"LEAVING THE FOX IN CHARGE OF THE HEN HOUSE": OF AGENCIES, JURISDICTIONAL DETERMINATIONS AND THE SEPARATION OF POWERS

*SARAH ZELEZNIKOW**

* BA/LLB (Hons)/Dip Mod Lang (University of Melbourne); LLM (Harvard). The author would like to thank Professor Vicki C Jackson for her invaluable advice and support in the preparation of an earlier form of this article, and Anna Bodi and Daniel Kinsey for their exceptional editorial guidance.

> "*'It is emphatically the province and duty of the judicial department to say what the law is.' The rise of the modern administrative state has not changed that duty.*"[2]

INTRODUCTION

In May 2013, the Supreme Court of the United States delivered its judgment in *City of Arlington v. FCC*.[3] In many circles, the decision was lauded for having resolved a highly contentious question in administrative law: whether the framework for judicial deference to agency action set out in *Chevron, U.S.A., Inc v. Natural Resources Defense Council, Inc.*[4] applied to agencies' determinations as to their own jurisdiction.[5] However, the decision also raises serious concerns about the future direction of the *Chevron* doctrine. In the majority's affirmation that there is no distinction between "jurisdictional" and "non-jurisdictional" decisions made by agencies for the purposes of assessing *Chevron* deference, the Court essentially gives its imprimatur to agencies' determinations of purely legal questions, without the necessity of a "policy" element which initially justified the development of the *Chevron* doctrine. This development seems difficult to reconcile with both the traditional justifications put forward for *Chevron* deference and the constitutionally mandated separation of powers.[6]

---

2. City of Arlington v. FCC, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting in part Marbury v. Madison, 5 U.S. 137, 177 (1803)).

3. *Id.* at 1863.

4. 467 U.S. 837 (1984).

5. Note, *Communications Act of 1934*—Chevron *Deference*—City of Arlington v. FCC, 127 HARV. L. REV. 338, 347 (2013).

6. While this article will generally use the term "separation of powers" to refer to the division of powers between the three branches of government established by

More broadly, *Arlington* may be viewed as the most recent development in a trajectory of constitutional compromises effected for the ongoing viability of the administrative state.[7] This uneasy accommodation is by no means new: the constitutional position of agencies has been contested since they were established by the first Congress, and several cases were brought in the first thirty years of the republic that sought to delimit the exact scope of agencies' powers.[8] In many respects, this ongoing contest may be an inevitable result of the Constitution's silence on agency power coupled with agencies' increasing prevalence.[9] However, the critical challenges to these compromises did not occur during the "constitutional watershed" of the New Deal when, "[f]aced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state."[10] Instead, the major "wave of structural challenges to the administrative state" coincided with President Reagan's desire to exercise

---

Articles I, II and III of the Constitution, it recognizes the ongoing discussion in the academic literature as to the appropriateness of this label (as opposed to, for example, the label of a system of "checks and balances"). *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430 (1987) [hereinafter Sunstein, *Constitutionalism After the New Deal*].

7. *See generally* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era,* 32 B.C. L. REV. 757 (1991). *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578–79, 596–97 (1984).

8. PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 550 (11th ed. 2011); *see* Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall (referring to early challenges to Article III literalism); *cf.* Symposium, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 369 (1987) (referring to the "uneasy constitutional position of the administrative agency").

9. *Cf.* City of Arlington v. FCC, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) ("Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, . . . executive power, . . . and judicial power . . . . The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government."); Strauss, *supra* note 6, at 575, 596, 598 ("In almost all significant respects . . . the job of creating and altering the shape of the federal government was left to the future—to the congressional processes suggested by Congress's authority to adopt any law 'necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'").

10. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

greater control over agency action.[11] Through cases like *Chevron*, these challenges resulted in a conception of the relationship between the three branches of government that fundamentally differed from the blueprint carefully laid out in Articles I, II and III of the Constitution.[12]

In the trajectory described above, *Chevron* is thus both "evolutionary and revolutionary:"[13] it represents both a natural development of previous case law and a watershed decision in terms of its breadth of effect. By requiring courts to defer to agency interpretations of their organic statutes where the statute is ambiguous and the agency interpretation is reasonable,[14] *Chevron* has been conceptualized as a "counter-*Marbury* for the administrative state" in its assertion "that in the face of ambiguity, it is emphatically the province of the executive department to say what the law is."[15]

If *Chevron* is a counter-*Marbury*, it may be equally plausible to consider *Arlington* as a "counter-*Crowell* for the administrative state." *Arlington* calls into question the logic of *Crowell v. Benson*'s holding that courts are constitutionally required to undertake de novo review of agencies' determinations as to jurisdictional facts[16] by its

11. STRAUSS ET AL., *supra* note 8, at 550. For a discussion of the Warren and Burger Courts' impact on this trajectory, see Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 995–96 (2011).

12. *Cf.* Strauss, *supra* note 6, at 575 (referring to "a difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power—Congress, President, and Supreme Court.").

13. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986).

14. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837, 843–44 (1984).

15. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) [hereinafter Sunstein, *Beyond* Marbury]; *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 11 (1983); Symposium, *supra* note 8, at 367–68.

16. Crowell v. Benson, 285 U.S. 22, 56, 62 (1932); *see also* Mark Tushnet, *The Story of* Crowell*: Grounding the Administrative State*, in FEDERAL COURTS STORIES 359, 359 (Vicki C. Jackson & Judith Resnick eds., 2010); Merrill, *supra* note 11, at 996 ("The true significance of *Crowell* . . . is that it contains the first intimation of judicial anxiety about the potential displacement of federal courts by administrative agencies. It was just an intimation . . . [b]ut the Court was concerned that meaningful judicial review of the legal limitations on the agency's authority required a more searching review of the evidence. If Congress could completely vest the authority to make all findings of fact with an agency—including those facts necessary to establish that the agency was acting within the scope of its delegated power—'[t]hat would be to sap the judicial power as it exists under the Federal

necessary consequence—that the Constitution does not mandate independent review of pure or substantial questions of law by Article III courts. Yet despite the potential significance of its holding, the *Arlington* Court paid little heed to the potential implications for the separation of powers: the majority and concurrence did not do so at all, and the dissent did so in an ultimately limited way.[17] This should be a matter of some consternation for those engaged in the task of "reconcil[ing] the modern regulatory state with a Constitution that is more than 200 years old, yet [which] still serves as our fundamental benchmark of political legitimacy."[18]

This article commences by briefly examining the arc of the law from *Chevron* to *Arlington*, with a view towards situating the latter case within its jurisprudential context.

In Part II, the article considers whether the extension of the *Chevron* doctrine effected by *Arlington* may be supported by reference to the traditional justifications put forward for *Chevron* deference. Through an analysis of each justification in both the paradigmatic *Chevron* context and the *Arlington* context of jurisdictional determinations, the article suggests that the force of the traditional justifications is generally weakened when applied to agencies' determinations on jurisdictional questions. However, to the extent that the traditional justifications continue to apply, the article contends that they should be viewed as having been eclipsed by the novel concerns that arise from the potential for agency bias or self-aggrandizement in the jurisdictional determinations sphere.

In Part III, the article analyzes the separation of powers issue raised by *Arlington*, and concludes that the decision raises significant questions from a constitutional perspective—questions which have existed since the inception of the *Chevron* framework, but which are significantly exacerbated in its newest iteration.

The conclusion of the article offers some brief suggestions for directions that could be pursued in future cases involving jurisdictional determinations—directions which would both maintain the

---

Constitution, and to establish a government of a bureaucratic character alien to our system.'" (quoting *Crowell*, 285 U.S. at 57)).

17. *Compare* City of Arlington v. FCC, 133 S. Ct. 1863, 1873–74 (saying only that "These lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges.") (2013), *with id.* at 1886 (Roberts, C.J., dissenting) (stating that separation of powers is a "valid concern" and that all branches should be "confine[d] to [their] proper role[s]"). *See also* Note, *supra* note 5, at 343 (referring to the majority opinion having "sidestepped the murky theoretical arguments on granting deference").

18. STRAUSS ET AL., *supra* note 8, at 551.

integrity of *Chevron*'s rule and place less strain on the underlying constitutional framework.

I.
FROM "THE *CHEVRON* REVOLUTION"[19] TO THE *ARLINGTON* RESOLUTION[20]

That *Chevron* has become the most frequently cited case in the administrative law canon is ironic given the limited ambitions of its author, Justice Stevens.[21] While the relationship between *Chevron* and prior precedent remains controversial—some writers urge that *Chevron* represents a synthesis of two previously conflicting lines of cases,[22] while others emphasize the novelty of its test[23]—it is clear that Justice Stevens "did not mean to do anything dramatic."[24]

Chevron involved a provision of the Clean Air Act that required some states to "establish a permit program regulating 'new or modified major stationary sources' of air pollution."[25] The Environmental Protection Agency (EPA) promulgated regulations to facilitate the program, under which states were permitted to utilize a holistic or "plantwide definition of the term 'stationary source.' "[26] This definition was also referred to as the "bubble concept," as it meant that

19. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1120 (2008).

20. Note, *supra* note 5, at 347.

21. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006); *see also* Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences,* 2009 U. ILL. L. REV. 1497, 1522; *cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy,* 38 ADMIN. L. REV. 363, 373 (1986) (stating that "[t]o read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent,' would be seriously overbroad, counterproductive and sometimes senseless", and that the case should rather be understood as embodying a more complex approach); Robert C. Dolehide, *A Comparative "Hard Look" at* Chevron: *What the United Kingdom and Australia Reveal About American Administrative Law*, 88 TEX. L. REV. 1381, 1384 (2010) (considering *Chevron*'s immediate and ongoing impact).

22. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837, 844–45 (1984); Breyer, *supra* note 21, at 366–67; Caust-Ellenbogen, *supra* note 7, at 764; Eskridge & Baer, *supra* note 19, at 1120–21; Rosemary Nicholson, *Interpretation—An Australian-American Comparison,* 32 AUSTL. INST. ADMIN. L. F. 11, 11–12 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, DUKE L.J., 511, 513 (1989); Sunstein, Chevron *Step Zero*, *supra* note 21, at 213, 247.

23. Sunstein, *Beyond* Marbury, *supra* note 15, at 2586.

24. Sunstein, Chevron *Step Zero*, *supra* note 21, at 188.

25. *Chevron*, 467 U.S. at 840.

26. *Id.*

"an existing plant that contain[ed] several pollution-emitting devices [could] install or modify one piece of equipment without meeting the permit conditions if the alteration [would] not increase the total emissions from the plant." In effect, those devices could be treated as if "they were encased within a single 'bubble.'"[27] Upon an application for review in the Court of Appeals for the District of Columbia Circuit, the central question was whether this interpretation represented a "reasonable construction" of the relevant term.[28]

In setting aside the EPA's regulations, the Court of Appeals emphasized the absence of a clear definition of "stationary source" within the legislation itself and the equivocal legislative history.[29] Focusing on the purposes of the statutory scheme (as elucidated by precedent), the Court of Appeals held that the bubble concept was "inappropriate" as the purpose of the program introduced by the Clean Air Act was "to improve air quality," rather than simply maintain air quality.[30]

In a unanimous judgment, the Supreme Court reversed the decision of the Court of Appeals,[31] emphasizing that the Court had "misconceived the nature of its role" by substituting its own analysis of the applicability of the "bubble concept" for that of the administrator's.[32] Instead, a two-step test was to be applied by courts when reviewing agencies' interpretations of their organic statutes (i.e., "the statute[s] which they administer"[33]):

> First, always, is the question 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether

27. *Id.*
28. *Id.*
29. *Id.* at 841.
30. *Id.* at 841–42.
31. *Chevron*, 467 U.S. at 842.
32. *Id.* at 845.
33. *Id.* at 842.

> the agency's answer is based on a permissible construction of the statute.[34]

Applying this test, Justice Stevens concluded that "Congress did not have a specific intention on the applicability of the bubble concept in these cases,"[35] and therefore "that the EPA's use of that concept [was] a reasonable policy choice for the agency to make."[36]

The Court provided rather scant explanation for its adoption of the new test and did little to clarify the test's relationship to the Administrative Procedure Act (APA).[37] In its limited exposition, the Court primarily focused on four interrelated justifications for deference,[38] each of which was grounded in the Court's understanding that the agency's role "necessarily requires the formulation of policy and the making of rules."[39]

The first justification was rooted in Congress' presumed intention to delegate—specifically, the concept that where Congress has explicitly or implicitly "left a gap for the agency to fill" in the administration of a statutory scheme, the gap should be viewed as a delegation of power from Congress to the agency, such that "a court may not substitute its own construction . . . for a reasonable

---

34. *Id.* at 842–43.

35. *Id.* at 845, 862 (concluding that the relevant legislative history was silent).

36. *Id.* at 845, 865 ("[T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests.").

37. 5 U.S.C. §§ 551–59, 701–06 (2012); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (alteration in original) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the 'reviewing court . . . interpret . . . statutory provisions,' we have held that *agencies* may authoritatively resolve ambiguities in statutes." (citing *Chevron*, 467 U.S. at 842-43)); Nicholson, *supra* note 22, at 16 (noting that one ground on which *Chevron* has been criticized is "that it violates the statutory command of §706" of the APA); Sunstein, *Beyond* Marbury, *supra* note 15, at 2586 (commenting that "[s]trikingly, the Court did not discuss the language or history of the APA"); Sunstein, Chevron *Step Zero*, *supra* note 21, at 196 (providing a reading of *Chevron* that is consistent with the text of § 706 of the Act).

38. *Cf.* Sunstein, *Beyond* Marbury, *supra* note 15, at 2586 (characterizing the Court as "offer[ing] two pragmatic arguments" for deference—expertise and accountability).

39. *Chevron*, 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)); *see also id.* at 865 ("In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests"); Sunstein, *Beyond* Marbury, *supra* note 15, at 2587 ("What is most striking about the Court's analysis in *Chevron* is the suggestion that resolution of statutory ambiguities requires a judgment about resolving 'competing interests.' This is a candid recognition that assessments of policy are sometimes indispensable to statutory interpretation.").

interpretation made by the administrator of an agency."[40] The second justification related to the agency's expertise in administering the "technical and complex" legislative scheme—an expertise which was explicitly stated not to be shared by judges.[41] The third justification provided was the relative level of accountability possessed by agencies when contrasted with courts. Agencies, as "part of [a] political branch of Government," are guided by "the incumbent administration's views of wise policy to inform [their] judgments," and gain some accountability through their relationship with the President (although they are not "directly accountable to the people").[42] The fourth and final justification, which received the most confined treatment, was rooted in the separation of powers: that "federal judges—who have no constituency—have a duty to respect those who do."[43]

Although *Chevron* had an immediate effect on the landscape of administrative law,[44] the decision raised as many questions as it answered. One such question—which was raised in *Schor*[45] but did not receive sustained judicial attention until *Mississippi Power & Light Co.*[46]—was the applicability of the *Chevron* framework to agencies' decisions as to their own jurisdiction.[47] In *Mississippi Power & Light*, the Supreme Court considered and endorsed "the Federal Energy Regulatory Commission's jurisdiction to require that a Mississippi utility purchase power from a nuclear plant, thereby preempting a state agency from determining whether those costs were prudently incurred."[48] While Justice Stevens, again writing for the majority, decided the case without reference to the *Chevron* framework, Justice Scalia's concurrence and Justice Brennan's dissent framed the boundaries of the jurisdictional debate in terms that would have repercussions for later cases—most notably, *Arlington*.

