ Compare, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (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 (1994) (same), with, e.g., Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989 (1999) (*Chevron* is inapplicable to

the Court’s *Chevron* jurisprudence and familiar public-choice considerations both strongly suggest that deference to agency determinations of their own jurisdiction should be disfavored. Further, when a statute is silent about the existence of jurisdiction, its silence is just that, and nothing more.

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 *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, as a denial) of jurisdiction. Part I then explores how the Supreme Court and lower federal courts have analyzed these different aspects of the jurisdiction problem.

Part II places this discussion in the broader context of the *Chevron* doctrine as explicated by the Supreme Court in more recent 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 thus is 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 discuss how the presumption against deference to agency constructions of their own jurisdiction applies to the various sorts of jurisdictional questions identified in Part I. In particular, we 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- and scope-of-power cases; this is so because the line that distinguishes those two categories can be difficult to discern. The one area where courts should be deferential to agencies is where agencies assert the existence of a factual predicate necessary to trigger jurisdiction. As with other factual determinations made by executive agencies 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. Not only does *Chevron* itself imply that jurisdictional interpretations are not entitled to judicial deference – delegation is antecedent to deference – the no-deference rule is implicit in 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 jurisdiction claims that might implicate separation-of-powers concerns.

certain types of jurisdictional questions), and Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L. J. 833 (2001) (same), and Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463 (2000) (same), and Torrey A. Cope, Note, *Judicial Deference to Agency Interpretations of Jurisdiction After Mead*, 78 S. CAL. L. REV. 1327 (2005) (same).

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 or the courts. Finally, independent judicial resolution of agency 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 jurisdictional 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 usually 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 is precisely whether that delegation has taken place.

I. DEFERENCE, JURISDICTION & STATUTORY SILENCES

A. Analytical Categories

Almost invariably, when courts grapple with whether to grant *Chevron* deference to an agency’s views on the extent of its own powers, they refer to such issues, without differentiation, as “jurisdictional.”¹⁸ In fact what are known as “jurisdictional” cases can be broken down into a number of analytically distinct categories. Certain cases involve agency *assertions* of jurisdiction, while others agency *disclaimers* of jurisdiction. Some disputes concern the *existence* of agency jurisdiction, others the *scope* of agency 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 expressly to confer or deny a proposed power—as a congressional conferral of jurisdiction. In this section we identify the various types of jurisdictional cases—both to assist analytical clarity, and because we argue that whether *Chevron* deference applies depends on the nature of the given jurisdictional dispute—and discuss the unique concerns that each raises.

The first type of categories has to do with whether the agency’s interpretation expands or contracts its jurisdiction. 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.

¹⁸ But cf. Crawford, *supra* note __, 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”).

Examples of jurisdiction-asserting interpretations are easy to come by.¹⁹ For instance, the Office of Management and Budget read the Paperwork Reduction Act to confer the authority to review agency rules requiring regulated parties to disclose information to third parties,²⁰ and the Postal Service interpreted the Postal Reorganization Act to grant it the unilateral authority to set rates for international mail service.²¹ 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.²² Aggrandizement thus raises the risk not only 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 deny it jurisdiction. These cases involve an agency affirmatively renouncing a power arguably granted to it, or concluding that Congress did not mean for its undisputedly granted power to permit a particular application. For instance, the Federal Communications Commission concluded that it lacked authority to regulate broadband cable Internet service under Title II of the Communication Act.²³ 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.²⁴ A third example is the Migratory Bird Treaty Act, which directs the Secretary of the Interior to promulgate a list of protected migratory birds and take measures to protect them from harmful activities. In promulgating this list, the Secretary interpreted the Act to exclude mute swans from protection, thereby limiting his own regulatory authority.²⁵ In perhaps the most famous, and controversial, recent example, the Environmental Protection Agency claimed it lacked statutory authority to regulate emissions of greenhouse gases under the Clean Air Act.²⁶

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 Environmental Protection Agency did in fact have authority to regulate greenhouse gases under the Clean Air

¹⁹ See Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 992 (1999) (arguing that, "except in highly unusual circumstances, agencies read their authority expansively and often pursue agendas far beyond that envisioned when the agencies were created").

²⁰ *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990).

²¹ *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213 (3d Cir. 1992).

²² *Meuller; Niskanen; Timothy Armstrong* ___. Cf. JAMES Q. WILSON, *BUREAUCRACY* __ (19__).

²³ *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

²⁴ *New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338 (D.C. Cir. 1988).

²⁵ *Hill v. Norton*, 275 F.3d 98 (D.C. Cir. 2001).

²⁶ See *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

Act, the Bush Administration resisted exercising this authority.²⁷ Presidential administrations are not always eager to implement congressional commands.

Abrogation is not the only risk. Even when an agency disclaims power, such interpretations sometimes pose the danger of agency aggrandizement, though of a different sort. Agencies may be prone to focus on matters that advance their own institutional interests, as distinct from the interests Congress tasked the agency with serving. For instance, J. Edgar Hoover's FBI for years resisted efforts by Congress to give it responsibility for investigating narcotics offenses and organized crime. 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.²⁸ 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 do so.²⁹ Before that, the Corps devoted most of its resources to maintaining navigability of waterways. Implementing a wetland permitting regime would require the Corps to develop a new regulatory focus, arguably at odds with its traditional development-oriented mission. It took an adverse court ruling that the agency *did* in fact have authority before the Corps would begin regulating wetlands.³⁰

A second set of categories 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 seeks not to apply the authority the legislature undisputedly has delegated it, but rather to extend its jurisdiction “to a broad area of regulation, or to a large category of cases.”³¹ In effect, the agency creates a power for itself *ex nihilo*. Perhaps the most celebrated existence-of-power issue arose when the Commodity Futures Trading Commission, which was charged by Congress with adjudicating violations of federal commodities law, asserted its jurisdiction to resolve related state-law issues as well.³² The Federal Election Commission likewise asserted, out of whole cloth, the power to place in the public record confidential information about an ongoing investigation.³³

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 vague. In such cases the agency interprets its grant of jurisdiction to entail another power, or to permit it

²⁷ CITE ANPRM.

²⁸ WILSON, BUREAUCRACY, at 180, 182-83.

²⁹ 39 Fed. Reg. 12,119 (Apr. 3, 1974).

³⁰ See NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

³¹ Sunstein, *Law and Administration*, at 2100.

³² Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

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

to exercise its power in a particular way. For instance, 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 authority to change the definition of a disease listed in the Table.³⁴ Similarly, the Interstate Commerce Commission concluded that its power to convert railroad rights of way into nature trails permitted it to authorize only voluntary transfers between railroads and trail operators, not compelled ones.³⁵ Such cases may be the most difficult to assess, as the line between expanding the scope an existing power and asserting an entirely new power may be particularly difficult to draw.

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, it is unclear whether a given set of facts, which is a necessary condition for the exercise of that power, is present. For example, the Federal Energy Regulatory Commission concluded that a quantity of natural gas was transported in interstate commerce, thus triggering its jurisdiction under the Natural Gas Act.³⁶ 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.³⁷ In these cases, Congress has identified the general conditions under which the agency can exercise its regulatory authority, but has delegated 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.³⁸ We discuss this problem at length below,³⁹ 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

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

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

³⁶ Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281 (D.C. Cir. 1994).

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

³⁸ See, e.g., Mississippi Power & Light Co. v. Mississippi, 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 ___, at 968-69.

³⁹ See *infra* Part V.A.

categorization enterprise.

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, is it somehow evidence that Congress delegated to the agency the jurisdictional decision?⁴⁰

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.⁴¹ Similarly, the Department of Transportation located its authority to impose money damages against bus companies that failed to comply with the Americans with Disabilities Act, in the statute’s failure expressly to deny that power.⁴² In each case, the agency asserted that congress’ failure to address the scope of 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. Supreme Court Caselaw

As more than one court of appeals has lamented, the Supreme Court “cannot be said to have resolved the issue definitively” whether agencies’ jurisdictional interpretations are entitled to *Chevron* deference.⁴³ 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.⁴⁴ Nor, when it has spoken, has it spoken with a single voice. And, just as frequently, the Court has

⁴⁰ ABA v. FTC.

⁴¹ Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd., 29 F.3d 655 (D.C. Cir. 1994) (en banc).

⁴² American Bus Ass’n v. Slater, 231 F.3d 1 (D.C. Cir. 2000).

⁴³ The Business 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. 1970); New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 911 F.2d 993, 1002 (5th Cir. 1990). *See also* Merrill & Hickman, *supra* note ____.

⁴⁴ *Compare* Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 844 (1986) (citing *Chevron*, and stating that “considerable weight must be accorded the CFTC’s position” that “it has the power to take jurisdiction over [state-law] counterclaims”), *with* Adams Fruit Co. v. Barrett, 494 U.S. 638, 560 (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))).

failed to speak at all, sidestepping obvious opportunities to illuminate the extent to which jurisdictional questions ought to be analyzed under the *Chevron* framework. This subsection surveys the often conflicting signals the High Court has sent on whether agencies’ interpretations of their own jurisdiction merit *Chevron* deference.

The question of whether to defer to agency interpretations of their own jurisdiction received its fullest treatment in Justices Scalia and Brennan’s dueling opinions in *Mississippi Power & Light Co. v. Mississippi*.⁴⁵ That case upheld the Federal Energy Regulatory Commission’s jurisdiction to require that a Mississippi utility purchase power from a nuclear plant, thereby preempting a state agency from determining whether those costs were prudently incurred.⁴⁶ 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 wrote to emphasize his view that “the rule of deference applies even to an agency’s interpretation of its own statutory authorization or jurisdiction.”⁴⁷ He identified three reasons for that proposition. First, he flatly denied “that agencies can claim no special expertise in interpreting their authorizing statutes if an issue can be characterized as jurisdictional.”⁴⁸ By negative implication, agencies are expert in determining whether they have jurisdiction, if for no other reason than agencies are expert in the general subject matter of their regulatory authority. This argument has at least some plausibility, since agencies sometimes are themselves responsible for drafting and pressing the legislative proposals they are later charged to implement, suggesting that they 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.⁴⁹ In other words, Congress should be presumed to have 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.⁵⁰

But by far the most important (and most frequently echoed⁵¹) of Justice Scalia’s

⁴⁵ 487 U.S. 354 (1988).

⁴⁶ *Id.* at 369-70.

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

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, __ (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., *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

objections is a prudentialist one: courts’ asserted inability to distinguish jurisdictional issues from nonjurisdictional issues. “[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.”⁵² Instead, one can describe a given question alternately as “jurisdictional” or “nonjurisdictional” simply by manipulating the level of generality at which one poses it.⁵³ Tasking courts with responsibility to determine whether a case implicates a jurisdictional issue requires judges to answer questions Scalia would rather leave with more-politically-accountable agencies.

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 it 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 confining themselves to truly jurisdictional questions. It is inevitable that courts will stray into the substance of the agency action, thereby intruding on areas that, for Justice Scalia, should be the exclusive domain of 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.⁵⁴ A related idea animates his opinion for the Court in *Michael H. v. Gerald D.*,⁵⁵ where he argued that, when considering whether a putative 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. 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.” Instead, “if arbitrary decisionmaking is to be avoided,” courts must be constrained “to adopt the most specific tradition as the point of reference.”⁵⁶ 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

the level of generality at which it is framed.”); *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (stressing “the difficulties of drawing a manageable and principled line between jurisdictional and other issues”); Sunstein, *Law and Administration*, at 2097 & n.124, 2099 & nn.132-33; Crawford, *supra* note __, at 968-69.

