COMMENTS

***Chevron* Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction**

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In *Chevron v National Resources Defense Council, Inc.*, the Supreme Court resolved a long-standing dispute by holding that courts must defer to an agency's reasonable interpretation of an ambiguous statute.¹ But in resolving that important conflict, the Court prompted many questions regarding the scope of this rule of deference. One of these unanswered questions is how courts should regard agency interpretations of statutes where the interpretation delimits the scope of the agency's jurisdiction. An agency makes what is arguably a jurisdictional interpretation when, for example, the Equal Employment Opportunity Commission interprets Title VII to apply extraterritorially,² the Commodity Futures Trading Commission asserts authority to adjudicate counterclaims,³ or the Occupational Safety and Health Administration interprets a statute mandating protection for all workers as applying only to the manufacturing sector.⁴ Generally, the law does not permit those limited by a statute to determine the scope of that limitation,⁵ but the conflict between this

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¹ 467 US 837 (1984).

² See *EEOC v Arabian Oil Co.*, 499 US 244 (1991).

³ See *Commodity Futures Trading Commission v Schor*, 478 US 833 (1986).

⁴ See *Dole v United Steelworkers of America*, 494 US 26 (1990).

⁵ See Norman J. Singer, 3 *Sutherland Statutory Construction* § 65.02 (Clark Boardman Callaghan, 5th ed 1992) ("[T]he general rule applied to statutes granting powers to [agencies] is that only those powers are granted which are conferred either

interpretive principle and *Chevron's* rule of deference has produced varying resolutions in the lower courts and even among members of the Supreme Court.

This Comment argues that under *Chevron*, courts should defer to an agency's interpretation of an ambiguous statute even if the interpretation delimits the scope of the agency's jurisdiction. Section I examines *Chevron* and the major rationales that have been proffered for it. Section II examines the Supreme Court's treatment of agency interpretations that raise jurisdictional issues, and shows, as a descriptive matter, that the Court has extended the *Chevron* framework to jurisdictional interpretations. It then examines the lower courts' treatment of the issue. Section III argues that courts should extend *Chevron* deference to an agency's interpretation of a statute delimiting its jurisdiction. A rule of deference both recognizes the problems in distinguishing jurisdictional and nonjurisdictional interpretations and best upholds the policies behind *Chevron*.

I. *CHEVRON* AND ITS RATIONALES

In *Chevron*,⁶ the Court established a two-part test for reviewing agency interpretations of statutes. The first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁷ If a "court determines that Congress has not directly addressed the precise question at issue," it must proceed to step two: "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁸

Commentators have offered a number of rationales for the *Chevron* opinion. Some treat *Chevron* as merely creating a default rule against which Congress can legislate;⁹ others argue

expressly or by necessary implication." See also Cass Sunstein, *Law and Administration After Chevron*, 90 Colum L Rev 2071, 2097 (1990), citing Federalist 78 (Hamilton) and *Marbury v Madison*, 5 US 137, 176 (1803).

⁶ *Chevron* has become a defining case in administrative law—described as a "kind of *Marbury*, or counter-*Marbury*, for the administrative state." Sunstein, 90 Colum L Rev at 2075.

⁷ 467 US at 842-43.

⁸ Id at 843.

⁹ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 516-17.

that the separation-of-powers doctrine requires *Chevron* deference to agency interpretations,¹⁰ and still others treat *Chevron* as an attempt to reconstruct congressional intent.¹¹ Since the principles behind the doctrine may influence whether *Chevron* should apply in a given situation, a survey of the major rationales for deference can help to evaluate the desirability of applying *Chevron* to jurisdictional questions.

Justice Scalia is the most prominent proponent of the default-rule view of *Chevron*. In his well-known article in the *Duke Law Journal*, Justice Scalia remarked,

In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule against which Congress can legislate.¹²

Under this view, *Chevron* improves upon previous doctrine in that "Congress now knows that the ambiguity it creates, whether intentionally, or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."¹³

Another view of *Chevron* holds that separation of powers requires the deference doctrine. Commentators have argued that resolving the ambiguities that arise in *Chevron* disputes necessarily involves policy judgments. Since policy judgments are properly the domain of the political branches, "democratically accountable officials" should interpret statutes.¹⁴ *Chevron* therefore upholds separation of powers by shifting interpretive power over ambiguous statutes to agencies, which are democratically accountable, from the courts, which are less so.

Finally, a third view grounds *Chevron* in legislative intent. On this view, Congress intended the agencies, and not the courts, to make reasonable interpretations of statutory ambiguities.

¹⁰ See Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin L J 269, 277-78, 283-85 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J Reg 283, 308, 312 (1986).

¹¹ See Sunstein, 90 Colum L Rev at 2085-91 (cited in note 5).

¹² Scalia, 1989 Duke L J at 517 (cited in note 9).

¹³ Id.

¹⁴ Starr, 3 Yale J Reg at 307-09, 312 (cited in note 10).

Chevron states: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."¹⁵

II. THE TREATMENT OF AGENCY INTERPRETATIONS INVOLVING THE SCOPE OF THE AGENCY'S JURISDICTION

A. *Mississippi Power and Schor*

In *Mississippi Power and Light Co. v Mississippi*, the Court held that an order of the Federal Energy Regulatory Commission (FERC) requiring an electric utility to purchase an amount of a nuclear power plant's output at rates FERC determined to be "just and reasonable" preempted an inquiry by the Mississippi Public Service Commission.¹⁶ All Justices agreed that if FERC had jurisdiction over the matter, then the state proceedings were preempted. The question of jurisdiction, however, divided the Court.

Justice Stevens, writing for the majority, simply stated that FERC's jurisdiction "ha[d] been established," and did not address *Chevron's* relation to the jurisdictional interpretation.¹⁷ Justice Scalia, in a concurring opinion, directly faced the question of the appropriate level of deference courts should grant agency interpretations delimiting their jurisdiction. He argued that the Court had held that *Chevron* "applies to an agency's interpretation of a statute designed to confine its authority," and concluded that "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."¹⁸

Scalia offered three arguments for deferring to jurisdictional interpretations. First, deference is "necessary because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'"¹⁹ Second, "deference [in jurisdictional matters] is appropriate because it is consistent with the general rationale for deference: Congress would naturally expect

¹⁵ 467 US at 843-44.

¹⁶ 487 US 354, 356-57 (1988).

¹⁷ Id at 374.

¹⁸ Id at 380-81.