---

40. *Chevron*, 467 U.S. at 843.

41. *Id.* at 865; *see also id.* at 844–45.

42. *Id.* at 865–66. *But see* City of Arlington v. FCC, 133 S. Ct. 1863, 1878–79 (2013) (Roberts, C.J., dissenting) (problematizing the assumption that agencies are accountable through executive oversight). The level of agencies' accountability seems inextricably linked to debates as to the unitary nature of the executive. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Strauss, *supra* note 6, at 597, 599–602 (on the relationship between the President and agencies).

43. *Chevron*, 467 U.S. at 866; Caust-Ellenbogen, *supra* note 7, at 773–76 (describing this justification as "break[ing] new ground in administrative law").

44. Sunstein, Chevron *Step Zero*, *supra* note 21, at 188–89.

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

46. Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988).

47. *See* Sales & Adler, *supra* note 21, at 1507, 1522.

48. *Id.* at 1507; *see also Mississippi Power & Light Co.*, 487 U.S. at 356-57.

Justice Scalia commenced by proclaiming it "settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."[49] In addition to rebuffing two of Justice Brennan's principal arguments against according deference (impropriety and agencies' lack of expertise on such issues),[50] Justice Scalia put forward two positive reasons for according deference. First, Justice Scalia stated that deference was "*necessary*" due to the impossibility of drawing a "discernible line" between agencies' jurisdictional and non-jurisdictional determinations.[51] Justice Scalia emphasized—in terms that would later be used in *Arlington*—that "[v]irtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe" the relevant question.[52] Second, Justice Scalia emphasized that deference was "*appropriate*" because, drawing on the "congressional intention" justification for *Chevron*,[53] "Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction."[54] It "would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, de novo, by the courts."[55] On these bases, applying the *Chevron* framework, Justice Scalia found that deference should be accorded to the Federal Energy Regulatory Commission's interpretation of its own jurisdiction under the Federal Power Act.[56]

In dissent, Justice Brennan disagreed with Justice Scalia's approach to according deference "even where, as here, the statute is designed to confine the scope of the agency's jurisdiction to the areas Congress intended it to occupy."[57] Justice Brennan adduced three factors that weighed against according deference in the instant case. First, under the *Chevron* formulation, deference is only to be accorded to agencies' interpretations of statutes which they have

49. *Mississippi Power & Light Co.*, 487 U.S. at 381 (Scalia, J. concurring).
50. *Id.*
51. *Id.* (emphasis in original).
52. *Id.*
53. *See infra* Sections II(a)(i), II(b)(i).
54. *Mississippi Power & Light Co.*, 487 U.S. at 381–82 (Scalia, J., concurring).
55. *Id.*
56. 16 U.S.C. §§ 791(a)–828(c) (2012); *Mississippi Power & Light Co.*, 487 U.S. at 382 (Scalia, J., concurring).
57. *Mississippi Power & Light Co.*, 487 U.S. at 386. Notably, Sales and Adler understand this not to mean that "*Chevron* is categorically inapplicable to jurisdictional disputes," but as a "more modest proposition" (although they also suggest that the judgment "speak[s] with broader force, and counsel[s] against deferring to *any* agency jurisdictional interpretation."). Sales & Adler, *supra* note 21, at 1509–10.

been "entrusted to administer."[58] Justice Brennan suggested that, on its own terms, the *Chevron* framework should not apply to agencies' jurisdictional determinations because agencies cannot be said to "'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies."[59] In the course of this discussion, Justice Brennan emphasized the distinction between statutes which "reflect conflicts between policies that have been committed to the agency's care," that properly fit within the *Chevron* framework, and those which "reflect policies in favor of limiting the agency's jurisdiction," that do not so fit.[60] Second, Justice Brennan considered that the traditional justifications for according deference did not apply with respect to agencies' jurisdictional determinations, as, *inter alia*, agencies could "claim no special expertise in interpreting a statute confining [their] jurisdiction,"[61] and a congressional intention to delegate would seem unlikely given that "by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power."[62] Third, Justice Brennan considered that deference may be viewed as inappropriate in circumstances where it entails the possibility of "conflict . . . with the agency's institutional interests in expanding its own power," as in the jurisdictional determinations sphere.[63] Applying these general principles, and considering the text and legislative history of the statutes in issue, Justice Brennan found that the statutes were plainly "designed to confine the scope of [the agency's] jurisdiction."[64]

In many respects, the considerations most eloquently raised in *Mississippi Power & Light*—the ability to delimit jurisdictional from non-jurisdictional determinations, the relevance of agency expertise and accountability, the presumptions (if any) that can be made as to what Congress would have intended, and the inherent risks of

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

59. *Id.* at 386–87.

60. *Id.* at 387.

61. *Id.*

62. *Id.*; *see also infra* Section III(c).

63. *Mississippi Power & Light Co.*, 487 U.S. at 387 (Brennan, J., dissenting). Justice Brennan then focused upon particular features of the statutory scheme to bolster his conclusion. *See id.* at 388 ("Deference is particularly inappropriate where, as here, the statute is designed not merely to confine an agency's jurisdiction but to preserve the jurisdiction of other regulators, for Congress could not have intended courts to defer to one agency's interpretation of the jurisdictional division where the policies in conflict have purposely been committed to the care of different regulators.").

64. *Id.* at 387–88.

agency bias or self-aggrandizement—have dominated the dialogue in subsequent cases.[65] Despite the opportunities presented to the Supreme Court to resolve the concurrence/dissent disjunction,[66] however, the applicability of the *Chevron* framework to jurisdictional determinations remained the subject of ongoing circuit splits and academic debate until *Arlington*.[67]

Arlington involved a challenge brought by two Texan cities to a declaratory ruling of the FCC.[68] Under the legislative scheme contained in the Communications Act of 1934, the FCC is empowered to promulgate rules and regulations "as may be necessary in the public interest to carry out [the Act's] provisions."[69] The Act contains a saving clause that expressly provides that state and local government authorities are to retain primary authority with respect to "[w]ireless telecommunications networks,"[70] and are required to address siting applications "within a reasonable period of time after the request is duly filed."[71] In response to state and local authorities' delays in dealing with siting applications, an industry body representing "wireless service providers" petitioned the FCC to

65. Sales & Adler, *supra* note 21, 1511.

66. A number of these cases paid relatively cursory attention to the issue. For arguably the most sustained discussion outside of *Mississippi Power & Light Co.*, 487 U.S. 354 (1988), see Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) and Dole v. United Steelworkers, 494 U.S. 26 (1990). For an example of a case in which the jurisdictional issue was not thought to raise considerations beyond the general application of the *Chevron* doctrine, see, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), and the accompanying analysis in Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 204, 234–35 (2004); Sales & Adler, *supra* note 21, at 1513–15; *see also* Sales & Adler, *supra* note 21, at 1515–18 (discussing Massachusetts v. EPA, 549 U.S. 497, 520–21 (2007) and Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)).

67. *See* City of Arlington v. FCC, 668 F.3d 229, 248 (5th Cir. 2012); Armstrong, *supra* note 66, at 241–42; Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 234; Note, *supra* note 5, at 340; Sales & Adler, *supra* note 21, at 1518. *But see City of Arlington*, 133 S. Ct. 1863, 1871 (2013) ("[W]e have consistently held 'that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'"); *Mississippi Power & Light Co.*, 487 U.S. at 380–81 (1988) (Scalia, J., concurring) ("[I]t is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction").

68. *Arlington*, 133 S. Ct. at 1867.

69. *Id.* at 1866.

70. *Id.* The saving clause, contained in § 332(c)(7) of the Act, provides that other than specified limitations, nothing "'shall limit or affect the authority of a State or local government' over siting decisions." Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (2012).

71. § 332(c)(7).

elucidate the meaning of "a reasonable period of time."[72] The FCC responded by way of the challenged declaratory ruling, which provided that the term "presumptively (but rebuttably) [means] 90 days to process a collocation application (that is, an application to place a new antenna on an existing tower) and 150 days to process all other applications."[73]

In the Court of Appeals for the Fifth Circuit, the petitioners alleged that aspects of the legislative scheme evidenced Congress' intent not to give power to the FCC to "interpret the limitations" placed on state and local governments' authority over siting decisions.[74] The court upheld the FCC's declaratory ruling and the two time limits contained therein. Applying *Chevron*, it found that the effect of the saving clause on the FCC's ability to administer the limiting sections (including the "reasonable period of time" limitation) was ambiguous,[75] and the FCC's interpretive approach constituted a "permissible construction."[76]

The Supreme Court granted certiorari on the question of "[w]hether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction."[77] Justice Scalia, writing for the Court, focused upon the impossibility and inutility of differentiating between agencies' jurisdictional and non-jurisdictional decisions. Justice Scalia began by stating that the argument against deference "rests on the [false] premise that there exist two distinct classes of agency interpretations": those that implicate jurisdictional determinations and those that do not.[78] While recognizing the utility and importance of the concept of jurisdiction in the "judicial context," Justice Scalia considered that "the distinction between 'jurisdictional' and 'non-jurisdictional' interpretations is a mirage" in the context of agencies' decisions, given that, as creatures of statute, "[b]oth their power to act and how they are to act is authoritatively prescribed by Congress."[79] Justice Scalia's opinion went on to demonstrate the difference between these two contexts by reference to the fact that "a jurisdictionally proper but substantively incorrect judicial decision

72. *Arlington*, 133 S. Ct. at 1867.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* (citing City of Arlington v. FCC, 668 F.3d 229, 247 (2012)).
77. Petition for Writ of Certiorari at i, Arlington, 133 S. Ct. 1863 (No. 11-1545).
78. *Arlington*, 133 S. Ct. at 1868.
79. *Id.* at 1868–69.

is not ultra vires," whereas agencies' actions would be ultra vires "when they act improperly . . . [or] when they act beyond their jurisdiction."[80] On this basis, Justice Scalia considered that "the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do."[81] Otherwise stated, the critical issue is "whether the statutory text forecloses the agency's assertion of authority, or not."[82]

Directly addressing Chief Justice Roberts' dissent, the opinion critiqued the suggestion that a court must undertake an individualized review in every case to assess "whether [the] delegation covers the 'specific provision' and 'particular question' before the court," regardless of the nature of the determination to be made (jurisdictional or non-jurisdictional) and the breadth of rulemaking authority conferred on the agency by the statute.[83] In effect, the opinion suggested that the implicit constraints placed on the *Chevron* doctrine through cases such as *Mead*[84] serve as an adequate safeguard against the dissent's concern—i.e., ensuring that "the agency [has] received congressional authority to determine the particular matter at issue in the particular manner adopted."[85] Furthermore, Justice Scalia expressed significant concern about the practical application of the dissent's proposal, suggesting that the "open-ended hunt for congressional intent" that would inevitably need to be undertaken by the thirteen Courts of Appeals would fracture the "stabilizing purpose of *Chevron*."[86]

Justice Scalia went on to find that the "preconditions" to *Chevron* deference were satisfied in this case, as they had been in several

---

80. *Id.* at 1869.

81. *Id.*; *see also id.* at 1871 (citing Justice Scalia's concurrence in Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988) with respect to this proposition).

82. *Id.* at 1871.

83. *Arlington*, 133 S. Ct. at 1874.

84. United States v. Mead Corp., 533 U.S. 218 (2001). *Mead* forms part of a trifecta of Supreme Court judgments delivered between 2000 and 2002 which develop the concept of "*Chevon Step Zero*—the initial inquiry into whether the *Chevron* framework applies at all." Sunstein, Chevron *Step Zero*, *supra* note 21, at 191. In *Mead*, Justice Souter, writing for the Court, emphasized that the *Chevron* framework is only to apply "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." *Mead*, 533 U.S. at 226–27.

85. *Arlington*, 133 S. Ct. at 1874.

86. *Id.*

other cases in which jurisdictional determinations were at issue.[87] The opinion concluded that as "Congress ha[d] unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority," deference was to be accorded to the FCC's determination.[88]

Justice Breyer, concurring in part and in the judgment, agreed with Justice Scalia's characterization of the critical question—*i.e.* "whether the agency has stayed within the bounds of its statutory authority" and accepted that, against this backdrop, "the proposed line between 'jurisdictional' and 'non-jurisdictional' agency interpretations" was "illusory."[89] However, Justice Breyer emphasized the necessity of a "reviewing judge . . . decid[ing] independently" whether the agency had received a conferral of power by Congress as an aspect of resolving the critical question.[90] In setting forth boundaries for this independent review, Justice Breyer hypothesized an inquiry similar to that developed in cases such as *Barnhart*[91]: where Congress has spoken clearly, "that is the end of the matter," but where ambiguity exists, it may not be a "conclusive sign" that Congress intended deference to be accorded.[92] To determine whether a "deference-warranting gap" does exist, Justice Breyer put forward several "sometimes context-specific . . . factors," including those set out in *Barnhart*,[93] the relationship between the provision's subject matter and the agency's regular sphere of au-

87. *Id.* at 1871–72. Notably, Justice Scalia analyzed several previous Supreme Court decisions—including *Schor*—as establishing that the *Chevron* framework could be applied to jurisdictional determinations. *See id.* at 1871–72. However, several of these cases did not expressly treat the underlying issues as ones of jurisdiction. *See, e.g.*, *id.* at 1872 (referencing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)); *see also* Sales & Adler, *supra* note 21, 1507–18 (discussing the pre-*Arlington* jurisprudential line, and concluding that the line had conveyed "mixed messages").

88. *Arlington*, 133 S. Ct. at 1874.

89. *Id.* at 1869 (Breyer, J., concurring).

90. *Id.* See also Justice Breyer's subsequent statement that "[t]he question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently." *Id.* at 1876.

91. Barnhart v. Walton, 535 U.S. 212, 218 (2002).

92. *Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring) (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837, 842 (1984)).