⁵² *Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment).

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

⁵⁴ See Antonin Scalia, *Rule of Law as Law of Rules*, ____.

⁵⁵ 491 U.S. 110 (1989).

⁵⁶ *Id.* at 127 n.6.

will do so in a way that enables them to reach a desired result.⁵⁷

Dissenting from his colleagues' conclusion that FERC had jurisdiction, Justice Brennan took special exception to Justice Scalia's brief for extending *Chevron* deference to jurisdictional questions. To be precise, Justice Brennan did not dispute his rival on all fours, 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 occupy."⁵⁸ 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 not 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, such 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."⁵⁹ Second, and *contra* Scalia, "agencies can claim no special expertise in interpreting a statute confining its jurisdiction."⁶⁰ (It is perhaps noteworthy that neither opinion musters any evidence for, and does no more than baldly assert, its claim about agency expertise in jurisdictional matters.) By its own terms, *Chevron* deference only applies when an agency is entrusted with administering the statute in question, because only then can it be presumed that Congress delegated the relevant authority. So the EPA resolves statutory ambiguity relating to specific environmental provisions, and the CFTC resolves statutory ambiguities related to commodities trading, but the Federal Energy Regulatory Commission would not receive deference for its interpretations of the National Environmental Policy Act or Clean Water Act, statutes administered by the Council on Environmental Quality and EPA, respectively. Yet adopting deference in such instances within the core of a given agency's expertise does not necessarily entail deference to a broader jurisdictional question that may implicate matters beyond the scope of an agency's traditional authority.

Justice Brennan's third and most powerful concern derives from the very nature of

⁵⁷ 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, ___ 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 one the Court asks us to draw today . . ."); see also *id.* at ___ (majority) ("Justice Scalia's first priority over the years has been to limit and simplify.").

⁵⁸ *Mississippi Power & Light*, 487 U.S. at 386 (Brennan, J., dissenting).

⁵⁹ *Id.* at 387.

⁶⁰ *Id.*

administrative agencies: “Agencies do not ‘administer’ statutes confining the scope of their jurisdiction, and such statutes are not ‘entrusted’ to agencies.”⁶¹ In other words, agencies only exercise the powers affirmatively conferred on them by Congress, and Congress has not vested them with the power to describe the boundaries of their own authority. Like Justice Scalia, Justice Brennan deduces Congress’s intent from a presumption: “we cannot presume that Congress implicitly intended an agency to fill ‘gaps’ in a statute confining the agency’s jurisdiction.”⁶² 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.⁶³

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 who grapple with the issue.

One of the best-known such discussions appears in *Commodity Futures Trading Commission v. Schor*,⁶⁴ which actually antedates *Mississippi Power & Light* by two years. Pro-deference courts and commentators often produce *Schor* as an example of the Supreme Court’s willingness to defer to an agency’s views on the extent of its 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.”⁶⁵ A close reading of *Schor*, however, reveals that it stands for no such thing.

Schor is a pure existence-of-power case. At issue was whether the CFTC, which had the undisputed power to adjudicate violations of the Commodities Exchange Act, rightly interpreted that statute as granting it jurisdiction over related state-law counterclaims. The Court held that it did.⁶⁶ 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

⁶¹ *Id.* at 386-87.

⁶² *Id.* at 387.

⁶³ See *Mead*, 533 U.S. at 226-27 (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 __ to __ and accompanying text.

⁶⁴ 478 U.S. 833 (1986).

⁶⁵ *Mississippi Power & Light*, 487 U.S. at 380 (Scalia, J., concurring in the judgment); see also, e.g., *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283 (D.C. Cir. 1994); *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223-24 & n.8 (3d Cir. 1992); Crawford, *supra* note __, at 961-62.

⁶⁶ *Schor*, 478 U.S. at 835, 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.

mustering evidence to support its conclusion that the CEA unambiguously evinced Congress’s design to grant the Commission authority over state-law counterclaims. Specifically, the Court found that “Congress plainly intended the CFTC to decide counterclaims”⁶⁷; Congress’s intent was “evident on the face of the statute”⁶⁸; the legislative history “unambiguously demonstrates that . . . Congress intended to vest in the CFTC the power to define the scope of the counterclaims”⁶⁹; the statute “clearly authorizes . . . adjudication of common law counterclaims”⁷⁰; the agency’s assertion of jurisdiction was “well within the scope of its delegated authority”⁷¹; and “abundant evidence” revealed Congress’s intent that the CFTC hear state-law counterclaims.⁷² This is not the language of a court deferring to an agency’s assertion of its own jurisdiction.

To be sure, *Schor* cited *Chevron* for the proposition that “considerable weight must be accorded the CFTC’s position.”⁷³ And the High Court explained that such deference was due in part because of the Commission’s expertise: “An agency’s expertise is superior to that of a court when a dispute centers on whether a particular regulation is ‘reasonable necessary to effectuate any of the provisions or to accomplish any of the purposes’ of the Act the agency is charged with enforcing.”⁷⁴ But this discussion comes on the heels of the Court’s holding that the CEA unambiguously granted the CFTC jurisdiction over state-law counterclaims. There was no need to defer to the CFTC’s “reasonable interpretation” at *Chevron* step two because Congress’s intent was clear at step one. The *Schor* Court’s feint toward extending *Chevron* to jurisdictional questions therefore is simply dicta.⁷⁵

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*,⁷⁶ the Court struck down the Office of Management and Budget’s assertion of jurisdiction, under

⁶⁷ *Id.* at 841.

⁶⁸ *Id.* at 841-42.

⁶⁹ *Id.* at 842.

⁷⁰ *Id.* at 843.

⁷¹ *Id.* at 844.

⁷² *Id.* at 847.

⁷³ *Id.* at 844.

⁷⁴ *Id.* at 845.

⁷⁵ Cf. *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1226 (3d Cir. 1992) (Becker, J., concurring) (“As I read *Schor*, the Court only decided that, in light of the extremely broad authorizing language of [the CEA], the CFTC had superior expertise in interpreting the statute, even though the particular dispute focused on a jurisdictional issue.”). As we discuss below, this is a common strategy not just at the Supreme Court, but among the lower courts as well: to discuss the possibility of *Chevron* deference only after discovering the statute to be unambiguous. See *infra* notes ___ to ___ and accompanying text.

⁷⁶ 494 U.S. 26 (1990).

the Paperwork Reduction Act, to review the Labor Department’s “hazard communication standard.” That regulation required manufacturers to disclose information about hazardous workplace chemicals directly to their employees, rather than to the government.⁷⁷ It was undisputed that OMB had jurisdiction to review “information-gathering rules”—i.e., rules requiring regulated entities to collect information and submit it to the agency. What was uncertain was whether the Act authorized OMB to review “disclosure rules”—i.e., rules requiring regulated entities to collect information and make it available, not to the agency, but to third parties.

The Court recognized that the Paperwork Reduction Act did not expressly deny OMB the power to review disclosure rules.⁷⁸ But it nevertheless held that the agency lacked jurisdiction since “the statute, as a whole, clearly expresses Congress’ intention” to deny OMB such authority.⁷⁹ As in *Schor*, the Court therefore 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 OMB’s interpretation.⁸⁰ Justice White also approvingly cited the *Mississippi Power & Light* concurrence of Justice Scalia (who joined the *Dole* majority, presumably on the ground that the statute unambiguously foreclosed OMB jurisdiction) to disparage the assertion that “*Chevron* should not apply” to agency regulations that “determine the scope of its jurisdiction.”⁸¹

On its face, *Dole* appears to present an existence-of-power question: OMB’s authority to review disclosure rules. But, perhaps illustrating Justice Scalia’s concern about manipulating the level of generality, OMB cast the issue as concerning the scope of its jurisdiction. OMB argued that it had the authority to review disclosure rules since they are a specific type of information-gathering rule.⁸² As 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.*,⁸³ a scope-of-power

⁷⁷ See *id.* at 28-29 (citing 29 C.F.R. § 1910.1200 (1984)).

⁷⁸ *Id.* at 34.

⁷⁹ *Id.* at 42-43 (citing *Chevron*); see also *id.* 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”).

⁸⁰ *Id.* at 53 (White, J., dissenting).

⁸¹ *Id.* at 54.

⁸² *Id.* at 34-35.

⁸³ 529 U.S. 120 (2000).

case in which the Food and Drug Administration argued that its power under the Food, Drug, and Cosmetic Act to regulate “drugs” and “devices” entailed the power to regulate tobacco products. The FDCA defines “drug” to include “articles (other than food) intended to affect the structure or any function of the body.”⁸⁴ Pointing to 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.

A sharply divided Supreme Court struck the agency’s assertion of jurisdiction, concluding, at *Chevron* step one, that Congress unambiguously meant to exclude tobacco from the FDA’s purview. 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. This is so because the FDCA requires that a regulated product be deemed “safe” and “effective” for its intended use, and the agency consistently has maintained that tobacco products are unsafe, indeed deadly.⁸⁵ Second, Congress enacted a number of tobacco-specific statutes since 1965, creating a distinct regulatory scheme and “effectively ratif[y]ing the FDA’s long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products.”⁸⁶

In dissent, Justice Breyer argued that a literal reading of the FDCA’s text, its statutory purpose, and its legislative history all point in favor of FDA jurisdiction over tobacco products.⁸⁷ 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 reflects its intent to deny jurisdiction to the FDA. According to Justice Breyer, the FDCA grants the FDA wide latitude on how to protect consumers from unsafe products; it would not require an outright ban.⁸⁸ 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.⁸⁹

It would be difficult to imagine a case that more clearly presented the question whether *Chevron* applies to agencies’ jurisdictional interpretations. Indeed, several amici had urged the Court to hold that an agency’s assertion of jurisdiction is not eligible for deference.⁹⁰ And yet

⁸⁴ 21 U.S.C. § 321(g)(1)(C) (1994).

⁸⁵ *Brown & Williamson*, 529 U.S. at 133-43.

⁸⁶ *Id.* at 144; *see also id.* at 143-59.

⁸⁷ *Id.* at 161-67 (Breyer, J., dissenting).

⁸⁸ *Id.* at 174-81.

⁸⁹ *Id.* at 181-86.

⁹⁰ *See* Brief for Amicus Curiae Pacific Legal Foundation, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (No. 98-1152), *reprinted in* 1999 WL 712594, at * 16-*20; Brief for Amicus Curiae Product Liability Advisory Council, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (No. 98-1152), *reprinted in*

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.⁹¹ At the same, 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.” 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.⁹² 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 Association v. Brand X Internet Services*,⁹³ and again in *Massachusetts v. EPA*.⁹⁴ As in *Brown & Williamson*, both cases involved scope-of-power disputes. The wrinkle is that *Brand X* and *Mass. 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 Federal Communications Commission authority to regulate entities that offer “telecommunications services.”⁹⁵ 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.⁹⁶ The FCC concluded that broadband Internet services offered by cable companies were not “telecommunications services” within the meaning of the Act.⁹⁷ In other words, the Commission reasoned that the scope of its undisputed power to regulate providers of “telecommunications services” did not extend to the broadband services offered by cable companies.

Five years after the *Brown & Williamson* majority punted, the Court had been handed another chance to offer guidance on whether, to what extent, 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

1999 WL 712593, at *13-*17.

⁹¹ *Brown & Williamson*, 529 U.S. at 132 (remarking that “our analysis is governed by *Chevron*” since the case “involves an administrative agency’s construction of a statute that it administers”).