¹⁹ Id at 381 (Scalia concurring) (emphasis omitted).

that the agency would be responsible, within broad limits, for resolving statutory authority or jurisdiction."²⁰ Finally, Scalia noted that "Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, de novo, by the courts."²¹

After noting that he would defer to FERC's claim of exclusive jurisdiction in this case if *Chevron* applied,²² Justice Brennan rejected use of the deference principle in jurisdictional situations: "Our agency deference cases have always been limited to statutes the agency was 'entrusted to administer.' Agencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies."²³ Justice Brennan offered three arguments to support his claim. "First, statutes confining an agency's jurisdiction do not reflect conflicts between policies that have been committed to the agency's care, but rather reflect policies in favor of limiting the agency's jurisdiction"²⁴ Second, Brennan argued that "[an agency] can claim no special expertise in interpreting a statute confining its jurisdiction."²⁵ Finally, he suggested that "we cannot presume that Congress implicitly intended an agency to fill 'gaps' in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power."²⁶ Brennan concluded that it was "not surprising that this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its own jurisdiction."²⁷ Unfortunately, *Mississippi Power* represents the end as well as the beginning of the Scalia-Brennan dispute over the propriety of deference to jurisdictional interpretations. The two justices did not continue the debate in subsequent cases, and the Court has not explicitly resolved the issue.²⁸

Since *Chevron*, the Court has not faced a clearer example of a jurisdictional interpretation than it did in *Commodity Futures*

²⁰ Id at 382 (emphasis omitted).

²¹ Id.

²² Id at 386 (Brennan dissenting).

²³ Id at 386-87.

²⁴ Id at 387. Policies in favor of limiting the agency's jurisdiction, "by definition, have not been entrusted to the agency and [] may indeed conflict not only with the statutory policies the agency *has* been charged with advancing but also with the agency's institutional interests in expanding its own power." Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ See *Dole v United Steelworkers of America*, 494 US 26, 54-55 (1990).

Trading Commission v Schor, a case which turned on an explicit assertion of jurisdiction.²⁹ Section 14 of the Commodity Exchange Act (CEA) provides that any person injured by a commodity broker's violation of the Act or Commodity Futures Trading Commission (CFTC) regulations may apply to the CFTC for reparations.³⁰ The CFTC issued a regulation asserting the authority to adjudicate counterclaims along with the original claims in reparations hearings.³¹ Citing *Chevron*, the Court upheld the agency's assertion of jurisdiction.³²

There was no question that the CFTC's interpretation of Section 14 expanded its jurisdiction. The Court's reasons for upholding the jurisdictional grab, however, were not so clear. The Court claimed to be following *Chevron*'s step one; it found that Congress intended the CFTC to have this authority.³³ "Congress explicitly affirmed the CFTC's authority to dictate the scope of its counterclaim jurisdiction . . ."³⁴ However, other language in the opinion suggests that courts should defer to jurisdictional interpretations—even where Congressional intent is ambiguous. The Court stated that "the Court of Appeals was incorrect to state on the facts of this case that the CFTC's expertise was not deserving of deference because of the '[] jurisdictional' nature of the question at issue."³⁵ This language suggests that in at least some cases deference to an agency's jurisdictional interpretation is appropriate.

²⁹ 478 US 833 (1986).

³⁰ 7 USC § 18(a) (1988).

³¹ 478 US at 837, citing 17 CFR § 12.23(b)(2) (1983).

³² According to the Court:

[T]he CFTC's long-held position that it has the power to take jurisdiction over counterclaims . . . is eminently reasonable and well within the scope of its delegated authority. Accordingly, as the CFTC's contemporaneous interpretation of the statute it is entrusted to administer, considerable weight must be accorded the CFTC's position.

478 US at 844.

³³ *Id.* at 847.

³⁴ *Id.* at 846. The Court further divined congressional approval from the statutory language, which authorized the Commission to "promulgate such rules, regulations, and orders as it deems necessary . . ." *Id.* at 846, citing 7 USC § 18(b) (1988). Also, the Court stated that "[s]uch deference is especially warranted here, for Congress has twice amended the CEA since the CFTC declared by regulation that it would exercise jurisdiction over counterclaims arising out of the same transaction as the principal reparations dispute but has not overruled the CFTC's assertion of jurisdiction." 478 US at 845-46.

³⁵ 478 US at 845, quoting *Schor v Commodity Futures Trading Commission*, 740 F2d 1262, 1279 (DC Cir 1984).

B. Other Supreme Court Cases

In the wake of *Mississippi Power* and *Schor*, it remains unclear what standard, if any, the Court has adopted. Since *Chevron*, the Court has examined a number of agency interpretations that raise jurisdictional issues, even though it has not acknowledged them as such. This Section reviews these cases to show that the Court continued to apply *Chevron* deference even when an agency interpretation involved jurisdictional elements.

While Section III argues that courts cannot coherently distinguish jurisdictional from nonjurisdictional interpretations, the following cases contain what courts and commentators have recognized as at least having a strong jurisdictional element. A brief examination of these cases is important for three reasons. First, to the extent these cases do involve jurisdictional interpretations, their decisions may control later cases involving jurisdictional interpretations. Second, the cases provide examples of the manner in which this issue arises in practice. Third, the cases provide a frame of reference for Section III's examination of the desirability of *Chevron* deference in jurisdictional cases.

1. Supreme Court decisions deferring to the agency.

On a number of occasions, the Court has deferred to agency interpretations of the agency's authority. In *Japan Whaling Association v American Cetacean Society*, Congress had required the Secretary to certify any foreign country conducting fishing operations in a manner that "diminish[ed] the effectiveness" of the International Convention for the Regulation of Whaling (ICRW).³⁶ Though Japan had neither adopted quotas on the harvesting of sperm whales nor enforced a moratorium on commercial whaling as required under the ICRW, the Secretary refused to certify that Japan was violating the Act, claiming that the statutory language gave him discretion over the decision. Citing *Chevron*, the Court found the statute ambiguous and deferred to the Secretary.³⁷

In *City of New York v FCC*,³⁸ the Court deferred to the FCC's determination that the mandate of the Cable Communications Policy Act of 1984 to "establish technical standards relating

³⁶ 478 US 221, 225 (1986).

³⁷ Id at 223 ("[T]he Secretary's construction that there are circumstances in which certification may be withheld . . . is also a reasonable construction of the language . . .").

³⁸ 486 US 57 (1988).

to the facilities and equipment of cable systems"³⁹ not only authorized the FCC to establish uniform technical standards for cable television, but also allowed the FCC to prohibit states from instituting more stringent standards.⁴⁰ In deferring to the agency's decision to preempt state law, the Court explained that "if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'"⁴¹

These decisions illustrate a line of cases in which the Court has deferred to the agency's interpretation of a statute within the *Chevron* framework, despite the fact that each interpretation affected the agency's jurisdiction.⁴² Any claim that deference does not apply when the agency's interpretation delimits the scope of its jurisdiction must either distinguish this class of cases or show why the Court should depart from its settled practice. This Comment does not attempt to distinguish these cases, as it concludes that deference to jurisdictional interpretations is entirely appropriate.

2. Supreme Court decisions reversing the agency's interpretation.

When the Court has struck down agency interpretations delimiting jurisdiction, it has done so at the "step one" stage of

³⁹ Id at 61, citing 47 USC § 544(e) (1982 & Supp IV).

⁴⁰ The Court did not explicitly apply the *Chevron* framework, but rather focused on the question of preemption. However, the Court did defer to an agency's interpretation of a statute that affected the scope of the agency's jurisdiction. 486 US at 63-64.

⁴¹ Id at 64, quoting *United States v Shimer*, 367 US 374, 383 (1961). The Court relied mainly on negative inferences, holding that nothing in the history of the Act prohibited the agency from asserting jurisdiction over this field. 486 US at 66-69.