93. *Barnhart*, 535 U.S. at 222 ("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").

thority, and ordinary principles of statutory construction.[94] Applying this multifactorial approach to the case at hand, Justice Breyer found that "many factors favor[ed] the agency's view" that it had discretion to interpret the statutory language, including the breadth of the authority granted to the FCC by the statute, the ambiguity inherent in the relevant provision, the "interstitial" nature of the matter, and the utility of the agency's expertise on this question.[95]

Chief Justice Roberts dissented, expressing a "fundamental" disagreement with the majority's decision regarding the nature of the inquiry to be undertaken by courts. Echoing Justice Breyer's concurrence, the Chief Justice emphasized that "[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference," which must necessarily encompass a determination by the court that the agency has "interpretive authority."[96] Unlike the concurrence, however, the Chief Justice did not put forward any specific factors that were to be considered by the court during this inquiry.

Chief Justice Roberts began by analyzing the development of the modern administrative state, reassessing Madison's oft-quoted statement in *The Federalist*: "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."[97] Explicitly invoking this historical arc, the Chief Justice emphasized that it was against this "background" that the Court must "consider whether the authority of administrative agencies should be augmented even further, to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power."[98]

Chief Justice Roberts then considered the broader separation of powers implications raised by the case, both asserting that *Marbury*'s conception of the "province and duty of the judicial department . . . has not [been] changed" by the administrative state, and

94. *Arlington*, 133 S. Ct. at 1875–76 (Breyer, J., concurring). In relation to the *Barnhart* inquiry, and *Barnhart's* genesis and influence, see generally Sunstein, Chevron *Step Zero*, *supra* note 21, at 216–19.

95. *Arlington*, 133 S. Ct. at 1876–77 (Breyer, J., concurring).

96. *Id.* at 1877 (Roberts, C.J., dissenting).

97. *Id.* at 1877–1879 (citing THE FEDERALIST NO. 47 (James Madison) ("[The] accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny")).

98. *Id.* at 1879.

explaining how the APA requirement that courts decide "all relevant questions of law" could be read compatibly with the *Chevron* doctrine.[99] Situating his analysis firmly within a separation of powers framework, the Chief Justice considered, in line with Justice Breyer's opinion,[100] that "before a court may grant . . . deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue."[101] The Chief Justice emphasized that this was a "question[ ] of law,"[102] and that reserving such an inquiry for the courts accorded with Supreme Court precedent.[103]

While expressing similar concerns to those of the majority about the use of the term "jurisdiction,"[104] Chief Justice Roberts clearly recognized the jurisdiction inquiry as part of this broader question that the court must independently address.[105] On these bases, the Chief Justice rejected the FCC's argument that "a court need only locate an agency and a grant of general rulemaking authority over a statute" before *Chevron* is to apply.[106] The Chief Justice stated that the task to be undertaken by the court is "not . . . so difficult,"[107] and that "if the legitimacy of *Chevron* deference is based on a congressional delegation of interpretive authority, then the line is one the Court must draw."[108] Overall, finding that that the Fifth Circuit "should have determined on its own whether Congress delegated interpretive authority" over the relevant section prior to applying the *Chevron* framework, Chief Justice Roberts would have vacated the lower court's decision and remanded the case "to the Fifth Circuit to perform the proper inquiry in the first instance."[109]

Much of *Arlington*'s virtue lies in the clarity that it has provided in a longstanding theoretical debate. Early literature on the case

---

99. *Id.* at 1880.

100. *See id.* at 1876.

101. *Arlington*, 133 S. Ct. at 1880 (Roberts, CJ., dissenting).

102. *Id.* at 1880 (citing APA, 5 U.S.C. § 706 (2012)).

103. *Id.* at 1880-83.

104. *Id.* at 1879. Particularly notable is Chief Justice Roberts' comment that "[t]he parties, *amici*, and the court below too often use the term 'jurisdiction' imprecisely, which leads the Court to misunderstand the argument it must confront." *Id.*

105. *Id.* at 1880; s*ee also id.* at 1879.

106. *Id.* at 1883.

107. *Arlington*, 133 S. Ct. at 1884 (Roberts, CJ., dissenting).

108. *Id.* at 1885.

109. *Id.* at 1886.

lauded "Justice Scalia's majority opinion [for] side-stepp[ing] the murky theoretical arguments on granting deference in such cases and instead offer[ing] an overriding pragmatic one" in its focus on the mutability of the "jurisdictional/nonjurisdictional distinction."[110] However, this overtly pragmatic approach raises significant theoretical and constitutional questions that may well surpass the previous doctrinal queries in magnitude.

II.
JUSTIFYING DEFERENCE

One significant question raised by *Arlington* is the extent to which the justifications put forward for *Chevron* deference apply to agencies' jurisdictional determinations. This Section approaches that question by first outlining the traditional justifications offered for courts' deference to agencies' interpretations of law under *Chevron*. It then considers whether the same justifications apply to cases dealing with jurisdictional determinations, and concludes that to the extent that such justifications can be said to apply, they have substantially less explanatory power in this context. Next, this Section highlights two arguments that counsel against the application of *Chevron* deference to jurisdictional determinations, and which should be seen to eclipse the traditional justifications for deference even if those justifications retain some force: first, the potential for agency bias or self-aggrandizement and second, the logical structure of the *Chevron* doctrine. Finally, this Section assesses the claim that it is not possible to accurately distinguish jurisdictional from non-jurisdictional determinations, concluding that the distinction is one that can be, and often is, drawn by courts.

A. Traditional Justifications for Chevron Deference

Justice Stevens' opinion in *Chevron* did not put forward any overarching, holistic theory upon which its iteration of deference was based—one commentator has gone so far as to describe the opinion as "two steps in search of a rationale."[111] However, the case introduced several protean concepts that have taken on a more defined shape in later cases and in academic literature, such that it is now possible to identify at least six discrete (but overlapping) justifications for deference. As Sales and Adler have noted, "[e]ach of these rationales could be used to justify *Chevron* deference gener-

110. Note, *supra* note 5, at 343.

111. Sunstein, Chevron *Step Zero*, *supra* note 21, at 195.

ally, but which one predominates has important implications for whether the scope of *Chevron*'s domain is broad or narrow."[112]

i. *Chevron* as a Reflection of Congressional Intention

The current prevailing understanding of *Chevron* is as a doctrine "rooted in a background presumption of congressional intent."[113] As formulated in *Smiley v. Citibank (South Dakota), N.A.*,[114] the critical idea is that "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[115] This idea has sometimes been linked to the concept that *Chevron* may serve as a default, or background, rule against which Congress can legislate.[116]

It may be seen as ironic that *Chevron* has come to be understood in such a manner given Justice Stevens' explicit statement in *Chevron* that "Congress' particular intention 'matters not.'"[117] Nonetheless, this interpretation has gained prominence, largely through the extra-curial writings of Justices Scalia and Breyer in the 1980s.[118] Notably, while both justices "converged . . . on [this] distinctive understanding of *Chevron*" as based on the abovementioned "legal fiction," "the two sharply disagreed about its meaning and application."[119] Justice Scalia's consistent focus has been the pursuit

112. Sales & Adler, *supra* note 21, at 1523.

113. *Arlington*, 133 S. Ct. at 1868; *see also* Quincy M. Crawford, Chevron *Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 978 (1994); Sunstein, Chevron *Step Zero*, *supra* note 21, at 197. For a recent endorsement of this understanding, see King v. Burwell, 135 S. Ct. 2480, 2488 (2015).

114. 517 U.S. 735 (1996).

115. *Id.* at 740–41, *quoted in part in Arlington*, 133 S. Ct. at 1868.

116. *See, e.g.*, Crawford, *supra* note 113, at 958–59 (treating "reconstruct[ion of] congressional intent" and *Chevron* creating a "default rule" as separate justifications); Scalia, *supra* note 22, at 517 ("Congress now knows that the ambiguities 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."); Note, *supra* note 5, at 338 (referring to *Chevron* as a "stable background rule").

117. Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837, 865 (1984). Notably, despite this, there is a strong theme of either explicit or implicit delegation from Congress to an agency in Justice Stevens' judgment. *See* Sunstein, *supra* note 21, at 195–96.

118. *See* Sunstein, Chevron *Step Zero*, *supra* note 21, at 192.

119. *Id.*

of simple and broadly applicable rules,[120] while Justice Breyer has focused on a significantly more contextual and multifactorial approach.[121]

While the practical outworking of the congressional intent theory remains the subject of debate, the Supreme Court has effectively endorsed this justification. Most notably, in *United States v. Mead Corp.*, the Court emphasized that the *Chevron* framework will be 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."[122]

ii. *Chevron* as Grounded in Agencies' Expertise

One of the grounds briefly raised by Justice Stevens as a potential justification for the *Chevron* rule was agency expertise.[123] In *Chevron*, Justice Stevens indicated that agencies' "great expertise" may have impelled Congress to delegate the relevant question to them, and contrasted this to judges' relative lack of expertise.[124] Cass Sunstein has indicated that these cursory references to expertise may be construed as the Court suggesting that "the resolution of statutory ambiguities sometimes calls for technical expertise, and in such cases deference would be appropriate," recognizing that such a view "has roots in the New Deal's enthusiasm for technical competence."[125]

120. *See* United States v. Mead Corp., 553 U.S. 218, 236 (2001) ("Justice Scalia's first priority over the years has been to limit and simplify."); Sales & Adler, *supra* note 21, at 1509 n.59; *see also* Scalia, *supra* note 22, at 516; Sunstein, Chevron *Step Zero*, *supra* note 21, at 192 (and more generally 202-205).

121. Sunstein, Chevron *Step Zero*, *supra* note 21, at 192–93, 198–202, 217–18. For a neat juxtaposition of the two poles, see *id.* at 205 ("It should be clear that the disagreement between Judge Breyer and Justice Scalia involves the pervasive choice between standards and rules. Judge Breyer urged that no rule could solve the deference problem, simply because it would produce intolerable inaccuracy. Justice Scalia can be taken to have responded that a rule is likely to be as accurate as any standard and that it has the further advantage of reducing decisional burdens on courts.").

122. *Mead*, 553 U.S. at 226–27; *see also* Monaghan, *supra* note 15, at 28; Sales & Adler, *supra* note 21, at 1526; Sunstein, Chevron *Step Zero*, *supra* note 21, at 213; *cf.* Paul Daly, *Deference on Questions of Law*, 74(5) MODERN. L. REV. 694, 698–99 (2011). It has been suggested that the logical endpoint of this argument is that Congress is more or less given *carte blanche* to delegate in this arena subject to constitutional restrictions. *See* Sunstein, Chevron *Step Zero*, *supra* note 21, at 198. For a response to this specific point, see *infra* Section III(c).

123. Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837, 865 (1984).

124. *Id.*

125. Sunstein, Chevron *Step Zero*, *supra* note 21, at 197.

In his seminal 1989 article, Justice Scalia undertook a more detailed analysis of this justification and suggested that agency expertise may be grounded in an agency's "intense familiarity with the history and purposes of the legislation at issue [and] their practical knowledge of what will best effectuate those purposes."[126] Agency expertise may similarly be grounded in the frequency with which agency staff deal with the relevant legislation, and the agency's role (if any) in the inception and/or drafting of the legislation.[127] Notably, while Justice Scalia recognized that such expertise, if present, may render agencies "more likely than courts to reach the correct result," he also recognized that this provided "a good practical reason for accepting the agency's views, but hardly a valid theoretical justification for doing so."[128]

iii. *Chevron* as Effecting or Reflecting the Separation of Powers

From time to time, *Chevron* has also been justified on the basis of the constitutionally-enshrined separation of powers.[129] In terms used by Chief Justice Roberts in *Arlington*, "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking power properly left, under the separation of powers, to the Executive."[130]

Despite the intuitive appeal of such a position, Justice Scalia, writing extra-curially, has cautioned against its unquestioning adoption on two bases. First, drawing on general principles of statutory interpretation, Justice Scalia emphasized that "the consideration of policy consequences" forms part of the "traditional judicial tool-kit"

126. Scalia, *supra* note 22, at 514.

127. Sales & Adler, *supra* note 21, at 1523–24.

128. Scalia, *supra* note 22, at 514; *see also* Crawford, *supra* note 113, at 980 ("If agencies do not have an institutional advantage over courts in interpreting statutes, little purpose would be served by the *Chevron* doctrine.").

129. *Cf.* Caust-Ellenbogen, *supra* note 7, at 788 ("*Chevron* is not required by the Constitution. Indeed, the practice of delegating 'legislative' power to agencies rests on shaky constitutional moorings.").

130. City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013); *see also* Crawford, *supra* note 113, at 959; Scalia, *supra* note 22, at 515 ("When, in a statute to be implemented by an executive agency, Congress leaves an ambiguity that cannot be resolved by text or legislative history, the 'traditional tools of statutory construction,' the resolution of that ambiguity necessarily involves policy judgment. Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive."); Sunstein, Chevron *Step Zero*, *supra* note 21, at 197; *cf.* Starr, *supra* note 13, at 300–07 (discussing *Chevron*'s "broader message to the federal courts about their relationship to administrative agencies" and suggesting that "*Chevron* and *Vermont Yankee* . . . produced a decided shift away from the supervisory paradigm and toward the checking and balancing paradigm").

of statutory construction, and thus it cannot be correct to say that courts have "no constitutional competence to consider and evaluate policy."[131] Secondly, Justice Scalia noted that Congress would generally have the ability to specify that courts should consider matters of statutory interpretation de novo, and thus that "it is not any constitutional impediment to 'policy-making' that explains *Chevron*."[132]

iv. *Chevron* as Ensuring Democratic Accountability with Respect to Policy Decisions

As a corollary of the separation of powers argument put forward above, the Court in *Chevron* emphasized the appropriateness of agencies, as opposed to courts, making policy decisions. In Justice Stevens' language, "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices," in contrast to judges, who are "not part of either political branch of the Government."[133] Justice Scalia later made the same point in starker terms: "lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges."[134]

While it seems uncontroversial that agencies are generally more "accountable" than the judiciary,[135] questions remain as to when and how agency officials may be made accountable (some of which may relate to broader debates about the "unitary executive").[136] Where an agency's interpretation touches on a highly visi-

131. Scalia, *supra* note 22, at 515.

132. *Id.* at 515–16.

133. Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837, 865 (1984); *see* Sales & Adler, *supra* note 21, at 1524; Sunstein, Chevron *Step Zero*, *supra* note 21, at 196–97.

134. *Arlington*, 133 S. Ct. at 1873.

