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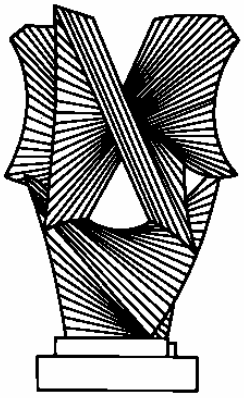

# OVERLAPPING AND UNDERLAPPING JURISDICTION IN ADMINISTRATIVE LAW

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## INTRODUCTION

Perhaps the central question in administrative law is how decision-making authority should be allocated among political institutions. The nondelegation doctrine requires that that Congress make certain policy choices by specifying an intelligible principle to guide agency discretion.[1] Nondelegation canons require that Congress speak with clarity when delegating especially important or broad discretionary authority to the executive.[2] Hard look review ensures that factual or scientific judgments are initially made by agencies, but with genuine judicial review of agency decision-making.[3] The Administrative Procedure Act's mandate for a rough separation of powers within agencies allocates decision-making authority to an administrative law judge and the collection of evidence to other officers or departments.[4] The *Chevron* doctrine allocates interpretive authority to agencies rather than courts.[5]

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[1] See *J.W. Hampton, Jr., & Co v United States*, 276 US 394, 409 (1928). The vitality of the doctrine is hotly contested. Compare Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721 (2002), with Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U Chi L Rev 1297 (2003). For the Supreme Court's most recent pronouncement on the matter, see *Whitman v American Trucking Association*, 531 US 474 (2001).

[2] See Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 321 (2000). Consider *FDA v Brown & Williamson Tobacco Corp*, 529 US 120, 161 (2000); *MCI Telecom Corp v AT&T Corp*, 512 US 218, 234 (1994).

[3] See 5 USC § 706(2)(A) (2000); *Motor Vehicle Mfrs Assn v State Farm Mutual Auto Ins Co*, 463 US 29 (1983). See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U Chi L Rev 1383, 1429–30 (2004); Sidney A. Shapiro and Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 Duke L J 1051, 1065 (1995). See also *Am Paper Inst, Inc v Am Electric Power Service Corp*, 461 US 402, 412 n 7 (1983).

[4] See 5 USC § 554(d) (2000).

[5] *Chevron USA, Inc v Natural Resources Defense Council*, 467 US 837 (1984).

The particular allocation of authority that any of these doctrines entail might be readily contested, and many volumes have been filled with such debates.[6] For example, there is no shortage of work urging that courts should resolve questions of statutory interpretation de novo rather than deferentially,[7] or that the nondelegation doctrine should be more actively or less actively enforced.[8] These standard administrative law debates are now being replicated in other fields like foreign relations and national security.[9]

Most typically, these allocative disputes involve parceling out decisionmaking authority between courts and another political institution. For example, *Chevron* doctrine allocates interpretive authority between the judiciary and the executive. But increasingly, *Chevron* is being applied confusingly to interpretations of statutes that allocate interpretive authority either to multiple administrative agencies or to a mix of federal and state institutions. These questions sound in the administrative law of preemption and shared jurisdiction statutes.

Such problems serve as the doctrinal backdrop for *Gonzales*,[10] a case resolved in the 2006 Term of the Supreme Court. *Gonzales* involved a disputed interpretation of the Controlled Substances Act (CSA),[11] a statute that allocates decision-making authority to a number of federal and state entities. The Attorney General interpreted the CSA to

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[6] For example, many commentators have urged that *Chevron* produces too much or too little deference. Compare Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum L Rev 452 (1989) (too low); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 Stan L Rev 1 (2000) (too low); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum L Rev 2071 (1990) (too low), with Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L J 1385 (1992) (too high); Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand L Rev 301, 308–14 (1988) (too high); Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum L Rev 1093 (1987) (too high).

[7] See, for example, Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363, 379 (1986).

[8] Consider Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (Norton 2d ed 1979); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 Am U L Rev 419, 424 (1987); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich L Rev 1223, 1229 (1985). But see Posner and Vermeule, 69 U Chi L Rev at 1729 (cited in note 1).

[9] See, for example, Eric A. Posner and Cass R. Sunstein, *Chevronizing Foreign Law*, 116 Yale L J 1170(2007); Derek Jinks and Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 1230 Yale L J (2007).

[10] 126 S Ct 904 (2006).

[11] 21 USCA § 801 et seq (2006).

preclude the prescription of drugs to facilitate assisted suicide for terminally ill patients, while an Oregon statute explicitly authorized such prescriptions.[12]

The underlying ethical and political questions in the case are obviously important and controversial. But *Gonzales* can also be used as a vehicle for revisiting and revising the conventional wisdom concerning agency interpretations of statutes that share jurisdiction between multiple political institutions.[13] Statues of this sort create overlapping and underlapping jurisdictional schemes. This Article examines the use by Congress and subsequent treatment by courts of overlapping and underlapping jurisdictional statutes in administrative law. Because overlapping and underlapping jurisdictional assignment can produce desirable incentives for administrative agencies, statutes of this sort are useful tools for managing principal-agent problems inherent in delegation. Unfortunately, however, courts often employ interpretive practices that undermine, rather than support these regimes. *Gonzales* is a prime example.

## I. DEATH, DIGNITY, AND DIVISION

### A. Background

In 1994, Oregon voters approved a ballot measure enacting the Oregon Death With Dignity Act (ODWDA).[14] The measure gives legal protection to state licensed physicians who dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient if, and only if, the doctors comply with certain procedural safeguards. To be eligible to request a prescription under the ODWDA, residents must receive a diagnosis from their attending physician that they have an incurable and irreversible disease that—within reasonable medical judgment—will cause death within six months.[15] Oregon physicians are then authorized to prescribe a lethal drug to facilitate the death of the terminally ill patient.

Prescribed drugs are regulated by the Controlled Substances Act (CSA), a voluminous statute that distributes authority to various federal and non-federal agencies,

[12] Oregon Death With Dignity Act, Or Rev Stat § 127.800 et seq (2003).
[13] On *Chevron* and preemption, see generally Nina A. Mendelson, Chevron *and Preemption*, 102 Mich L Rev 740 (2004).
[14] Or Rev Stat § 127.800 et seq (2003).
[15] Or Rev Stat §§ 127.815, 127.800(12) (2003).

including the Attorney General of the United States.[16] The CSA criminalizes the unauthorized distribution of substances classified in any of five schedules,[17] to which the Attorney General may add, remove, or reschedule substances after making specific findings. *Gonzales* involved Schedule II substances generally available to the public only pursuant to a written prescription issued by a physician.[18] A 1971 regulation promulgated by the Attorney General pursuant to CSA authority requires that every prescription for a controlled substance "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[19] Violations of the CSA are investigated by the Drug Enforcement Agency (DEA) and carry significant criminal penalties. The specific drugs at issue in *Gonzales* are sometimes used in small doses for pain relief; but in large doses they are lethal. In 2004, thirty-seven patients ended their lives by ingesting a lethal dose of medication prescribed pursuant to the ODWDA.[20]

By the late 1990's, certain members of Congress were increasingly concerned about assisted suicide generally and the ODWDA specifically.[21] In 1997, a group of legislators invited the DEA to prosecute or revoke the CSA registration of Oregon physicians who assisted suicide pursuant to the ODWDA.[22] Although the then-head of the DEA responded favorably, Attorney General Janet Reno concluded that the DEA could not take the proposed action because the CSA does not authorize it to "displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice."[23] Legislation was introduced in

[16] 84 Stat 1242 (1970), codified as amended 21 USCA § 801 et seq (2006).
[17] 21 USCA §§ 841, 844 (2006).
[18] 21 USC § 829(a) (2000).
[19] 21 CFR §1306.04(a) (2006).
[20] Or Dept of Human Servs, Seventh Annual Report on Oregon's Death with Dignity Act 20 (Mar 10, 2005).
[21] See Dan Eggen and Ceci Connolly, *Ashcroft Ruling Blocks Ore. Assisted-Suicide Law*, Wash Post A01 (Nov 7, 2001); Joe Rojas-Burke, *Showdown on Assisted Suicide Looms In Senate; Both Sides Know the Stakes are High for the Right-To-Die Movement Across the Nation*, Oregonian A01 (Sept 19, 2000); *Meddling with Oregon's Law*, NY Times A14 (Oct 30, 1999).
[22] Letter from Sen. Orrin Hatch and Rep. Henry Hyde to Thomas A. Constantine (July 25, 1997), reprinted in Hearings on S 2151 before the Senate Committee on the Judiciary, 105th Cong, 2d Sess 2–3 (1999).
[23] Letter from Attorney General Janet Reno to Sen. Orrin Hatch on Oregon's Death with Dignity Act (June 5, 1998), reprinted in Hearings on S. 2151 before the Senate Committee on the Judiciary, 105th Cong, 2d Sess 5–6 (1999).

Congress to delegate explicitly to the agency any requisite authority, but the bills did not garner enough support to pass.[24]

In 2001, John Ashcroft was appointed Attorney General. Oregon officials wrote to Attorney General Ashcroft in February 2001, to inquire whether the Department was likely to change its position.[25] Initially, Ashcroft disclaimed any intention to alter the agency's view on the CSA and the ODWDA. However, drawing on analysis from an Office of Legal Counsel memorandum on the subject, Attorney General Ashcroft soon issued an interpretive rule stating that

> assisting suicide is not a "legitimate medical purpose" within the meaning of 21 C.F.R. 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act . . . and that prescribing drugs for assisted suicide may render his registration . . . inconsistent with the public interest and therefore subject to possible suspension or revocation under 21 U.S.C. § 824(a)(4).[26]

The prior regulation, 21 CFR 1306.04 (issued in 1971), had interpreted the CSA to require that prescriptions be for a "legitimate medical purpose." The Ashcroft Interpretive Rule offered an interpretation of the preexisting regulation, concluding that prescribing drugs to facilitate the death of terminally ill patients is not a "legitimate medical purpose." Because distribution of Schedule II drugs for non-authorized purposes would constitute a violation of the CSA, the Ashcroft interpretation purported to make conduct illegal that the ODWDA explicitly authorized. The Interpretive Rule was challenged in federal district court, resulting in a permanent injunction against the Ashcroft directive.[27] The Ninth Circuit held the Interpretive Rule invalid,[28] and the Supreme Court ultimately agreed.[29]

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[24] See HR 4006, 105th Cong, 2d Sess, in 144 Cong Rec H 4240 (June 5, 1998); HR 2260, 106th Cong, 1st Sess, in 145 Cong Rec H 4614 (June 17, 1999).
[25] See Letter of Feb 2, 2001 in Brief for Patient-Respondents in Opposition, Appendix 55a, *Gonzales v Oregon*, 126 S Ct 904 (2006) (No 04-623).
[26] Dispensing of Controlled Substances To Assist Suicide, 66 Fed Reg 56607 (Nov 9, 2001).
[27] *Oregon v Ashcroft*, 192 F Supp 2d 1077, 1080 (D Or 2002).
[28] *Oregon v Ashcroft*, 368 F3d 1118, 1138 (9th Cir 2004).
[29] *Gonzales*, 126 S Ct at 925–26.

B. Legal Questions

*Gonzales* involved the intersection of a number of typically discrete administrative law doctrines. First, what deference is due an agency's interpretation of its own rule? Second, what deference ought to be given to a statutory interpretation issued by a federal agency that has the effect of displacing a state law? Third, should deference be given to an agency's interpretation of a statute that gives authority to multiple federal agencies? These are not new questions, but it is rare to witness them arise simultaneously with such stark results.

The government, and Justice Scalia in dissent, argued that the case should have been resolved without legal fanfare. Courts generally defer to agencies on interpretations of statutes,[30] and will overturn an agency's interpretation of its own rules or regulations only if "plainly erroneous."[31] Justice Scalia's dissent concluded that the Interpretive Rule should have been easily upheld, on either ground. The majority opinion, per Justice Kennedy, took a rather different tack, avoiding deference to the Interpretive Rule, either as an interpretation of the agency's own regulations or as an interpretation of a statute the agency administers.[32]

Much of Justice Kennedy's opinion relies on two ideas. First, when a statute shares authority between agencies, deference should be given to the agency that has the relevant expertise—here not the Attorney General, but the Secretary of Health and Human Services.[33] Second, because the CSA shares authority between federal and state governments, no deference should be given to an interpretation that "displaces the States' general regulation of medical practice."[34] Both these presumptions undermined the Attorney General's claim to deference from the courts.[35] Properly understood, the Court's analysis contributes to an emerging doctrine known as *Chevron* Step Zero, which clarifies when judicial deference to agency views is appropriate. Neither of the employed presumptions is implausible, but nor is either inevitable. Given the increasing prominence

[30] *Chevron USA, Inc v National Resources Defense Council*, 467 US 837 (1984).
[31] *Auer v Robbins*, 519 US 452 (1997); *Bowles v Seminole Rock & Sand Co*, 325 US 410, 414 (1945).
[32] *Gonzales*, 126 S Ct 904, 914–17 (2006).
[33] Id at 914–17. See also 21 USCA §§ 811, 823(q) (2006).
[34] 126 S Ct at 923.
[35] Id.

of Step Zero in administrative law, and the frequency with which courts encounter shared jurisdiction statutes, clarifying this state of affairs is of some importance.