⁹² *Id.* at 159 (counseling that “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation”).

⁹³ 545 U.S. 967 (2005).

⁹⁴ 127 S. Ct. 1438 (2007).

⁹⁵ 47 U.S.C. § 153(46).

⁹⁶ *Id.* §§ 201-09, 251(a)(1), 254(d).

⁹⁷ In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002).

Act’s reference to “telecommunications services” was ambiguous, and concluded that the FCC’s interpretation of that term to exclude broadband offered by cable companies was reasonable. 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 services” was inconsistent with a prior Ninth Circuit precedent. (Citing *Mead* and *Christensen*, the Court concluded that deference was in order.⁹⁸) But the Court missed the most obvious “step zero” inquiry of all. It simply declared that “the *Chevron* framework governs our review of the Commission’s construction”⁹⁹ 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 services” within the meaning of the Act. 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.¹⁰⁰ 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 prescribes. That is to say, private freedom can neither be constrained *nor continue to be constrained* without good reason.¹⁰¹

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 APA’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,”¹⁰² and applies the *Chevron*

⁹⁸ *Brand X*, 545 U.S. at 980-86.

⁹⁹ *Id.* at 980.

¹⁰⁰ See *State Farm Mut. Auto. Ins. Co. v. Dep’t of Transp.*, 680 F.2d 206 (D.C. Cir. 1982), *vacated sub nom* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

¹⁰¹ *Active Judges and Passive Restraints*, REGULATION, July/Aug. 1982, at 10, 13.

¹⁰² *Id.* at 1013 (Scalia, J., dissenting); see also *id.* at 1005 (Scalia, J., dissenting) (reasoning that “it might be more accurate to say the Commission has attempted to establish a whole new regime of *non-regulation*” (emphasis in

analysis at full strength.

The Court’s most recent foray into questions of agency jurisdiction came in *Massachusetts v. EPA*.¹⁰³ In 2003, the Environmental Protection Agency concluded it lacked jurisdiction to regulate greenhouse gases as “air pollutants” under the Clean Air Act. According to the EPA, the statute simply did not confer such authority.¹⁰⁴ A 5-4 majority made short work of 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”¹⁰⁵ – was broad enough to embrace “[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.”¹⁰⁶ 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.¹⁰⁷ 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.”¹⁰⁸

C. Lower Courts

Given the Supreme Court’s conflicting signals, 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.¹⁰⁹ Two others—the Seventh and Eighth Circuits—have declined to extend *Chevron* deference.¹¹⁰ The largest group

original)).

¹⁰³ 127 S. Ct. 1438 (2007).

¹⁰⁴ See Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925-29 (Sept. 8, 2003). It should be noted that one of the authors participated in an *amicus curiae* brief taking this position as well. See Brief of The Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents at 14, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120), at 14-17, available at http://www.cato.org/pubs/legalbriefs/ma_v_epa_10-24-06.pdf.

¹⁰⁵ 42 U.S.C. § 7602(g).

¹⁰⁶ *Massachusetts v. EPA*, 127 S. Ct. at 1460.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1459.

¹⁰⁹ See *Connecticut v. United States Dept. of the Interior*, 228 F.3d 82, 93 (2d Cir. 2000); *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223-25 (3d Cir. 1992); *Bd. of Governors of the Univ. of North Carolina v. United States Dept. of Labor*, 917 F.2d 812, 816 (4th Cir. 1990); *Transpacific Westbound Rate Agreement v. Fed. Mar. Comm’n*, 951 F.2d 950, 952 (9th Cir. 1991).

¹¹⁰ See *United Transp. Union v. Surface Transp. Bd.*, 169 F.3d 474, 477 (7th Cir. 1999); *State of Missouri v. Andrews*, 787 F.2d 270, 286 (8th Cir. 1986).

is those that have left the question unresolved: the First, Fifth, Sixth, Tenth, Eleventh, and Federal Circuits.¹¹¹ The D.C. Circuit apparently has resolved the issue both ways. After initially signaling that *Chevron* is inapplicable to jurisdictional questions, the court has shown its willingness to extend deference in more recent cases.¹¹²

Characteristic of the pro-deference position is *Air Courier Conference of America v. U.S. Postal Service*,¹¹³ an existence-of-power case in which the Postal Service asserted the authority to establish international mail rates without consulting the Postal Rate Commission. The Third Circuit upheld the claim of jurisdiction, holding both that Congress unambiguously delegated that power to the agency, and that the agency's interpretation merited *Chevron* deference. While pro-deference courts typically ground their holdings in the difficulty of distinguishing between jurisdictional and nonjurisdictional cases,¹¹⁴ the Third Circuit's conclusion was based solely on the Supreme Court's decision in *Schor*, which the panel cited for the proposition that "an agency's view of its own statutory jurisdiction may be entitled to deference under *Chevron*."¹¹⁵ The court acknowledged that judicial acquiescence to jurisdictional interpretations raised the possibility of agency self-dealing. But it denied that those concerns were valid here since the Postal Rate Commission, the agency whose authority arguably was circumscribed by the Postal Service's interpretation, had "express[ly] acquiesce[d]" in the latter's view.¹¹⁶ Indeed, the court suggested that the danger of "bureaucratic bias" can never negate an agency's entitlement to *Chevron* deference.¹¹⁷

In a concurring opinion, Judge Becker denied that "an agency *always* deserves deference

¹¹¹ See *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996); *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 911 F.2d 993, 1002 (5th Cir. 1990); *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 936 (6th Cir. 1997); *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d 1412, 1415 n.3 (10th Cir. 1002); *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"). As of July 9, 2001, we were unable to find a Federal Circuit case that dealt with the issue.

¹¹² Compare *New York Shipping Ass'n, Inc. 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 *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994), and *SEC v. Business Roundtable*, 905 F.2d 406, 408 (D.C. Cir. 1990); see also *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, (D.C. Cir. 1990) (recognizing that *Chevron*'s applicability to jurisdictional questions "is unsettled in this circuit").

¹¹³ 959 F.2d 1213 (3d Cir. 1992).

¹¹⁴ See, e.g., *Oklahoma Natural Gas*, 28 F.3d at 1284 (proposing that *Chevron* should apply to all jurisdictional cases "in significant part because of the difficulties of drawing a manageable and principled line between jurisdictional and other issues"); cf. *O'Connell v. Shalala*, 79 F.3d 170, 176 n.6 (1st Cir. 1996).

¹¹⁵ *Air Courier Conference*, 959 F.2d at 1223.

¹¹⁶ *Id.* at 1225; cf. *State of Missouri v. Andrews*, 787 F.2d 270, 291 (8th Cir. 1986) (Bright, J., dissenting) (arguing that "deference seems particularly apt here, where the Army Corps of Engineers asserts no objection to the actions taken by the Secretary of the Interior").

¹¹⁷ *Air Courier Conference*, 959 F.2d at 1225 (rejecting as "counter to *Chevron*" the argument "that deference is inappropriate" when an agency seeks to advance "its own bureaucratic self-interest").

on a jurisdictional question,” proposing a “more limited” rule: “agencies *may be* entitled to deference,” especially where the breadth of a statutory authorization implies Congress’s belief “that the agency possesses superior expertise.”¹¹⁸ He concluded that *Chevron* deference was appropriate in this case for two reasons. First, although “the Postal Service is no better at statutory interpretation than the judiciary,” it “may be better able to judge which construction makes the most policy sense and should therefore be imputed to Congress.”¹¹⁹ Judge Becker thus blended two analytically distinct considerations—agency expertise and a presumption about congressional intent—into a single rationale for deference. Second, there was no risk of aggrandizement given that the Postal Rate Commission had acquiesced in the Postal Service’s assertion of authority.¹²⁰

Both majority and concurrence agreed that the Postal Service’s decision to set international mail rates was not an instance of impermissible self-dealing. But their understanding of agency aggrandizement is a specific one. They are concerned only with the allocation of authority as between various agencies, not with the distribution of powers between Congress, on the one hand, and agencies on the other. The danger to be avoided is the possibility that one agency, here the Postal Service, will arrogate to itself a power properly wielded held by another agency, here the Postal Rate Commission. Neither opinion expresses misgivings about the possibility that an agency will wield a power that Congress never delegated in the first place.

Nor do the majority or concurrence appear to recognize that even disclaimers of jurisdiction can raise the possibility of agency aggrandizement. As discussed above, agencies might deny authority where the assertion of such power could expose them to political criticism, distract from their own institutional priorities, or create other problems. As relevant here, agencies might collude so as to avoid or deflect accountability concerns. If the Postal Service had adopted unpopular or controversial international mail rates, the Postal Rate Commission might have tried to duck responsibility by denying that it had any authority over the matter.¹²¹ Thus in some circumstances it could well be in an agency’s interest to acquiesce in another’s assertion of authority. That, too, is a form of aggrandizement.

The D.C. Circuit’s decision in *ACLU v. FCC*,¹²² a scope-of-power case, typifies the anti-deference position. In an order governing the rates cable operators could charge their customers, the FCC asserted the authority to adopt a definition of “basic cable service” at odds with the term as it was defined in the Cable Communications Policy Act. The court invalidated the Commission’s interpretation, finding that “the statute speaks with crystalline clarity” as to the

¹¹⁸ *Id.* at 1225 (Becker, J., concurring).

¹¹⁹ *Id.* at 1226, 1227.

¹²⁰ *Id.* at 1227.

¹²¹ This sort of dynamic often occurs between the Environmental Protection Agency and the states. Cite Greve.

¹²² 823 F.2d 1554 (D.C. Cir. 1987) (per curiam).

proper definition of “basic cable service.”¹²³

Although it resolved the issue *de novo*, the panel paused to dispute the proposition that it owed the FCC’s interpretation *Chevron* deference. According to the *ACLU* court, there is a “pivotal distinction” between jurisdictional statutes—“that is, provisions going to the agency’s power to regulate an activity or substance”—and nonjurisdictional ones—“that is, provisions pertaining to the mechanics or inner workings of the regulatory process.”¹²⁴ In other words, the court assumed it coherently could identify a jurisdictional issue as such and to distinguish it from other sorts of issues without much difficulty. The court concluded that deference is inappropriate “[w]here the issue is one of whether a delegation of authority by Congress has taken place (and the boundaries of any such delegation).” Instead, *Chevron* applies only when the dispute concerns “whether an agency has properly implemented authority indisputably delegated to it.”¹²⁵

Anti-deference courts occasionally find *Chevron* inapplicable to jurisdictional questions because such matters are within the judiciary’s peculiar expertise.¹²⁶ By contrast, the D.C. Circuit declined to defer because of a presumption about congressional intent: “it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.”¹²⁷ Indeed, if the nondelegation doctrine had any life, such a delegation of authority might even be unconstitutional.

The D.C. Circuit’s rationale reflects two distinct ideas, one positive and one normative. First, the court denies, as an empirical matter, that Congress has delegated the FCC discretion to determine the extent of its own jurisdiction. Second, the court implies that, even if the legislature had wished to do so, it could not; such a delegation would not be “responsible.” While the court stops short of holding that an open-ended delegation would be unlawful, it goes out of its way to register its disapproval, on undisclosed grounds, of such an arrangement.