135. After all, judicial independence from political matters is a central feature of Article III. U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

136. *See* Kagan, *supra* note 42; Caust-Ellenbogen, *supra* note 7, at 759 (referring to the particular issues that arise with respect to certain "independent" administrative agencies not directly accountable to the President); Symposium, *supra* note 8, at 369 ("Administrative agencies . . . are only indirectly accountable. They are not directly accountable to the President . . . nor are they directly accountable to the Congress."). *But cf* Sales & Adler, *supra* note 21, at 1524 ("Agencies can be held accountable if they adopt discretionary policies that are unpopular or inconsistent with the views of elected officials. While this rationale is more attenuated in the context of independent agencies, insofar as such agencies are headed by offi-

ble matter, questions as to accountability may be less urgent—as Justice Breyer noted in dissent in *Brown & Williamson*, "important, conspicuous and controversial" decisions will almost certainly be subject to "the kind of public scrutiny that is essential in any democracy."[137] However, such situations appear to be the exception rather than the rule. As recognized by Chief Justice Roberts in *Arlington*, "with hundreds of federal agencies poking into every nook and cranny of daily life, [a] citizen might . . . understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching."[138]

v. *Chevron* as Avoiding Balkanization and Promoting Predictability and Consistency

Several academics have emphasized the true value of *Chevron* as a decision that, by virtue of the clarity, singularity, and breadth of its rule, constituted a "dramatic departure from what preceded it."[139] Accordingly, judicial and extrajudicial writings have referred to *Chevron*'s "stabilizing purpose,"[140] and endorsed its ability to produce "regulatory uniformity."[141] A similar theme was taken up by Breyer, et al., who, following from Strauss,[142] emphasized *Chevron*'s ability to safeguard against "balkanization":

> If courts review agency interpretations independently, it is likely that there will be many disagreements between courts of appeals. If courts uphold any reasonable interpretation of ambiguous statutes, it is likely that the courts of appeals will unite around a single view, viz, the agency's. With more and more cases being reviewed, and more and more reviewing panels, and a Supreme Court unable or unwilling to iron out all possible conflicts, the shift of interpretive power from court to

---

cials appointed for limited terms and subject to executive and legislative oversight, they are still more likely to be politically accountable than are courts").

137. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190 (2000) (Breyer, J., dissenting); *see also* Sunstein, Chevron *Step Zero*, *supra* note 21, at 241–42 (discussing this aspect of Justice Breyer's opinion in *Brown & Williamson*).

138. *Arlington*, 133 S. Ct. at 1879 (Roberts, CJ., dissenting).

139. *See* Sunstein, Chevron *Step Zero*, *supra* note 21, at 203; *cf.* Caust-Ellenbogen, *supra* note 7, at 770 (referring to the "history of confusion" prior to the decision in Chevron).

140. *Arlington*, 133 S. Ct. at 1874; *see also* Note, *supra* note 5, at 347.

141. Sales & Adler, *supra* note 21, at 1523.

142. *See generally* 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).

agency could help unify the law, for there is but one agency, while there are many appellate courts.[143]

This characterization of the relative likelihood of predictability and consistency in agency adjudications, as opposed to judicial decisions, is not universally accepted.[144] In addition, several academics have suggested that difficulties in applying the *Chevron* test may undermine any suggestion that the test ensures predictability and consistency.[145]

vi. *Chevron* as Providing Drafting Incentives to Congress

As a final point, it has been suggested that *Chevron* may provide "a salutary incentive for Congress to write laws with greater precision."[146] This argument, often attributed to Kenneth Starr and John Manning, proceeds on the assumption that Congress would be perturbed by the prima facie conferral of unconstrained discretion on the executive, and that it therefore has an incentive to be clear and specific in its delegations.[147] However, "[w]hether this incentive exists, is powerful, will have any actual impact, or is a good thing are all contested."[148]

B. Application of Traditional Justifications to the Jurisdictional Determinations Sphere

Discussions of the applicability of traditional *Chevron* justifications to the jurisdictional determinations sphere have frequently taken the form of broad generalizations lacking an empirical basis.[149] This may in part be due to the complex dynamics at play in

143. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 288 (7th ed. 2011); *see also Arlington*, 133 S. Ct. at 1874 ("Thirteen Courts of Appeals applying a totality-of-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*"); Sales & Adler, *supra* note 21, at 1524 ("Deferring to agency interpretations of federal statutes is . . . more likely to ensure a degree of uniformity in federal law.").

144. *See* Sales & Adler, *supra* note 21, at 1536 (discussing this in the context of jurisdictional determinations).

145. *See, e.g.*, Caust-Ellenbogen, *supra* note 7, at 786.

146. BREYER ET AL, *supra* note 143, at 288.

147. *Id.*; *see also* John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Starr, *supra* note 13.

148. BREYER ET AL, *supra* note 143, at 288–89.

149. *See, e.g.,* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 4 (1998) ("The scholarship on *Chevron* has reached an impasse, in which three distinct paradigms of the doctrine compete for attention without the substantial empirical evidence needed to advance or impede their claims"); *see also* Eskridge & Baer, *supra* note

many of the justifications, and is almost certainly also referable to the relative paucity of cases squarely addressing jurisdictional determinations. While this difficulty poses problems for any analysis, it is possible to put forward some tentative conclusions from existing precedent and academic literature.

i. Congressional Intention Justification

While this justification now represents the dominant basis for understanding *Chevron*, it may also be the most problematic as regards *Chevron*'s application to jurisdictional determinations. In an article published in 1990, Sunstein argued that "[b]ecause congressional instructions are crucial here, courts should probably refuse to defer to agency decisions with respect to issues of jurisdiction" as "Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers."[150] Although Sunstein has since adopted a different view on the appropriateness of according deference to jurisdictional determinations,[151] his later articles moderate—rather than expressly repudiate—this particular point.[152]

Furthermore, there are good reasons to accept this relatively intuitive reasoning as correct. As Sunstein recognized, there is a strong systemic assumption "[i]n Anglo-American law [that] those limited by law are generally not empowered to decide on the meaning of the limitation."[153] In addition, this reasoning seems very much in line with the subsequent development of the "major questions" doctrine in administrative law—i.e. that where an issue of

19, at 1089–90 (noting that "hard empirical data" is "lacking in the academic discourse on *Chevron*"). But, for an example of valuable empirical work on the subject, see Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

150. Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071, 2099 (1990) [hereinafter Sunstein, *Law and Administration after* Chevron]; *see also* Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-based Delegations*, 20 CARDOZO. L. REV. 989, 994 (1999) ("When agency self-interest is directly implicated, such as when it must decide whether an area previously unregulated by the agency should now come within its jurisdiction, the justifications for deference fade. Its experience and expertise in the new subject matter is limited; it is at most a fiction that Congress intended that the agency would exercise jurisdiction if it had addressed the question").

151. *See, e.g.*, Sunstein, *Beyond* Marbury, *supra* note 15, at 2604–05; Sunstein, Chevron *Step Zero*, *supra* note 21, at 235–36 ("In the end, there is no sufficient basis for an exception to *Chevron* when jurisdictional issues are involved").

152. *See, e.g.*, Sunstein, *Beyond* Marbury, *supra* note 15, at 2604–05; Sunstein, Chevron *Step Zero*, *supra* note 21, at 234–36.

153. Sunstein, *Law and Administration after* "Chevron," *supra* note 150, at 2097.

statutory interpretation raises a major question or relates to an "essential characteristic" of a statutory scheme, it is presumed to be "highly unlikely that Congress would [have intended to] leave the determination . . . to agency discretion."[154]

Despite the foregoing analysis, the Supreme Court has recognized the existence of a congressional intention to delegate power to agencies with respect to jurisdictional determinations in certain situations.[155] In such cases, however, the Court has often relied on something more than an ambiguous statutory provision to justify its conclusions on intention. By way of example, in *Schor*, the Court found that "Congress [had] explicitly affirmed the [authority of the Commodity Futures Trading Commission (CFTC)] to dictate the scope of its counterclaim jurisdiction."[156] In coming to this finding, the Court emphasized both the extremely broad grant of power to the CFTC to "promulgate such rules, regulations, and orders as it deems necessary," and more compellingly, the fact that "Congress ha[d] twice amended the [Act] since the CFTC declared by regulation that it would exercise [this] jurisdiction . . . but has not overruled the CFTC's assertion of jurisdiction."[157] Without additional factors such as were present in *Schor*, the inquiry as to congressional intention in the jurisdictional determinations sphere may be significantly closer to the line.

ii. Expertise Justification

Another substantial area of contention is the extent to which jurisdictional determinations implicate agencies' expertise. From a pragmatic perspective, in at least one circuit court concurrence, it was accepted that Congress had authorized an agency to determine jurisdictional issues on the basis of its "superior expertise."[158] Crawford suggests that *Mississippi Power & Light* and *Schor* could also be read as having been sustained on that basis.[159]

---

154. MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); *see also* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015); Sunstein, Chevron *Step Zero*, *supra* note 21, at 237.

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

156. *Id.* at 846.

157. *Id.*

158. *See* Air Courier Conference v. United States Postal Serv., 959 F.2d 1213, 1225 (3rd Cir. 1992) (Becker, J., concurring), *discussed in* Crawford, *supra* note 113, at 967.

159. *See* Crawford, *supra* note 113, at 967 (regarding Judge Becker's treatment of this point).

When one delves into more theoretical questions of whether and how such expertise affects jurisdictional determinations, however, matters become murkier. Crawford suggests that the central issue in this respect "is not whether the federal courts have a greater expertise in interpreting grants of jurisdiction," but rather, "once the federal courts have found the grant of jurisdiction to be ambiguous, [whether] courts or agencies have greater expertise in resolving the ambiguity."[160]

Crawford puts forward two arguments in favor of agencies' expertise. First, he notes that to the extent that questions of law and questions of policy are not easily distinguishable or extricable in this field, "the benefits of agency expertise for policy questions apply to jurisdictional interpretations as well."[161] Secondly, and arguably more compellingly, Crawford notes (in part echoing Sunstein) that the expertise of an agency is "relevant to the resolution of a jurisdictional ambiguity"[162] in situations where "the assertion of jurisdiction furthers the policy of the act entrusted to the agency."[163] On this point, Sunstein gives the particular examples of the FCC's "comparative competence" potentially "bear[ing] on whether federal regulatory authority extends to cable television," and the CFTC's expertise in administering the Commodity Exchange Act as impacting a determination with respect to its "authority over common law counterclaims."[164]

Sales and Adler strongly eschew such arguments, emphasizing that "there is no reason to presume that agencies have the same level of expertise in jurisdictional questions as they do in the subject matter of their expertise."[165] While Sales and Adler recognize that agencies' technical expertise "is relevant to the question of whether expanding their jurisdiction will facilitate the broad policy goals enunciated by Congress," they suggest that this point "sidesteps the relevant inquiry."[166] In crude terms, "[w]hether or not broader agency jurisdiction would serve the agency's mission does not mean Congress delegated such authority."[167] As Sales and Adler note,

160. *Id.* at 980.

161. *Id.*; *see also infra* Section III(a).

162. Crawford, *supra* note 113, at 970 (quoting Sunstein, *Law and Administration after* "Chevron," *supra* note 150, at 2099–2100).

163. *Id.* at 981.

164. Sunstein, *Law and Administration after* "Chevron," *supra* note 150, at 2100.

165. Sales & Adler, *supra* note 21, at 1529; *see also* Armstrong, *supra* note 66, at 244 (citing BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.36 (3d ed. 1991) and Gellhorn & Verkuil, *supra* note 150, at 994).

166. Sales & Adler, *supra* note 21, at 1535.

167. *Id.* at 1535–36.

"[i]n enacting statutes, Congress necessarily resolves tradeoffs between competing policy goals and inevitably grants agencies less power than was conceivably possible."[168] This means that the particular expertise held by the agency does not clearly align with the task of the Court—i.e. to determine what authority was actually conferred. This task—the search for "statutory intent"[169]—is a task with respect to which courts have significantly greater "institutional competence."[170]

To counter this final point, Crawford ventures the argument that the ambiguity that must necessarily exist in the statute for *Chevron* to apply renders nugatory any search for statutory intent—in his terms, "[s]ince the statute is ambiguous . . . there is no intent of Congress."[171] With respect, however, this argument seeks to prove too much. The existence of ambiguity in statutory meaning does not mean that there is *no* intent of Congress—it means that the statutory intent is not immediately clear on the face of the legislation. In situations such as these, courts can—and inevitably do—utilize their extensive and well-worn tools of statutory construction to give meaning to a provision, an exercise which archetypally resembles adjudication on a purely legal question, rather than a question involving mixed law and fact.[172] Given courts' primary expertise in such tasks of statutory construction, it seems arguable that the expertise justification may at the very least be diminished in the sphere of jurisdictional determinations.

iii. Separation of Powers and Democratic Accountability Justifications

While substantial discussion of the separation of powers issues has been reserved for Section III of this article, it should briefly be noted that the separation of powers and democratic accountability justifications also appear significantly weakened in the jurisdictional determinations context. This analysis is primarily grounded in the same assumption that informs the expertise justification analysis—that jurisdictional determinations are by their nature closer to constituting pure questions of law than questions of policy. Accordingly, there are substantially fewer reasons to leave the resolution of such questions to the executive branch. Indeed, as will be discussed in Section III(b) and (c), the separation of powers justification almost certainly operates in favor of reserving such power to the judi-

168. *Id.*
169. *Id.* at 1535.
170. *Id.* at 1535.
171. Crawford, *supra* note 113, at 980.
172. *See infra* Section III(a).

ciary.[173] This would not only ensure that questions of law are decided by Article III judges, as considered further below, but may also ensure that the legislative "deal" reached by Congress can be appropriately scrutinized through the judicial review process.[174]

iv. Predictability and Consistency Justification

As Peter Strauss has suggested in a different context, any analysis sought to be undertaken with respect to this justification is necessarily somewhat impressionistic and anecdotal given the difficulties in formulating a method of, and undertaking, empirical verification of claims of "predictability" and "consistency."[175] However, Sales and Adler have presented a persuasive argument that courts have "a comparative advantage in resolving jurisdictional questions in a consistent and predictable fashion" for at least two reasons.[176] First, "[j]udicial perspectives do not swing with each change in presidential administration"; agency interpretations have on numerous occasions changed quite dramatically,[177] though not necessarily in a manner as overtly linked to politics as Sales and Adler suggest. Secondly, following from the work of Molot, Sales and Adler note that "[j]udges . . . are subject to strong institutional

173. *See infra* Section III(b), (c).

174. Sales & Adler, *supra* note 21, at 1501, 1533; *see also* Caust-Ellenbogen, *supra* note 7, at 788, 794 ("[T]he fact that agencies exercise legislative power in conjunction with executive power argues for a strong role for the judiciary in reviewing agency action in order to curb possible agency bias"); Symposium, *supra* note 8, at 369 ("[T]he uneasy constitutional position of the administrative agency justifies an aggressive judicial role, above all in interpreting administrative agency understandings of law"). *But see* Monaghan, *supra* note 15, at 32–33 (agreeing as regards the "judicial duty . . . to ensure the administrative agency stays within the zone of discretion committed to it by its organic statute", but noting that the existence of "alternative methods of control" of agency action means that "there has never been a pervasive notion that limited government mandate[s] an all-encompassing judicial duty to supply all of the relevant meaning of statutes."). In addition, see City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) (recognizing "the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well").