## II. OVERLAPPING AND UNDERLAPPING JURISDICTION

Much of the analysis in *Gonzales* depends on how *Chevron* doctrine treats statutes that entail the ambiguously overlapping and underlapping jurisdiction of political institutions. Courts have long struggled with whether deference should be given to statutes administered by multiple federal agencies, and an administrative law variant of federalism specifies if and when courts should defer to agency decisions that preempt state law. Currently, *Chevron* doctrine instructs courts to defer to agency statutory interpretations when Congress has delegated law-interpreting authority. This determination, in turn, rests on a rational reconstruction of congressional intent about local judicial deference to agency interpretations. Therefore, to know whether Congress would want courts to defer to agency interpretations of shared jurisdiction statutes or to interpretations with preemptive effects, it is necessary to theorize about why Congress would rely on statues that share authority in this way.

### A. Conceptual Basics

As one court recently noted, "we live in an age of overlapping and concurring regulatory jurisdiction."[36] The CSA is one prime example, but statutes that parcel out authority or jurisdiction to multiple agencies may be the norm, rather than an exception. Still, there are many variants of shared jurisdiction regimes, and all need not be treated identically by the law.

Suppose Congress is considering enacting a new statute, to address policy space X, that there are only two governmental units, A and B, and that Congress wishes to allocate some authority to one entity and some authority to the other. Conceptually, Congress might allocate authority in any number of ways, but consider two dimensions of variation: *exclusivity* and *completeness*. With respect to exclusivity, Congress might grant

[36] *FTC v Ken Roberts Co*, 276 F3d 583, 593 (DC Cir 2001), quoting *Thompson Medical Co v FTC*, 791 F2d 189, 192 (DC Cir 1986). See also *FTC v Texaco, Inc*, 555 F2d 862, 881 (DC Cir 1976). See generally *FTC v Cement Institute*, 333 US 683, 694–95 (1948).

authority to one agency alone or to both. With respect to completeness, Congress might delegate authority to act over the entire policy space or only a subset of the space. If both agencies receive concurrent authority to regulate in a field, there is jurisdictional overlap. When neither gets authority, there is jurisdictional underlap. Combining the dimensions of exclusivity and completeness yields four potential statutory schemes.

1. Congress could delegate *complete* and *exclusive* jurisdiction. Agency A is given the authority to regulate $X_1$, where $X_1$ is a subset of X ($X_1 \subset X$). Agency B is given authority to regulate $X_2$, where $X_2$ is a subset of X ($X_2 \subset X$). In the complete and exclusive regime, there is no policy authority held simultaneously by both agencies; that is, $X_1 \cap X_2 = \varnothing$. And the combination of the policy space regulated by both agencies is the entire policy space, $X_1 \bigcup X_2 = X$. If the space X is represented with a circle, a single line dissecting the circle marks the jurisdictional divisions, with A getting all authority on one side of the line and B all authority on the other.

2. Congress could delegate *incomplete* and *exclusive* jurisdiction. If the policy space X continues to represented by a circle, this statutory scheme excepts a subset of the policy space from the jurisdiction of either agency A or B. The remainder of the space is exclusively within either the jurisdiction of agency A or B. That is, the sets of authority delegated to agencies A and B remain disjoint, $X_1 \cap X_2 = \varnothing$. However, the union of A and B does not occupy all of the policy space; $X_1 \bigcup X_2 \subset X$. The important difference between regimes (1) and (2) is that some potential authority in the policy field that could have been given to an agency is not given to either agency. This is jurisdictional underlap.

3. Congress could delegate *complete* authority to agencies A and B, but with *nonexclusive* jurisdictional assignments. In this regime, all of the potential authority within space X is delegated, but some authority is given to both agencies. The authority might be perfectly overlapping, such that $X_1=X_2=X$. Or more likely, each agency is given some exclusive jurisdiction, but some subset of authority is also jointly held by both agencies such that $X_1 \cap X_2=X_3 \subset X$. That is, jurisdiction is partially overlapping.

4. Lastly, Congress might generate a *non-exclusive* shared jurisdiction scheme in which the grant of authority is *incomplete* (or non-exhaustive). At least some portion of each agency's authority is also shared with the other agency. What differentiates regime (4) from regime (3) is that there is also some subset of the policy space not clearly given to either agency, such that $X_1 \bigcup X_2 \subset X$. Regime (4) carves out a portion of potential authority that is not given to either government entity, although of course the scope and existence of this pocket will usually be ambiguous. Jurisdiction in this scheme is both overlapping and underlapping.

This description is not meant to be especially novel or controversial. The typology just describes generic ways to carve up authority among government units. The institutions to which authority is granted, A and B, might be two agencies like the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), or they might be two levels of government like the federal government and state governments. Institution A might be the National Labor Relations Board (NLRB) and Institution B an administrative law judge (ALJ). If the typology cuts ice it is only because it gives conceptual clarity to the differences between statutory schemes which are often assumed to be the same, helping to theorize about why Congress would use each of these possible regimes.

B. Refinements

The levers of completeness and exclusivity are only two of many that Congress might adjust to vary agency authority. Congress might allocate overlapping jurisdiction, but give different policy tools to different agencies, perhaps giving rulemaking authority to one agency and enforcement authority to another, as Congress often does. Both agencies could act in the same policy area, but one could do so using rules and the other using adjudications.

Alternatively, holding the type of policy tools constant, both agencies might have overlapping authority, but one agency might be given dominant authority, either explicitly or implicitly. In the case of direct conflict between the two agencies on some legal question, one agency's decision might clearly control. For example, if one agency has rulemaking authority and another only enforcement authority, and the two agencies disagree on the meaning of a statutory term, the interpretation proffered by the agency with rulemaking authority might control or vice versa.[37] An agency given rulemaking authority might be given preference because the process of making rules better incorporates both democratic and informational expertise, but enforcement proceedings allow agencies to incorporate more particularized insights so perhaps the opposite inference is just as plausible. That is, the mere fact of jurisdictional overlap leaves

[37] See Part II.D.2.

unresolved the important subsequent question of whether authority is equal or hierarchical.

In practice, jurisdictional boundaries between political institutions are also fuzzy or ambiguous. Outside the overlapping jurisdiction context, the ambiguous border problem animates an ongoing debate about whether *Chevron* deference should be given to agency determinations about the scope of the agency's own jurisdiction.[38] The outcome in many cases depends on whether agencies have jurisdiction and whether specific agency views warrant deference.[39] If defining jurisdictional borders is difficult generally, it promises to be even harder in shared jurisdiction regimes. If a statute clearly gives some jurisdiction to one agency to administer one portion of a statute, and clearly gives some jurisdiction to another agency to administer another portion of the statute, how should courts treat agency interpretations or assertions of authority with respect to a third portion of the statute, related to both other sections?

C. Justification

Overlapping and underlapping jurisdiction in a world with fuzzy borders is a practical mess for agencies, courts, and private parties. So why would Congress rely on shared jurisdiction schemes? Scholarship in political science and economics provides one answer. Delegation by Congress to other institutions creates agency problems. Overlapping and underlapping jurisdiction schemes can be understood as a partial response to these problems. More specifically, Congress might use overlapping or underlapping jurisdiction as a mechanism for encouraging the development and accurate revelation of information by agencies, or as a means of controlling agency conduct and substantive policy choices.

A central organizing principle of the delegation and oversight literature is that an enacting congressional coalition must balance the risk of legislative drift against the risk

[38] See, for example, Sunstein, 90 Colum L Rev at 2097 (cited in note 6).
[39] See, for example, *FDA v Brown & Williamson Tobacco Corp*, 529 US 120 (2000); *Mississippi Power & Light Co v Mississippi*, 487 US 357 (1988); *United States v Riverside Bayview Homes*, 474 US 121 (1985); *Massachusetts v EPA*, 415 F3d 50 (DC Cir 2005), cert granted, 126 S Ct 2960 (2006); *United Transportation Union v Surface Transportation Board*, 183 F3d 606 (7th Cir 1999); *Alaska v Babbitt*, 72 F3d 698 (9th Cir 1995).

of bureaucratic drift. Congress could produce policy internally, but given limitations of time, resources, and the potentially lower costs of bureaucratic production, delegation to agencies will often prove a more desirable alternative. When Congress delegates, there is always a risk that the preferences of the enacting coalition in Congress will diverge from the views of the administrative agency.[40] That is, delegation involves agency problems.

The commentary is replete with suggestions about how and to what extent Congress can effectively control the bureaucracy, including the use of ex ante procedures,[41] ex post monitoring,[42] temporal limitations,[43] budgetary appropriations,[44] and other forms of political influence.[45] This literature focuses on the use of ex ante and ex post mechanisms for generating or calibrating the incentives of agents to encourage them to act consistently with the interests of principals. Jurisdictional overlap and underlap should be understood as additional tools for structuring the incentives of administrative agencies. Congressional choice about how to structure delegated authority inevitably reflects the preferences of legislators and interest groups.[46] Just as procedural mechanisms like those set out in the Administrative Procedure Act (APA) can be used to control agency behavior, so too can overlapping and underlapping agency jurisdiction.

A statute that allocates authority to multiple government entities relies on *competing agents* as a mechanism for managing agency problems. Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent. To illustrate, consider the problem of agency expertise.

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[40] See generally David Epstein and Sharon O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge 1999). See also Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency*, 8 J L Econ & Org 111 (1992).

[41] See Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va L Rev 431 (1989).

[42] See Matthew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am J Pol Sci 165 (1984).

[43] See Jacob E. Gersen, *Temporary Legislation*, 74 U Chi L Rev 247 (2007).

[44] See Michael M. Ting, *The "Power of the Purse" and its Implications for Bureaucratic Policy-Making*, 106 Pub Choice 243 (2001).

[45] See, for example, Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision-Making*, 14 J L Econ & Org 114 (1998).

[46] See Terry M. Moe, *The Politics of Bureaucratic Structure*, in John E. Chubb and Paul E. Peterson, eds, *Can the Government Govern?* 267 (Brookings 1989).

A potential justification for the use of complete and exclusive jurisdiction (regime 1) is to facilitate the use of relevant agency expertise in the implementation of policy. If one agency has expertise in a field and a second agency in another, Congress should delegate to the most-informed agency. The trouble with this view of expertise is that it is static and exogenous; but agency expertise is itself a function of many factors, including the degree of discretion given to the agency, the costliness of developing expertise, the degree of divergence between agency and congressional preferences, and other political influences like interest groups.[47] Agency expertise is neither static nor exogenous, but rather is a function of existing institutional arrangements.[48] Like other mechanisms for mitigating principal-agent problems, the assignment of jurisdiction can be used to create incentives for agencies to invest in the development of expertise.

Consider regime 3, complete and overlapping jurisdiction. If agencies prefer to increase jurisdiction rather than decrease it, assigning overlapping jurisdiction at time 0 gives agencies an incentive to invest in information at time 1, so that their jurisdiction is not eliminated at time 2.[49] If Congress wants to take advantage of agency knowledge, but is concerned that agencies will shirk and fail to invest heavily enough in the development of expertise, manipulating jurisdiction can help manage that possibility. If one agency invests in developing expertise and the other does not, Congress can shift from regime 2 to regime 1, giving the agency that invested in expertise exclusive authority. The threat of

[47] See Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise* (John M. Olin Center for Law, Econ & Bus Paper No 553, July 2006), online at http://ssrn.com/abstract=921439 (visited Mar 30, 2007); Jonathan Bendor and Adam Meirowitz, *Spatial Models of Delegation*, 98 Am Pol Sci Rev 293 (2004); Philippe Aghion and Jean Tirole, *Formal and Real Authority in Organizations*, 105 J Pol Econ 1 (1997); Kathleen Bawn, *Political Control versus Expertise: Congressional Choices about Administrative Procedures*, 89 Am Pol Sci Rev 62 (1995); Steven Callander, *A Theory of Policy Expertise* (unpublished manuscript, 2006), online at http://harrisschool.uchicago.edu/Academic/workshops/pol_econ_papers/expertise5october2006.pdf (visited Mar 30, 2007); Sean Gailmard, *Discretion Rather than Rules: Choice of Instruments to Constrain Bureaucratic Policy-Making* (unpublished manuscript, August 2006), online at http://faculty.wcas.northwestern.edu/~spg763/menus.pdf (visited Mar 30, 2007).