⁴² See *K Mart Corp. v Cartier*, 486 US 281 (1988) (deferring to "common-control" exception); *Japan Whaling Association*, 478 US 221 (deferring to Secretary of Commerce's interpretation of "diminish the effectiveness," giving the Secretary discretion over enforcement proceedings); *City of New York*, 486 US 57 (deferring to the FCC's assertion of the authority to preempt state law); *Massachusetts v Morash*, 490 US 107, 115-17 (1989) (deferring to the Secretary of Labor's determination that vacation pay is not an employee welfare benefit plan, which determined the scope of the agency's regulatory responsibilities under ERISA); *EEOC v Commercial Office Products Co.*, 486 US 107, 114 (1987) (deferring to the EEOC's interpretation of Title VII, which determined the agency's authority to bring a civil rights enforcement action); *NLRB v Food and Commercial Workers United Union Local 23*, 484 US 112 (1987) (deferring to the NLRB's interpretation of the NLRA, which determined the agency general counsel's authority to make post-complaint informal settlement decisions). See also Sunstein, 90 Colum L Rev at 2098 n126 (cited in note 5) (collecting cases).

the *Chevron* inquiry, finding a clear congressional intent that contravened the agency's interpretation of the particular statute. For example, in *Dole v United Steelworkers of America*,⁴³ the Office of Management and Budget claimed authority under the provision of the Paperwork Reduction Act of 1980 for reviewing "information collection requests"⁴⁴ to review agency promulgation of "disclosure rules."⁴⁵ The Court, citing *Chevron*, found that Congress unambiguously intended that a "disclosure rule" was not an "information collection request."⁴⁶ Justice White, joined in dissent by Justice Rehnquist, found the issue ambiguous and explicitly rejected the notion that the jurisdictional nature of the statute should affect the *Chevron* analysis.⁴⁷

In *Adams Fruit Company, Inc. v Barrett*, the Department of Labor promulgated a regulation stating that where state workers' compensation covers a migrant or seasonal worker, the state program offers the exclusive remedy under the federal Migrant and Seasonal Agricultural Worker Protection Act.⁴⁸ The Court struck down this regulation, holding that as a matter of statutory construction, Congress had in fact intended the Act to preempt state laws making workers' compensation programs an exclusive remedy.⁴⁹ Because "Congress ha[d] expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute," the Court refused to defer to the agency's interpretation.⁵⁰ It concluded by noting that "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"⁵¹

It is important to note that when the Court has overturned the agency's interpretation, it has relied upon congressional intent and the statutory text. It has not engaged in independent review of a statute unless the statute has mandated that review. This is consistent with *Chevron*. Significantly, applying *Chevron*

⁴³ 494 US 26 (1990).

⁴⁴ Id at 34, quoting 44 USC § 3502(11) (1982 & Supp V) and 44 USC § 3502(4) (1982). Information collection requests include "the obtaining or soliciting of facts by an agency through . . . reporting or recordkeeping requirements . . ." Id.

⁴⁵ 494 US at 43. Disclosure rules "require regulated entities to disclose information . . . about what dangers exist and how these dangers can be avoided." Id at 28.

⁴⁶ Id at 41.

⁴⁷ Id at 43-55 (White dissenting).

⁴⁸ 494 US 638, 649 (1990), citing 29 CFR § 500.122(b) (1989).

⁴⁹ 494 US at 650-51.

⁵⁰ Id at 649.

⁵¹ Id at 650, quoting *Federal Maritime Commission v Seatrain Lines, Inc.*, 411 US 726, 745 (1973).

deference to jurisdictional interpretations will not necessarily allow agencies to expand their jurisdiction. The Court has not hesitated to overturn agency assertions of authority as violative of the intent of Congress.

C. *Chevron* and Jurisdiction in the Lower Courts

Lower courts have adopted varying approaches to the question of *Chevron*'s interaction with jurisdictional interpretations. Some circuit court decisions have granted deference to an agency's jurisdictional interpretation,⁵² while others have stated that deference is not appropriate.⁵³ Some circuits have vacillated on the question,⁵⁴ while others have acknowledged the issue as unresolved by the Court and have explicitly reserved the question.⁵⁵

For example, the D.C. Circuit reserved the question in *ACLU v FCC*.⁵⁶ Before doing so, however, the D.C. Circuit stated that "a pivotal distinction exists between statutory provisions that are jurisdictional in nature—that is, provisions going to the agency's power to regulate an activity or substance—and provisions that are managerial—that is, provisions pertaining to the mechanics

⁵² See *Transpacific Westbound Rate Agreement v Federal Maritime Commission*, 951 F2d 950, 952-54 (9th Cir 1991) ("Because Congress has not directly addressed the issue of the Commission's jurisdiction over mixed agreements, we must uphold the Commission's analysis as long as it is reasonable [under *Chevron*]."); *Board Of Governors Of The University Of North Carolina v United States Department of Labor*, 917 F2d 812, 816 (4th Cir 1990) (*Chevron* deference "holds true as well for an agency's determination of its own jurisdiction when that determination turns on the agency's findings of fact."); *Puerto Rico Maritime Shipping Authority v Valley Freight Systems, Inc.*, 856 F2d 546, 552 (3d Cir 1988) ("[*Chevron*'s] rule of deference is fully applicable to an agency's interpretation of its own jurisdiction.").

⁵³ See *New York Shipping Association v Federal Maritime Commission*, 854 F2d 1338, 1363 (DC Cir 1988) (Deference to an agency "would . . . be inappropriate" in interpreting statutory provisions "delimiting its jurisdiction."); *Air Courier Conference v United States Postal Service*, 959 F2d 1213, 1225-27 (3d Cir 1992) (Becker concurring) (suggesting that deference is not always appropriate).

⁵⁴ Compare *The Business Roundtable v SEC*, 905 F2d 406, 408 (DC Cir 1990) ("We assume that we owe the Commission deference under *Chevron* [] even though the case might be characterized as involving a limit on the SEC's jurisdiction."), with *New York Shipping Association*, 854 F2d at 1363 (Deference to an agency interpretation may be "inappropriate" when it involves statutory provisions "delimiting its jurisdiction.").

⁵⁵ See *United Transportation Union v United States*, 987 F2d 784, 790 n 4 (DC Cir 1993); *Lancashire Coal Co. v Secretary of Labor, Mine Safety and Health Administration*, 968 F2d 388, 392-93 n 4 (3d Cir 1992); *Puerto Rico Ports Authority v Federal Maritime Commission*, 919 F2d 799, 803 (1st Cir 1990); *United States v 25 Cases, More or Less, of an Article of Device*, 942 F2d 1179, 1182-83 (7th Cir 1991).