Despite the lower courts’ disagreement on *Chevron*’s applicability to jurisdictional issues, several general trends are discernable. First, courts often decide whether to extend *Chevron* deference after engaging in only the most perfunctory analysis. Characteristic in this regard is the Ninth Circuit, which deferred to the Federal Maritime Commission’s decision to decline jurisdiction over certain foreign shipping agreements. The court did not so much as acknowledge the issue, let alone supply a reason; it simply noticed that the FMC’s order affected the scope of its jurisdiction, and cited *Chevron* for the proposition that it was obliged to defer to

¹²³ *Id.* at 1568; *see also id.* at 1570.

¹²⁴ *Id.* at 1567 n.32.

¹²⁵ *Id.*

¹²⁶ *See, e.g.,* *United Transp. Union v. Surface Transp. Bd.*, 169 F.3d 474, 477 (7th Cir. 1999).

¹²⁷ 823 F.2d at 1567 n.32.

the agency’s interpretation.¹²⁸ Only slightly better is the Seventh Circuit, which held that the Surface Transportation Board’s assertion of jurisdiction over a set of railroad tracks was not eligible for *Chevron* deference.¹²⁹ It did so solely on the basis of a prior precedent, *Midland Coal Co. v. Director, Office of Workers’ Compensation Programs*,¹³⁰ which the court cited for the rule that “an administrative agency’s determination about the scope of its own jurisdiction . . . does not receive *Chevron* deference but is reviewed de novo.”¹³¹ In fact *Midland Coal* dealt not with an agency’s entitlement to *Chevron* deference on the extent of *its own* jurisdiction, but rather *a court’s*.¹³²

Second, taking their cue from the Supreme Court in *Schor*, 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, they discuss the possibility of deferring to an agency’s views only after deciding, *de novo*, whether those views are meritorious. Evaluating the Postal Service’s assertion of authority to set international mail rates, a court concluded that Congress unambiguously delegated that power,¹³³ and went on to state that its holding was “buttressed” and “strengthened” by the deference to which the agency was entitled.¹³⁴ 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,¹³⁵ and went on to extend the agency’s interpretation *Chevron* deference— “[i]nsofar as agency deference remains appropriate in this case.”¹³⁶ The same pattern holds true for courts declining to defer to an agency’s assertion of jurisdiction.¹³⁷

¹²⁸ *Transpacific Westbound Rate Agreement v. Fed. Mar. Comm’n*, 951 F.2d 950, 951, 952 (9th Cir. 1991); *see also* *United States Dept. of Commerce v. FERC*, 36 F.3d 893, 897 (9th Cir. 1994) (Trott, J., dissenting) (citing *Transpacific Westbound* for the proposition that an agency’s “declination of jurisdiction” merits *Chevron* deference).

¹²⁹ *United Transp. Union v. Surface Transp. Bd.*, 169 F.3d 474, 477 (7th Cir. 1999).

¹³⁰ 149 F.3d 558 (7th Cir. 1998).

¹³¹ *United Transp. Union*, 169 F.3d at 477.

¹³² *See Midland Coal*, 149 F.3d at 561 (holding that “we review the question of jurisdiction”—i.e., whether “we have jurisdiction in this case”—“*de novo*”); *see also id.* (explaining that “deference does not extend to the question of judicial review, a matter within the peculiar expertise of the courts” (quoting *Love v. Thomas*, 858 F.2d 1347, 1352 n.9 (9th Cir. 1988))).

¹³³ *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1217-23 (3d Cir. 1992).

¹³⁴ *Id.* at 1215, 1223.

¹³⁵ *Connecticut v. United States Dept. of the Interior*, 228 F.3d 82, 89 (2d Cir. 2000).

¹³⁶ *Id.* at 93.

¹³⁷ *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 does receive de novo review and not *Chevron* deference”); *United Transp. Union v. Surface Transp. Bd.*, 169 F.3d 474, 477 (7th Cir. 1999) (same).

This approach is consistent with *Chevron*,¹³⁸ but it is also consistent 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.¹³⁹ But they are also engaging in the sort of *de novo* analysis they would be obliged to undertake were *Chevron* deference 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.

Third, courts generally agree, if only implicitly, that the difference between assertions and disclaimers of jurisdiction is irrelevant to whether an agency interpretation is eligible for *Chevron* deference. The D.C. Circuit once described jurisdiction-asserting and -disclaiming interpretations as “analytically indistinguishable.”¹⁴⁰ Indeed, courts seldom distinguish 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.”¹⁴¹ 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.”¹⁴² 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.¹⁴³

¹³⁸ See Crawford, *supra* note ___, at 965.

¹³⁹ See *Chevron*, 467 U.S. at ____.

¹⁴⁰ *New York Shipping Ass’n, Inc. v. Fed. Mar. Comm’n*, 854 F.2d 1338, 1363 n.9 (D.C. Cir. 1988); see also *Air Courier Conference of Am. v. U.S. Postal Serv.*, 959 F.2d 1213, 1225 (3d Cir. 1992) (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, 644 (D.C. Cir. 1994) (en banc) (remarking, in a related context, 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”).

¹⁴¹ *Nat’l Wildlife Fed’n v. ICC*, 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).

¹⁴² *Connecticut v. United States Dept. 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.”).

¹⁴³ See, e.g., example cited earlier and work of James Q. Wilson on bureaucracy.

D. Statutory Silences

While the *Chevron* Court squarely held that statutory silences can be deference-triggering ambiguities,¹⁴⁴ 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.¹⁴⁵ 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 expressly to deny a power to an agency is not an ambiguity on whether that power has been delegated.

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*.¹⁴⁶ 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,”¹⁴⁷ but the Board now 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 expressly to deny it that power.¹⁴⁸

A divided court invalidated the Board’s interpretation, finding “incredible” the suggestion that Board “has the power to do whatever it pleases merely by virtue of its existence.”¹⁴⁹ On the contrary, agencies have no intrinsic authority, and wield only the powers that the legislature has delegated them.¹⁵⁰ 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 is “no ambiguity.”¹⁵¹ 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

¹⁴⁴ *Chevron*, 467 U.S. at 843 (concluding that deference is due “if the statute is silent or ambiguous with respect to the specific issue”).

¹⁴⁵ CITE

¹⁴⁶ 29 F.3d 655 (D.C. Cir. 1994); *see also* *In re: Sealed Case*, 237 F.3d 657, (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, 391 (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).

¹⁴⁷ 45 U.S.C. § 152 Ninth (1994).

¹⁴⁸ *Ry. Labor Executives’ Ass’n*, 29 F.3d at 659 (noting that “the Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power”); *id.* at 661.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 670.

¹⁵¹ *Id.* at 664 n.5; *see also id.* at 671.

representation disputes *sua sponte*.¹⁵² The court then 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.¹⁵³

Several features of the D.C. Circuit’s decision merit attention. First, the majority’s holding turned on its view of the nature of administrative agencies: 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, echoing its decision in *ACLU*, the D.C. Circuit suggested not just that Congress *had not* delegated the Board the power to define its own jurisdiction, but that it *could not*. This time the court identified the impediment: the Constitution, presumably in the form of a judicially enforceable nondelegation doctrine.

Judge Williams’s dissent does 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 makes the more general claim that agencies are entitled to *Chevron* deference on all jurisdictional questions.¹⁵⁴ His principal reason, echoing Justice Scalia,¹⁵⁵ 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.”¹⁵⁶ Judge Williams conceded that courts have the capacity to distinguish jurisdictional questions from nonjurisdictional ones when the powers of the judiciary are at issue. But “the categorization” of such cases “is typically self-evident” because the relevant constitutional and statutory provisions expressly define themselves as jurisdictional.¹⁵⁷

A D.C. Circuit panel blinked at the issue when it was presented in *American Bus Ass’n v.*

¹⁵² *Id.* at 666, 664-69.

¹⁵³ *Id.* at 671 (citations omitted).

¹⁵⁴

¹⁵⁵ See *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) (arguing that “there is no discernable line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority”).

¹⁵⁶ *Ry. Labor Executives’ Ass’n*, 29 F.3d at 676 (Williams, J., dissenting).

¹⁵⁷ *Id.*

Slater,¹⁵⁸ a case in which the Department of Transportation asserted the authority to impose money damages on bus companies that failed to comply with the Americans with Disabilities Act. The ADA provides that a violation of its guarantees is to be cured by the same remedies authorized by portions of the 1964 Civil Rights Act,¹⁵⁹ portions that do not permit plaintiffs to recover damages.¹⁶⁰ The statute is wholly silent on agencies' authority to supplement the enumerated remedies with ones of their own devising. 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.¹⁶¹

In an opinion by Judge Sentelle, the court struck down the agency's rule on the grounds that Congress unambiguously meant to preclude DOT from authorizing money damages.¹⁶² The panel declined to engage DOT's argument from statutory silence, but the question receives extended treatment in Judge Sentelle's concurrence to his own majority opinion. According to Judge Sentelle, *Chevron* "is not even implicated in this case."¹⁶³ This is because statutory silences, at least for jurisdictional questions, are not deference-triggering ambiguities.¹⁶⁴ 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."¹⁶⁵

Judge Sentelle derided DOT's position—"that that which is not forbidden is permitted"—as contrary to the nature of administrative agencies. "Agencies have no inherent powers." 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."¹⁶⁶ Judge Sentelle concluded by

¹⁵⁸ 231 F.3d 1 (2000).

¹⁵⁹ 42 U.S.C. § 12188(a)(1) (1994).

¹⁶⁰ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

¹⁶¹ *See American Bus Ass'n, Inc. v. Slater*, 1999 WL 986849, at *22 (D.D.C. Sept. 10, 1999) ("The plain language indicates that Congress did not explicitly forbid the Secretary from including a compensation mechanism in the [bus] accessibility regulations.").

¹⁶² *American Bus*, 213 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.").

¹⁶³ *Id.* at 8 (Sentelle, J., concurring).

¹⁶⁴ *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.").

¹⁶⁵ *American Bus*, 213 F.3d at 9 (Sentelle, J., concurring); *see also Nat'l Rifle Ass'n of Am. 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.").

¹⁶⁶ *American Bus*, 213 F.3d at 9 (Sentelle, J., concurring).

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.¹⁶⁷

II. MEAD AND THE MEANING OF CHEVRON

The Supreme Court’s 1984 decision in *Chevron v. NRDC*¹⁶⁸ did not purport to be a landmark holding, nor was it universally recognized as such when first issued.¹⁶⁹ The justices who participated saw the case as a case involving fairly routine, albeit somewhat technical, questions of environmental law and regulatory application.¹⁷⁰ 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.¹⁷¹ Since 1984, the decision has become a “foundational, even a quasi-constitutional text.”¹⁷² 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 verbal 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.¹⁷³ Whether to extend *Chevron* deference to agency interpretations of jurisdictional provisions is one of the contested realms within *Chevron*’s domain.¹⁷⁴

As announced by Justice Stevens, *Chevron* outlined a two-step inquiry for courts to apply when called upon to evaluate 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.”¹⁷⁵ If so, the statute controls, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁷⁶ If the statute is

¹⁶⁷ *Id.*

¹⁶⁸ 467 U.S. 837 (1984).

¹⁶⁹ 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 Supreme Court’s Deference Continuum, An Empirical Analysis (from Chevron to Hamdan)*, __.

¹⁷⁰ Percival, Merrill

¹⁷¹ See Eskridge & Baer, *supra* note __, at __ (“Almost immediately after the Supreme Court handed down this decision, Reagan officials and appointees proclaimed a ‘*Chevron* Revolution.’”); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986). As Eskridge and Baer note, even *Chevron*’s early critics recognized its potential impact. See Eskridge & Baer, *supra* note __, at __.