175. Strauss, *supra* note 142, at 1095–96.

176. Sales & Adler, *supra* note 21, at 1536.

177. As to changes in agency interpretation, *see, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82, 1000–01 (2005); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742–43 (1996); Rust v. Sullivan, 500 US 173, 186–87 (1991); *see also* Sunstein, Chevron *Step Zero*, *supra* note 21, at 235–36 (considering that "[i]f an agency is asserting or denying jurisdiction over some area", it may be because "democratic forces are leading it to do so", and seemingly suggesting that it is appropriate, rather than problematic, that an agency's view of its jurisdiction over particular subject matter may change from administration to administration).

norms that render judicial interpretation more stable and consistent over time" than agency interpretations.[178] These institutional norms include, but are not limited to, the "faithful application of precedent, applicable legal [principles], and canons of construction."[179] While these arguments—which do not always feature prominently in the general *Chevron* justification debate—could also be said to support the virtue of judicial decisions (as opposed to agency decisions) more generally, they seem to have particular force in this situation, where the determination to be made is primarily one of law.[180] Accordingly, there may be some meaningful basis on which to suggest that the "predictability and consistency" justification cuts against *Chevron* deference in the jurisdictional context.

Overall, the analysis contained in this sub-section suggests that the justifications generally put forward for *Chevron* deference may not apply, or may at least apply with lesser force, when considering agencies' jurisdictional determinations.[181]

C. Countervailing Concerns against According Chevron Deference to the Jurisdictional Determinations Sphere

In addition, there are at least two countervailing concerns (in addition to the separation of powers concern considered *infra* in Section III) which weigh against application of the *Chevron* doctrine in this arena.

i. Agency Bias and Self-Interest

As discussed in Section I, there is a systemic assumption—also reflected in a canon of statutory interpretation[182]—that with the

178. Sales & Adler, *supra* note 21, at 1536 (quoting Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1247 (2002)). Drawing on Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 359 (2007), Sales and Adler have also noted that as a corollary of the broader systemic view that courts are required to take, courts may be less likely to engage in "tunnel vision" than agencies. *See* Sales & Adler, *supra* note 21, 1536.

179. Sales & Adler, *supra* note 21, 1536.

180. *Id.* at 1535 ([This type of inquiry]—"not a policy or technical question, but rather, one of statutory intent"—is "not the sort of [question on] which an agency could be expected to have expertise as a general matter"); *see also infra* Section III(a).

181. In the interest of completeness, it does not appear that any differential analysis applies to the "drafting incentives" justification in the jurisdictional determinations context. *See infra* Section II(a)(vi).

182. Crawford, *supra* note 113, at 977.

notable exception of courts' ability to determine limits on their own jurisdiction, "those limited by the law are generally not empowered to decide on the meaning of the limitation."[183] This assumption is also reflected in the "underlying constitutional conception . . . that wielders of governmental power must be subject to the limits of law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary."[184] The assumption is grounded in several different rationales, including that any person or body made the judge "in [its] own cause" is inherently "susceptible to bias."[185]

This concern has been expressed on several occasions with specific reference to the *Chevron* framework.[186] For example, in the contexts of deference to litigating positions,[187] deference to agencies' decisions as to reviewability,[188] and deference on "major questions,"[189] academics and judges have expressed serious concerns about according *Chevron* deference because of the obvious incentives for agencies to prefer interpretations that will further their immediate self-interest, regardless of the longer-term consequences of such an interpretation.[190]

These concerns have generally been met with two responses. The first response is that in many situations, the structure of the *Chevron* doctrine itself, particularly when coupled with subsequent "arbitrary and capricious" review, may provide an implicit restraint

183. Sunstein, *Law and Administration after "*Chevron,*"* *supra* note 150, at 2097; *see* Sales & Adler, *supra* note 22, at 1552 (relating to courts' abilities to determine their own jurisdiction); *see also* Sunstein, *Constitutionalism After the New Deal*, *supra* note 6, at 467; Caust-Ellenbogen, *supra* note 7, at 810.

184. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 938 (1988) [hereinafter Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*].

185. Sunstein, *Law and Administration after "*Chevron,*"* *supra* note 150, at 2099; *see* Armstrong, *supra* note 66, at 206 and 269–72; Crawford, *supra* note 113, at 981; Symposium, *supra* note 8, at 367–68.

186. *See, e.g.*, Armstrong, *supra* note 66, at 205 (providing a survey of such occasions).

187. *See* Bradley G. Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 447–49, 486 (2013) (advocating that only *Skidmore* deference should be accorded in these situations).

188. *See* Sunstein, Chevron *Step Zero*, *supra* note 21, at 209–10.

189. *See id.* at 243–44.

190. *But cf.* Scalia, *supra* note 22, at 519–20 (arguing that there may be many "right" interpretations of a statutory provision, and that it is far from self-evident that such interpretations should be discounted solely due to the context in which they were first advanced); Sunstein, Chevron *Step Zero*, *supra* note 21, at 204 (reflecting on Justice Scalia's position).

on the ability of agencies to adduce self-interested interpretations.[191] This is undoubtedly true to the extent that any such interpretations are either foreclosed by the relevant statute or rise to the level of "unreasonableness,"[192] although the strength of the constraint is entirely dependent on the level of "bite" which the reviewing court is willing to give to the two *Chevron* steps.[193]

The second response is that where particularly serious concerns exist about the ability of agencies to adduce an interpretation that is not infected by bias, a court may only accord an interpretation *Skidmore* deference. If *Skidmore* deference is accorded, the court will consider the agency's interpretation as "a body of experience . . . to which courts . . . may properly resort for guidance," with the "weight of such a judgment in a particular case . . . [depending] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[194] This approach has been taken by some courts considering "agency statutory interpretations first advanced during litigation."[195]

It is arguable that the concern regarding agency self-dealing may be more problematic in the *Arlington* context than those contexts previously mentioned for two reasons.[196] First, in contrast to the reviewability and litigating position contexts discussed above, it

---

191. *See, e.g.*, Crawford, *supra* note 113, at 982. Crawford notes that the broader political process may restrain agency action:

> 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 behaviour.

Id.; *see also* Sunstein, Chevron *Step Zero*, *supra* note 21, at 233, 243–44 ("*Chevron* deference does not give agencies a blank check. It remains the case that agency decisions must not violate clearly expressed legislative will, must represent reasonable interpretations of statutes, and must not be arbitrary in any way. These constraints produce significant checks on potential agency self-interest and bias.").

192. *See* Michigan v. EPA, No. 14–46, slip op. 1, 5–6 (June 29, 2015) (a rare example of an agency interpretation being adjudged "unreasonable" by a court).

193. *See* Caust-Ellenbogen, *supra* note 7, at 788.

194. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

195. Hubbard, *supra* note 186, at 448; *see also* Armstrong, *supra* note 66, at 206-207 (discussing the potential applicability of *Skidmore* to cases in which agencies' interpretations may have been affected by self-interest).

196. *See* Armstrong, *supra* note 66, at 209; Gellhorn & Verkuil, *supra* note 150, at 992.

is likely that the result of any bias infecting an agency's jurisdictional interpretation may be less overt on its face. For example, if one considers the multitude of complex situations in which an agency may make an ambit claim to jurisdiction—or may discount authority which should, on the preferable legal interpretation, be viewed as properly reserved to it—it becomes quite clear that an agency's interest in expanding or contracting its own jurisdiction may be far from facially obvious. In such cases, *Chevron*'s focus on the reasonableness of the result reached by the agency[197]—as opposed to the procedure utilized by the agency to reach that result—may offer substantial cover to what could constitute a highly relevant decision-making process (in contrast to both *Skidmore* deference and the concept of the "procedural hard look," typified in cases such as *State Farm*).[198]

Secondly, in contrast to the "major questions" context, it is arguable that the types of agency self-interest implicated when agencies make jurisdictional determinations may fall outside the traditional concern of the *Chevron* doctrine, with negative consequences. Though a great oversimplification, a review of the "major questions" cases suggests that the types of agency self-interest which are implicated in that context are more broadly politicized interests: for example, whether the FDA has jurisdiction to regulate tobacco products;[199] the extent to which the Department of Interior can utilize existing provisions of the Endangered Species Act to prevent "significant habitat modification or degradation;"[200] or the FCC's ability to effect a partially deregulatory agenda through a

197. *See* Armstrong, *supra* note 66, at 272–73.

198. *See id.* at 279-81 (discussing the rationale behind *State Farm*'s 'reasoned decisionmaking' requirement, particularly in terms of decisions implicating an agency's self-interest (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)); Moira Coombs, *Making the Rules: A Comparison Between the United States and Australian Systems,* 32 AUSTL. INST. ADMIN. L. F. 25, 32 (2002) (explaining "hard look" judicial review); Dolehide, *supra* note 21, at 1388–89 (discussing the *Chevron/State Farm* anomaly); Starr, *supra* note 13, at 298 (comparing the strength of judicial deference under *State Farm* and *Chevron*). *See generally* Merrill, *supra* note 11, at 998 (discussing the historical background of hard look review).

199. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)*; see also* Sunstein, *Beyond* Marbury, *supra* note 15, at 2605-06 (describing the FDA as having "tak[en] action to reduce one of the nation's most serious public health problems in a judgment that had a high degree of public visibility and required immersion in the subject at hand.").

200. Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Oregon, 515 U.S. 687, 690 (1995); *see also* Sunstein, Chevron *Step Zero*, *supra* note 21, at 238-40 (discussing the limited use of *Chevron* in *Sweet Home*).

provision of the Communications Act allowing the Commission to "'modify' the statutory requirement that carriers file tariffs and charge customers in accordance with the tariffs that have been filed."[201] These are precisely the sorts of interests that *Chevron* recognizes agencies will consider. Indeed, such consideration forms part of the rationale for the existence of the doctrine. In contrast, the species of agency interest which are implicated in the jurisdictional determinations sphere may be significantly more inwardly-focused, such as concerns about the agency's ongoing profit, operations, or relevance within a regulatory scheme.[202] It may seem, at first glance, that such questions are less broadly meaningful and therefore more appropriate for agency determination. However, the possibility that more inwardly-focused interests will be in issue also raises the possibility that any tendencies towards agency aggrandizement or agency shirking may be more difficult to detect.

The risk of agency aggrandizement in this situation has been recognized in the academic literature[203] and in the case law. Both Justice Scalia and Chief Justice Roberts expressed an understanding as to the potential for agency aggrandizement in *Arlington*: Justice Scalia with a certain resignation,[204] and Chief Justice Roberts with significantly more concern.[205] Justice Brennan voiced similar apprehensions in *Mississippi Power & Light*.[206]

---

201. Sunstein, Chevron *Step Zero*, *supra* note 21, at 236–37 (discussing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994)); *see also id.* at 233, 243.

202. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1872 (2013) (discussing the circumstances in which *Chevron* deference has been granted to jurisdictional determinations, despite the agency's "expansive construction of the extent of its own power [potentially creating] a fundamental change in the regulatory scheme"); Armstrong, *supra* note 66, at 209-11.

203. *See, e.g.*, Armstrong, *supra* note 66, at 209–211, 250 (summarizing the academic literature on agency self-motivation, and discussing aggrandizement concerns specifically in the context of *Brown & Williamson*); Gellhorn & Verkuil, *supra* note 150, at 992, 996–1006.

204. *Arlington*, 133 S. Ct. at 1872 ("[W]e have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme.").

205. *Id.* at 1879 (Roberts, C.J. dissenting). See, ironically, Chief Justice Roberts' inclusion of a quote from Justice Scalia's judgment in Talk Am. Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) with respect to the FCC having "repeatedly been rebuked in its attempts to expand the statute beyond its text, and ha[ving] repeatedly sought new means to the same ends."

206. Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting) (expressing concerns about according *Chevron* deference

Agency shirking is arguably even more problematic given that it is often less overt, and may be more common in practice: Crawford notes that "[i]n 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."[207] Crawford views this as a comfort, extrapolating that "[t]his in fact suggests that in areas of ambiguous authority, the agency is more concerned with carrying out the policies of the statute than its power."[208] An alternative interpretation—and one that may be more plausible in the current political predicament—is that agencies may sometimes reap benefits from adopting an unduly narrow view of their own authority.[209] These benefits may come from obviating the immediate need to deal with difficult or politically-sensitive issues,[210] or by liberating previously-committed funds to spend on regulatory goals that the agency prefers, rather than executing the priorities that Congress, on the preferable reading of a statute, laid out for it.[211] Taken together, concerns in relation to agency self-dealing and agency aggrandizement raise serious questions about the application of the *Chevron* framework to jurisdictional determinations.[212]

ii. The Logic of the *Chevron* Doctrine

In addition, the logic of the *Chevron* doctrine itself may weigh against according *Chevron* deference in the context of jurisdictional determinations.[213] Since agencies are creatures of statute, "the universe of each agency is limited by the legislative specifications con-

---

to agencies' jurisdictional determinations given "the agency's institutional interests in expanding its own power").

207. Crawford, *supra* note 113, at 982.

208. *Id.*

209. *See* Gersen, *supra* note 67, at 235 ("Agencies may overreach, but they often underreach as well, and there is no reason to be systematically more concerned with overreaching than underreaching."); Sunstein, *Law and Administration after "*Chevron,*"* *supra* note 150, at 2100 (referring to "abdication of enforcement power" as a "major legislative fear").

210. *See* Sunstein, *Law and Administration after "*Chevron,*"* *supra* note 150, at 2090–2100.

211. Armstrong, *supra* note 66, at 211–30; *cf.* Crawford, *supra* note 113, at 981 (discussing the relevance of agency expertise to an agency's assessment of how to allocate limited resources).

212. Sunstein, Chevron *Step Zero*, *supra* note 21, at 209–10 ("[W]hen an agency's self-interest is so conspicuously at stake, Congress should not be taken to have implicitly delegated law-interpreting power to the agency.").

213. Sales & Adler, *supra* note 21, at 1533.

tained in its organic act."[214] Agencies have no inherent power to act, absent a source of authorization.[215] In the more systemically-focused terms used by Justice Rehnquist in *Chrysler Corp. v. Brown*, "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."[216]

The question of whether agencies are empowered to act—that is to say, whether they have jurisdiction to act on a certain matter—is generally viewed as an anterior question to the issue of whether *Chevron* deference should be granted to any agency interpretations made once a grant of power is established. Sales and Adler consider that this question is both "chronologically" and "logically" prior:

> It is chronologically prior, in the sense that a court typically will want to know whether an agency has authority at all before it considers what standard of review should be used to assess the agency's exercise of that authority. More importantly, the jurisdiction question is logically prior to the deference question. Because the existence of agency jurisdiction is a precondition to Chevron deference, it cannot be the case that the Chevron framework should be used to resolve that initial jurisdictional issue. Only after the delegation question has been answered in the affirmative can one move on to address whether deference is warranted.[217]

If, as seems reasonably well accepted, the existence of a power to act is a precondition to the application of the *Chevron* doctrine,[218] it would seem antithetical to the doctrine to suggest that it could apply to a question which conditions its application.