⁵⁶ 823 F2d 1554 (DC Cir 1987).

or inner workings of the regulatory process."⁵⁷ Accordingly, "[w]here the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation), rather than whether an agency has properly implemented authority indisputably delegated to it, Congress can reasonably be expected both to have and to express a clear intent."⁵⁸

The Third Circuit has been more receptive to the *Chevron* doctrine in the jurisdictional context. In *Air Courier v United States Postal Service*, the court deferred to the Postal Service's claim that it had jurisdiction to set international postal rates without input from the Postal Rate Commission.⁵⁹ The court found *Chevron* deference appropriate despite the obviously jurisdictional nature of the interpretation. Relying on *Schor*, the court noted that the "Supreme Court has also held that an agency's view of its own statutory jurisdiction may be entitled to deference under *Chevron*."⁶⁰ The court found that the "Postal Service's construction of [the statute] to grant itself the power to establish international postage rates is analogous to the [CFTC's] assertion of jurisdiction over state-law counterclaims"⁶¹ In both cases, "the regulatory body was construing the provisions of the act that controlled its administrative powers."⁶²

In a concurrence, Judge Becker challenged the majority's reading of Supreme Court precedent and suggested a different rule: "[A]gencies *may be* entitled to deference on jurisdictional questions, especially where the statutory authorization is quite broad, implying a congressional belief that the agency possesses superior expertise in determining how to effectuate the statutory purposes."⁶³ Under this view, *Schor* and *Mississippi Power* do not provide a rule of general application, but rather rely on the agency's superior expertise in the area in question and the long-standing nature of the interpretation.⁶⁴ *Chevron* deference only applies to jurisdictional questions when the factors supporting the *Chevron* decision itself are applicable.

⁵⁷ Id at 1567 n 32.

⁵⁸ Id. See also *New York Shipping Association*, 854 F2d at 1363.

⁵⁹ 959 F2d 1213 (3rd Cir 1992).

⁶⁰ Id at 1223.

⁶¹ Id.

⁶² Id.

⁶³ Id at 1225 (Becker concurring).

⁶⁴ Id at 1226 ("As I read *Schor*, the Court only decided that, in light of the extremely broad authorizing language of that statute, the CFTC had superior expertise in interpreting the statute, even though the particular dispute focused a jurisdictional issue.").

III. APPLYING THE DEFERENCE PRINCIPLE

As a descriptive matter, the Supreme Court has applied the *Chevron* framework to agency interpretations that delimit the agency's jurisdiction. This Section argues that, as a normative matter, courts *should* defer to agency interpretations delimiting the scope of the agency's authority. Two lines of argument support this proposition. On one hand, since courts cannot cogently distinguish jurisdictional from nonjurisdictional interpretations, failure to adopt a rule of deference for jurisdictional interpretations would undermine the core *Chevron* values of predictability and consistency, and ultimately the *Chevron* doctrine itself. In addition, since the benefits of agency expertise and certainty outweigh concerns associated with agency self-dealing, deference best accords with legislative intent and the rationales for the *Chevron* doctrine.

A. Distinguishing Jurisdictional from Nonjurisdictional Interpretations

If a court is to grant less deference to jurisdictional interpretations than to other sorts of statutory interpretations by agencies, it must of course be able to distinguish jurisdictional from nonjurisdictional interpretations. If courts cannot draw a coherent distinction, then deference is necessary to keep the *Chevron* doctrine from slipping into an arbitrary exercise of judicial power.

The importance of, and difficulty in, making this distinction has been well noted.⁶⁵ It is difficult to come up with a precise definition of a "jurisdictional interpretation." Jurisdiction is a malleable concept, and its definition depends upon the context in which it is used. *Black's Law Dictionary* defines jurisdiction as "the power of courts to inquire into facts, apply law, make decisions, and declare judgment."⁶⁶ The Court attempted to give a definition of "jurisdictional facts" in *Crowell v Benson*: "In relation to administrative agencies, the question [of jurisdiction] in a

⁶⁵ See *Mississippi Power*, 487 US at 381 (Scalia concurring); *Steelworkers*, 494 US at 54 (White dissenting). See also Sunstein, 90 Colum L Rev at 2097-2100 (cited in note 5) (arguing that there should be no deference where an agency extends its authority "to an entire category of cases," in an attempt to solve the problem of distinguishing jurisdictional and nonjurisdictional interpretations); Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 59-60 (Little, Brown, 3d ed 1992) (discussing criticism of the jurisdictional fact doctrine of *Crowell v Benson*).

⁶⁶ *Black's Law Dictionary* 853 (West, 6th ed 1990).

given case is whether it falls within the scope of the authority validly conferred."⁶⁷ *Crowell* might lead to a definition of jurisdictional interpretation, on the following reasoning: Administrative agencies can only act when authorized by Congress to do so. For an administrative agency to exceed jurisdiction, it must assert authority over an area that Congress has not delegated to the agency. A jurisdictional interpretation, therefore, is an interpretation which includes a determination by the agency that Congress has delegated authority to the agency over an activity or substance. However, *Crowell's* jurisdictional-fact doctrine has fallen into disuse, largely because of the difficulty of distinguishing jurisdictional facts from other facts.⁶⁸

Justice Scalia has argued that creating a cogent distinction between jurisdictional and nonjurisdictional interpretations is simply beyond the capacities of courts: "There is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority."⁶⁹ As Scalia noted, "[v]irtually any administrative action can be characterized as either the one or the other, depending on how generally one wishes to describe the 'authority.'"⁷⁰

The D.C. Circuit, by contrast, argued in *ACLU v FCC* that courts can make a clear distinction between the two classes of interpretations.⁷¹ There, the court held that a "pivotal distinction exists between statutory provisions that are jurisdictional in nature—that is, provisions going to the agency's power to regulate an activity or substance—and provisions that are managerial—that is, provisions pertaining to the mechanics or inner workings of the regulatory process."⁷² Such a standard presupposes that the distinction is workable in practice.

Professor Sunstein has suggested an intermediate position. He argues that "Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers.

⁶⁷ 285 US 22, 54 n 17 (1932).

⁶⁸ The jurisdictional fact doctrine "has suffered much criticism, and doubts have often been expressed by judges and commentators alike as to its continued vitality." Breyer and Stewart, *Administrative Law* at 59, citing John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U Pa L Rev 1055 (1932); Bernard Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U Pa L Rev 163 (1949).

⁶⁹ *Mississippi Power*, 487 US at 381 (Scalia concurring).

⁷⁰ *Id.*

⁷¹ 823 F2d 1554.

⁷² *Id.* at 1567 n 32.

To accord such powers to agencies would be to allow them to be judges of their own cause, in which they are of course susceptible to bias."⁷³ Although "agency expertise and accountability are often relevant to the resolution of a jurisdictional ambiguity," Sunstein argues that the costs of bias outweigh these benefits.⁷⁴ He concludes that "there is no magic in the word 'jurisdiction,'" and that the correct inquiry is "whether the agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases."⁷⁵ Although Sunstein admits that "[t]his distinction is not always sharp" and "will call for an exercise in judgment," he believes that "in the vast majority of cases, it is easily administered."⁷⁶

In attempting to distinguish jurisdictional from nonjurisdictional interpretations, one should separate two types of jurisdictional interpretations: those in which the agency is interpreting language directly entrusted to the agency and those assertions of authority that are not grounded in the statutory text. While the textual line is not perfect, and gray areas are inevitable, it serves both to focus those agency interpretations that are relevant to the issue of *Chevron* deference and to illustrate the problems inherent in distinguishing the jurisdictional from the nonjurisdictional.