¹⁷² Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

¹⁷³ Eskridge & Baer.

¹⁷⁴ Merrill & Hickman.

¹⁷⁵ *Chevron*, 467 U.S. at 843.

¹⁷⁶ *Chevron*, 467 U.S. at 843.

“silent or ambiguous,” however, the reviewing court then 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.”¹⁷⁷ In other words, at step two, the interpretation of the administering agency is given “controlling weight” unless it is found to be “arbitrary, capricious, or manifestly contrary to the statute.”¹⁷⁸ 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.”¹⁷⁹

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 said that statutory ambiguities themselves are evidence that Congress intended an implied delegation of authority.¹⁸⁰ While the Court did not note it at the time, this approach produced “a fundamental transformation in the relationship between courts and agencies.”¹⁸¹

Courts and commentators have offered several potential policy justifications for according agencies *Chevron* deference, including agency expertise, political accountability, and a desire for regulatory uniformity. While each of these rationales could be used to justify *Chevron* deference generally, they have different implications for the proper scope and application of deference to agency interpretations.

One reason to defer to implementing agencies is that they should have more familiarity and expertise concerning the statute in question and its subject matter.¹⁸² Federal judges are, of necessity, legal generalists. Agency officials are specialists. As the *Chevron* court noted, “Judges are not experts in the field, and are not part of either political branch of government.”¹⁸³ Whereas a given court, or judge, may be asked to interpret a given statutory provision on an infrequent basis, agencies officials can be expected to deal with their implementing legislation

¹⁷⁷ *Chevron*, 467 U.S. at 843.

¹⁷⁸ *Chevron*, 467 U.S. at 844.

¹⁷⁹ 480 U.S. 421, 448 (1987)

¹⁸⁰ See *Chevron*, 467 U.S. at 843-44 (citations omitted):

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.

¹⁸¹ Merrill & Hickman, *supra* note ___, at 834.

¹⁸²

¹⁸³ *Chevron*, 467 U.S. at 865.

on a daily basis. In some cases, agency officials may have been involved in the identification and definition (if not creation) of the problems a given statute is designed to address, as well as the actual drafting of statutory provisions. Many regulatory statutes are based upon proposals developed within federal agencies.¹⁸⁴ 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.

Deference to agency interpretations may enhance political accountability because federal agencies, as part of the executive branch, are "political." Interpreting statutes requires agencies to make policy judgments, and that such decisions are best made by officials of administrative agencies that are overseen by the executive branch.¹⁸⁵ If, for example, a statute requires that an agency set a permissible exposure level for a hazardous substance with an "adequate margin of safety," it is more appropriate for the "adequate margin" to be set by an executive agency than a federal court.¹⁸⁶ 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."¹⁸⁷ For these reasons, "deference to regulatory agencies is a reasonable policy for the courts to adopt. Micromanaging regulatory agencies is not a task for which courts are well suited. Nonetheless, it is important to recognize that deference is not abdication."¹⁸⁸ Agencies, more so than courts, may be held accountable should they adopt discretionary policy positions that are unpopular or inconsistent with the views of elected officials. While this rationale is more attenuated in the context of independent agencies,¹⁸⁹ insofar as such agencies are headed by individuals 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.¹⁹⁰ Given the complexity of many federal regulatory statutes,

¹⁸⁴ See creation of OSHA in *Cass, Diver, Beerman*.

¹⁸⁵ See, e.g., Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 39 DUKE L.J. 511, __ (1989) (such policy determinations are "not for the courts but for the political branches"); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, __ (1986).

¹⁸⁶ Of course, there is a strong argument that most such decisions should actually be made by the people's elected representatives in the legislature. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (New Haven: Yale University Press, 1993).

¹⁸⁷ *Chevron*, 467 U.S. at 864.

¹⁸⁸ *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment).

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¹⁹⁰ See Peter L. Strauss, *One-Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resource for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-29 (1987). Insofar as the Supreme Court's docket as 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 __, at 861 n.156.

it is inevitable that different circuit courts of appeal will adopt different interpretations of particular provisions. While eventual Supreme Court review can restore uniformity, in the interim, given 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. Some commentators have argued that *Chevron* is ultimately grounded in constitutional principles of separation of powers,¹⁹¹ while others suggest *Chevron* should be seen as a rule of federal common law.¹⁹² While *Chevron* itself may have been somewhat ambiguous on this point,¹⁹³ subsequent decisions have made clear that *Chevron* deference “arises out of background presumptions of congressional intent.”¹⁹⁴ As the Court stated in *Adams Fruit Co. v. Barrett*: “A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”¹⁹⁵ It is a “legislatively mandated deference doctrine.”¹⁹⁶ “The threshold issue for the court is always one of congressional intent: did Congress intend the agency’s interpretation to bind the courts?”¹⁹⁷

While an academic debate over the basis for the *Chevron* doctrine continued, the Supreme Court has been fairly consistent in recent years that congressional delegation is the basis for according deference to agency interpretations of ambiguous statutes. In *Christensen v. Harris County*,¹⁹⁸ a majority of the Court held Congress can only be said to have impliedly delegated the power to interpret ambiguous statutory language when it has granted an agency

¹⁹¹ See, e.g., Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225 (1997); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

¹⁹² See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (___); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618-19 (1992).

¹⁹³ Sunstein, *Step Zero*, *supra* note ___, at 195 (the *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.”).

¹⁹⁴ *Dunn v. CFTC*, 519 U.S. 465, 479 n.14 (1997). See also Merrill & Hickman, *supra* note ___, at 863 (observing the Court “has rather consistently opted for the congressional intent theory” as the legal foundation for *Chevron* deference).

¹⁹⁵ 494 U.S. 638, 649 (1990). Merrill & Hickman, *supra* note ___, at 855 (“A finding that there has been an appropriate congressional delegation of power to the agency is critical under *Chevron*.”).

¹⁹⁶ Merrill & Hickman, *supra* note ___, 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.”).

¹⁹⁷ Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990).

¹⁹⁸ 529 U.S. 576 (2000).

power to take actions that bind the public with the “force of law.”¹⁹⁹ Other agency interpretations, the Court held, should only receive the lesser form of deference known as *Skidmore* deference.²⁰⁰ The scope of an agency’s authority to authoritatively interpret ambiguous statutory text only extends so far as the agency’s own authority to take actions with the force of law. 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.²⁰¹

Whatever doubt about *Chevron*’s foundation there remained after *Christensen* was quieted by *United States v. Mead Corporation*.²⁰² In concluding that tariff classification rulings by the U.S. Customs Service were not entitled to *Chevron* deference, the Court made clear that congressional intent is the touchstone for the analysis.²⁰³ *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.”²⁰⁴ There are many ways that Congress may demonstrate its intention to delegate interpretive authority,²⁰⁵ but without such delegation, full *Chevron* deference is not due.

Comment [GMU1]: Can we cut this, or is it essential?

Though the actuality of congressional delegation is often characterized as a “legal fiction,”²⁰⁶ grounding *Chevron* deference in congressional intent has several implications. For starters, it means that *Chevron* is not a constitutional doctrine. Rather, it has “roughly the same status in law as a federal statute.”²⁰⁷ This approach is consistent with the language of the Administrative Procedure Act, which dictates that courts, not agencies, are to decide relevant questions of law. Further, “if *Chevron* rests on a presumption about congressional intent, then

¹⁹⁹ 529 U.S. at 586-88.

²⁰⁰ See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

²⁰¹ See *Merrill & Hickman*, *supra* note __, at 837. The Court suggested that delegation should be presumed in *Haggar Apparel Co. v. United States*, 526 U.S. 380 (1999).

²⁰² 533 U.S. 218 (2001). As Eskridge & Baer observe, “*Mead* appears to have settled the debate within the Court about the conditions for triggering *Chevron* deference.” Eskridge & Baer, *supra* note __, at __. Their empirical analysis also concludes that the Court’s actual practice “supports the *Mead* and *Oregon* understanding of *Chevron*.”

²⁰³ Thomas W. Merrill, *The Mead Doctrine: Of Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. __, __ (200__) (“At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent.”).

²⁰⁴ *Mead*, 533 U.S. at 226-27.

²⁰⁵ *Id.* at 227.

²⁰⁶ Sunstein, *Step Zero*, *supra* note __, at 192; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989). See also David J. Barron and Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212-25 (2002).

²⁰⁷ *Merrill & Hickman*, *supra* note __, at 863.

Chevron should apply only where Congress would want *Chevron* to apply.”²⁰⁸ And this, in turn, “suggests that *Chevron*’s domain should be relatively narrow, rather than broad.”²⁰⁹ A more sweeping interpretation of *Chevron* “is not faithful to the logic of implied delegation on which *Chevron* rests.”²¹⁰

One implication of *Chevron*’s legal pedigree is what Professors Merrill and Hickman have termed “step zero”: “the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all.”²¹¹ “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.”²¹² 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 delegate interpretive authority explicitly. Absent the application of some newly revised non-delegation 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.²¹³ As Professor Herz pointed out, where *Chevron* speaks of “filling gaps” left by Congress it is “misleading.”²¹⁴ It implies that the agency is operating on the same “horizontal plane” as Congress, when it is actually acting as Congress’ agent exercising delegated powers.²¹⁵

Another implication of *Chevron* “step zero” is that Courts must first consider the nature of the congressional delegation to an agency, if any, *before* it considers whether to defer to an agency.²¹⁶ After *Mead*, a statutory ambiguity is no longer, by itself, sufficient evidence of a

²⁰⁸ Merrill & Hickman, *supra* note ___, at 872.

²⁰⁹ Merrill & Hickman, *supra* note ___, at 872; *id.* at 859 (“expanding 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 a dilution of the practice of deferring to agency interpretations of law.”).

²¹⁰ Merrill & Hickman, *supra* note ___, at 883.

²¹¹ See Merrill & Hickman, *supra* note ___, at 836; see also Sunstein, *Step Zero*, *supra* note __.

²¹² Sunstein, *Step Zero*, *supra* note ___, at 208.

²¹³ See Merrill & Hickman, *supra* note ___, at 837.

²¹⁴ Herz, *supra* note ___, at ____.

²¹⁵ *Id.*

²¹⁶ Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADMIN. L.J. AM. U. 187 (1992) (“the court must follow the statute before it follows the agency.”).

congressional intent to delegate interpretive responsibility to an agency. Rather, 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. 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.²¹⁷

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.”²¹⁸ This suggests that certain types of questions are less likely to be subject to the *Chevron* framework.

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. 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 it is to the specifics of this proposal that we now turn.

III. A PROPOSAL FOR JURISDICTIONAL QUESTIONS & STATUTORY SILENCES

As *Chevron* and its progeny make clear, deference to agency interpretations of the statutes they administer is grounded in the idea that Congress has delegated such authority to the agency in question. 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,²¹⁹ nor does Congress have the 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 there are jurisdictional questions and there are jurisdictional questions. That is, as noted above,²²⁰ a given case may

²¹⁷ Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003).

²¹⁸ Merrill & Hickman, *supra* note __, at 911.

²¹⁹ Cf. *Dames & Moore v. Regan* (noting Congress can’t anticipate everything)

²²⁰ See *supra* ____.

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. In the former the presumption against delegation of authority is strongest, and the case for deference is at its weakest. In the latter circumstance, to the contrary, the argument for deference to an agency is quite strong (even if it does not necessarily implicate traditional matters of statutory interpretation).