---

214. Monaghan, *supra* note 15, at 14; *see* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 876 n.229 (2001); Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1498 (2000) ("As creatures of statutes lacking any independent constitutional pedigree, agencies cannot invoke some kind of inherent authority to justify actions that find no warrant in their enabling legislation.").

215. Sales & Adler, *supra* note 21, at 1534.

216. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (majority opinion).

217. Sales & Adler, *supra* note 21, at 1534.

218. *See, e.g.,* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."), discussed in Merrill & Hickman, *supra* note 213, at 855 ("A finding that there has been an appropriate congressional delegation of power to the agency is critical under *Chevron*."). The language used in Chevron U.S.A., Inc. v.

This understanding of the surrounding legal framework appears to be bolstered by the Administrative Procedure Act, which, in provisions such as § 558(b)[219] and § 706(2)(C),[220] draws a distinction between the limits imposed on agency power by agencies' jurisdiction, and other such limitations.[221] As a result of this grounding in statutory language, this objection would likely hold some influence with those who support the "congressional intention" justification for the *Chevron* doctrine.[222]

D. Justice Scalia's Trump Card? The (In)Determinacy of the Jurisdictional/Non-Jurisdictional Line

One of the most persistent and compelling objections to the creation of a bifurcated legal regime with respect to agencies' jurisdictional and non-jurisdictional determinations is the objection, developed and promulgated by Justice Scalia, that the line between the two categories of decision is illusory.[223] According to this strand of argumentation, the practical difficulty in drawing such a line renders irrelevant any assessment of whether the traditional justifications for *Chevron* deference maintain their force in the jurisdictional determinations sphere.[224]

Nat. Res. Def. Counsel, 467 U.S. 837, 843-844 (1984) seems to presuppose the existence of an explicit or implicit Congressional delegation.

219. 5 U.S.C. § 558(b) (2012) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.").

220. 5 U.S.C. § 706(2)(C) (2012) (authorizing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority or limitations, or short of statutory right").

221. Sales & Adler, *supra* note 21, at 1537.

222. *Supra* Section II(a)(i).

223. *See* Gersen, *supra* note 67, at 32; Note, *supra* note 5, at 343; *see also* Sales & Adler, *supra* note 21, at 1555 (discussing the strength of this objection).

224. *See, e.g.,* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013). Interestingly, Sales & Adler have suggested that Justice Scalia's reasoning in *Mississippi Power* is heavily based on empirical claims surrounding the difficulty of separating non-jurisdictional from jurisdictional determinations, and that if this complication can be overcome, there does not appear to be anything "intrinsically wrong . . . with courts resolving jurisdictional matters *de novo*" (assuming that this would not require courts to stray into policymaking territory). *See* Sales & Adler, *supra* note 21, at 1508–09. While this may arguably overstate the point—Justice Scalia's second point in *Mississippi Power*, discussed in *supra* Section I, does suggest a conviction that *Chevron* should apply in some jurisdictional cases—the language of the judgment nonetheless implies that Justice Scalia was willing to recognize the appropriateness of *de novo* review in some cases.

As discussed in Section I, Justice Scalia's objection was thoroughly ventilated in both *Arlington*[225] and in earlier cases such as *Mississippi Power & Light*.[226] Justice Scalia's concern has been acknowledged to varying degrees by several other justices, including Justice Breyer in his *Arlington* concurrence[227] and implicitly by Justice White in dissent in *Dole v. United Steelworkers of America*.[228] It has also received some support in academic literature.[229]

However, several other judgments and academic works have questioned the extent of the difficulty imposed by this line-drawing exercise. In dissent in *Mississippi Power & Light*, Justice Brennan implicitly endorsed the utility of the jurisdictional/non-jurisdictional line, both in the circumstances of that case and more broadly.[230] Similarly, several D.C. Circuit decisions have meaningfully employed the distinction between jurisdictional and non-jurisdictional decisions.[231] In *ACLU v. FCC*, the Court went so far as to state that:

> In our view, a pivotal distinction exists between statutory provisions that are jurisdictional in nature—that is, provisions going

225. *See, e.g., Arlington*, 133 S. Ct. at 1868–71, 1874.

226. *See, e.g.*, Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring).

227. *Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring); *see also id.* at 1879–80 (Roberts, C.J., dissenting).

228. Dole v. United Steelworkers, 494 U.S. 26, 54 (1990); *see* Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 676 (D.C. Cir. 1994) (Williams, J., dissenting), discussed in Sales & Adler, *supra* note 21, at 1520.

229. *See, e.g.,* Crawford, *supra* note 113, at 968-69, 975–76 (suggesting three reasons that "[c]ourts cannot coherently make this distinction"). The reasons why courts may not make this distinction are, first, "many interpretations do not have separate jurisdictional and nonjurisdictional elements"; second, "an attempt to separate out cases that have a strong jurisdictional element would not fare much better"; and third, "history has shown the difficulties inherent in separating jurisdictional from non-jurisdictional issues." *Id.* at 975–76. In relation to the final point, Crawford notes that "[t]he 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." *Id.* (referring to Crowell v. Benson, 285 U.S. 22 (1932)); *see also* Merrill, *supra* note 11, at 979 (referring to the "rapid eclipse of the jurisdictional fact doctrine"). However, *Crowell* remains good law. *See infra* Section III(b)(i).

230. *Mississippi Power & Light Co.*, 487 U.S. at 383–91 (1988) (Brennan, J., dissenting) ("I thus examine the jurisdictional issue [here] without any special deference to the agency's position.") ("The jurisdictional decisions of the United States Court of Appeals for the District of Columbia Circuit are not before us, and I do not question them."). In relation to the Supreme Court's handling of this issue more broadly, see Sales & Adler, *supra* note 21, at 1515–18.

231. For a review of these decisions, see Sales & Adler, *supra* note 21, at 1518–21.

> 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.[232]

As Crawford has noted, such a statement "presupposes that the distinction is workable in practice."[233]

A substantial body of academic writing suggests that the distinction is not only meaningful, but also that it is similar in character to questions which are frequently resolved by courts. In addition, the concepts of jurisdictional and non-jurisdictional determinations do not "in principle [appear] to be any more elusive" than other distinctions regularly drawn by courts (e.g., the distinction between legislative and interpretive rules).[234] Against this background, there is simply "no reason to suspect" that courts will find the drawing of this distinction more difficult than the multitude of other distinctions that they are frequently required to draw.[235] In a distinct but related discourse (speaking of the terms "law" and "deference"), Monaghan has aptly stated that:

> [T]hese categories can be neither discarded as vestigial remains of primitive word magic, nor dissolved by appeals to epistemology, or . . . to literary theory. They are practical constructs designed to systematize, order and control certain forms of social experience . . . . That this concept does not explain or answer everything does not mean that it does not illuminate anything.[236]

So long as the underlying categories of jurisdictional and non-jurisdictional determinations are "analytically valid"—and this article argues that they are—the existence of some "fuzz[iness]" in

---

232. American Civ. Liberties Union v. FCC, 823 F.2d 1554, 1567 n. 32 (D.C. Cir. 1987). The court went on to state:

> Where 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. The reason is that it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power. When an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.

Id.

233. Crawford, *supra* note 113, at 969.

234. Sales & Adler, *supra* note 21, at 1558.

235. *Id.*

236. Monaghan, *supra* note 15, at 4.

their borders at the margins does not mandate their abandonment.[237] To the extent that there will be some "hard cases" in practice[238]—a possibility which is undeniable—it is important to keep in mind Sales and Adler's encouragement that "[t]he fact that judges may have trouble drawing lines does not mean that it is impossible to do so."[239]

Sales and Adler also postulate that "critics might be overestimating the magnitude of decision costs" which are truly at issue, as "the challenge of distinguishing jurisdictional actions from nonjurisdictional ones is unlikely to arise in most cases."[240] They go on to suggest that the analytical problems which most frequently arise in this context "involve uncertainty over whether a particular agency action implicates the *existence* of power or the *scope* of power,"—two subcategories of inquiry that Sales and Adler identify within the broader field of jurisdictional questions—"not whether it is properly classified as jurisdictional."[241] Sales and Adler demonstrate this point by reference to several examples, including a hypothetical scenario in which the FCC refuses "to regulate cable companies' broadband Internet services."[242] They note that this could be conceptualized in at least two ways—as "a denial of the existence of jurisdiction ('the FCC is disclaiming power to regulate an entire industry') or a restriction on the scope of jurisdiction ('the FCC's power to regulate telecommunications services does not reach cable broadband')"[243]—but that in either circumstance, it is clear that what is at issue is a jurisdictional determination.[244]

This, coupled with the other considerations ventilated above, suggests that the difficulty hypothesized by Justice Scalia may not be insurmountable. While it is clearly desirable for doctrine to develop with as much clarity as is possible, and to thereby reduce decision costs, Justice Scalia's proposed response—abandoning any attempt to categorize decisions as "jurisdictional or nonjurisdictional," and

237. Sales & Adler, *supra* note 21, at 1557; *see also* Monaghan, *supra* note 15, at 4.

238. Sales & Adler, *supra* note 21, at 1557.

239. *Id.*

240. *Id.* at 1556.

241. *Id.*

242. *Id.*

243. Sales & Adler, *supra* note 21, at 1556.

244. *Id.* at 1556. To demonstrate the capacity of judges to delineate such issues even in hard cases, Sales & Adler point out that "[n]ot only was Justice Scalia able to successfully identify the issue in [*Mississippi Power*] as a jurisdictional one, but he also managed to distinguish among a number of possible jurisdictional disputes that might conceivably be presented to the Court." *Id.* at 1557.

undertaking the default *Chevron* analysis with respect to both—risks increasing error costs in the broader precedential and constitutional scheme.[245]

III.
DEFERENCE AND THE SEPARATION OF POWERS

While *Chevron* itself is now more or less beyond challenge[246]—from a Burkean perspective if no other[247]—more compelling separation of powers questions are raised when applying the *Chevron* framework to *Arlington*-type jurisdictional determinations. In this section, the essential differentiating factor between the two types of cases will be discussed—the nature of the question to be answered by the agency—before turning to the challenges that *Arlington* poses to the constitutionally-enshrined separation of powers.

A. Arlington and Questions of Law

A central premise of the *Chevron* framework is that when legal questions are intrinsically interlinked with policy questions—as often occurs in the everyday administration of a complex regulatory program—the existence of a policy element tends to favor deferring to executive interpretations.[248] It is a testament to the legal realist school of thought that this premise has been so broadly accepted: as Sunstein notes, there are strong legal realist underpinnings in the suggestion that almost any "legal" decision can be characterized as a policy judgment.[249]

---

245. *But cf.* Note, *supra* note 5, at 347 ("*Arlington* resolved a lingering question that threatened to undermine the stability of the *Chevron* framework. One of the central merits of *Chevron* is its provision of a stable baseline from which to legislate; an unpredictable antecedent inquiry into the nature of the statutory provision in issue would throw this system into disarray. While the theoretical arguments for entrusting judicial determination to a neutral third party are tempting, they deservedly fell to Justice Scalia's demonstration of the impossibility of drawing such a line.").

246. *But see* Caust-Ellenbogen, *supra* note 7, at 790, 833 (discussing the constitutional problems posed by *Chevron*).

247. *See, e.g.*, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 688 (1994).

248. *See infra* Section I. Interestingly, this may suggest that the United States' framework is more willing to permit the seepage of judicial power to the executive branch than executive power to the judicial branch. *See, e.g.*, Dolehide, *supra* note 21, at 1393. In contrast, the Australian position is on balance more permissive of the seepage of executive power to the judiciary than judicial power to the executive. *Id.* at 1382.

249. Sunstein, Chevron *Step Zero*, *supra* note 21, at 197*; see also* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 (2013) (expressing concern over "transfer[ring]

Despite this, it is certainly arguable that jurisdictional determinations have a different character to the "archetypal *Chevron* questions"[250] discussed above—a character which brings those determinations much closer to pure "question[s] of law," rather than "mixed question[s] of law and fact."[251] While the precise boundaries of these categories have proved contentious,[252] there is little doubt that such categorizations, which are used widely throughout administrative law, continue to provide a reasonable method of delineating certain decisions.[253] Indeed, the "law-fact distinction" is both the "key variable in determining the division of competence" between trial courts and appellate courts in the traditional appellate review model of civil litigation, and the central organizing principle with respect to the "division of institutional authority" in administrative law.[254] In short, "the categories of law and fact have traditionally served an important regulatory function in distributing authority among various decision makers in the legal system."[255]

To embark upon any meaningful discussion of these concepts, it is helpful to use Sunstein's taxonomy as a frame of reference. Under this taxonomy, a "pure question of law" is essentially a "ques-

---

any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts."). Similar philosophical tendencies appear to be in play in the frequently articulated fear that allowing judges to deal with such issues would permit them to "make . . . public policy." *Id.* at 1873 (Scalia, J.); *see* BREYER ET AL., *supra* note 142, at 271; Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 304 (1988).

250. *Arlington*, 133 S. Ct. at 1873.

251. Symposium, *supra* note 8, at 368.

252. *See, e.g.*, Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 239–41 (1955); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 3–4 (1985); Merrill, *supra* note 11, at 940 n.2.

253. *See* Symposium, *supra* note 8, at 368–71. *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 334–35 (6th ed. 2009) [hereinafter FALLON ET AL., HART & WECHSLER'S].

254. Merrill, *supra* note 11, at 940–41, 975-77 ("Here . . . the reviewing court conceives of its role vis-à-vis the administrative agency in terms of the conventions that govern the appeals court-trial court relationship . . . The agency, which gathers evidence and makes the record, is understood to have superior competence to resolve questions of fact, whether adjudicative facts specific to particular parties or legislative facts of more widespread significance. The reviewing court is characterised as having superior competence to resolve questions about the meaning of the law.").

255. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985).

tion . . . that turn[s] only on the meaning of statutes."[256] An example of such a question which "calls purely for lawyers' competence," and in which "[a]dministrative agencies' fact-finding competence is not relevant," is "whether the Occupational Safety and Health statute is a feasibility statute or a cost-benefit statute."[257] In contrast, a "mixed question . . . of law and fact" implicates agencies' fact-finding expertise—for example, through the question of "whether benzene poses a significant risk within the meaning of a statute."[258]

It is relatively unproblematic to conceptualize the vast majority of cases which courts have considered under the *Chevron* rubric as cases of mixed law and fact.[259] In these situations, which primarily entail the application of legal standards to an agency's factual findings, "the agency is creating norms of conduct, and thus is making law in the realistic sense; yet its doing so does not seem to trigger the 'independent judgment' review standard supposedly associated with questions of law."[260] Otherwise stated, in the words of then-Judge Breyer, these are the situations in which, amongst a sea of factual and regulatory complexity, "the relevant administrative law issues often seem but the tiny tip of a vast . . . iceberg."[261]

In contrast, *Arlington* cases paradigmatically consider a different question—the question of whether, utilizing "the traditional tools of statutory construction,"[262] an agency is empowered to act in a certain manner. Such questions, which focus almost singularly on statutory interpretation, veer significantly closer to the category of "questions of law." The closeness of the relationship between questions of statutory interpretation and pure questions of law was implicitly recognized by Justice Stevens in *INS v. Cardoza-Fonseca*, where, writing for the Court, he held that no deference should be accorded to agency interpretations in circumstances where a case raised "a pure question of statutory construction for the courts to decide."[263] Following from the above, it seems natural to character-

256. Symposium, *supra* note 8, at 368.

257. *Id.*

258. *Id.* With respect to how *Chevron* "collapses this critical distinction between pure questions of law on the one hand and mixed questions on the other," see also *id.* at 369–70.

259. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Oregon, 515 U.S. 687 (1995), Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009) and Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837 (1984).

260. Levin, *supra* note 252, at 11.

261. Breyer, *supra* note 21, at 373.

262. INS. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

263. *Id.*; *see also* Caust-Ellenbogen, *supra* note 7, at 783. *But see* Cardoza-Fonseca, 480 U.S. at 454 (Scalia, J., concurring).

ize cases involving an inquiry into whether a particular statute has conferred jurisdiction on an agency to act in a particular manner as raising (either purely or predominantly) "questions of law." This species of adjudicative task sits firmly within the traditional conception of the role of courts—consider Alexander Hamilton's suggestion that "[t]he interpretation of the laws is the proper and peculiar province of the courts,"[264] or more simply, Monaghan's statement that "[l]aw interpretation is what courts 'do.'"[265]

B. The Separation of Powers Implications

If the above characterization is accepted, the developments precipitated by *Arlington* may be seen as posing a distinct challenge to the constitutionally-enshrined separation of powers.[266] As Fallon has persuasively argued, a (re)turn to "article III literalism,"—which would posit that "Congress need not create any 'inferior' courts," but if "it does create any federal adjudicative bodies, those bodies must be the constitutional courts contemplated by article III"—is untenable for several reasons.[267] Nonetheless, in several cases considering the constitutional position of administrative agencies and legislative courts, the Supreme Court has set out definite, if sometimes shifting, limitations on the powers of such adjudicative bodies flowing from Article III.

While the text of Article III does not recognize any distinction "in constitutional principle" between administrative agencies and legislative courts, there are marked differences in the "jurisprudential traditions" relating to the two categories of bodies.[268] On that basis, this Article will analyze the principles set out in *Crowell v. Ben-*

264. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton), *quoted in* Monaghan, *supra* note 15, at 12.

265. Monaghan, *supra* note 15, at 12, 14.

266. For a recent high-level canvassing of these, and related, issues, see Michigan v. EPA, No. 14–46, slip op. 1 (June 29, 2015) (Thomas, J., concurring).

267. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, *supra* note 184, at 918–20 (referring to three sets of problems, termed "Uncertain historical foundations", "Policy Concerns" and "Entrenched practice"). However, as Fallon notes, Justice Brennan's plurality opinion in N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), does seem to take Article III literalism as "the normative ideal." Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, *supra* note 184 at 926; *see also* FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 342.

268. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, *supra* note 184, at 928. *See generally* FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 339–42, (discussing the distinctions that may meaningfully be made between legislative courts' and agencies' adjudication).

son,[269] which remains the leading case with respect to Article III limitations on administrative agencies,[270] before considering the lessons that can be taken from the more recent legislative courts jurisprudence.

i. *Crowell v. Benson*

Crowell involved a challenge to an award made by the Deputy Commissioner of the United States Employees' Compensation Commission under the Longshore and Harbor Workers' Compensation Act.[271] The challenge was mounted on several bases,[272] including that "Congress, in enacting the statute . . . exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters" by delegating to the Commission the ability to make certain limited factual findings.[273]

Chief Justice Hughes, writing for the Court, drew a distinction between regular findings of fact, findings of "jurisdictional fact," and findings on "matters of law."[274] With respect to regular findings of fact,[275] Chief Justice Hughes opined that in cases dealing with private (as opposed to public) rights,[276] "there is no requirement that, in order to maintain the essential attributes of the judicial power [contained in Article III of the Constitution], all determinations of fact in constitutional courts shall be made by judges."[277] Accordingly, Congress had not "exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters" by vesting the determination of confined factual issues relating to "the measure of the employer's liability" in the Commission.[278] In the

269. Crowell v. Benson, 285 U.S. 22 (1932).

270. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011).

271. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (2012).

272. *Crowell*, 285 U.S. 22, 37 (1932).

273. *Id.* at 53.

274. *Id.* at 54.

275. Which in *Crowell* related to "the determination of claims of employees within the purview of the Act." *Id.*

276. Private rights cases raise "the liability of one individual to another under the law as defined." *Id.* at 51. In contrast, "public rights" cases involve disputes "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 50. For an analysis of the principles involved in public rights cases, see *id.* at 50–51. On the development and treatment of the public rights doctrine, see Monaghan, *supra* note 15, at 15–17.

277. *Crowell*, 285 U.S. at 51.

278. *Id.* at 53–54.

course of this discussion, Chief Justice Hughes expressly delineated administrative from judicial functions, noting that:

> Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors; and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases.[279]

However, a separate series of questions raised by the statutory scheme—questions as to whether "the injury occur[ed] upon the navigable waters of the United States and [whether] the relation of master and servant exist[ed]"—required the Commission to find "fundamental or 'jurisdictional'" facts, "in the sense that their existence is a condition precedent to the operation of the statutory scheme."[280] When allocating power to decide on such foundational issues, "the question is not the ordinary one as to the propriety of provision for administrative determinations," but is "rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions."[281] In other words:

> It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend.[282]

After an extensive review of the division of executive and judicial fact-finding authority in several fields of law,[283] Chief Justice Hughes concluded that it was appropriate to adopt a saving con-

---

279. *Id.* at 54–55.

280. *Id.* In addition to their role conditioning the application of the statutory scheme, Chief Justice Hughes also emphasized that both the location at which the injury occurred and the existence of the employment relationship "determine[d] the existence of the congressional power to create the liability prescribed by statute." *Id.* at 55–56. The Chief Justice further noted:

> If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

Id. at 56.

281. *Id.* at 56.

282. *Id.*

283. *See Crowell*, 285 U.S. at 60–62.

struction of the statute by which a reviewing court would conduct de novo review of the jurisdictional facts.[284] Chief Justice Hughes suggested that any contrary holding may:

> sap the judicial power as it exists under the Federal Constitution, and . . . establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.[285]

While the Supreme Court has taken few opportunities to address the limitations placed on administrative agencies by Article III since *Crowell*, the case remains good law.[286] Indeed, in *Stern v. Marshall*, Justice Scalia memorably remarked that "certain adjudications by federal administrative agencies" are "governed (for better or worse) by our landmark decision in *Crowell v. Benson*."[287]

ii. The "Legislative Courts" jurisprudence: from *Northern Pipeline* to *Arkison*

In contrast to the *Crowell* line of cases, the Supreme Court has had several recent opportunities to consider the restrictions that Article III places on "so-called 'legislative courts'—adjudicative bodies created by Congress under Article I and not bound by Article III's guarantee that federal judges should enjoy life tenure and protection against reduction in salary."[288] The cases—commencing with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[289] and culminating in *Executive Benefits Insurance Agency v. Arkison*[290]—are far from consistent in methodology. Fallon, et al., have characterized the cases as displaying a "dizzying succession of ap-

284. *Id.* at 62.

285. *Id.* at 57. For interesting interpretations of *Crowell*'s relationship to the administrative state, compare Monaghan, *supra* note 15, at 18, with Tushnet, *supra* note 16, at 371. For an analysis of Justice Brandeis' dissenting judgment in *Crowell*, see Monaghan, *supra* note 15, at 19.

286. Note, however, Crawford's suggestion that "*Crowell*'s jurisdictional-fact doctrine has fallen into disuse, largely because of the difficulty of distinguishing jurisdictional facts from other facts." Crawford, *supra* note 68, at 969; *see also* FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 334–35.

287. Stern v. Marshall, 131 S. Ct. 2594, 2611–15, 2622–32 (2011) (citing *Crowell*, 285 U.S. 22).

288. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, *supra* note 184, at 921. As to the distinctions between agencies and legislative courts, see *supra* note 268.

289. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 208 (1982).

290. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014).

proaches,"[291] from the formalism of *Northern Pipeline* to Justice O'Connor's rejection of any "doctrinaire reliance on formal categories . . . inform[ing the] application of Article III" in *Thomas*,[292] to a return to formalism in the subsequent decisions of *Granfinanciera*[293] and *Stern*.[294] Despite this confusion, Caust-Ellenbogen has compellingly argued that the cases:

> [I]mplicitly support a crucial dichotomy: although fact-finding may sometimes be reassigned to [A]rticle I bodies, law declaration may not be assigned to such bodies. In order to maintain the checks and balances inherent in our constitutional framework, judicial review of [A]rticle I adjudications must exist and independent review of questions of law must be permitted.[295]

Although a full survey of each case is beyond the scope of this Article, several of the key principles can be illustrated with reference to *Northern Pipeline Construction Co*.[296] Amongst other issues, the case considered whether bankruptcy courts created by Congress could be viewed as adjuncts to district courts,[297] thus rendering "the delegation of certain adjudicative functions to the bankruptcy court . . . consistent with the principle that the judicial power of the

---

291. FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 362; *see also* Chemerinsky, *supra* note 8, at 203–05, 212–13 (arguing that "[i]t is not possible to reconcile the functional approach in *Thomas* and *Schor* with the formalistic approach in *Stern v. Marshall*. The Court in *Stern v. Marshall* returned to the earlier formalism of *Northern Pipeline*, but without ever acknowledging that the cases subsequent to it had taken a dramatically different method of analysing when Congress can give authority to non-Article III courts.").

292. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985); FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 357. See also Justice Brennan's critique of the balancing approach of *Schor*, considered in *id.* at 359.

293. *See generally* FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 359–60.

294. Chemerinsky, *supra* note 8, at 201.

295. Caust-Ellenbogen, *supra* note 7, at 803. For a practical example of the outworking of this principle, see *Arkison*, 134 S. Ct. at 2170 ("In *Stern,* we held that Article III prohibits Congress from vesting a bankruptcy court with the authority to finally adjudicate certain claims . . . . But we did not address how courts should proceed when they encounter one of these '*Stern* claims'—a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter.

As we explain in greater detail below, when a bankruptcy court is presented with such a claim, the proper course is to issue proposed findings of fact and conclusions of law. The district court will then review the claim *de novo* and enter judgment. This approach accords with the bankruptcy statute and does not implicate the constitutional defect identified by *Stern*.").

296. 458 U.S. 50 (1982).

297. *See* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, *supra* note 184, 923–27 (discussing adjuncts).

United States must be vested in Art. III courts" (or, otherwise stated, whether Article III courts "retained 'the essential attributes of the judicial power'" in this scheme).[298] Expressly contrasting the case to *Crowell*, Justice Brennan found that the Act vested "all 'essential attributes' of the judicial power of the United States in the 'adjunct' bankruptcy court,"[299] as:

a. unlike the agency in *Crowell*, which had "made only specialized, narrowly confined factual determinations regarding a particularized area of law," the bankruptcy courts had extremely broad subject-matter jurisdiction and exercised "'*all* of the jurisdiction' conferred by the Act on the district courts";[300]
b. while the remedial powers of the *Crowell* agency were extremely limited—the Commission could only "issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court"—the bankruptcy courts "exercise[d] all ordinary powers of the district courts,"[301] including the power to "issue final judgments," which were "binding and enforceable even in the absence of an appeal";[302] and
c. the bankruptcy courts' orders were subject to significantly narrower grounds of review than those of the *Crowell* agency (a "clearly erroneous" standard in relation to the former, as opposed to a "not supported by the evidence" standard in the latter).[303]

This arrangement removed "most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct," thereby violating Article III of the Constitution.[304] In his concurrence, Justice Rehnquist suggested to similar effect that "whatever the congressional power to assign adjudicatory matters to non-Article III bodies, an Article III court must conduct an independent review of

298. *Northern Pipeline*, 458 U.S. at 77 (quoting in part Crowell v. Benson, 285 U.S. 22, 51–52 (1932)). See also *Northern Pipeline*, 458 U.S. at 81, for Justice Brennan's further exposition of this principle by reference to *Crowell* and *United States v. Raddatz*, 447 U.S. 667, 682 (1980). In relation to the judgment and its implications, see Strauss, *supra* note 6, at 629–33.

299. *Northern Pipeline*, 458 U.S. at 84–85.

300. *Id.* at 85.

301. *Id.*

302. *Id.* at 85–86.

303. *Id.* at 85.

304. *Northern Pipeline*, 458 U.S. at 87.

issues of law and some review of questions of fact."[305] The principles originating in *Northern Pipeline*—including that of an "independent review of issues of law"[306]—were revised and developed in *Thomas v. Union Carbide Agricultural Products Co.*,[307] *Commodity Futures Trading Commission v. Schor*,[308] and *Granfinanciera, S.A. v. Nordberg*.[309]

The Court most recently addressed the scope of Article III's restrictions on bankruptcy courts in *Stern v. Marshall*[310] and *Arkison*.[311] *Stern* considered, *inter alia*, the ability of Congress to confer on a bankruptcy court the power to "issue a final judgment on [a] counterclaim."[312] While a number of the judgments delivered in the case distinguished between the positions of agencies (guided as they are by *Crowell v. Benson*) and legislative courts,[313] *Stern* nonetheless reaffirmed some significant principles about the scope of Article III more broadly. Chief Justice Roberts, delivering the opinion of the Court, found that the arrangement at issue violated Article III as "[t]he Bankruptcy Court . . . exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection" as required by Article III.[314] The opinion emphasized the centrality of Article III to the maintenance of "the constitutional system of checks and balances,"[315] noting that in accordance with this system:

---

305. Caust-Ellenbogen, *supra* note 7, at 804; *see Northern Pipeline*, 458 U.S. 50, 91 (1982). On the links between *Northern Pipeline* and *Crowell*, see Monaghan, *supra* note 15, at 18. For a cogent analysis of Justice White's dissent, see Strauss, *supra* note 6, at 631.