[48] For earlier and more general analysis, see McCubbins, Noll, and Weingast, 75 Va L Rev 431 (cited in note 41); Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L Econ & Org 243 (1987).

[49] Even this is not obvious. James Q. Wilson sought to explain why expansionist bureaucracies often shun new responsibilities. See *Bureaucracy: What Government Agencies Do and Why They Do It* (Basic Books 1989). Agencies might lose a sense of mission or jurisdictional expansion might introduce additional opportunities for failure.

jurisdictional loss is a sanction for the failure to produce desirable informational expertise.

What of jurisdictional underlap, as in regimes (2) or (4), where Congress has not clearly allocated authority over a subset of the policy space? Two agencies have jurisdiction over other parts of the statute, either exclusively (regime 2) or concurrently (regime 4). If ambiguous jurisdictional boundaries is the norm, underlapping jurisdiction can also produce desirable incentives. Suppose it is unclear whether either agency has jurisdiction at time 0. By investing in the development of relevant expertise and asserting jurisdiction at time 1, the agency demonstrates relevant expertise, and Congress (or a court) could redefine clear and potentially exclusive jurisdiction at time 2. If ex ante jurisdictional ambiguity is resolved in favor of an agency that develops expertise, ambiguous underlap in time 0 can create a race to produce expertise and assert jurisdiction.

Understood in this way, both jurisdictional overlap and jurisdictional underlap use delegation to competing agents to control agency behavior. Jurisdictional overlap is like the stick; jurisdictional underlap the carrot. Both statutory schemes, however, can be sensibly understood as intentional mechanisms for mitigating agency problems inherent in delegation to other political institutions. Redundancy can sometimes also increase the reliability of bureaucratic performance, and using multiple agents may also provide for monitoring and reporting of agent behavior by competing agents themselves.[50]

This is not to say that jurisdictional overlap is a silver bullet for agency problems. Overlapping jurisdiction also creates a risk of shirking by both agencies when Congress observes only outcomes and not effort.[51] Moreover, redundancy in the assignment of

[50] For a discussion of related issues deriving from the appropriate allocation of function to government agencies, see David A. Weisbach and Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 Yale L J 955 (2004).

[51] See Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal L Rev 1655 (2006); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 Am J Pol Sci 274, 287 (2003); Charles Perrow, *Normal Accidents: Living with High-Risk Technologies* 332 (Princeton 1999); Jean Tirole, *The Internal Organization of Government*, 46 Oxford Econ Papers 1 (1994). See also Jonathan B. Bendor, *Parallel Systems: Redundancy in Government* 244–45 (California 1985); Dan S. Felsenthal and Eliezer Fuchs, *Experimental Evaluation of Five Designs of Redundant Organizational Systems*, 21 Admin Sci Q 474, 474 (1976); Rowan Miranda and Allan Lerner, *Bureaucracy, Organizational Redundancy, and the Privatization of Public Services*, 55 Pub Admin Rev 193, 193 (1995).

bureaucratic tasks can also create duplicative monitoring and enforcement costs.[52] Overlapping jurisdiction, therefore, is not necessarily an ideal structure for delegation, but there is an implicit logic in the use of overlapping and underlapping jurisdictional schemes that can itself be traced to an elaborate theoretical literature in economics and political science.

If manipulating jurisdiction is an effective tool for constraining agencies, then several conclusions might follow. First, courts might adopt interpretive practices that support rather than undermine these statutory schemes. For example, a common view is that courts owe no *Chevron* deference to agency views of shared jurisdiction statutes; Congress would not want courts to defer to the view of one agency when the statute is administered by many agencies. The competing agents framework suggests otherwise. Deference is a form of reward, which could encourage agencies to develop expertise and enter areas of ambiguous jurisdiction.

Second, the same framework has implications for deference and preemption, though the implications are less clear. When a statute allocates overlapping jurisdiction to state and federal entities, courts might endeavor to preserve concurrent jurisdiction, perhaps by refusing to defer to agency decisions to preempt state law. By the same token, in a case of jurisdictional underlap, where it is unclear whether either entity has jurisdiction, giving deference to preemptive decisions by the agency could be understood as a reward for moving into a field of ambiguous jurisdiction. The difficulty is that the state agency cannot do the same thing, and therefore the agents are competing on unequal footing. If a genuine conflict exists and the federal agency has clear authority, the state agency may not displace the federal agency's view. This asymmetry creates a wrinkle, but nonetheless it is a wrinkle that should be ironed out within the competing agents framework.

[52] See Andrew B. Whitford, *Adapting Agencies: Competition, Imitation, and Punishment in the Design of Bureaucratic Performance*, in George A. Krause and Kenneth J. Meier, eds, *Politics, Policy, and Organizations: Frontiers in the Scientific Study of Bureaucracy* 160 (Michigan 2003); Gary J. Miller and Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 Am Pol Sci Rev 297, 310 (1983). But see William A. Niskanen, *Bureaucrats and Politicians*, 18 J L & Econ 617, 637 (1975) (competition decreases cost of monitoring).

Lastly, courts have sometimes been hesitant to defer to agency views about their own jurisdiction, even setting aside the problem of overlap or underlap. The competing agents framework suggests this may be a mistake. Congress might well prefer that agencies are rewarded for developing expertise and asserting jurisdiction.

The competing agents framework is not inevitably correct, but it provides a way to structure the dispute in *Gonzales*. The CSA establishes a partially overlapping jurisdictional scheme in which authority is shared between federal agencies and between state government authorities. The Attorney General is authorized to add or remove drugs from CSA schedules.[53] For certain determinations, the Attorney General must consult with other governmental actors like the Secretary of Health and Human Services.[54] The Attorney General is authorized to issue rules,[55] and require registration,[56] but the precise contours of that authority and the appropriate inference to draw from those contours were fiercely disputed in the case. The CSA preserves state authority to regulate medical practice with a savings clause disclaiming an intent to occupy the field.[57] The outcome of the case turned on the extent of authority granted to the Attorney General, whether that authority was exclusive, overlapping, or underlapping; and if overlapping, inferior or superior to the authority of other federal agencies and state authorities.

D. Doctrine

The core of the Court's analysis in *Gonzales* took place in the analytic framework of *Chevron* doctrine. The key question then is how the various statutory schemes fit into *Chevron* doctrine. The *Gonzales* majority hewed closely to the conventional wisdom, refusing to give deference to the Attorney General's interpretation of the statute. In part, this refusal was driven by the fact that the CSA is a shared jurisdiction statute that

[53] 21 USC § 811(a) (2000 & Supp 2004).
[54] See, for example, 21 USC § 811(d)(3)(C) (2000 & Supp 2004) (requiring the Attorney General and the Secretary of Health and Human Services to coordinate drug scheduling).
[55] 21 USC § 821 (2000 & Supp 2004).
[56] 21 USC §§ 822, 871 (2000).
[57] 21 USC § 903 (2000) ("No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.").

allocates authority not just between multiple federal agencies, but also federal and state authorities. The competing agents framework suggests this analysis was partially incomplete and partially incorrect. After a brief sketch of *Chevron* doctrine, this section focuses on the intersection of *Chevron* with overlapping jurisdiction statutes.

1. *Chevron* Basics

*Chevron* established an analytic framework for judicial review of agency interpretations of statutes. At Step One of *Chevron*, judges ask whether the statute speaks to the "precise question at issue";[58] if so, then judges simply enforce its commands.[59] If the statute contains a gap—if, in other words, it is silent or ambiguous on the relevant question—then judges are to proceed to Step Two, at which they ask whether the agency interpretation of the statute is "reasonable," or, in other words, whether the agency interpretation falls within the scope of the statute's ambiguity.[60]

The decades after *Chevron* brought much wrangling over the scope, foundation, and application of the *Chevron* doctrine.[61] In an important series of cases, *Christensen v Harris County*,[62] *United States v Mead*,[63] and *Barnhart v Walton*,[64] the Supreme Court sought to clarify precisely when the *Chevron* deference framework applies and when it does not. The trilogy creates a third step of analysis in the *Chevron* framework, a sort of *Chevron* Prequel, increasingly known as Step Zero.[65] The Step Zero doctrine requires that before proceeding to the *Chevron* two step, a court must first engage in a prior analytic inquiry to ascertain whether Congress would want courts to defer to agencies on this sort of interpretation of this sort of statute in this particular context. Step Zero is an increasingly important doctrine; and *Gonzales* is most naturally read as a Step Zero case.

*Chevron's* original justification was ambiguous. The *Chevron* majority cited several potential justifications for judicial deference to administrative agencies including comparative expertise and democratic accountability, in addition to an implicit

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[58] *Chevron*, 467 US at 842.

[59] There are many subtle problems about Step One that I do not attempt to review here. For a comprehensive treatment, see Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, in John F. Duffy and Michael Herz, eds, *A Guide to Judicial and Political Review of Federal Agencies* (ABA 2005).

[60] See *Chevron USA, Inc v Natural Resources Defense Council*, 467 US 837, 845 (1984).

[61] For an overview, see Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187 (2006).

[62] 529 US 576 (2000).

[63] 533 US 218 (2001).

[64] 535 US 212 (2002).

[65] The term is originally from Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 Geo L J 833, 836 (2001).

congressional directive that courts ought to defer to agencies.[66] However, in *Mead* the Court followed existing commentary and suggested that *Chevron* rests on Congress's implicit delegation of law-interpreting authority to agencies.[67] In *Mead*, the Court held that a tariff classification ruling by the United States Customs Service was not entitled to *Chevron* deference.[68] The Court concluded that *Chevron* deference is appropriate "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."[69] *Mead*'s language initially appeared to make Step Zero turn on procedural formality. The strongest cases for *Chevron* deference looked to be when an agency had been given rulemaking authority that the agency had actually used in promulgating the interpretation.[70] The weakest candidates for deference were the result of informal adjudication, a decision-making process that lacks any required procedural formality.[71] Unfortunately, the precise relationship between the delegation of force-of-law authority and procedural formality remained elusive. The Court clearly stated that a lack of procedural formality does not preclude *Chevron* deference.[72] And at least Justice Breyer thinks procedural formality is not a sufficient condition for *Chevron* deference either.[73]

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[66] *Chevron*, 476 US at 865.

[67] See *Mead*, 533 US at 230 n 11, citing Merrill and Hickman, 89 Geo L J at 872 (cited in note 65). This rationale is a bit awkard given that the APA, which is the closest Congress has come to providing a general instruction on the allocation of law-interpreting authority, says that courts are to decide all relevant questions of law. See 5 USC § 706 (2000) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law.").

[68] *Mead*, 533 US at 226.

[69] Id at 226–27 (emphasis added).

[70] See *Shalala v Illinois Council on Long Term Care, Inc*, 529 US 1, 20–21 (2000); *United States v Haggar Apparel Co*, 526 US 380 (1999); *AT&T Corp v Iowa Utilities Board*, 525 US 366 (1999); *Atlantic Mutual Insurance Co v Commissioner*, 523 US 382 (1998); *Regions Hospital v Shalala*, 522 US 448 (1998); *United States v O'Hagan*, 521 US 642 (1997); *Smiley v Citibank (South Dakota), NA*, 517 US 735 (1996); *Babbitt v Sweet Home Chapter, Communities for Greater Ore*, 515 US 687 (1995); *ICC v Transcon Lines*, 513 US 138 (1995); *PUD No 1 of Jefferson City v Washington Department of Ecology*, 511 US 700 (1994); *Good Samaritan Hospital v Shalala*, 508 US 402 (1993); *American Hospital Association v NLRB*, 499 US 606 (1991); *Sullivan v Everhart*, 494 US 83 (1990); *Sullivan v Zebley*, 493 US 521 (1990); *Massachusetts v Morash*, 490 US 107 (1989); *K Mart Corp v Cartier, Inc*, 486 US 281 (1988); *Atkins v Rivera*, 477 US 154 (1986); *United States v Fulton*, 475 US 657 (1986); *Riverside Bayview Homes*, 474 US 121.