1. Extensions of jurisdiction not supported by the statutory text.

There are two ways in which an agency might venture an extension of jurisdiction not supported by the text of the statute. However, both cases should prove easy for courts to handle, because in most cases courts will be able to resolve the question of deference at step one of the *Chevron* inquiry.

First, an agency might assert authority over an activity or substance not mentioned in the statutory text. For example, an attempt by the EEOC to regulate cable TV would constitute an unauthorized assertion of jurisdiction—if no statute entrusted to

⁷³ Sunstein, 90 Colum L Rev at 2099 (cited in note 5).

⁷⁴ Id at 2099-2100.

⁷⁵ Id at 2100.

⁷⁶ Id. Sunstein believes that problems of self-dealing weigh against deference on jurisdictional issues, but he recognizes that an unworkable line may do more harm than good. By limiting cases that will not receive deference to those that courts can clearly label jurisdictional, Sunstein tempers his desire to limit agencies in this area with the practical reality of the situation.

the EEOC bore any reasonable relation to cable TV. Second, an agency might assert jurisdiction over an activity or substance when the statute explicitly restricts the jurisdiction of the agency in that area. In *Adams Fruit Co.*, for example, the Department of Labor claimed adjudicatory authority over claims that the statute had expressly reserved for the federal judiciary.⁷⁷

Courts can easily distinguish such text-ignoring interpretations from interpretations of language entrusted to the agency. A court need only examine the statutory text to see whether the agency is regulating a substance or activity found in the text or whether the statute explicitly restricts the agency's jurisdiction. For most of the agency interpretations that fall within this category, the authority of the agency to issue the regulation will be unambiguous. Here, the standard enunciated by the D.C. Circuit is a workable one. A court can distinguish provisions "going to the agency's power to regulate an activity or substance" and "provisions pertaining to the mechanics or inner workings of the regulatory process."⁷⁸

This ability to distinguish assertions of jurisdiction that are not supported by the statute from interpretations of statutory language entrusted to the agency does not answer the question of whether courts should apply *Chevron* deference to jurisdictional interpretations. If *Chevron* does not apply, courts would independently review the assertion of jurisdiction. If *Chevron* does apply, courts would first ascertain the intent of Congress. If Congress has expressly restricted the agency's jurisdiction, or if the agency does not base its assertion of jurisdiction in the statutory text, then courts will find that Congress did not intend for the agency to have the asserted authority. For this class of interpretations, therefore, whether or not *Chevron* applies to jurisdictional interpretations will not affect the behavior of courts.

In other cases, the agency might have a plausible argument that an extension of jurisdiction that is not expressly provided for in the statutory text is nonetheless legitimate. In *Schor*, for example, the CFTC claimed authority to adjudicate counterclaims despite the statute's failure to mention counterclaims.⁷⁹ The Supreme Court, relying on the legislative history of the Act, held that the CFTC had implicit authority to assert jurisdiction over counterclaims, and upheld the CFTC's assertion of authority.

⁷⁷ 494 US 638.

⁷⁸ *ACLU v FCC*, 823 F2d at 1567 n 32.

⁷⁹ 478 US 833.

Schor indicates that generally a strong showing of legislative intent—indeed, an unambiguous showing of legislative intent—will be needed to rebut this presumption of no jurisdiction.⁸⁰

2. Jurisdictional interpretations that result from defining statutory terms entrusted to the agency.

In a second type of jurisdictional interpretation, the agency increases or decreases the scope of its authority by defining statutory language directly entrusted to the agency. Most jurisdictional interpretations by agencies fall into this category.

When an agency interprets statutory language in a manner that affects its jurisdiction, the court has something to focus on other than an abstract jurisdictional question: the actual treatment of the language. As long as this interpretation meets *Chevron's* reasonableness requirement, the question of entrusting it to the agency will implicate the policies Congress intended to delegate when it enacted that language. Conversely, since every regulation implicates the agency's authority to regulate as to the specific matter involved, all nonjurisdictional interpretations necessarily contain a jurisdictional element. Unless courts can cogently separate the jurisdictional and the nonjurisdictional elements within each interpretation, a court cannot, in some sense, refuse to defer to the jurisdictional interpretation without also refusing to defer to the nonjurisdictional aspects of the provision.

K Mart Corp. v Cartier, Inc. illustrates this problem.⁸¹ The Tariff Act required the Customs Service to prohibit the importation of "gray-market goods."⁸² While the Customs Service's regulations generally prohibited the entry of gray-market goods,⁸³ they furnished a "common-control" exception from the

⁸⁰ Whether a text is ambiguous depends in part on the method of statutory interpretation one adopts. Textualists look only to the statutory text to determine its meaning. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L Rev 621 (1990). Other methods of statutory interpretation examine legislative history in addition to the text. The *Chevron* decision, while recognizing the importance of statutory interpretation to its framework, leaves the question of what method of statutory interpretation to use unresolved. 467 US at 843 n 9. See *Bridgestone/Firestone, Inc. v Pension Benefit Guaranty Corp.*, 892 F2d 105, 111 (DC Cir 1989). When there is no textual basis for the agency's interpretation, one's view of statutory construction will only make a difference at the margin.

⁸¹ 486 US 281 (1988).

⁸² "A gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder." Id at 285.

⁸³ The Customs Service regulation now in force provides generally that "[foreign

ban, permitting the entry of gray-market goods manufactured abroad by the trademark owner or its affiliate."⁸⁴ The regulations also furnished an "authorized-use" exception, which permitted the "importation of gray-market goods where '[t]he articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner'"⁸⁵ *K Mart* challenged the Customs Service for failing to exercise jurisdiction over both classes of goods.⁸⁶ The Court deferred to the agency and upheld the "common-control" exception,⁸⁷ but it overturned the agency's regulation allowing the "authorized-use" exception as contrary to the unambiguous intent of Congress.⁸⁸

Congress intended the Customs Service to regulate gray-market goods. In classifying certain goods as gray-market goods, however, the agency necessarily expanded or restricted its jurisdiction. Some goods fall clearly within the statutory definition of gray-market goods, and some goods are obviously beyond the jurisdiction of the agency.⁸⁹ For other goods, it is ambiguous whether they constitute gray-market goods. For example, the Court held that it was ambiguous whether goods "manufactured abroad by the trademark owner or its affiliate" constituted gray-market goods.⁹⁰ The agency's decision that goods "manufactured

made] articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association within the United States are subject to seizure and forfeiture as prohibited importations." *Id.* at 288, quoting 19 CFR § 133.21(b) (1987).

⁸⁴ 486 US at 289, quoting 19 CFR § 133.21(c)(1)-(2) (1987).

⁸⁵ 486 US at 290, quoting 19 CFR § 133.21(c)(3).