As a general matter, courts should not give agencies *Chevron* deference to resolve questions of the existence or scope of agency regulatory jurisdiction. For the reasons outlined above and elucidated below, courts are in better position to deal with determining the extent of jurisdiction than implementing agencies. This lack of deference should prevail whether a case implicates the existence or the scope of an agency’s jurisdiction, in large part because it is difficult to draw a line that coherently distinguishes the former from the latter.²²¹

The one type of jurisdictional question on which an agency should nonetheless receive deference is when a given factual predicate -- or “premise fact”²²² -- provides the basis for the assertion of jurisdiction.²²³ The deference an agency receives in this context, however, would not be *Chevron* deference. Rather, an agency determination that a factual predicate for the assertion of regulatory authority has been satisfied would receive the deference that agency factual determinations ordinarily receive under the APA; such findings are upheld if they are supported by “substantial evidence.”²²⁴ 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.²²⁵ Also, there is a relatively low risk of agency aggrandizement in this context 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.²²⁶ 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.

The rule against deference should prevail whether an agency is asserting or disclaiming jurisdiction. This is so because, while the risk of aggrandizement is at its peak in assertion cases,

²²¹ See *infra* notes 318 to 321 and accompanying text.

²²² “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).

²²³ See generally, Todd S. Aargaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. ____ (2008).

²²⁴

²²⁵ Aargaard.

²²⁶

agencies also might seek to aggrandize by disclaiming jurisdiction.²²⁷ Also, it is the nature of the question asked, rather than the agency's answer, that should determine whether deference is due.

At the same time, courts should adopt a rebuttable presumption that an agency lacks the regulatory jurisdiction at issue. As a practical matter, the combination of a no-deference rule with a rebuttable presumption against delegation may make it more difficult for agencies to demonstrate jurisdiction on the margin. Yet it will not prevent Congress from giving agencies jurisdiction where Congress wishes to do so.²²⁸

A key element of our proposal is that a statutory silence does not, in itself, create a statutory ambiguity sufficient 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.²²⁹ For this reason, where a statute is not ambiguous but silent on the existence of agency jurisdiction, courts should presume that no jurisdiction exists. As Judge Sentelle argued in *American Bus Association*, where the statute is silent, *Chevron* is not even implicated.

While this aspect of the proposal contradicts the express language of *Chevron* that equates statutory ambiguity and silence, it is entirely 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."²³⁰ 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.

²²⁷ See *supra* notes ___ to ___ and accompanying text.

²²⁸ 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 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618-19 (1992); OTHER CITES ON VALUE OF CLEAR STATEMENT RULES.

²²⁹ 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.

²³⁰ Herz, *supra* note ___ at ___.

<u>Assertions of jurisdiction</u> No deference		<u>Disclaimers of jurisdiction</u> No deference (though aggrandizement concerns are weaker)
<u>Existence of jurisdiction</u> No deference	<u>Scope of jurisdiction</u> No deference	<u>Factual predicate</u> Deference
<u>Statutory Silences</u> No deference		

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

There are many reasons against extending *Chevron* deference to agency interpretations of statutes on the question of whether jurisdiction exists. They fall into two basic categories. The first set of reasons derives from principles and norms that are endogenous to the administrative state. First, it is implicit in *Chevron* and its progeny that jurisdictional questions are not eligible for deference. The no-deference rule likewise is implicit in 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 “avoidance canon” by which courts can prevent agencies from assertions of jurisdiction that could implicate important separation-of-powers norms.

The second group of reasons is based on familiar public choice insights. First, independent judicial review of agency jurisdictional interpretations is necessary to preserve the legislative “deal” about the scope of regulatory authority that was 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, we suggest 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. For the same reason that 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 very 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 jurisdictional 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 *Chevron*, implicit in the *Chevron* decision itself,²³¹ was made explicit in *Mead*. *Mead* clarifies that the basis for *Chevron* deference is a presumption about Congress’s intent to delegate policymaking power to an administrative agency. *Chevron* deference is appropriate where, and only where, evidence suggests that Congress meant to give the agency in question the authority to undertake legislative-type policymaking – for example, where the agency has been granted and has exercised the power to engage in notice and comment rulemaking.²³² Where such evidence of congressional intent is lacking, the agency may not invoke the relatively deferential *Chevron* framework. The best it can hope for is *Skidmore* deference – which is to say no more deference than the persuasiveness of a given agency’s argument can command.²³³

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,²³⁴ 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 to agencies on jurisdictional questions is the fact, as already noted, that agencies do not have any inherent powers, only delegated ones. “It is axiomatic that an administrative agency’s power to promulgate legislative regulation is limited to the authority delegated by Congress.”²³⁵ As Professor Monaghan noted, “the universe of each agency is limited by the legislative specifications contained in its organic

²³¹ See *supra* notes 180 to 181 and accompanying text.

²³² See *Mead*, 533 U.S. at 226-27 (explaining 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”).

²³³ See *id.* at 234-35.

²³⁴ *Adams Fruit v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”).

²³⁵ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

act.”²³⁶ This means that Congress must delegate agencies the powers to act. If Congress did not act, the agency would have no authority. In such a circumstance it would be odd, to say the least, to defer to an agency’s assertion of jurisdiction when there is a question about the agency’s underlying authority. As Professor Molot observes, “If administrators were given final authority on issues of statutory construction this shift in power would substantially undermine our constitutional commitment to representative government.”²³⁷

This constitutional notion is reaffirmed by the text of the APA itself which 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.”²³⁸ Agencies only have authority to implement and enforce when the underlying jurisdiction exists. Further, there is fairly universal disapproval of agency efforts to “arrogate undelegated power.”²³⁹ While agencies receive deference when implementing a statute that they administer, it cannot really be said that agencies “administer” statutes confining the scope of their jurisdiction, and such statutes are not ‘entrusted’ to agencies.”²⁴⁰

3. Comparative Institutional Competence

Third, agencies do not possess any institutional advantage over courts in answering jurisdictional questions. To the contrary, courts are required to address jurisdictional questions all the time, including those 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 may ultimately depend. But an agency is no more expert than courts at figuring out when jurisdiction exists. Under *Adams Fruit*, agencies are not accorded *Chevron* deference where private rights of action are concerned.²⁴¹ Rather, such questions are resolved by federal

²³⁶ Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983).

²³⁷ Molot, *supra* note __, at _ (59). 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 are left undisturbed by the courts will often function as the “final” interpretation for some time. *See id.* at __ (70); *see also id.* at __ (54) (“The constitutional structure is squarely at odds with allowing administrators to police boundaries of their own authority.”). *See also* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1492-93 (2000) (“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.”).

²³⁸ 5 U.S.C. § 558(b).

²³⁹ Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1493 (2000) (noting “apparently all [administrative law paradigms] would condemn efforts by agencies to arrogate undelegated power.”).

²⁴⁰ *Mississippi Power & Light v. Miss. ex rel. Moore*, 487 U.S. 354, 386-87 (1988) (Brennan, J., dissenting).

²⁴¹ Molot, *supra* note __, at _ (40).

courts. “Outside of the administrative context, of course, there is no agency to defer to and courts accordingly must resolve statutory ambiguity themselves.”²⁴²

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 technical question, but one of statutory intent. Agencies may seek to get around this by asserting that they may well have technical expertise as to whether expanding the scope of 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 adopts various trade-offs, and inevitably grants agencies less power than was conceivably possible. Thus, the fact that giving an agency, e.g. the Corps of Engineers, broader jurisdiction would serve a stated policy goal does not mean that courts should defer to such a determination by the agency. Rather, if that is the intent of Congress, it should make this intent clear. Indeed, agencies always have the opportunity of seeking greater authority from Congress where necessary.

Courts have a comparative advantage at resolving jurisdictional questions in a consistent and predictable fashion. As Professor Molot notes, “judges are subject to strong institutional norms that render judicial interpretation more stable and consistent over time than interpretation by successive political administrations.”²⁴³ 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. “Judicial power over statutory interpretation tends to impose valuable limits on political power in our constitutional system.”²⁴⁴

4. The APA

Fourth, jurisdictional questions should be left in the hands of courts because Congress has made clear its intention to do just that. Under § 706 of the Administrative Procedure Act, reviewing courts are to decide “all relevant questions of law.”²⁴⁵ 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.²⁴⁶ In the APA, the term “jurisdiction” is used to denote the limited sphere of agency power. Section 558(b), for

²⁴² Molot, *supra* note __, at __ (40).

²⁴³ Jonathan T. Molot, Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation _____ (manuscript at 11).

²⁴⁴ Molot, *supra* note __, at __ (51).

²⁴⁵ 5. U.S.C. § 706.

²⁴⁶ Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1524 (2000).

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.”²⁴⁷ 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.”²⁴⁸ 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.²⁴⁹

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’s the proper interpretation of the statute. Now the legal question is whether the agency has exceeded the scope of its discretion.

The problem with this argument is that it conflates questions of law and policy. As we have stressed throughout, all agency authority comes from Congress. Agencies only have authority to engage in interpretation and exercise interpretive discretion where Congress has already delegated such authority. Thus to shift interpretive authority to an agency is to presume, as a matter of law, that such a delegation occurred, and to relieve the courts of determining whether, in fact, such a delegation occurred. Such a move may 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.”²⁵⁰ No doubt Justice Scalia endorses this approach so as to reduce the likelihood that unelected judges 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, contrary to the language of the APA.

It should also be noted that the delegation understanding of *Chevron* is the surest way reconcile *Chevron* with the language of the APA.²⁵¹ The APA’s dictate 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

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

²⁴⁸ 5 U.S.C. § 706(2)(C).

²⁴⁹ See also Noah, *supra* note __, at 1524 (noting Congress “considered amending the APA to reinforce the judicial function in reviewing statutory questions, particular on jurisdictional issues”).

²⁵⁰ Merrill & Hickman, *supra* note __, at 910.

²⁵¹ See Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 24-27 (1996).

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”).²⁵² So, the APA reinforces the presumption that agencies should not receive deference when considering jurisdictional questions, but also allows Congress to adopt administrative statutes with different presumptions.

5. Nondelegation and Constitutional Avoidance

A fifth reason for refusing to defer to agency interpretations implicating the existence or scope of their own authority is the doctrine of constitutional avoidance. As already noted, agencies have no inherent authority. Agencies only have those powers – and that jurisdiction – which has 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.

As a general matter, courts seek to avoid statutory interpretations that raise difficult constitutional questions.²⁵³ 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 which places less pressure of constitutional limits on federal authority. This concern would seem to justify a “nondelegation canon”²⁵⁴ 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 force today, it remains a force in statutory interpretation.²⁵⁵

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 *SWANCC* and *Rapanos*, two cases implicating the scope of federal regulatory

²⁵² 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.”).

²⁵³ See *Solid Waste Agency of North. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U. S. 159 (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. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“where 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 University Hospital*, 488 U.S. 204, 208-09 (1988).

²⁵⁴ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

²⁵⁵ John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224 (2000) (“The nondelegation doctrine . . . now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions.”).

authority over wetlands and other waters of the United States under the Clean Water Act (CWA), the Court refused to defer to the Army Corps' and EPA's interpretation of the CWA because the agencies' interpretation would push the outer bounds of the federal government's power to regulate commerce "among the several states." Rather than delineate the precise bonds of the federal government's authority to regulate interstate commerce, the Court adopted an interpretation of the CWA that left federal regulatory authority safely within its constitutional limits.²⁵⁶

When applying an avoidance canon, courts presume that if Congress wants to challenge the extent of its own powers, it will do so directly, and will not delegate such questions to an executive agency. So, for instance, where federalism questions are present, the 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 "nondelegation 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."²⁵⁷

B. Public Choice Principles

Support for our proposal is not only to be found 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. Concern for preserving the legislative deal upon which legislation is based, providing each branch with appropriate incentives and controlling agency self-aggrandizement all reinforce the case for our proposal.²⁵⁸

²⁵⁶ Adler, Adler

²⁵⁷ Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADMIN. L.J. 187, 187 (1992).