[71] See *Mead*, 533 US at 231.

[72] Id ("The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*.").

[73] See *National Cable & Telecommunications Assn v Brand X Internet Servs*, 545 US 967, 1003–05 (2005) (Breyer, J, concurring).

How then are courts to determine whether Congress has (implicitly) delegated law-interpreting authority to an agency? Recent guidance has not been altogether clear. One answer was given by Justice Breyer in *Barnhart v Walton*.[74] In *Barnhart*, the Court upheld an interpretation in a Social Security Administration regulation of the term "impairment." Although the interpretation had been issued in notice and comment rulemaking, Justice Breyer emphasized that deference could apply even though "the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking."[75] Considering "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time,"[76] *Chevron* deference was properly applied.[77] This view of *Chevron* echoes Justice Breyer's view of many years ago, arguing that judicial deference to agency interpretations of law should depend on a case-by-case consideration of the particular agency interpretation and the specific statutory scheme.[78]

Questions about *Chevron's* scope had pre-Step Zero answers. But before the trilogy, they were answers without an analytic framework. A charitable reading of *Mead, Christensen*, and *Barnhart* is that they impose a structure on the decision of whether *Chevron* deference is appropriate.[79] To decide whether *Chevron* applies, judges should ask whether Congress is best taken to have delegated law-interpreting authority to the agency, that is, would Congress want courts to defer? The competing agents framework helps answer this question by offering a rationally reconstructing congressional intent about judicial deference and overlapping jurisdiction statutes. Any resolution of the Step Zero question ought to at least to take account of this explanation; and if no better explanation is available, then the competing agents approach should prevail, on the ground that it is the best reconstruction of Congress's intentions.

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[74] 535 US 212 (2002).
[75] Id at 221.
[76] Id at 222.
[77] See Sunstein, 92 Va L Rev at 217 (cited in note 61) (discussing the passage and opinion).
[78] Breyer, 38 Admin L Rev at 379 (cited in note 7).
[79] Compare David J. Barron and Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup Ct Rev 201, 227, with Adrian Vermeule, Mead *in the Trenches*, 71 Geo Wash U L Rev 347 (2003); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 Vand L Rev 1443, 1457 (2005).

2. *Chevron* and Shared Jurisdiction

When a statute is administered by multiple agencies, do agency views about statutory meaning receive deference in the *Chevron* framework? This question has long been disputed.[80] Today, it is best treated as a Step Zero inquiry, but before the court accepted the implicit congressional directive theory of *Chevron*, some scholarship used democratic accountability and expertise to argue that deference to interpretation of shared jurisdiction statutes was inappropriate.[81] Although accountability and expertise are no longer sufficient to support *Chevron* deference, they remain relevant variables in the Step Zero inquiry if expertise or accountability would be reasons that Congress would prefer courts to defer to agencies.

In the shared jurisdiction context, however, neither expertise nor democratic accountability necessarily supports the no deference view. When several agencies share responsibility for administering a statute, all of them might have more expertise than the courts. And even outside the competing agents framework, two agencies with concurrent jurisdiction will generally be more responsive to democratic processes than any court is likely to be. Within the competing agents framework, multiple agencies with overlapping jurisdiction may well be both more expert and more accountable than a single agency with exclusive jurisdiction. Notwithstanding this view, agency expertise has regularly been used as a justification for not giving deference to agency views of shared jurisdiction statutes.

Consider agency interpretations of general statutes—statutes that bear on the business of multiple agencies like Freedom of Information Act (FOIA) or National Environmental Policy Act (NEPA). "It is universally agreed that no single agency with enforcement power has been charged with administration of these statutes, and hence that *Chevron* does not apply."[82] Similarly, no deference is given to agency interpretations of

[80] See Merrill and Hickman, 89 Geo L J at 851 (cited in note 65). See also *Sutton v United Airlines*, 527 US 471, 478–80 (1999); *Bragdon v Abbott*, 524 US 624, 642 (1998). As Merrill and Hickman point out, in the pre-*Chevron* case law, the fact that a statute was administered by multiple agencies was sometimes cited as a factor for giving reduced deference. See *New Haven Board of Education v Bell*, 456 US 512, 522 n 12 (1982); *General Electric Co v Gilbert*, 429 US 125, 144–45 (1977).

[81] See, for example, Daniel Lovejoy, Note, *The Ambiguous Basis for* Chevron *Deference: Multiple-Agency Statutes*, 88 Va L Rev 879 (2002).

[82] Merrill and Hickman, 89 Geo L J at 893 (cited in note 65).

the Administrative Procedure Act because "[t]he APA is not a statute that the Director is charged with administering."[83] Congress should not be taken to have implicitly delegated law-interpreting authority to any agency because no agency administers the statute.[84]

To the extent that the APA, FOIA, and NEPA are statutes that applies to all agencies but that are not truly "administered" by any agency, this view is perfectly reasonable. Accordingly, the lower courts generally do not defer to agency views in these settings, largely on expertise grounds.[85] To illustrate, consider *Professional Reactor Operator Society v NRC*.[86] The D.C. Circuit refused to give *Chevron* deference to the Nuclear Regulatory Commission's interpretation of the APA because the "Supreme Court has indicated . . . that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer."[87]

However, not giving deference to an agency's view of a statute that it does not administer[88] implies little about whether deference is warranted for agency views of a statute that multiple agencies do administer. Unfortunately, the same basic analysis is often applied. For example, *Bowen v American Hospital Association*[89] involved a challenge to regulations promulgated by the Secretary of Health and Human Services, pursuant to the Rehabilitation Act. Section 504 of the Rehabilitation Act authorized "any

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[83] *Metropolitan Stevedore Co. v Rambo*, 521 US 121, 137 (1997) (internal citations omitted). The Court added that the "interpretation does not appear to be embodied in any regulation or similar binding policy pronouncement to which such deference would apply" and the "interpretation is couched in a logical non-sequitur." Id.

[84] The Supreme Court has never conclusively said that interpretations of statutes administered by multiple agencies do not qualify for *Chevron* deference, but *Metropolitan Stevedore Co.*, 521 US at 137, is probably the closests the Court has come. See also Merrill and Hickman, 89 Geo L J at 893 n 288 (cited in note 65).

[85] See, for example, *DuBois v United States Department of Agriculture*, 102 F3d 1273, 1285 n 15 (1st Cir 1996) (declining to apply *Chevron* to NEPA "because we [the court] are not reviewing an agency's interpretation of the statute that it was directed to enforce"). However, even here it is not clear shared jurisdiction is the appropriate framework for analysis. At least on the court's own terms, the correct parallel is whether the agency is one of several which enforces the statute. A somewhat stronger case is *Reporters Commn for Freedom of the Press v United States Dept of Justice*, 816 F2d 730, 734 (DC Cir 1987) ("[N]o one executive branch entity is entrusted with [FOIA's] primary interpretation"), revd on other grounds, 489 US 749 (1989).

[86] 939 F2d 1047 (DC Cir 1991).

[87] Id at 1051.

[88] See *Adams Fruit Co v Barrett*, 494 US 638 (1990) (stating that *Chevron* deference to anagency interpretation of a statute the agency did not administer would be inappropriate); *Crandon v United States*, 494 US 152 (1990) (Scalia, J, concurring) (rejecting *Chevron* deference because the statute in question was not administered by any agency but by the courts).

[89] 476 US 610 (1986).

head of an Executive Branch Agency . . . to promulgate regulations prohibiting discrimination against the handicapped."[90] Although the plurality overturned the regulations because they lacked a sufficient evidentiary basis, the plurality opinion also noted that where twenty-seven agencies had promulgated regulations forbidding discrimination on the basis of handicap under section 504's authority, "[t]here is thus not the same basis for deference predicated on expertise as we found [in *Chevron*]."[91]

In *Sutton v United Air Lines, Inc.*,[92] the Court emphasized that no agency was given authority to issue regulations for the applicable provisions of the Americans with Disabilities Act (ADA), even though multiple agencies clearly had authority to administer other portions of the ADA.[93] The Court chose to treat one portion of the statute as "administered by no agency" notwithstanding that the statute itself was administered by multiple agencies. Even the dissent would have given deference to the agency only because the term at issue—"disability"—was used both in the portion of the statute the Equal Employment Opportunity Commission (EEOC) administers and in the more general portion of the statute not solely administered by the EEOC.[94] *Sutton* might be treated as a case of ambiguously underlapping jurisdiction. Given uncertainty about whether agencies with some responsibility for some portion of the statute have law-interpreting authority for some other portion of the statute, the Court elected to inhibit the assertion of law-interpreting authority by the EEOC. The competing agents framework suggests this is a mistake. Ambiguously underlapping jurisdiction may facilitate competition between two agencies. Enacting judicial obstacles only undermines these goals.

*a. An Exclusive Jurisdiction Canon*

In many cases of concurrent jurisdiction, courts go to great length either to conclude that no agency was given law-interpreting authority (as above) or to conclude that *only one* agency was given law-interpreting authority. In so doing, the courts often

[90] Rehabilitation Act of 1973, Pub L No 93-113, 87 Stat 394, codifed as amended at 29 USC § 794 (1986). See also *Bowen*, 476 US at 642.
[91] Id at 643 n 30.
[92] 527 US 471 (1999).
[93] Id at 479.
[94] Id at 514–15 (Breyer, J, dissenting).

rely on what appears to be a *presumption of exclusive jurisdiction*. In effect, this presumption imposes an additional cost on Congress to use overlapping jurisdiction effectively to discipline agency behavior. For example, *California v Kleppe*[95] involved the question of whether EPA and the Secretary of Interior had concurrent jurisdiction over air quality on off-shore oil rigs. The Ninth Circuit concluded that there was no overlapping jurisdiction because such authority would "impair or frustrate the authority which [the statute] grants to the secretary."[96]

In *Martin v Occupational Safety & Health Review Commission*,[97] the Supreme Court was faced with a conflict between the Secretary of Labor and the Health Review Commission, both of whom have responsibility for implementing OSHA.[98] The Court rejected the Commission's interpretation, holding that the Secretary was the agency entitled to deference, not the Commission.[99] The Supreme Court appeared to rely on a presumption that Congress delegates law-interpreting or "force of law" authority to a single agency. This idea is even implicit in the way the Court phrased the issue presented: "[t]he question before us in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this 'interpretive' lawmaking power under the OSH Act."[100] Said the Court:

> Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.[101]

*ETSI Pipeline Project v Missouri*[102] is similar. The case involved a dispute over whether the Flood Control Act of 1944[103] created overlapping or exclusive agency jurisdiction.

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[95] 604 F2d 1187 (9th Cir 1979).
[96] Id at 1193–94. See also *Get Oil Out! Inc v Exxon Corp*, 586 F2d 726 (9th Cir 1978).
[97] 499 US 144 (1991).
[98] See generally Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 Ala L Rev 35 (1991); George Robert Johnson, *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin L Rev 315 (1987).
[99] *Martin*, 499 US at 150.
[100] Id at 151.
[101] Id at 153.
[102] 484 US 495 (1988). See also Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J L & Pub Policy 203, 246–47 (2004).
[103] Pub. L No 78-534, 58 Stat 887, codified as amended at 33 USC § 701 et seq (2000).

The Flood Control Act granted authority to the Federal Power Commission, the Department of Agriculture, the Department of Interior and the Secretary of War.[104] Both the Secretary of Interior and the Secretary of War asserted the authority to enter into contracts respecting use of certain reservoirs.[105] Writing for a unanimous court,[106] Justice White concluded that the plain language of the statute granted exclusive authority to the Secretary of War, rather than the Secretary of Interior who was claiming concurrent authority.

What might be inelegantly termed an *exclusive jurisdiction canon*[107] presumes that when Congress delegates power to the executive, it gives law-interpreting authority only to a single agency. Because *Mead* makes this inquiry the hurdle for *Chevron* deference, the presumption makes truly concurrent law-interpreting authority unlikely. It also reduces the effectiveness and increases the costs of using competing agents to control agency behavior. The presumption makes it more difficult for Congress to use regimes (3) or (4), and favors regimes (1) and (2).[108]

What explains the presumption of exclusive jurisdiction? Perhaps the presumption is a sub-set of democracy-reinforcing canons that sometimes manifest in the *Chevron* context.[109] Presuming that Congress does not give concurrent jurisdiction might facilitate greater democratic accountability because there is always one agency that has the authority to act with the force of law in a given policy domain. Citizens would know to whom to direct complaints and about whom to complain to Congress. Or the presumption might be taken to facilitate transparency. If the presumption merely requires that Congress speak clearly when delegating law-interpreting authority to multiple agencies, perhaps the clarity allows citizens to monitor Congress and reward or punish for the grant of concurrent jurisdiction accordingly.