⁸⁶ This case presents an example of a case where the agency limits the scope of its jurisdiction. Professor Sunstein has argued that courts should not treat cases where an agency limits its jurisdiction differently from cases where the agency expands its jurisdiction. See Sunstein, 90 Colum L Rev at 2099 (cited in note 5).

⁸⁷ 486 US at 291-94. In upholding the common-control exception, no opinion commanded a majority of the Court. Justice Brennan, writing for four justices, grounded his decision in *Chevron* step one, holding the Custom Service's regulation was permissible because Congress intended that application. *Id.* at 300-12 (Brennan concurring). Justices White and Kennedy concluded the regulations were "permissible constructions designed to resolve statutory ambiguities." *Id.* at 292.

⁸⁸ The regulation granting the authorized-use exception failed a *Chevron* step-one analysis. The Court held that "[u]nder no reasonable construction of the statutory language can goods made in a foreign country by an independent foreign manufacturer be removed from the purview of the statute." *K Mart*, 486 US at 294. For an examination of the debate between the opinions of Justices Brennan and Scalia over the authorized-use exception, see Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 108-10 (Chicago, 1991) (discussing the role changed circumstances should play in evaluating the agency's "authorized-use exception").

⁸⁹ In *K Mart*, the Court held that goods under the Custom Service's "authorized-use" exception fell within this category. See 486 US at 288.

⁹⁰ *Id.* at 289.

abroad by the trademark owner or its affiliate" did not constitute gray-market goods restricted the agency's jurisdiction, but it was also a policy decision regarding the statutory scheme entrusted to the agency. What constitutes a gray-market good today remains ambiguous,⁹¹ and its definition is closely tied to the policies of the Tariff Act. The agency cannot implement its policy of prohibiting gray-market goods if it cannot categorize such goods.

In order to determine whether courts can distinguish jurisdictional from nonjurisdictional interpretations for purposes of *Chevron* deference, it is important to identify where this distinction is relevant. Where the intent of Congress is clear, courts will independently review the statute whether or not *Chevron* applies. For example, even though Congress entrusted the Customs Service with authority to regulate gray-market goods, the Customs Service cannot declare all goods from Germany to be gray-market goods and expect deference. Only where the congressional grant of authority is ambiguous will the application of *Chevron* shift interpretive power from the courts to the agencies. The ability of courts to distinguish the jurisdictional from the nonjurisdictional, therefore, is only relevant in this class of cases.

When the scope of the agency's authority is ambiguous, the assertion of jurisdiction must be related to the inner workings or policies of the statute entrusted to the agency. If the agency's interpretation merely defined the power of the agency to regulate an activity or substance, and did not pertain in any way to the inner workings of the statute, then the assertion of jurisdiction would fall into the first category of jurisdictional interpretations described above.⁹² Courts that have adopted this distinction fail to recognize that when the authority of the agency is ambiguous, both types of provisions are present. It is not that courts are incompetent to determine which interpretations are jurisdictional and which ones are not. The problem is that the assertion of

⁹¹ Farber and Frickey note:

When Congress imposed the import restriction, . . . trademarks served only to identify the origin of the goods, and any attempt to license a trademark could nullify it. Hence, legislators could not have imagined how the statute would apply in a world in which trademarks are readily transferable property interests.

Law and Public Choice at 109. Justice Brennan recognized that the statutory language likely did not authorize a common-control exception from gray-market goods, but he also noted that Congress wrote the statute fifty years ago, when trademark law was very different than it is today. *K Mart*, 486 US at 300-12 (Brennan concurring).

⁹² See text accompanying notes 77-80.

jurisdiction is at the same time a policy decision that is grounded in the statutory text entrusted to the agency.

Where the authority of an agency is ambiguous, jurisdictional interpretations will contain a jurisdictional and a nonjurisdictional element. As a result, the viability of a rule rejecting *Chevron* deference depends upon the ability of courts to distinguish the jurisdictional from the nonjurisdictional within this area of ambiguous authority. Courts cannot coherently make this distinction for three reasons. First, many interpretations do not have separate jurisdictional and nonjurisdictional elements, but rather have one element that is both jurisdictional and nonjurisdictional. Stating that a good is not a gray-market good is both a jurisdictional and policy determination. Or, when the EPA adopted a plant-wide definition of stationary source in *Chevron*, the agency both increased its jurisdiction and furthered its policy of regulating pollution emissions. A court cannot pass on the jurisdictional question without also passing on the policy decision. Since all interpretations have a jurisdictional component, a rule of no deference for jurisdictional interpretations would undermine the *Chevron* doctrine.

Second, an attempt to separate out cases that have a strong jurisdictional element would not fare much better. Tying the rule of deference to the strength of the jurisdictional element of the provision invites incoherent and arbitrary decisions. Clear lines are highly unlikely in inquiries concerning the degree of the jurisdictional impact. The greater the jurisdictional nature of the statute, the more likely it is the intent of Congress is unambiguous. Ambiguity only arises when the jurisdictional element is intertwined with the political. Removing *Chevron* deference when a statute raises substantial jurisdictional questions, therefore, fails to resolve the problem.

Finally, history has shown the difficulties inherent in separating jurisdictional issues from non-jurisdictional issues. The jurisdictional-fact doctrine of *Crowell v Benson* has been discredited, and the Supreme Court's abandonment of the doctrine was a direct result of the inability of courts to distinguish jurisdictional facts from nonjurisdictional ones.⁹³ Professor Sunstein's attempt to distinguish jurisdictional from nonjurisdictional interpretations also fails to provide an acceptable solution. Problems arise with efforts to draw a line at a "class or category of cases." Most agency interpretations will involve a category of cases and

⁹³ Sunstein, 90 Colum L Rev at 2099 (cited in note 5).

not simply "one or a few cases."⁹⁴ Unless a "category of cases" can be meaningfully contained, the standard would remove most interpretations from the *Chevron* framework. More importantly, it is by no means clear that a "category of cases" would serve as a sufficient proxy for "unauthorized assertion of jurisdiction." In many cases, Congress will grant the agency authority over a category or class of cases. When the EPA adopted a plant-wide definition of stationary source, it did so for the entire class of pollution-emitting plants. The Customs Service "common control exception" also covered a class of goods. By limiting the inquiry to whether the interpretation asserts jurisdiction over a category of cases, Sunstein bypasses the fundamental question of how to determine which assertions of jurisdiction over a category of cases are permissible.

In short, carving an exception from the *Chevron* doctrine for jurisdictional interpretations depends in the first instance upon the ability of courts to distinguish jurisdictional from nonjurisdictional interpretations. In making this determination, one must find that class of cases where the application of *Chevron* deference will make a difference. Application of the *Chevron* doctrine only changes the locus of interpretive power when the agency is interpreting language entrusted to the agency and the scope of the agency's authority is ambiguous. While courts can distinguish some classes of jurisdictional interpretations from others, they cannot do so in that category of cases that are relevant to the question of *Chevron* deference. As a result, creating an exception from the *Chevron* doctrine ultimately undermines the doctrine itself.