²⁵⁸ Some of the arguments we make in this Part 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 political 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,

1 Preserving the Deal

From a public choice perspective, legislation is a “deal” among competing interests, each vying for advantage through the legislative process.²⁵⁹ Various interest groups with various 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.²⁶⁰ As Professors Rodriguez and Weingast explain, “to 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.”²⁶¹

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 at it blunts the impact of the statutory measure.²⁶² The prospect that courts might defer to agency constructions of their own jurisdiction threatens to take such measures of compromise off the table. “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.”²⁶³ Just as expansive readings of legislation by courts may discourage future compromises, allowing agencies to expand the scope of their own jurisdiction may impede future legislative deals.²⁶⁴ If those moderates whose concurrence is necessary to reach a majority compromise cannot be

there probably are 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*.)

²⁵⁹ See William M. Landes & Richard A. Posner, *The independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 3 (1971); see also DANIEL A. FARBER & PHILIP A. FRICKEY, LAW & PUBLIC CHOICE 12-37 (1991).

²⁶⁰ 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.

²⁶¹ Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1210 (2007).

²⁶² Rodriguez & Wiengast, *supra* note __, at 1216.

²⁶³ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

²⁶⁴ See Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1209 (2007) (noting that expansive readings of existing statutes by judges inhibits congressional passage of new progressive legislation”).

assured that the compromise 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.²⁶⁵ 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.²⁶⁶ 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.”²⁶⁷

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 into the future. “Legislators 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 trade-offs.²⁶⁸ As Judge Easterbrook notes, “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.”²⁶⁹ 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 difficult to argue 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. “Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.”²⁷⁰ At the margin, this tendency may even have increased in recent years. “As interest groups have become more specialized and as more interest groups have succeeded in gaining voice in the policy-making process, consensus has become more difficult to achieve. Congress has adopted, therefore, the strategy of passing increasingly broad and amorphous enabling legislation that delegates controversial matters to administrative agencies.”²⁷¹ 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. It is easier for Congress to police the “pure” policy questions about how jurisdiction is authorized than whether jurisdiction exists. The oversight process is more conducive to the examination of discretionary agency judgments, than

²⁶⁵ Landes & Posner, *supra* note __, at 879.

²⁶⁶ See Landes & Posner, *supra* note __, at 888.

²⁶⁷ Landes & Posner, *supra* note __, at 877.

²⁶⁸ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 541 (1983).

²⁶⁹ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 541 (1983).

²⁷⁰ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

²⁷¹ Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 666 (1992).

underlying interpretations of the scope of agency authority.

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.²⁷² 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.²⁷³ 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).

Congress. A no-deference rule would create favorable incentives in Congress for greater legislative 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. In other words, a no-deference rule 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

²⁷² 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 __, at 878. On “vetogates,” see William N. Eskridge Jr., *Norms, Empiricism, and Canons in Statutory Construction*, 66 U. CHI. L. REV. 671, 677n13 (1999) (defining “vetogate” as “a place within a process where a statutory proposal can be vetoed or effectively killed.”).

²⁷³ See Landes & Posner, *supra* note __, at 879 (“the 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.”).

such policy choices”²⁷⁴

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, congressmen 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,²⁷⁵ and a single Senator’s constituency can range from nearly 250,000 to almost 17 million.²⁷⁶ But an agency official (like the president she serves) counts as her constituency the nation’s entire population of 300 million.²⁷⁷ An individual voter thus has less weight with an agency official than with a Senator or member of the House.

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.²⁷⁸ 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. For starters, a statute might be ambiguous for the simple reason that Congress had no view on whether a given agency has jurisdiction over a given matter, or could not have foreseen that the agency conceivably might exercise jurisdiction over the matter.²⁷⁹ Less creditable reasons exist as well. Congress might enact ambiguous legislation because its members could not reach consensus on a hotly-disputed

²⁷⁴ *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, ___ (1984).

²⁷⁵ See Jim Abrams, *House Restores Partial Vote to Nonstate Delegates*, ORLANDO SENTINEL, Jan. 25. 2007, at A3.

²⁷⁶ 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. See 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

²⁷⁷ 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.

²⁷⁸ See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, __ (2001).

²⁷⁹ 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.”).

issue, and a vague generality was the most they could agree on.²⁸⁰ 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 the costs of adopting controversial policies.²⁸¹ Finally, Congress might be vague because it wants to maintain its future flexibility in overseeing the executive branch. Laws 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.²⁸² 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 is not likely to 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 decisionmaking 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.²⁸³ 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

²⁸⁰ 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.").

²⁸¹ 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").

²⁸² CITE

²⁸³ 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).

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 Food and Drug Administration 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 on the bounds 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 *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 Commodity Futures Trading Commission may, in the course of adjudicating violations of federal commodities law, decide related state-law counterclaims.²⁸⁴ Congress could write a statute identifying predicates whose presence would establish CFTC counterclaim jurisdiction – e.g., “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 predicates, 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.

²⁸⁴ See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

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 “The Commission may issue an order awarding actual damages proximately caused by a violation of the Commodity Exchange Act,”²⁸⁵ 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 so 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 policymaking than a rule of jurisdictional deference.

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 improperly to 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.²⁸⁶ 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 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

²⁸⁵ Cf. 7 U.S.C. § 18(a)(1).

²⁸⁶ See *supra* notes 22 to 30 and accompanying text; see also Gellhorn & Verkuil, *supra* note __, 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”).

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.²⁸⁷ Our proposal to deny *Chevron* deference would alter the cost-benefit calculus for agencies considering disclaimers of jurisdiction as well, not just 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 restore (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 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,²⁸⁸ or a statute that directs an agency to decide whether certain goods were transported on public highways.²⁸⁹ 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.²⁹⁰ Likewise, the silence of the Americans with Disabilities Act on whether the Department of Transportation had authority to impose money damages on non-compliant bus companies cannot plausibly be described as presenting a factual-predicate problem.²⁹¹ 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

²⁸⁷ Compare *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (FDA asserts authority to regulate tobacco products under the Food, Drug, and Cosmetic Act), with *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (EPA asserts that it lacks statutory authority to regulate greenhouse gases under the Clean Air Act).

²⁸⁸ See *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994).

²⁸⁹ See *Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546 (3d Cir. 1988).

²⁹⁰ *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (en banc).

²⁹¹ *American Bus Ass'n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000).

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 at recasting a not-insignificant number of jurisdictional matters and take advantage of the safe harbor, that would not fatally undermine the case for our 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 will 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 out of agencies’ control, even an imperfect no-deference regime will mean less aggrandizement.

3. Agency Self-Aggrandizement

Professor Sunstein has offered a third, related reason why courts should decline to afford *Chevron* deference to agencies’ jurisdictional interpretations: “foxes should not guard henhouses.”²⁹² In the broadest terms: “In Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation”²⁹³ Entrusting agencies with the responsibility of determining the extent of their powers poses too great a risk of aggrandizement.²⁹⁴ For that reason, it is unreasonable to suppose that Congress meant to give agencies such authority. “Congress would be unlikely to want agencies to decide on the extent of their own powers.”²⁹⁵

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

²⁹² Sunstein, *Interpreting Statutes in the Administrative State*, 103 HARV. L. REV. 405, 446 (1989).

²⁹³ Sunstein, *Law and Administration*, *supra* note __ at 2097; *see also* NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION §65.02 (1992) (“the 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.”).

²⁹⁴ *See* Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 616 (1944) (“Determination 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* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POLICY 203 (2004).

²⁹⁵ Sunstein, *Law and Administration*, *supra* note __ at 2099; *see also* Gellhorn & Verkuil, *supra* note __, 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 __, 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.”).

good company; disputes over the proper scope of *Chevron*'s domain are rife with competing undefended presumptions.²⁹⁶ The second idea is that, irrespective of what Congress may have expected, courts should not acquiesce in agency 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 check the exercise of power; or an "administrative common law"²⁹⁷ 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.²⁹⁸ 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 plainly would run afoul of it²⁹⁹ – for example, if the FDA asserted authority to regulate tractor-trailers that haul medications as "devices" under the Food, Drug, and Cosmetic Act, on the ground that the trucks are "machine[s]" that are "intended for use in the . . . cure, mitigation, treatment, or prevention of disease."³⁰⁰

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

²⁹⁶ See, e.g., *Mississippi Power & Light Co. v. Mississippi*, 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 __, at 235 (acknowledging that "the claim about what 'Congress would naturally expect' is a fiction").

²⁹⁷ Cf. *Webster v. Doe*, 486 U.S. 592, __ (1988) (Scalia, J., dissenting).

²⁹⁸ 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." First, echoing Justice Scalia, "the line between jurisdictional and nonjurisdictional questions is far from clear." 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 the two classic rationales for *Chevron* deference. Sunstein, *Step Zero*, *supra* note __, at 235.

²⁹⁹ See *American Bus Ass'n v. Slater*, 231 F.3d 1, __ (2000) (Sentelle, J., concurring) ("We would not, of course, be obliged to rubberstamp 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.").

³⁰⁰ 21 U.S.C. § 321(h).

jurisdiction in a variety of disputes, for example ones involving the constitutionality of a state law the meaning of which is unclear³⁰¹ or a state law that is particularly complex.³⁰² 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,³⁰³ and each house is solely responsible for carrying out its power to expel a member.³⁰⁴ 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 are. 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.³⁰⁵ Justiciability requirements therefore can be seen as a means by which the court-as-fox problem is managed.³⁰⁶

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. 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.³⁰⁷ Instead, Congress typically commences impeachment proceedings or seeks to expel a member only after an independent investigation has uncovered plausible evidence of criminal wrongdoing.³⁰⁸ Unlike

³⁰¹ *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

³⁰² *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943),

³⁰³ *Nixon v. United States*, 506 U.S. 224 (1993).

³⁰⁴ *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.

³⁰⁵ *See* Molot, *supra* note __, at __ (93) (“[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 enhance their own power or implement their own political ideology.”).

³⁰⁶ 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, ____ (1992).

³⁰⁷ The Reconstruction Congress's efforts to remove President Andrew Johnson from office are an obvious counterexample. CITE.

³⁰⁸ 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

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 active. Agencies are “policy entrepreneurs.”³⁰⁹ Not only do they propose solutions to commonly recognized social problems, they 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 interest, convenience, and necessity,”³¹⁰ the EPA is to protect air quality within an “adequate margin of safety,”³¹¹ 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 constraints 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 to resolve such matters independently. (Another would be a judicially enforced nondelegation doctrine, but courts have shown little interest in reviving that principle.³¹²) 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 most prominent – and in our view most difficult – objections. First and foremost, there is the difficulty (some would say impossibility) of distinguishing jurisdictional from non-jurisdictional questions. In other words, a no-deference rule increases courts’ decision costs. This objection has its own independent force, and strengthens others. Second is the possibility that denying *Chevron* deference in the jurisdictional context will force courts to engage in policy-making, 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

removed after he was indicted (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.