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[104] Id.
[105] See *ETSI*, 484 US at 502–05. See 58 Stat at 890, 903–07.
[106] Justice Kennedy took no part in the consideration or decision.
[107] Weaver refers to a similar idea as "authority principles." See Weaver, 43 Ala L Rev at 38 (cited in note 98).
[108] This practice is not universal. Some courts grappling with potentially overlapping jurisdiction schemes have asserted that "when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect," *Pennsylvania v ICC*, 561 F2d 278, 292 (DC Cir 1977), at least where they do not create "conflicting or incompatible obligations." *Ken Roberts Co*, 276 F3d at 593.
[109] See Sunstein, 92 Va L Rev at 245 n 245 (cited in note 61).

These views are plausible, but ultimately not particularly persuasive. Private groups regularly monitor the actions of multiple agencies, and publication of agency actions in the Federal Register would seem to mitigate any ambiguity about which government agency is responsible for which policy. The complexity of statutory schemes may undermine transparency, but that problem is hardly unique to overlapping jurisdictional schemes.

The cases themselves seem to ground the presumption in the idea of agency expertise.[110] As between two agencies, courts should presume that Congress delegated law-interpreting authority to the more expert agency rather than the less expert agency.[111] In *Gonzales* itself, one reason the majority did not defer to the Attorney General's interpretation was that the Attorney General lacked the relevant expertise. The majority concluded the Secretary of Health and Human Services was given exclusive interpretive authority regarding health and medical practices.

When one agency has greater expertise than another agency, it is not ludicrous to suggest courts should defer to the more expert one. But as noted above, this view of expertise is too static and exogenous. If concurrent jurisdictional schemes facilitate the development of agency expertise, then the exclusive jurisdiction presumption undermines the precise goal the presumption is supposed to serve.

*b. Step Zero Canons*

Suppose the exclusive jurisdiction presumption were embraced. If the presumption is like a substantive canon, it raises an ongoing debate about when to apply substantive canons in the *Chevron* regime.[112] Take for example, the canon of constitutional avoidance.[113] The canon might be applied at Step One of *Chevron*. If a statute allows for two interpretations, one of which raises a constitutional question, courts will generally adopt the interpretation that avoids the constitutional question. If only one plausible interpretation of the statute remains after applying the canon, then the statute is

[110] See, for example, *Gonzales*, 126 S Ct at 937 (Scalia, J, dissenting).
[111] See *Martin*, 499 US at 153.
[112] See generally Sunstein, 67 U Chi L Rev 315 (cited in note 2).
[113] Id.

clear and unambiguous, and the case is resolved at Step One.[114] The constitutional avoidance idea could theoretically be invoked at Step Two as well, although courts rarely do so. Even if the text of the statute does not unambiguously preclude the interpretation (Step One), the interpretation is unreasonable because it is arguably unconstitutional. Historically, the major alternative was to treat certain substantive canons as *Chevron* trumps.[115] In the context of avoidance, courts should not defer at all to agencies when agencies advance interpretations that raise constitutional questions. Substantive canons displace *Chevron* entirely.

This was the pre-*Mead* thinking. However, *Mead* provides a structure for this analysis. Like other substantive canons, the presumption of exclusive jurisdiction is best conceived as part of a growing number of Step Zero Canons. Consider the presumption that Congress does not delegate "major questions"[116] to agencies, and therefore no *Chevron* deference should be given on such matters.[117] As long as the goal of Step Zero is to ascertain whether Congress would want courts to defer to agencies on the particular interpretation of the particular statute, then the exclusive jurisdiction presumption fits most naturally at Step Zero. If Congress is presumed not to give law-interpreting authority to multiple agencies, applying the presumption at Step Zero should end the matter. No deference is warranted.

Although the presumption fits naturally at Step Zero, the competing agents framework suggests it is also wrong. The presumption undermines a potentially important set of mechanisms with which Congress creates desirable incentives for agencies. If the competing agents framework constrains the behavior of agencies, aligning outcomes more closely with the preferences of Congress, then it the presumption of exclusive jurisdiction is democracy-undermining rather than democracy-reinforcing.

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[114] See, for example, *Edward J. DeBartolo Corp v Florida Gulf Coast Bldg & Constr Trades Council*, 485 US 568, 574–75 (1988); *Chamber of Commerce v FEC*, 69 F3d 600, 605 (DC Cir 1995).

[115] See Mendelson, 102 Mich L Rev at 746–47 (cited in note 13); Sunstein, 90 Colum L Rev 2071 (cited in note 6).

[116] Sunstein, 92 Va L Rev at 243–44 (cited in note 61) (discussing the possibility of reading *MCI* and *Brown & Williamson* as Step Zero cases, but ultimately concluding they are best read as Step One cases).

[117] See *Walton*, 536 US 212; *Mead*, 533 US 218; *Christensen*, 529 US 576.

How ought these cases to be analyzed? A tentative suggestion is as follows.[118] First, courts should hesitate declining to defer to agency interpretations of either general statutes or statutory provisions that the agency does not clearly administer. Either of these scenarios might involve jurisdictional underlap and Congress might well prefer that ambitious agencies be rewarded for developing expertise and asserting an interpretation of a statutory term not clearly within their jurisdiction.

For so-called joint-enforcement statutes that call on one agency to promulgate regulations and another to enforce the statute via adjudications, courts should give deference to both agencies, at least absent an affirmative conflict between the two.[119] If overlapping jurisdiction helps incentivise agencies, then failing to give reward expertise by giving deference frustrates Congressional goals. Moreover, the touchstone of *Chevron* is whether Congress has delegated the agency "the power to act with the force of law."[120] Both rulemaking and formal adjudicatory powers confer such authority, therefore the (not quite) necessary and (usually) sufficient condition for deference is met. The mere fact that Congress has distributed lawmaking authority to several agencies does not imply that Congress would not want courts to defer to agency interpretations of statutory ambiguity,[121] and the competing agents framework provides an affirmative reason why Congress would want courts to do so.[122]

The competing agents theory of overlapping and underlapping jurisdiction suggests that the exclusive jurisdiction idea is a mistake, and that more disputes about the meaning of concurrent jurisdiction statutes should proceed past Step Zero. The proposal,

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[118] Compare Merrill and Hickman, 89 Geo L J at 893–99 (cited in note 65).

[119] See id at 894. Consider the Occupational Safety and Health Act, the Mine Safety and Health Act and the Longshore and Habor Workers' Compensation Act, discussed therein.

[120] See Merrill and Hickman, 89 Geo L J at 895 (cited in note 65).

[121] See id at 893–99.

[122] This disagreement aside, it seems clear that the lower courts have trended away from this preferred position. For example, in *Rapaport v Office of Thrift Supervision*, 59 F3d 212 (DC Cir 1995), the DC Circuit refused to give deference to a statutory interpretation by the Office of Thrift Supervision because "that agency [OTS] shares responsibility for the administration of the statute with at least three other agencies." Id at 216. As a matter of circuit law, this is simply a mistake. The Court relied on *Wachtel v Office of Thrift Supervision*, 982 F2d 581 (DC Cir 1993), where the court, in dicta, suggested deference might not apply in such settings. Id at 585. *Wachtel*, in turn, relied on *Professional Reactor Operator Society*, 939 F2d 1047. But the court simply referred to language of the Supreme Court indicating that where an agency interprets a statute that it does not administer, no deference is warranted. Id at 1052, citing *Chevron*, 467 US 837; *Adams Fruit Co*, 494 US 638; and *Crandon*, 494 US 152 (Scalia, J, concurring).

however, might generate at least two problems, the possibility of inconsistent interpretations of a statute and a race to the courthouse steps.[123] Said one court, "[giving deference] would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all."[124]

Even if superficially unseemly, there is nothing inherently troubling about a statutory term having different meanings in different policy spheres. *Chevron* is supposed to open up policy discretion for agencies that have significant expertise in the fields they regulate. When a single agency administers a statute that uses the same term in different parts of the statute, the term may be defined differently so long as there is a sufficient justification for doing so.[125] Similarly, a single agency is free to offer two different interpretations of a statutory term in two different time periods so long as adequate justification is given for the difference.[126] That two agencies regulating different fields would offer different interpretations is no more objectionable.[127] Alternatively, where one agency has rulemaking authority and another concomitant adjudication authority, courts could defer to either if no conflict exists or to the agency with rulemaking authority if a conflict does exist.[128]

The race to the courthouse steps may have been a genuine problem at one point. But the ideas embraced by *National Cable & Telecommunications Association v Brand X Internet Service*[129] suggests this is no longer a significant concern. In *Brand X*, the Court clarified the relationship between a prior judicial interpretation of a statute and an agency's subsequent and different interpretation of the same term.[130] The *Brand X* majority held that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision

[123] See *Rapaport*, 59 F3d at 216–17.
[124] Id at 216–17.
[125] See *Environmental Defense v Duke Energy Corp*, 2007 US LEXIS 3784 (2007); *K Mart*, 486 US at 293 n 4.
[126] See, for example, *Chevron*, 467 US 837.
[127] Unless of course the same parties are being regulated and the two interpretations are mutually inconsistent.
[128] See Merrill and Hickman, 89 Geo L J at 894–95 (cited in note 65).
[129] 545 US 967 (2005).
[130] For a proposal to address sequencing problems like this, see generally Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 NYU L Rev 1272 (2002).

holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[131] Put differently, when a court rejects an agency position because the statute unambiguously requires the interpretation the court adopted, the agency may not later adopt a different position. When a court acknowledges statutory ambiguity, the agency maintains the flexibility to pick new interpretations in the future[132]—in effect picking an interpretation different from the one the prior court thought best.[133] When a court finds that a statute requires a given interpretation, the agency is bound; when a court finds merely that an agency position is permitted, the agency is not.

*Brand X* clarifies that first in time need not imply first in right with respect to statutory interpretation. One agency's interpretation upheld by the courts in one time period need only bind other agency interpretations if the interpretation is required by the statute (Step One) rather than merely permitted (Step Two). If the case is resolved at Step One, the same result would be required no matter which agency litigated the issue and with or without a deference regime. If not, both agencies would remain free to adopt alternative interpretations in the future, irrespective of which agency first breached the courthouse door. Like *Chevron* itself, *Brand X* is flexibility preserving, and deference to agency interpretations of overlapping jurisdiction statutes is perfectly in keeping with that impulse.[134]

### *3. Chevron, Federalism, and Preemption*

Although much of the analysis thus far has focused on overlapping and underlapping jurisdiction schemes involving multiple federal agencies, variants of the same issues arise in the context of overlapping or underlapping jurisdiction between federal agencies and state authorities. The CSA allocates authority to multiple federal

[131] *Brand X*, 545 US at 982.
[132] Id at 983.
[133] See id at 1013–14 (Scalia, J, dissenting).
[134] See also Merrill and Hickman, 89 Geo L J at 894–95 (cited in note 65).

agencies and to state authorities, and therefore *Gonzales* implicates not only the courts' shared jurisdiction cases, but also the intersection of *Chevron* and preemption doctrine.[135]

*a. Background*

The history and desirability of preemption doctrine generally has been well canvassed elsewhere.[136] As to conflict preemption, federal requirements preempt state requirements either if compliance with both is impossible,[137] or if the state requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[138] As to field preemption, a state requirement is preempted if the "scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[139] The presumption against preemption articulated in *Rice v Santa Fe Elevator Corp*,[140] serves as strong to intermediate weight against preemption: Congress must speak with clarity to preempt state law,[141] but congressional intent determines preemptive effect.[142]

The intersection of administrative law with preemption analysis creates an added layer of complexity. As between a valid federal regulation implementing a statute and an actually conflicting state policy, the federal rule would preempt state law.[143] Where there

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[135] For general treatments, see Mendelson, 102 Mich L Rev 740 (cited in note 13); Peter J. Smith, Pennhurst, Chevron, *and the Spending Power*, 110 Yale L J 1187 (2001); Sunstein, 67 U Chi L Rev 315 (cited in note 2); Jack W. Campbell IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U Pitt L Rev 805 (1998); Damien Marshall, Note, *The Application of* Chevron *Deference in Regulatory Preemption Cases*, 87 Geo L J 263 (1998); Howard P. Walthall, Jr., Comment, Chevron *v. Federalism: A Reassessment of Deference to Administrative Preemption*, 28 Cumb L Rev 715 (1997); Paula A. Sinozich et al, *The Role of Preemption in Administrative Law*, 45 Admin L Rev 107 (1993); Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law*, 46 U Pitt L Rev 607 (1985). The preemption literature is, of course, expansive. See, for example, Caleb Nelson, *Preemption*, 86 Va L Rev 225 (2000); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo L J 2085 (2000); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich L Rev 813 (1998).