B. Deference and the Rationales for the *Chevron* Doctrine

Putting to one side the question of whether courts can distinguish jurisdictional from nonjurisdictional interpretations, the

⁹⁴ Of the cases examined in Section II, only in *Japan Whaling Association* can one say that the interpretation did not cover a class of cases. *Steelworkers* involved an assertion of jurisdiction over a category of rules—disclosure rules. *City of New York* involved an assertion of jurisdiction over a class of state laws. *K Mart* involved classes of goods exempted from the requirements accompanying gray-market goods, and *Schor* involved a class of claims. To the extent that any of the above cases can be characterized as not covering a class or category, the fact that they can easily be characterized as one or the other suggests that the standard has no teeth and provides no coherent basis for courts to distinguish cases. Whenever an agency engages in rulemaking, it will likely act to regulate a class or category of cases. The fact that the agency needs to promulgate a "rule" suggests that it contemplates enforcement over many actors.

question remains whether courts should do so. This question is one of interpretive power: Should courts or administrative agencies interpret ambiguous statutes when the interpretation involves the scope of the agency's jurisdiction? A canon of statutory construction holds that those empowered by law should not be permitted to determine the scope of that limitation,⁹⁵ and some have argued that this canon should trump *Chevron* deference in jurisdictional interpretations.⁹⁶ The issue, however, is a narrower one. The question is not whether courts should defer to all assertions of jurisdiction by agencies. The question, post-*Chevron*, is whether courts should defer to an agency's assertion of jurisdiction when the authority of the agency is ambiguous and the agency's interpretation is a reasonable one.

The default-rule rationale for *Chevron*, advocated by Justice Scalia, strongly supports application of the deference principle to jurisdictional interpretations.⁹⁷ Under this view, the important thing is that Congress knows who will interpret the statutory ambiguities it creates when it passes legislation. Since jurisdictional interpretations are intertwined with policy decisions, any attempt to separate the two will inevitably lead to more uncertainty and inconsistency than under a uniform rule of deference. If courts cannot coherently separate the jurisdictional from the nonjurisdictional, Congress will no longer know who will resolve statutory ambiguities. Only a uniform rule of deference can maintain *Chevron*'s core values of consistency and uniformity.⁹⁸

If agency interpretations were either purely jurisdictional or purely nonjurisdictional, and courts could distinguish the two, then the separation-of-powers rationale for *Chevron* would support a rule giving courts the power to interpret statutory questions of jurisdiction.⁹⁹ Indeed, *Crowell v Benson* held that separation of powers requires courts to determine jurisdictional facts. Yet in a world where policy decisions are intertwined with an agency's jurisdictional interpretation, separation of powers supports *Chevron* deference because agencies, which are more politically accountable than courts, should make the policy determinations.

⁹⁵ See Singer, 3 *Sutherland Statutory Construction* at § 65.02 (cited in note 5).

⁹⁶ See Sunstein, 90 *Colum L Rev* at 2098 (cited in note 5).

⁹⁷ See text accompanying notes 12-13.

⁹⁸ It also provides Congress with the incentive to clearly demarcate the agency's authority. Moreover, Congress can always revise the statutory language to restrict the agency's authority if it did not intend for the agency to regulate in a given area.

⁹⁹ See text accompanying note 14.

The most widely accepted view of *Chevron* grounds the decision in legislative intent and the belief that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."¹⁰⁰ Under this view, *Chevron* deference allows agencies to make policy decisions, but jurisdictional questions are questions of law, not policy, and Congress did not intend for courts to defer on questions of law. Despite this traditional understanding, this rationale for *Chevron* also supports a uniform rule of deference.

1. The intent of Congress.

Courts can divine congressional intent concerning some jurisdictional interpretations. Congress does intend for an agency to have jurisdiction over a general area. It also intends that the agency will not have jurisdiction over areas foreign to the statute.¹⁰¹ In the gray area between these two extremes, the intent of Congress is ambiguous. The question of *Chevron* deference is only relevant in this gray area. For this category of cases, the question is not "what did Congress intend?" By definition, the intent of Congress is ambiguous. The relevant question is whether Congress intends for the courts or the administrative agencies to have the power to resolve jurisdictional ambiguities. Since members of Congress have probably never considered the issue, one must ask what Congress would intend if it had considered the issue.

A textualist approach to statutory interpretation holds that courts should only seek the intent of Congress in the language Congress enacts.¹⁰² Since the textualist regards congressional intent as a fiction, it is of no moment that Congress never considered whether courts should apply *Chevron* to jurisdictional interpretations. A textualist is only concerned with whether the particular statute's language grants the agency authority. Under this view, similar to that of Judge Becker in *Air Courier*, courts should grant more deference when the statute contains broad jurisdictional language.¹⁰³ Judge Becker also noted that courts

¹⁰⁰ *Chevron*, 467 US at 843-44. See text accompanying note 15.

¹⁰¹ For example, Congress clearly did not intend the EEOC to regulate cable TV.

¹⁰² For an examination of the textualist approach, see Eskridge, 37 UCLA L Rev 621 (cited in note 80).

¹⁰³ See *Air Courier*, 959 F2d at 1225 (Becker concurring) ("[A]gencies may be entitled to deference on jurisdictional questions, especially where the statutory authorization is

may also examine other factors in making individualized deference determinations, such as the expertise of the agency, or the long-standing nature of the regulation.¹⁰⁴

There are two problems with the textualist view. First, it represents a return to the multi-factor approach that dominated the Supreme Court's analysis of agency interpretations of statutes prior to *Chevron*.¹⁰⁵ The multi-factor approach produced a system of confusion and inconsistency¹⁰⁶ and was the major impetus behind the Court's decision to adopt a uniform rule of deference in *Chevron*. Second, ambiguities will still arise under a textualist approach, and textualism does not speak to who should have interpretive power when the statute is ambiguous. To say that courts can resolve all jurisdictional questions by reference to the statute is simply another way of saying courts will not defer to agencies in the case of jurisdictional ambiguities. If Congress presumably intends for agencies to interpret ambiguities in nonjurisdictional interpretations, some affirmative reasons must be put forward as to why the intent changes when jurisdictional questions arise. Textualism does not provide the necessary distinction.

While Congress does have intentions regarding some jurisdictional limits for agencies, almost by definition it does not have an intent when the scope of the agency's authority is ambiguous. To ask what Congress intended, therefore, is to ask the wrong question. One must focus on whether courts or agencies are better situated to make the jurisdictional interpretation. Two considerations are especially relevant: agency expertise and the problem of self-dealing.

quite broad, implying a congressional belief that the agency possesses superior expertise in determining how to effectuate the statutory purposes.”).

¹⁰⁴ Id at 1226-27. See also *Maislin Industries, U.S., Inc. v Primary Steel, Inc.*, 497 US 116 (1990); Comment, *Precedents Construing Statutes Administered by Federal Agencies After the Chevron Decision: What Gives?*, 60 U Chi L Rev 223 (1993).

¹⁰⁵ See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L J 969, 972 (1992) (“[I]n deciding what degree of deference to give an executive interpretation, the Court relied on an eclectic cluster of considerations The default rule was one of independent judicial judgment. Deference to the agency interpretation was appropriate only if a court could identify some factor or factors that would supply an affirmative justification for giving special weight to the agency views.”).