³⁰⁹ See James Q. Wilson, *The Politics of Regulation* 370 (1980).

³¹⁰ CITE

³¹¹ CITE

³¹² See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, __ (2001).

each of these objections has some merit, we do not believe that either is fatal to our proposal. Warts and all, our proposal 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*³¹³: 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 don't know it when they see it. According to Justice Scalia, "there is no discernable line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."³¹⁴ "Virtually any administrative action can be characterized" as either jurisdictional or nonjurisdictional "depending on how generally one wishes to describe the 'authority.'"³¹⁵ 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. On 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.³¹⁶

These criticisms have considerable force, but are ultimately unpersuasive. For starters, we suspect that it will be quite easy for courts to classify as jurisdictional those cases that involve agency claims about statutory silences.³¹⁷ Concerns about the slippery boundary

³¹³ 487 U.S. 354 (1988).

³¹⁴ *Id.* at 381 (Scalia, J., concurring in the judgment).

³¹⁵ *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 ___, at 1340-42; Crawford, *supra* note ___, at 968-69.

³¹⁶ 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 ___, 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 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. To put it somewhat crudely, we worry more about agency aggrandizement than we do about judges and lawyers working harder.

³¹⁷ See, e.g., *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("The Commission apparently assumed –

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. 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 at all. Even if one shares Justice Scalia’s aversion to courts playing fast and loose with the level of generality with 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 (or perhaps even in a large number of) cases. The line-drawing problems that come to mind most readily 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 at all. One might dispute whether the Food and Drug Administration’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”).³¹⁸ 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 Federal Communications Commission’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”).³¹⁹ But, again, it is pretty easily classified as a jurisdictional case (and our proposal would deny *Chevron* deference in either case).

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.³²⁰ 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 Federal Energy Regulatory Commission could require a Mississippi utility to purchase power from a nuclear plant – did not involve any dispute over whether, “in reviewing

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.”); *American Bus Ass’n, Inc. v. Slater*, 1999 WL 986849, at *22 (D.D.C. Sept. 10, 1999) (“The plain language indicates that Congress did not explicitly forbid the Secretary from including a compensation mechanism in the [bus] accessibility regulations.”).

³¹⁸ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

³¹⁹ See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

³²⁰ See *supra* Part III.A.

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.” Nor, according to Justice Scalia, “is it seriously contended 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.”³²¹ Not only was Justice Scalia able to successfully identify the issue in the case as a jurisdictional one, he managed to distinguish among a number of possible jurisdictional disputes that might conceivably be presented to the Court. We suspect that, in most 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.”³²² 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.³²³ Matters of agency jurisdiction, like interstate commerce, “birds and baldness, is not a crisp set.”³²⁴ But that does not make it inherently less amenable to judicial enforcement.

In administrative law (as in other contexts), courts are called upon to draw fuzzy lines all the time, including jurisdictional ones. Professor Lars Noah has observed that courts sometimes “have to mediate ‘turf battles’ between agencies with apparently overlapping jurisdiction.”³²⁵ If courts are competent to determine (without repairing to *Chevron*) that, for example, the Securities Exchange Commission lacks authority to regulate a financial instrument because the Commodity Futures Trading Commission has that power,³²⁶ 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

³²¹ *Mississippi Power & Light*, 487 U.S. at 378 (Scalia, J., concurring in the judgment).

³²² See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995) (applying concept of “fuzzy logic” to question of what constitutes “commerce”).

³²³ Indeed, this is part of the reason that the pre-New Deal court’s Commerce Clause decisions are so routinely criticized for their inconsistencies. CITE.

³²⁴ Merritt, *supra* note ___, at 742.

³²⁵ Noah, *supra* note ___, at 1524.

³²⁶ See *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537 (7th Cir. 1989) (holding that “index participations” were a type of futures contract that therefore were subject to the CFTC’s jurisdiction, not the SEC’s).

Administrative Procedure Act’s notice and comment requirements).³²⁷ It might be unclear whether an agency action is properly classified as a rule at all, and not an adjudication.³²⁸ 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).³²⁹ 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 to successfully 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.³³⁰ Where 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.”³³¹ Where, on the other hand, the agency is applying its regulations or interpreting 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.”³³² Likewise, where an agency focuses on factual predicates or premise facts in determining the application of its regulatory authority, it is engaged in “retail application.” Eskridge and Baer conclude, and we concur, that courts generally have the capacity to distinguish between such “wholesale” and “retail” applications.

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”³³³ 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

³²⁷ See, e.g., *Nat’l Family Planning and Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

³²⁸ For instance, the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), disagreed on whether the Board had engaged in rulemaking or adjudication when, in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1996), 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) (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).

³²⁹ See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988).

³³⁰ Eskridge & Baer, *supra* note __, at __.

³³¹ *Id.*

³³² *Id.*

³³³ Vermeule, *supra* note __, at 356-57.

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? A statutory-silence claim may be sufficient, though it certainly is not necessary, for the agency's action to be fairly characterized as jurisdictional. But 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.³³⁴ 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.³³⁵ 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 American.³³⁶ 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.³³⁷
- 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 now does? Not all policy shifts herald that the agency's action is a jurisdictional one; the Department of Transportation'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.³³⁸ But policy shifts some do – for example, when the Federal Trade Commission for the first time claimed the power to regulate lawyers and law firms as "financial institutions,"³³⁹ or 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

³³⁴ See Gellhorn & Verkuil, *supra* note __, 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").

³³⁵ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

³³⁶ See *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

³³⁷ See *United States v. Mead Corp.*, 533 U.S. 218 (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 USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, __ (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.

³³⁸ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

³³⁹ See *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 466-67 (D.C. Cir. 2005).

statutory authority to do so.³⁴⁰ 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.³⁴¹ The reverse would also be true, as when the Bush Administration EPA concluded that it lacked the authority to regulate greenhouse gases under the Clean Air Act, despite the Clinton Administration’s view to the contrary.

- Is there any independent evidence that the agency might be seeking to aggrandize – that is, evidence other than the agency action being challenged? 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.³⁴² Needless to say, agencies can aggrandize in less dramatic ways than when they claim (or deny) jurisdiction, but the presence of aggrandizement concerns is at least some indication that the dispute fairly can 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 projects³⁴³; or indications that the agency disagrees with its congressional overseers on the priorities it should be focusing on.³⁴⁴

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 objection to our proposal. It is also possible to argue 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.³⁴⁵

Some may object that questions of regulatory jurisdiction are themselves policy questions

³⁴⁰ See *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

³⁴¹ See Gellhorn & Verkuil, *supra* note __, 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 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.

³⁴³ 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 SCHOOL OF GOVERNMENT, MIKE PERTSCHUK AND THE FEDERAL TRADE COMMISSION 13 (1981).

³⁴⁴ CITE. Greenhouse gases may be a good example here, too, especially during 2001-02 when Democrats controlled the Senate.

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

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.”³⁴⁶ If Congress has failed to resolve a jurisdictional question, the argument goes, then it is preferable to allow a politically accountable executive agency to resolve the matter in lieu of leaving the matter to unelected judges.

The assertion that jurisdictional questions are themselves merely policy questions of another sort is somewhat question begging. As noted above, agencies have no inherent powers. They only have those powers delegated them by the legislature. Therefore, agencies have authority to set policies only if Congress has delegated them that power, and the ultimate issue 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 itself precede the existence of any agency authority to resolve the question. If an agency lacks the authority to exercise jurisdiction, how could it have 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 delegated such authority to an agency in the first place would severely undermine the underlying requirement of a legislative delegation – which is the ultimate basis of the *Chevron* doctrine itself.

Whether a federal agency should have certain powers is certainly a policy question, but it is a policy question that must ultimately 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 themselves constitute the *absence* of agency authority, and such silences do not, in themselves 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 doctrine³⁴⁷ – and the absence of any meaningful limit on Congress’ 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 policy making.³⁴⁸

³⁴⁶ Scalia, *Judicial Deference*, at 515.

³⁴⁷ Cite dissents in *Indian Reorg Act* cases.

³⁴⁸ Of course it is an overstatement to suggest, as some deference advocates do, that courts can never engage in

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.³⁴⁹ 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 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 courts.

Other objections are not more fatal to our proposal. 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.³⁵⁰ Indeed, in some cases the agency may itself have drafted or participated in structuring the statute at issue. Agency expertise may be a reason for Congress to grant greater interpretive authority to administrative agencies, but it does not provide a principled basis for granting agencies the authority to determine the scope of their own jurisdiction. As Justice Scalia noted, alleged expertise is “a good practical reason for accepting the agency’s views, but hardly a valid theoretical justification for doing so.”³⁵¹

The existence of agency expertise, or other institutional competence, does not establish 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.”³⁵² 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

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*.” Scalia, *Judicial Deference*, at 515.

³⁴⁹ See Scalia, *Judicial Deference*, *supra* note __, 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.”).

³⁵⁰ See, e.g., Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 215 (2006).

³⁵¹ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989).

³⁵² Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 359 (2007).

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 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 their jurisdiction – does not mean that Congress can or should be presumed to have done so. Moreover, that some involved in the legislative process may have intended to give the agency broader interpretive authority does not mean that Congress has, in fact, done so, and the initial determination about what authority an agency has must, in the first instance, be made by a court. As Justice Brennan noted in *Mississippi Power and Light*, “an agency can claim no special expertise in interpreting a statute confining its jurisdiction.”³⁵³

Crawford makes the additional argument that deference in jurisdictional questions is necessary for predictability and consistency.³⁵⁴ Yet this presumes that the universal application of *Chevron* itself produces such predictability and conformity. Can it really be said that Congress gets more certainty by delegating to administrative agencies than to courts? It would seem that the contrary is more likely. Courts, particularly lower courts that hear the bulk of cases in which agency claims are heard, are bound by precedent and institutional constraints which 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 partisan administration warrant. Indeed, while Congress may have more ability to mau-mau agencies, agency 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 agency assessments of their own jurisdiction, and these changes that occurred without any formal delegation from Congress.

An related critique is that insofar as interpretive authority is vested in courts rather than agencies, this leads to ossification of regulatory law. Leaving interpretive decisions in the hands of regulatory agencies, on the other hand, allows agencies to revise their interpretations as changed circumstances or an accumulated understanding of a given regulatory matter accumulate. This argument provides a strong 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.”³⁵⁵ Agency authority only extends as far as the legislative delegation of authority, and such delegation “has outer parameters that court should enforce.”³⁵⁶ Not only is

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³⁵⁵ 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).

³⁵⁶ Foote, *supra* note ___, at 713.

this an underlying axiom of administrative law, it is evident in the APA requirement that courts invalidate agency actions “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”³⁵⁷

CONCLUSION

Nearly a quarter century after the Supreme Court unwittingly proclaimed a “*Chevron* Revolution,”³⁵⁸ 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 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, don’t count as the requisite evidence. The question whether Congress has conferred power on a given agency at all thus is prior to the question whether deference is due to that agency’s statutory interpretation.

That basic insight has important consequences for the perennially contested, and perpetually unresolved, question 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 can’t 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.

Of course *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 interpretations 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 part in making basic policy choices, and frustrate imperial agencies’ ambitions to accumulate more and more policymaking power. *Chevron*’s domain may be wide indeed, but that doesn’t mean it should displace Congress and the courts from their traditional responsibilities.

³⁵⁷ 5 U.S.C. § 706(2)(C). See also Foote, *supra* note ___, at 713.

³⁵⁸ Eskridge & Baer, *supra* note ___, at 1085.