[136] Consider Nelson, 86 Va L Rev 225 (cited in note 135).

[137] See *Florida Lime & Avocado Growers, Inc v Paul*, 373 US 132, 142–43 (1963).

[138] *Hines v Davidowitz*, 312 US 52, 67 (1941).

[139] *Medtronic*, *Inc v Lohr*, 518 US 470, 508 (1996) (Breyer, J, concurring in part), quoting *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947).

[140] 331 US 218 (1947).

[141] See Id.

[142] See *Medtronic*, 518 US at 485.

[143] See, for example, *Geier v American Honda Motor Co*, 529 US 861 (2000); *Norfolk Southern Railway v Shanklin*, 529 US 347 (2000); *United States v Locke*, 529 US 89 (2000); *Smiley*, 517 US 735; *Medtronic*, 518 US 470; *City of New York v FCC*, 486 US 57 (1988). See generally Richard Pierce, 1 *Administrative Law Treatise* § 3.5 (Aspen 4th ed 2002).

is uncertainty about either the scope of federal agency's authority,[144] the validity of the agency's statutory interpretation, the meaning of the agency regulation that could have preemptive effect, or whether the agency regulation creates a genuine conflict with state law,[145] courts must decide whether to defer to agency judgments.

The courts' analysis of *Chevron* and regulatory preemption has been somewhat uneven, and is at the center of *Watters v Wachovia Bank, NA,*[146] a Supreme Court case to be decided during the October 2006 Term. But in the past several decades the Court has tended to uphold, if not defer to, agency views that bear on preemption questions. For example, in *Smiley v Citibank*,[147] a unanimous Court cited *Chevron* in upholding an agency interpretation of the statutory term "interest" that had the effect of preempting usury laws in most states.[148] However, in *Medtronic, Inc v Lohr*,[149] the Supreme Court gave only "substantial weight" to an FDA determination that the Medical Devices Act preempted state common law claims,[150] while not technically deferring to the regulation.[151] In concurrence, Justice Breyer seemed to ground his agreement in concerns other than the mere fact of statutory ambiguity and implicit Congressional delegation that underlie *Chevron*.[152] Elsewhere, the Court has treated agency views regarding preemption

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[144] See Mendelson, 102 Mich L Rev at 738 (cited in note 13).

[145] When a federal agency acts within the scope of delegated power it can preempt state and local regulations. *City of New York*, 486 US at 64.

[146] No. 05-1342, cert. granted, 126 S Ct 2900 (2006). The question in *Watters* is whether an interpretation of the Comptroller of the Currency of the National Bank Act that has the effect of preempting Michigan's laws is entitled to *Chevron* deference.

[147] 517 US 735 (1996).

[148] In the lower courts, *Chevron* deference is sometimes applied, see, for example, *Center for Legal Advocacy v Hammons*, 323 F3d 1262 (9th Cir 2003) (applying *Chevron* framework, but rejecting agency view), and sometimes not, see, for example, *Massachusetts Association of HMO's v Ruthardt*, 194 F3d 176 (1st Cir 1999) (independent evaluation of statute's effect).

[149] 518 US 470.

[150] Id at 496. See also *Smiley*, 517 US at 739–41; *Lawrence County v Lead-Deadwood School District No 40-1*, 469 US 256, 261–262 (1985) (substantially deferring to Interior Department finding of preemption of state law); *Hillsborough County v Automated Medical Labs, Inc*, 471 US 707, 714 (1985) ("The FDA's statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent.").

[151] See *Medtronic*, 518 US at 512 (O'Connor, J, dissenting in part) ("Apparently recognizing that *Chevron* deference is unwarranted here, the Court does not admit to deferring to these regulations, but merely permits them to 'inform' the Court's interpretation."). Justice O'Connor went on to note that it "is not certain that an agency regulation determining the preemptive effect of *any* federal statute is entitled to deference." Id (emphasis in original).

[152] Id at 506 (Breyer, J, concurring in part) ("To draw a similar inference [in favor of deference] here makes sense, and not simply because of the statutory ambiguity. The Food and Drug Administration (FDA) is fully responsible for administering the MDA. That responsibility means informed agency involvement and,

as entitled to some though not dispositive weight.[153] Nonetheless, if a federal agency has clear statutory authority to preempt state law via regulations, the federal rule is supreme so long as properly promulgated.[154] As a result, underlying disputes in litigation are largely about statutory authority and regulatory effects.[155]

The commentary is somewhat divided about whether deference is owed to agency views that bear on preemption.[156] The standard reasons for not giving *Chevron* deference are several. First, some scholars have taken the view that *Chevron* deference is inappropriate because of a mismatch in institutional competence and democratic structure.[157] If deference is given to agency judgments about preemption, questions bearing on "state interests" would be resolved by agencies rather than Congress. Because the representational structure of Congress is allegedly more attuned to state interests than are agencies controlled by the executive,[158] agencies should be prevented from making preemption determinations. The executive branch is sometimes said to be more likely to represent national interests whereas Congress is more likely to represent state or regional interests.[159] The weakness in this view is that it both overstates the protections inherent in Congress and understates the ability of Congress to protect state sovereignty interests against invasion by agencies. Agency organic statues are crafted by Congress, and to the

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therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives. The FDA can translate these understandings into particularized pre-emptive intentions accompanying its various rules and regulations.") (internal citations omitted).

[153] Consider *Geier*, 529 US at 883 ("We place some weight upon DOT's interpretation of [the statute's] objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives.") (internal quotation marks omitted).

[154] See id at 883; *United States v Shimer*, 367 US 374, 382 (1961). See also *City of New York*, 486 US at 64.

[155] See generally Paul A. McGreal, *Some Rice with Your* Chevron*?: Presumption and Deference in Regulatory Preemption*, 45 Case W Res L Rev 863, 866 (1995).

[156] Compare Mendelson, 102 Mich L Rev 740 (cited in note 13) (no deference); Dinh, 88 Geo L J at 2087 (cited in note 135) (same); Campbell, 59 U Pitt L Rev at 832 (cited in note 135) (no deference); with Pierce, 1 Administrative Law Treatise § 3.5 (cited in note 143) (yes deference); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex L Rev 1321, 1425 (2001) (deference to agencies' finding of preemption threatens federalism); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 BU L Rev 685 (1991) (criticizing deference to agencies' findings of preemption as threat to meaningful local governance); Marshall, 87 Geo L J 263 (cited in note 135) (deference inappropriate because agencies lack political accountability).

[157] See, for example, Campbell, 59 U Pitt L Rev at 832 (cited in note 135).

[158] See id. See also Sunstein, 67 U Chi L Rev at 331 (cited in note 2).

[159] See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543 (1954).

extent that Congress wants to protect state interests, it can do so through the standard mix of ex ante and ex post constraints. Indeed, jurisdictional boundaries are one mechanism for doing so.

A second justification for the "no deference to agency views on preemption" position is grounded in expertise. Agencies might lack expertise with respect to the distribution of overall government authority, and "the intrinsic value of preserving core state regulatory authority."[160] But to the extent that federal jurisdiction is overlapping with state authorities, this expertise might easily develop over time. In the CSA context, there were repeated interactions between Oregon and federal authorities. It could be that Attorney General Reno's decision not to preempt Oregon law was too attuned to state interests, or that the later Ashcroft decision to preempt the state law was insufficiently respectful of those interests, but there is little in the case itself to suggest a uniform bias in favor of preemption and against the preservation of statute authority.

A third commonly cited reason for not giving deference to agency statutory interpretations that displace state law is that the agency is effectively interpreting the scope of its own jurisdiction. Some commentary argues that granting deference on preemption-related questions would increase the risk that agencies would inappropriately expand their own authority at the expense of the states.[161] Notwithstanding several opportunities to do so, the Supreme Court has not offered a definitive answer about whether there is a "scope of jurisdiction" exception to *Chevron*.[162]

Both before and after *Chevron*, some authority suggested courts owe no deference when an agency interprets its own jurisdiction.[163] Others, led by Justice Scalia, urged that interpretive questions about jurisdiction are no different from other interpretive questions; often it is impossible to distinguish jurisdictional questions from non-jurisdictional ones.[164] When the FDA concludes tobacco is a drug and the agency's organic statute

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[160] Mendelson, 102 Mich L Rev at 741–42 (cited in note 13). Mendelson also argues that giving deference to agency views on preemption might result in inadequately constrained decision-making processes. Id.
[161] See id at 740.
[162] See Merrill and Hickman, 89 Geo L J 833 at 844 n 54 (cited in note 65); Sunstein, 90 Colum L Rev at 2097 (cited in note 6).
[163] See *Dole v United Steelworkers*, 494 US 26, 43 (1990) (White, J, dissenting); *Social Security Board v Nieretko*, 327 US 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power.").
[164] See *Mississippi Power & Light Co*, 487 US at 381–82 (1988) (Scalia, J, concurring).

grants the FDA jurisdiction to regulate drugs, is the initial determination jurisdictional or not? The lower courts are divided as well,[165] but in shared jurisdiction schemes, the no deference view tends to predominates.[166]

The counterpoint on deference to jurisdictional decisions was articulated some years ago by Justice Brennan: one reason deference is owed to agency interpretations is that Congress has "entrusted" the agency with administering the statute.[167] If *Chevron* rests on an implicit delegation of law-interpreting authority, perhaps it is awkward to infer that Congress intended agencies to define the scope of their own power, authority, or jurisdiction.[168] Any alternative view would be inconsistent with at least some strains of Anglo-American law.[169]

Still, if there were no risk of bias or self-interested agency behavior, Congress might prefer to entrust agencies with the task of determining the scope of their own jurisdiction.[170] And even if agencies might act in their narrow self-interest, there is a tradeoff between expertise and accountability on the one hand and the risk of self-interested action on the other. These problems are not unique to jurisdictional judgments.[171]

Ultimately, the no deference to jurisdictional judgments view rests on unproven background assumptions about the behavior of administrative agencies. The running

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[165] Compare *Air Courier v United States Postal Service*, 959 F2d 1223, 1225 (3d Cir 1992) (Becker, J, concurring) (deference to jurisdictional questions should be limited), with *Oklahoma National Gas Co v FERC*, 28 F3d 1281, 1283–84 (DC Cir 1994) (deference to jurisdictional judgments appropriate).

[166] *Collins v NTSB*, 351 F3d 1246, 1252–53 (DC Cir 2003) (no deference to jurisdictional determination when statute is implemented by multiple agencies); *Rapaport*, 59 F3d at 216 (same); *Wachtel*, 982 F2d at 585 (same); *ACLU v FCC*, 823 F2d 1554, 1567 n 32 (DC Cir 1987) ("highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.").

[167] *Mississippi Power & Light Co*, 487 US at 386.

[168] See Merrill and Hickman, 89 Geo L J at 910 (cited in note 65); Sunstein, 90 Colum L Rev at 2099 (cited in note 6) ("Because congressional instructions are crucial here, courts should probably refuse to defer to agency decisions with respect to issues of jurisdiction—again, if we assume that the distinction between jurisdictional and nonjurisdictional questions is easily administrable.").

[169] See Sunstein, 90 Colum L Rev at 2097 (cited in note 6).

[170] See generally Armstrong, 13 Cornell J L & Pub Policy 203 (cited in note 102).

[171] See Sunstein, 90 Colum L Rev at 2100–2101 (cited in note 6). See also Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U Chi L Rev 957, 969–70 (1994).

theme (with few exceptions[172]) is agency over-reaching. Agencies might maximize jurisdiction, but they may also maximize budgets or autonomy.[173] Agencies may overreach, but they often underreach as well, and there is no reason to be systematically more concerned with overreaching than underreaching[174] More to the point, if agencies prefer more authority, then overlapping and underlapping jurisdictional schemes make use of this tendency, generating desirable incentives for agency behavior rather than resisting institutional inclinations.