¹⁰⁶ See *Pittston Stevedoring Corp. v Dellaventura*, 544 F2d 35, 49 (2d Cir 1976) (citations omitted), aff'd as *Northeast Marine Terminal Co., Inc. v Caputo*, 432 US 249 (1977) (Judge Friendly acknowledged confusion over when deference was appropriate.); Merrill, 101 Yale L J at 972 (“Admittedly, the factors tended to be invoked unevenly.”).

2. Agency expertise.

Agency expertise is an important factor in justifying *Chevron* deference. If agencies do not have an institutional advantage over courts in interpreting statutes, little purpose would be served by the *Chevron* doctrine.¹⁰⁷ Once again, one must give the inquiry a sharper focus. The issue is not whether the federal courts have a greater expertise in interpreting grants of jurisdiction. Perhaps they do. But the issue is, once the federal courts have found the grant of jurisdiction to be ambiguous, do courts or agencies have greater expertise in resolving the ambiguity?

The traditional view holds that courts are experts on questions of law while agencies are experts on questions of policy, and to ascertain the intent of Congress is to resolve a legal question. Since the statute is ambiguous, however, there is no intent of Congress. The court's greatest area of expertise is of little help once the court declares the statute ambiguous. While courts may have some expertise in determining how to resolve an ambiguity in the scope of the agency's authority, since there is no congressional intent, and since questions of agency policy are involved, the court's expertise is greatly diminished.

Agency expertise supports application of a rule of deference to jurisdictional determinations for two reasons. First, to the extent a court cannot disentangle questions of law from questions of policy in jurisdictional interpretations, the benefits of agency expertise for policy questions apply to jurisdictional interpretations as well. Courts only have a comparative advantage over agencies in interpreting language delimiting jurisdiction if courts can separate jurisdictional issues from nonjurisdictional ones. Given the inevitable overlap in this area, courts should grant more deference to the agency's expertise.

Second, an agency's expertise is "relevant to the resolution of a jurisdictional ambiguity."¹⁰⁸ As Sunstein notes, "whether the [CFTC] has adjudicative authority over common law counterclaims might well depend upon the consequences of the exercise of that authority for the fair and efficient administration of the

¹⁰⁷ *Chevron* itself suggests that agency expertise is an important consideration:

The principle of deference to administrative interpretations has been consistently followed by this Court whenever . . . a full understanding of the force of the statutory policy in a given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

467 US at 844 (quotations omitted).

¹⁰⁸ See Sunstein, 90 Colum L Rev at 2099-2100 (cited in note 5).

Commodity Exchange Act.”¹⁰⁹ In many cases, an agency does not assert authority over a substance or activity solely to increase its authority; it does so because the assertion of jurisdiction furthers the policy of the act entrusted to the agency. The agency’s expertise is highly relevant to this policy determination.

Agency expertise is especially relevant when an agency’s interpretation restricts its jurisdiction.¹¹⁰ Agencies have limited resources. An agency without the funds to fully carry out its statutory mandate must pick and choose among competing alternatives. The agency’s knowledge of where the resources will be most productive is extremely relevant in deciding how to allocate funding. A court lacks the knowledge and capabilities to make such allocations. It may suffer from tunnel vision and pay too much attention to the cases before it without adopting a systemic perspective. Where the statutory requirements are unclear, courts should not engage in the enterprise of requiring agency action.

3. Self-dealing.

Even if the agency’s expertise is greater than that of the courts, the benefits of that expertise must be weighed against the potential costs that may arise from agency self-dealing or aggrandizement. Commentators have cited self-dealing concerns as a primary reason for denying agencies deference for jurisdictional questions, even given superior agency expertise.¹¹¹ It has been suggested that “our system of checks and balances does not allow government agencies to judge the scope of their own authority,”¹¹² and that agency “aggrandizement” occurs when the agency has a “substantial and obvious institutional interest in its interpretation.”¹¹³ The fear is that in questions of jurisdiction, the agency’s self-interest will inappropriately influence the agency’s decision.

¹⁰⁹ Id at 2100.

¹¹⁰ Professor Sunstein argues that courts should treat cases where the agency restricts its jurisdiction in the same manner as when agencies expand their authority. See id (“It should also follow that agencies will not receive deference when they are denying their authority to deal with a large category of cases.”).

¹¹¹ See id at 2099-2100 (“Moreover, agency expertise and accountability are often relevant to the resolution of a jurisdictional ambiguity.”); Note, *Coring the Seedless Grapes: A Reinterpretation of Chevron U.S.A. v. NRDC*, 87 Colum L Rev 986 (1987).

¹¹² See Note, 87 Colum L Rev at 1006 & n 147, citing *Addison v Holly Hill Fruit Products*, 322 US 607, 616 (1944).

¹¹³ Note, 87 Colum L Rev at 1006.

The concern that an agency will always act to increase its authority is unjustified. In many of the cases before the Supreme Court that involved the agency's jurisdiction, the agency had in fact acted to *restrict* the scope of its authority.¹¹⁴ This fact suggests that in areas of ambiguous authority, the agency is more concerned with carrying out the policies of the statute than its own power.

Admittedly, the possibility of agency self-dealing carries costs. But several factors constrain these costs. First, since courts will only defer to the agency when the scope of the agency's authority is ambiguous, and since the agency's assertion of jurisdiction must also be reasonable, the structure of the *Chevron* doctrine places significant restraints on the agency's ability to increase its jurisdiction. Second, Congress or the President can act to restrain the authority of an agency whenever either branch believes the agency has overstepped its bounds. Congressional committees stay in close contact with their administrative counterparts—statutory ambiguities that result in unjustified assertions of jurisdiction are not likely to remain ambiguous for long. Even if the political restraints are not entirely effective, they provide another institutional restraint that lessens the probability of self-dealing behavior. Given these restraints, the costs of self-dealing probably do not outweigh the substantial benefits of agency expertise. Even if the benefits of agency expertise are roughly equivalent to the costs of agency self-dealing, the additional benefits associated with uniformity of application suggest that courts should defer to the agencies.¹¹⁵

CONCLUSION

Courts should not carve out an exception to the *Chevron* doctrine for agency interpretations that delimit the agency's jurisdiction. The Supreme Court has consistently followed the *Chevron* framework when it has analyzed agency interpretations that delimit the agency's authority. Application of the *Chevron* doctrine only changes the locus of interpretive power when the Congressional grant of authority is ambiguous. In this class of cases, courts are incapable of distinguishing jurisdictional from nonjurisdictional interpretations, since within this category the

¹¹⁴ See, for example, *K Mart*, 486 US 281; *Morash*, 490 US at 115-17.

¹¹⁵ But see Merrill, 101 Yale L J 969 (cited in note 105) (questioning whether *Chevron* has in fact resulted in consistent and predictable outcomes by courts).

interpretation is simultaneously jurisdictional and nonjurisdictional. Most importantly, the rationales for the original *Chevron* decision apply with equal or greater force to jurisdictional interpretations. Courts, therefore, have no reason to upset the current regime by bifurcating the rule of deference.