*b. Preemption at Step Zero*

When state interests are not at issue, the competing agents framework suggests courts should defer to agency views of statutes more often than current doctrine does. However, when a statute uses overlapping or underlapping jurisdiction to allocate authority between federal and state actors, things are somewhat more complicated. Like the generic shared jurisdiction deference question, the agency preemption question is properly analyzed at Step Zero. Should Congress be taken to have implicitly delegated law-interpreting authority to an agency with respect to statutory interpretations implicating preemption? The answer to that question will depends on the structure of the specific statutory scheme, but again, the overlap-underlap framework emphasizes a set of relevant variables that is both important and often overlooked.

Deferring to the agency's view on preemption issues may undermine the use of the competing agents framework because the views of the state actor (one of the agents) are jettisoned. In essence, one of the two competing agents would be given authority to end unilaterally the regulatory competition that the statute establishes. If so, then the competing agents framework suggests an alternative reason for not deferring to agency views that have preemptive effects, without invoking the questionable argument that

[172] See id at 2100 ("It should follow that agencies will not receive deference when they are denying their authority to deal with a large category of cases.").

[173] See, for example, William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36–42 (Aldine, Atherton 1971). See also Wilson, *Bureaucracy* at 118–19 (cited in note 49); Anthony Downs, *Inside Bureaucracy* 26 (Little, Brown 1989).

[174] In practice, it may be exceedingly difficult to distinguish these two factors. For example, was the EPA's decision not to regulate greenhouse gases during the second Bush administration a function of politics, expertise, or both? See *Massachusetts*, 415 F3d 50, cert granted, 126 S Ct 2960 (2006). See also Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv L Rev 915, 935 (2006).

courts should not defer to agencies' determinations of their own jurisdiction or dubious assumptions about agency interests and the political process.

This conclusion is not especially strong, however, and it should yield in the face of contrary considerations. Another way of stating the point is that when a statute shares jurisdiction between federal agencies and state authorities, there is no potential for genuine jurisdictional underlap. Either the state has authority or the federal agency does. Giving deference to agency views would provide an additional incentive for federal agencies to develop expertise, enter the field, and assert jurisdiction. But because judicial deference to agency views would also short-circuit the regulatory competition, the argument against implicit Congressional delegation and therefore *Chevron* deference is weaker. This conclusion is admittedly tentative, but note that it is perfectly in keeping with the *Rice* presumption, even though it derives from a somewhat different intuition. The problem is not preserving state authority against federal intrusion, but supporting a set of mechanisms that Congress might use to generate incentives for other governmental units.

Another alternative would be to aggressively review agency determinations in favor of preemption, but to readily defer to agency views concluding no preemption.[175] This would be more supportive of competing agents regimes, but awkward in the implicit delegation framework. Would Congress delegate the authority to interpret decisions that reach outcome X, but not outcome Y? Perhaps, but there is little in existing doctrine to provide a rigorous conceptual foundation for this idea.

Lastly, note that "dual federalism,"[176] which relies on the notions of "mutually exclusive" spheres of state and federal authority to support dual sovereigns[177] can be understood as a variation on the theme of the exclusive jurisdiction canon. In federalism

[175] This regime has been proposed to address agency bias or overreaching as well. See Walthall, 28 Cumb L Rev at 754–58 (cited in note 135).
[176] Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va L Rev 1 (1950).
[177] See generally Martin H. Redish, *The Constitution As Political Structure* 26 (Oxford 1995); Alpheus Thomas Mason, *The Role of the Court*, in Valerie A. Earle, ed, *Federalism: Infinite Variety in Theory and Practice* 8, 24–25 (F.E. Peacock 1968). For an overview and discussion in the context of foreign affairs, see Ernest Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 Geo Wash L Rev 139, 143 (2001). See also Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485 (1994).

jurisprudence, the trend has been away from efforts to enforce mutually exclusive spheres of authority and toward concurrent jurisdiction,[178] a shift that is perfectly in keeping with the competing agents framework. This trend in federalism jurisprudence toward concurrent rather than exclusive jurisdictional schemes mirrors the proposed shift towards supporting concurrent jurisdiction for federal agencies.

## III. GONZALES V OREGON

*Gonzales v Oregon* involved the interpretation of a statute that shared jurisdiction and authority horizontally between multiple federal agencies and vertically between federal agencies and state government authorities. The precise contours of any overlapping or underlapping jurisdiction were ambiguous. Accordingly, the Attorney General's authority to displace Oregon's statute was contested, as was the question whether the Attorney General should receive deference for his view.

The 1971 Rule required that every prescription for a controlled substance be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.[179] The 1971 Rule was not challenged in *Gonzales*. Rather, at issue was the validity of the Attorney General's 2001 Interpretive Rule, which interpreted the 1971 Rule, concluding that using controlled substances to assist suicide is not a "legitimate medical practice"[180] as that term is used in the 1971 Rule, and that therefore the CSA prohibits dispensing or prescribing drugs for that purpose.[181]

It is not hard to imagine a world in which *Gonzales* is an easy case. Indeed, perhaps it is Justice Scalia's world. Justice Scalia contended that the case involved three sufficient reasons to uphold the Attorney General's interpretation.[182] As an interpretation of an agency's own regulation, the Interpretive Rule might have been given the high level of deference that an agency's interpretation of its own rules receives under *Auer v*

[178] See Young, 69 Geo Wash L Rev at 143–45 (cited in note 177).
[179] 21 CFR §1306.04(a), 36 Fed Reg 7799 (Apr 24, 1971), redesignated at 38 Fed Reg 26609 (Sept 24, 1973), and amended at 39 Fed Reg 37986 (Oct 25, 1974).
[180] 21 CFR § 1306.04.
[181] 66 Fed Reg 56607 (Nov 9, 2001).
[182] *Gonzales v Oregon*, 126 S Ct 904, 926 (2006) (Scalia, J, dissenting). Justice Scalia concluded the Attorney General's interpretation should have been upheld either as a de novo interpretation, or the agency's interpretation of a statute reviewed deferentially it the *Chevron* framework, or the agency's interpretation of its own regulation reviewed even more deferentially in the *Auer* framework.

*Robbins*.[183] Under *Auer*, an agency's interpretations of its own regulations are controlling unless "plainly erroneous or inconsistent with the regulation."[184]

The majority thought *Auer* deference inappropriate, because the Attorney General's Interpretive Rule did "little more than restate the terms of the statute itself."[185] This setting, the majority said, was unlike *Auer*, where the interpretation offered by the Secretary of Labor (of regulations exempting certain law enforcement officers from the Fair Labor Standards Act of 1938) gave specificity to a general statutory command. As the majority concluded, an agency may not receive *Auer* deference merely by restating the terms of the statute in a regulation and then subsequently purporting to interpret the regulation.[186] "[T]he language the Interpretive Rule addresses comes from Congress, not the Attorney General," the Court said, and "the near-equivalence of the statute and regulation belies the Government's argument for *Auer* deference."[187] Within the *Auer* framework, the Interpretive Rule would very likely have been upheld.

What of *Chevron* deference for the Interpretive Rule? To start with, the majority conceded that, once within the *Chevron* framework, Step One of *Chevron* would be satisfied: "All would agree, we should think, that the statutory phrase 'legitimate medical purpose' is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense."[188] The majority continued:

> *Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.[189]

Enter Step Zero.

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[183] Id at 927.
[184] *Auer v Robbins*, 519 US 452, 461 (1997). See also *Bowles v Seminole Rock & Sand Co*, 325 US 410, 414 (1945).
[185] *Gonzales,* 126 S Ct at 915.
[186] Id at 916.
[187] Id at 915.
[188] Id at 916.
[189] Id, citing *United States v Mead Corp*, 533 US 218, 226–27 (2001).

A. Step Zero and Switched Presumptions

For many years, *Chevron* was taken to be a global presumption in favor of judicial deference to agencies. In the face of statutory silence or ambiguity, judges would defer to agencies on matters of statutory interpretation. In the aftermath of *Mead*, the direction of this presumption may be shifting. Courts apparently will not defer to agency interpretations of statutes absent some affirmative indication that Congress delegated law-interpreting authority.

In *Gonzales*, the Court first asserted that the Step Zero hurdle is cleared if "the statute gives an agency broad power to enforce all provisions of the statute."[190] However, where the specific delegation provision fails to grant such broad authority to the agency, more analysis is required. Importantly, in overlapping jurisdiction statutes, this generally sufficient condition for *Chevron* deference will almost never be met unless authority is completely overlapping. This reading of *Mead* amounts to a bias against concurrent regulatory authority in the *Chevron* framework. The majority concluded that the CSA delegates to the Attorney General only "limited powers, to be exercised in specific ways"[191] rather than the sufficient general authority. Because the CSA gives the Attorney General the authority to make rules and regulations to carry out "registration and control" and for the "efficient execution of his functions," the majority concluded that the Attorney General does not have general "force of law" authority to implement the entire statute.[192] The Interpretive Rule could pass muster under Step Zero only if it was related to one of the two explicit delegation provisions, and the majority thought it inadequately tethered to either. In essence, the Court concluded that the statute does not create

[190] *Gonzales*, 126 S Ct at 916 (emphasis added). See also *National Cable & Telecommunications Assn v Brand X Internet Servs*, 545 US 967, 980 (2004) (finding *Chevron* deference appropriate to an FCC regulation because Congress delegated authority to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act); *Household Credit Services, Inc v Pfennig*, 541 US 232, 238 (2004) (deferring under *Chevron* doctrine to Federal Reserve board regulation because Congress delegated authority to make regulations as necessary or proper to effectuate the purposes of the statute).

[191] *Gonzales*, 126 S Ct at 917.

[192] For example, section 821 gives the Attorney General authority "to promulgate rules and regulations and to charge reasonable fees relating to the *registration* and *control* of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals." 21 USC § 821 (2006) (emphasis added). Section 871(b) gives the Attorney General authority "to promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter." 21 USC § 871(b) (2006).

overlapping interpretive authority between the Attorney General and the Secretary on medical matters.[193] The Interpretive Rule was not issued via notice and comment rulemaking, as required for rules promulgated under the relevant section.[194] And the majority concluded that the Interpretive Rule could not be "justified" under the registration portion of the statute because it failed to undertake the five factor analysis required of such rules[195] and concerned more than just registration.[196]

Because dispensing controlled substances without being registered to do so is a crime,[197] the majority concluded that the Interpretive Rule "purports to declare that using controlled substances for physician-assisted suicide is a crime, an authority that goes well beyond the Attorney General's statutory power to register or deregister."[198] This would be "extraordinary authority." This part of the opinion connotes a series of cases in which the Court declined to give deference to agencies on "major questions."[199] These cases

[193] With respect to the control provision, the Attorney General can make regulations for the "control" of drugs, but control is defined for purposes of the subchapter: "The term 'control' means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise." See 21 USC § 802(5) (2006). To exercise this scheduling authority the Attorney General must follow a set of procedures that include requesting a scientific and medical evaluation from the Secretary of Health and Human Services. 21 USC § 811 (2006). Because the Interpretive Rule was not issued via notice and comment rulemaking, as required for rules promulgated under the relevant section, and because it did not follow the specified procedures of consultation, the majority thought the control provision clearly inadequate to support the rule. Section 821 is in subchapter C rather than subchapter B, which is guided by the statutory definition the majority cites. Subchapter C relates to registration of manufacturers, distributors, and dispensers of controlled substances. Subchapter B relates to scheduling. These are technical debates about the reach of statutory definitions, which need not be definitively resolved here.

[194] This is a readily contestable point. Interpretive rules are excepted from notice and comment requirements of the APA, and so long as an interpretive rule interprets a validly issued regulation, it would be perfectly valid (authorized). To say the least, the Court's reading of "control" is far from obvious, or as Justice Scalia urged "manifestly erroneous." *Gonzales*, 126 S Ct at 929.

[195] See 21 USC § 823(f) (2006):

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.
>
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
>
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
>
> (5) Such other conduct which may threaten the public health and safety.

[196] *Gonzales*, 126 S Ct at 918.

[197] 21 USC § 841 (2006).

[198] *Gonzales*, 126 S Ct at 918.

[199] Sunstein, 92 Va L Rev at 243–44 (cited in note 61).

were decided before *Mead*, and *Gonzales* indicates that the "major questions" exception fits neatly into the Step Zero analytic.

Each of these interpretive moves is an attempt to narrowly define the scope of the Attorney General's authority in the CSA.[200] By tracing law-interpreting authority to very specific statutory provisions, the majority effectively shrank the agency's jurisdiction and the potential law-interpreting authority associated therewith. The narrower the Attorney General's statutory jurisdiction gets, the less plausible the inference that Congress implicitly delegated law-interpreting authority that would warrant judicial deference.[201]

The Court made a number of arguments that clearly implicate the overlapping and underlapping jurisdiction analysis. First, the Court reasoned that it would not interpret ambiguous general authority broadly in the face of specific and prescribed grants of authority.[202] Given the alleged breadth of the authority claimed by the Attorney General, and the silence or ambiguity of the CSA, the statute was best read to preclude *Chevron* deference because Congress does not confer broad authority through an implicit delegation.[203] Justice Scalia disagreed. By giving the Attorney General sole and explicit charge for administering the registration and deregistration provisions, Congress "implicitly (but clearly) gave the Attorney General authority to interpret those criteria—*whether or not* there is any explicit delegation provision in the statute."[204] After all, *Chevron* itself was a case of implicit delegation.[205] The majority read the alleged statutory ambiguity to create exclusive jurisdictional assignments, while Justice Scalia would have interpreted the statute to create concurrent law-interpreting authority.[206]

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[200] Prior to 1984, the Attorney General's registration authority was limited, allowing for deregistration only for a false application, felony conviction, or State denial of license; the Attorney General was required to register any physician authorized by the State. *Gonzales*, 126 S Ct at 917; Pub L No 91-513, 84 Stat 1253 (1970), codified at 21 USC § 301 et seq (1976). After the 1984 Amendments, the Attorney General could also deny or revoke registration if such registration is found to be "inconsistent with the public interest." 21 USC §§ 823(f), 824(a) (2006).

[201] Moreover, the 1971 Rule that the 2001 Interpretive Rule purported to interpret was issued prior to the 1984 Amendments, which the majority took as further evidence that the Attorney General lacked authority.

[202] See *Gonzales*, 126 S Ct at 918, citing *Federal Maritime Commission v Seatrain Lines, Inc*, 411 US 726, 744 (1973). *Seatrain Lines* reasoned that ambiguous provisions would not be read to extend agency authority in light of specific grants.

[203] See *Gonzales*, 126 S Ct at 921–22.

[204] Id at 936 (Scalia, J, dissenting) (emphasis in original).

[205] *Chevron USA, Inc v Natural Resources Defense Council*, 467 US 837, 844 (1984).

[206] Justice Scalia reasoned that because § 821 gives the Attorney General authority to promulgate rules and regulations relating to the registration and control of the manufacturing, distribution, and dispensing of

Given the mix of explicit and implicit delegated rulemaking authority, Scalia found the majority's conclusion that the statute gives exclusive federal authority over scientific and medical determinations to the Secretary of Health and Human Services "not remotely plausible."[207]

B. Applying the Exclusive Jurisdiction Presumption

The majority also relied on the general statute and exclusive jurisdiction presumptions discussed above, and was unwilling to give deference to agency interpretations of terms used in multiple parts of the same statute.[208] The Attorney General's regulations interpreted the terms "public interest," but as the Court said: "[i]t is not enough that the terms 'public interest,' 'public health and safety,' and 'Federal law' are used in the part of the statute over which the Attorney General has authority."[209] To further the inference that Congress would not want courts to defer to the Attorney General on such matters the court noted that:

> The Attorney General does not have the sole delegated authority under the CSA. He must instead share it with, and in some respects defer to, the Secretary, whose functions are likewise delineated and confined by the statute. The CSA allocates decisionmaking powers among statutory actors so that medical judgments, if they are to be decided at the federal level and for the limited objects of the statute, are placed in the hands of the Secretary.[210]

This passage might be read to support concurrent jurisdiction, but in practice it did not. Despite a statue that clearly shares authority between these two institutional actors, the majority concluded law-interpreting authority for *Chevron* purposes was only delegated to one agency—the Secretary. As such, the opinion appears to embrace the exclusive jurisdiction presumption as part of a Step Zero analysis. Again, this presumption makes a

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controlled substances, the statute should be read to delegate interpretive authority to the Attorney General for all of Part C of the CSA, §§821–830. *Gonzales*, 126 S Ct at 936–37 (Scalia, J, dissenting).

[207] Id at 937.

[208] The Court relied on *Sutton v United Air Lines*, 527 US 471 (1999). Recall that in *Sutton*, the Court rejected an argument that EEOC could receive *Chevron* deference for its interpretation of "disability" because the ADA is administered by many agencies, despite the fact that the EEOC was given authority to implement a subchapter of the ADA. See 527 US at 514 (Breyer, J, dissenting).

[209] *Gonzales*, 126 S Ct at 919.

[210] Id at 920.

plausible, but ultimately unsatisfying, inference about congressional intent and its relation to expertise:

> Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.[211]

The majority reasoned that because the Interpretive Rule involved a quintessentially medical judgment, the CSA was best read (via the presumption) to preclude rather than grant the Attorney General the authority to act with the force of law in the promulgation of the Interpretive Rule. Therefore, no *Chevron* deference was warranted.

C. Applying the Modified Step Zero Preemption Presumption

The majority also used a modified presumption against preemption to analyze Step Zero. When deciding whether to defer to the Attorney General's interpretation of the CSA, the majority explicitly disclaimed reliance on clear statement principles, but nonetheless invoked related presumptions to justify its inference against an implicit Congressional delegation:

> Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements or presumptions against pre-emption to reach this commonsense conclusion.[212]

This is a dense and somewhat cryptic passage, but the key seems to be that courts will presume Congress has not delegated law-interpreting authority to issue rules that have the effect of displacing state policy, at least in "traditional" fields of state regulation.[213] The Court could have said that agency interpretations that create positive conflicts with state

[211] Id at 921, quoting *Martin v Occupational Safety and Health Review Commission*, 499 US 144, 153 (1991).
[212] *Gonzales*, 126 S Ct at 925 (internal citations omitted).
[213] Id.

law are not entitled to *Chevron* deference.[214] The Court might also have applied its presumption against preemption,[215] or a clear statement rule,[216] to preserve the state law. But it did neither.[217] Read properly as Step Zero analysis, this passage indicates that *Chevron* deference will not generally be given to agency interpretations of statutes generating conflicts with state law, at least in fields traditionally of state or local concern like the regulation of the medical profession.

The majority reasoned that the CSA constitutes a comprehensive federal regime for regulating drug trafficking and drug use,[218] but that the CSA is concerned only secondarily with the regulation of the medical profession.[219] The statute's text and design manifest "no intent to regulate the practice of medicine generally," particularly given the structure and limitations of federalism.[220] Because the CSA presumes and expressly utilizes state regulation of the medical profession under the police powers,[221] and the statute contains an express preservation clause,[222] the statute should not be read lightly to preempt state regulation of the medical profession.[223]

As long as Congress has acted pursuant to a legitimate grant of constitutional power, the federal government can clearly set national standards that preempt state law even though regulation of health and safety is primarily and historically a matter of local

[214] Justice Scalia argued in dissent that the Interpretive Rule does not purport to preempt state law even by conflict preemption because a federal law that precludes physician-assisted suicide would not create a positive conflict with a state law authorizing physician-assisted suicide unless the state law mandated physician-assisted suicide rather than merely authorizing it. Id at 934 (Scalia, J, dissenting).
[215] See *Rush Prudential, HMO, Inc v Moran*, 536 US 355, 387 (2002).
[216] See *United States v Bass*, 404 US 336, 349 (1971).
[217] See *Gonzales*, 126 S Ct at 925.
[218] See generally *Gonzales v Raich*, 545 US 1, 13 (2006).
[219] See *Gonzales*, 126 S Ct at 922.
[220] Id at 923.
[221] See, for example, 21 USC § 823(f) (2006) (making compliance with the laws of the State in which the potential registrant practices necessary to dispense controlled substances). See also 21 USC § 802(21) (2006).
[222] See 21 USC § 903 (2006).
[223] See *Gonzales*, 126 S Ct at 923. The majority continued: "In the face of the CSA's silence on the practice of medicine generally and its recognition of state regulation of the medical profession it is difficult to defend the Attorney General's declaration that the statute impliedly criminalizes physician-assisted suicide. This difficulty is compounded by the CSA's consistent delegation of medical judgments to the Secretary and its otherwise careful allocation of powers for enforcing the limited objects of the CSA." Id at 924. This passage conflates de novo interpretation of the CSA with the scope of the Attorney General's jurisdiction, which in turn, contributes to the Step Zero analysis.

concern.[224] The Interpretive Rule proffered an interpretation of the CSA that created an inconsistency between federal law and the ODWDA. On its face, the majority seems to use a modified Step Zero presumption against preemption. Congress will not be taken to delegate law-interpreting authority when a federal agency asserts authority in a way that butts up against traditional state concerns. The majority's emphasis on the statute's "silence on the practice of medicine generally"[225] suggests a rebuttable presumption, as does the emphasis on implicit rather than explicit authorization. However, the majority took the specific delegations of rulemaking authority in the CSA to be insufficient to rebutt this modified presumption. The CSA might or might not provide authority for the Attorney General to preempt the ODWDA—a matter of clear disagreement in the case—but the modified Step Zero presumption against preemption implies that courts will more often resolve these questions de novo than within the *Chevron* deference framework.

D. Summary

In the overlapping and underlapping jurisdiction framework, the Attorney General's Interpretive Rule is an assertion of ambiguous jurisdiction. By not clarifying the precise boundaries of the Attorney General's authority, Congress could be taken to have provided for the possibility that the Attorney General would develop expertise and assert jurisdiction. The majority's inference of exclusive rather than concurrent law-interpreting authority in the CSA undermines the use of jurisdiction to generate incentives for agencies. If the competing agents framework constitutes a reasonable reconstruction of congressional behavior, then the trend in the courts towards an inference of exclusive law-interpreting authority is inconsistent with the foundation of Step Zero. The majority's focus on expertise—tailoring deference to relevant knowledge—is laudable. But the Court's view of expertise is too static. Expertise develops over time. When the Court uses the exclusive delegation canon to presume that Congress wants only a single agency to receive deference for relevant interpretations, it adopts a short-term resolution to what is a long-term challenge and enacts obstacles to the formation of better regulatory policy.

[224] See id at 923. See also *Hillsborough County v Automated Medical Laboratories, Inc*, 471 US 707, 717 (1985).
[225] *Gonzales*, 126 S Ct at 924.

Unlike the exclusive jurisdiction presumption, which I have argued undermines the competing agents framework, the Step Zero modified preemption presumption can be understood as competing-agents-supporting, although imperfectly so. The majority's reluctance to defer to an agency view that would have the effect of displacing state judgments could support the use of creative statutory design in domains like the CSA. The preservation of concurrent jurisdiction helps avoid premature termination of the checks on behavior that competing agents can produce.

The overlap-underlap framework will clearly not always resolve Step Zero inquiries. However, by offering a theory of why Congress would use statutes with overlapping and underlapping jurisdiction, the competing agents framework more closely aligns the Step Zero inquiry with actual congressional dynamics. If a rational reconstruction of congressional intent is to be the cornerstone of the Step Zero inquiry, courts will increasingly need elaborate theoretical frameworks to analyze whether Congress is best taken to request deferential or de novo review of agency decisions.

## CONCLUSION

*Gonzales* is a rich case for administrative lawyers. Beyond the nuanced moral and policy debates that physician-assisted suicide raises, the statutory and regulatory framework is remarkably complex. Ultimately, what drove the Court's analysis was the relationship between statutes that share jurisdiction among various federal and state authorities and the *Chevron* deference framework. As such, the case constitutes part of an important emerging Step Zero doctrine that sorts administrative judgments into those that qualify for judicial deference and those that do not.

The Court seemed to adopt two interpretive presumptions that reduce the likelihood of deference for interpretations of shared jurisdiction statutes. The first presumes that Congress gives law-interpreting authority to a single government entity. If real, the presumption makes the use of overlapping and underlapping jurisdictional schemes more costly and less effective. The second presumes that Congress does not implicitly grant law-interpreting authority to agencies with respect to interpretations that would impinge on state interests. This modified preemption presumption of Step Zero is a

close cousin to the *Rice* presumption against preemption, but the Court apparently conceives of them as different tools.

*Gonzales* also illustrates fault-lines in the *Chevron* doctrine itself. *Chevron* asks whether agencies or judges should make interpretive decisions. This was an important first generation *Chevron* problem: courts versus agencies, when, where, and why? Increasingly, however, courts are being called on to allocate authority within the executive branch and between state and federal governments. *Chevron* may be the right lens through which to view such disputes, but these second-generation questions require more nuanced analysis of politics and policy. The competing agents framework suggests greater attention to the justification for, and dynamics of, overlapping and underlapping jurisdiction schemes in administrative law.

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