306. Caust-Ellenbogen, *supra* note 7, at 804.

307. 473 U.S. 568 (1985).

308. 478 U.S. 833 (1986).

309. 492 U.S. 33, 55–56 (1989). For further analysis of these three cases in the "public rights" context, see Stern v. Marshall, 131 S. Ct. 2594, 2611–15 (2011), and more generally Caust-Ellenbogen, *supra* note 7, at 806–10.

310. 131 S. Ct. 2594 (2011).

311. 134 S. Ct. 2165 (2014).

312. *Stern*, 131 S. Ct. at 2600. As to the importance of the decision in the context of "core" and "non-core" proceedings under the governing legislation, see *Arkison*, 134 S. Ct. at 2171–72.

313. *See, e.g.*, *Stern*, 131 S. Ct. at 2615; *id.* at 2621 (Scalia, J., concurring); *id.* at 2622 (Breyer, J., dissenting). For a more general assessment of the distinction between agencies and legislative courts, see FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 342. For a discussion of why such a distinction is not required by Article III, see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, *supra* note 184, at 928.

314. *Stern*, 131 S. Ct. at 2601.

315. *Id.* at 2608.

> [T]he 'judicial Power of the United States' . . . can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.[316]

While "recogniz[ing] that the three branches are not hermetically sealed from one another," Chief Justice Roberts emphasized that "Article III imposes some basic limitations that the other branches may not transgress," including the limitation, stemming from both a structural and purposive reading of Article III, that "other branches of the Federal Government [may not] confer the Government's 'judicial power' on entities outside Article III."[317] The reasoning in *Stern* was fully endorsed in *Arkison*, where a unanimous Court gave further consideration to the practical consequences of *Stern*'s holding.[318]

When read together, the series of cases from *Northern Pipeline* to *Arkison* can be taken to endorse the proposition that:

> [T]he article III command that the judicial power of the United States be exercised by article III courts is satisfied even when an article I body adjudicates, so long as an article III court is available to engage in some review over factual conclusions and de novo review over legal determinations.[319]

It is this principle—which this Article refers to as the requirement for an "independent judgment on questions of law"—that is principally threatened by *Arlington*.[320]

---

316. *Id.* (quoting United States v. Nixon, 418 US 683, 704 (1974), in turn quoting U.S. CONST. art. III, § 1).

317. *Stern*, 131 S. Ct. at 2609.

318. *Arkison*, 134 S. Ct. at 2170. The court stated:

> In *Stern*, we held that Article III prohibits Congress from vesting a bankruptcy court with the authority to finally adjudicate certain claims . . . . But we did not address how courts should proceed when they encounter one of these "*Stern* claims"—a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter . . . . [W]hen a bankruptcy court is presented with such a claim, the proper course is to issue proposed findings of fact and conclusions of law. The district court will then review the claim *de novo* and enter judgment. This approach accords with the bankruptcy statute and does not implicate the constitutional defect identified by *Stern*.

Id.

319. Caust-Ellenbogen, *supra* note 7, at 809.

320. *See generally* Levin, *supra* note 253, at 11 (recognizing a taxonomy of questions of fact, questions of discretion and questions of law, and suggesting that "[a] question of law . . . for scope of review purposes, should be defined as an issue that requires the making of normative judgments, unlike a question of fact, *and*

C. A Principle of Independent Judgment

When one considers the legislative courts cases alongside *Crowell v. Benson,* it becomes clear that the Constitution requires—at a minimum—that Article III judges conduct an independent review of non-Article III judges' determinations on questions of law.[321] Yet this also appears to be the very principle which has been eroded by the decision in *Arlington*: while agencies' legal determinations on jurisdictional questions may be challenged in an Article III court, the *Chevron* doctrine intentionally limits the independent nature of the court's review of such questions.[322] Although a formalistic approach to the paradigm may suggest that "the law" is still technically being made by Article III judges,[323] a more substantive approach must acknowledge that depending on the strength afforded to the two limbs of *Chevron* by the reviewing court, the requirement of independent review is at the very least constrained.[324]

Some commentators have suggested that this concern may be alleviated to the extent that Congress has expressly delegated authority to the agency to determine the scope of its own jurisdiction

---

that is open to independent reconsideration by a reviewing court, unlike a question of discretion.").

321. Michigan v. EPA, No. 14–46, slip op. 1, 2 (June 29, 2015) (Thomas, J., concurring) ("Interpreting federal statutes—including ambiguous ones administered by an agency—'calls for [an] exercise of independent judgment.' . . . *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."); Caust-Ellenbogen, *supra* note 7, at 809. *See generally* Caust-Ellenbogen, *supra* note 7, at 795 ("[A]dministrative agencies can and do render interpretations of law. If they do so while exercising judicial power, however, the courts must be able to exercise their constitutional role by independently deciding these questions of law"); Gellhorn & Verkuil, *supra* note 150, at 993; Monaghan, *supra* note 15, at 14. *But see id.* at 9 ("the judicial duty 'to say what the law is' is analytically empty"; it "demands nothing with respect to the *scope* of judicial review"), and more generally *id.* at 11 (considering *Marbury*'s "independent judgment rule"), and *id.* at 21 (considering Hart's position on independent judgment by Article III courts).

322. Merrill, *supra* note 11, at 1001 ("*Chevron* is a kind of patchwork solution jiggered on the top of the appellate review model, and it seems to be at constant war with the underlying premises of the model. The appellate review model tells courts to decide all questions of law independently, whereas *Chevron* interposes and instructs the court to hold off if there is reason to think that Congress has given the legal issues to the agency to decide.").

323. *Cf.* Monaghan, *supra* note 15, at 9, 26–28; Sales & Adler, *supra* note 21, at 1537 (discussing the approach taken by Justice Scalia in dissent in United States v. Mead Corp., 553 U.S. 218, 239 (2001)).

324. For a recent discussion of this point, see Michigan v. EPA, No. 14–46, slip op. 1 (June 29, 2015) (Thomas, J., concurring). *See generally* Caust-Ellenbogen, *supra* note 7, at 811.

(either in an absolute sense, or within a sphere of reasonableness).[325] However, a delegation of this variety is far from a panacea. At the most basic level, if the delegation were sufficiently broad and open-ended as to lack an "intelligible principle," the non-delegation doctrine may render the delegation constitutionally infirm (to the extent that this doctrine retains some legal force).[326] Secondly, it is possible to conceive of limitations on such a delegation as a result of other constitutional provisions and principles, including the due process clauses of the Fifth and Fourteenth Amendments, or Article III itself, particularly where agencies are empowered to determine their own jurisdiction with respect to adjudication, rather than rulemaking.[327] If there is no constitutional—or other—impediment to such a delegation, then the delegation would presumptively be valid, and any interpretation of such a provision by an agency would fall to be determined under the *Chevron* rubric. For the reasons discussed throughout this Article, both from a *Chevron* justifications perspective and from the separation of powers perspective, *Chevron* deference should not be accorded in this situation (although it should be noted that the argument as to congressional intention[328] may be strengthened where there has been an express congressional delegation).[329] Accordingly, relying on any actual or purported delegation by Congress to an agency to determine its

325. *See* Daly, *supra* note 122, at 698–99; Monaghan, *supra* note 15, at 27–28; Sales & Adler, *supra* note 21, at 1527; Sunstein, Chevron *Step Zero*, *supra* note 21, at 198.

326. On the existence and vitality of the doctrine, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 485, 529–30 (1935), Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) and Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001). *See also* Lisa Schultz Bressman, Chevron's *Mistake*, 58 DUKE L. J. 549, 558 (2009); Gellhorn & Verkuil, *supra* note 150, at 989–91; Gersen, *supra* note 67, at 201. For a consideration of how the non-delegation doctrine could work within agencies, see David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201. On the incidence of "open-ended federal statutes," see Bressman, *supra*, and John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

327. I am indebted to Professor Richard Fallon for discussing this particular point with me. On the interaction between the choice of adjudicative forum and the due process clause, see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, *supra* note 184, at 939–40.

328. Discussed in, *supra*, Section II(b)(i).

329. *Cf.* Caust-Ellenbogen, *supra* note 7, at 788–79. Caust-Ellenbogen argues:

> Even if Congress intends courts to defer to the legal determinations made by agencies, the expression of congressional will does not relieve the courts of their obligations to assess the constitutionality of Congress's action. If Congress may not require courts to defer to agency interpretations without run-

own jurisdiction may be a somewhat illusory solution. In any case, it in no way supplants the requirement that Article III courts exercise "independent judgment" on questions of law.

The concern as to the absence of courts' "independent judgment" is arguably most real in cases where an agency reaches a jurisdictional determination that falls within the range of permissible outcomes sanctioned by *Chevron*,[330] but which is not, in the opinion of the Court, the correct or preferable reading of the statute.[331] As discussed in Section I, step two of *Chevron* mandates that such an interpretation be "given 'controlling weight' unless it is found to be 'arbitrary, capricious, or manifestly contrary to the statute,'"[332] "even if a court would reach a different construction if it had to address the question de novo."[333] In other terms, a court faced with

---

ning afoul of the Constitution, then it necessarily follows that courts may not enforce this prohibition.

Id.

330. On a related point, see *id.* at 787. Caust-Ellenbogen observes:

> *Chevron* deference indisputably entails an alteration of normal judicial functioning. In the absence of agency delegation, a court presented with an issue of law would reach an interpretation; it would not be content with the identification of a range of permissible interpretations. The refinement of statutory meaning in the course of adjudicating bona fide cases and controversies lies at the heart of the judiciary's function.

Id. See also BREYER ET AL., *supra* note 146, 380–81 (excerpting the impressions of E. Donald Elliott, former General Counsel of the Environmental Protection Agency, as to the impact of *Chevron* on agency decision-making).

331. Sunstein seems to acknowledge this possibility in Symposium, *supra* note 8, at 370; *see also* Michigan v. EPA, No. 14–46, slip op. 1, 2 (June 29, 2015) (Thomas, J., concurring) ("Interpreting federal statutes—including ambiguous ones administered by an agency—'calls for [an] exercise of independent judgment'. . . . *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."). It is possible to imagine the premise in the body of the article being challenged on the basis that, at least as a general principle, laws should not be viewed as having one fixed or "correct" meaning. Perhaps the strongest counterargument is that courts regularly recognize and endorse one meaning as more correct than others through the use of traditionally accepted legal tools (including regular principles and canons of statutory construction and resort to legislative history). *See* Scalia, *supra* note 22, at 520 ("The judicial task, every day, consists of finding the *right* answer, no matter how closely balanced the question may *seem* to be.").

332. Sales & Adler, *supra* note 21, at 1522–23 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Counsel, 467 U.S. 837, 844 (1984)).

333. Caust-Ellenbogen, *supra* note 7, at 761. *See Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."); *see also* Armstrong, *supra* note 66, at 263–64 ("*Chevron* requires a court

such a situation is stripped of the ability to exercise its own independent judgment in relation to pure questions of law and is limited to endorsing a less correct, or reasonable but incorrect, interpretation.

It is likely that many *Chevron* enthusiasts would respond to this situation as they have responded elsewhere: that the structure of the *Chevron* doctrine provides some protection against this concern. In Justice Scalia's terms, "[t]he fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority."[334] However, the adequacy of this response is almost entirely premised on the particular way in which a court approaches the two steps of the *Chevron* doctrine.

In relation to the first step, much academic literature has focused on the imprecision inherent in the requirement of "ambiguity,"[335] yet the content given to that term has a significant impact on whether *Chevron* does indeed provide a safeguard in the situation posited above. For example, if a Court were willing to declare that a statutory provision was not ambiguous in this situation, and hence that the agency's interpretation was not to be accorded *Chevron* deference in a situation where regular tools of statutory interpretation tended towards one interpretation, then the *Arlington* conundrum may be slightly lessened. Here, finding that the *Chevron* framework did not apply, a court would be able to give effect to its independently determined construction of a provision in place of the agency's construction.[336] However, adopting such a narrow reading of "ambiguity"—essentially a reading that a provision will not be ambiguous where it is capable of multiple meanings, though one seems more correct than, or preferable to, others—both strains the

---

to accept an agency's reasonable interpretation of ambiguous statutory language even where the court, had it been free to construe the text *de novo*, would not have adopted the agency's interpretation."); FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 335; Starr, *supra* note 13, at 300–01 ("*Chevron* strongly suggests that courts should see themselves not as supervisors of agencies, but more as a check or bulwark against abuses of agency power.").

334. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

335. Scalia, *supra* note 22, at 520–21. See also the continuation of the abovementioned quote from Justice Scalia in *Arlington*, 133 S. Ct. at 1874 ("Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.").

336. *See* Symposium, *supra* note 8, at 367.

meaning of the term, and seems to undermine the logic of the *Chevron* doctrine.[337]

A seemingly more likely candidate for addressing the situation is the second step of *Chevron*, through a finding that the agency's interpretation in this situation is not "reasonable." However, as with the term "ambiguity" in the first step, there are a range of meanings that could be attributed to the word "reasonable," many of which would support the application of the *Chevron* framework to an agency interpretation which is reasonable but not preferable.[338] This is far from a hypothetical concern—as Breyer, et al., have noted, "[i]n step two, the court is all but bound by the agency's conclusion. Courts almost never invalidate an agency decision under step two."[339] The authors go on to note that "[b]y most counts, the Supreme Court has only done so twice"—although the authors were writing before the handing down of *Michigan v. EPA*[340]—and that "[t]his is consistent with the general idea that, in contrast to *Skidmore* deference, *Chevron* deference is in some sense binding."[341] Though now somewhat dated, Kerr's empirical study reviewing every Court of Appeals decision applying *Chevron* in 1995 and 1996 observed a similar effect: over eighty-nine percent of cases (100 of 112) were upheld at step two.[342]

Taken together, these factors suggest that the *Chevron* doctrine, as applied, does not meaningfully preserve a sphere of independent judgment for courts on questions of law as is required by Article III. Rather, in line with the very purpose of *Chevron*, courts will be constrained by agency interpretations on questions of law which do not rise to the level of being "arbitrary, capricious, or manifestly contrary to the statute."[343] While this position can be accepted when agencies make determinations on questions of mixed fact and law for the reasons set out in Section II(a) of this Article, the same justifications do not hold—and strong countervailing concerns exist—when *Chevron* is automatically transposed to apply to jurisdictional determinations, as questions of law. The development is not only concerning on its own terms, but also—and

337. Scalia, *supra* note 22, at 520.

338. On the breadth of the reasonableness inquiry, see Armstrong, *supra* note 66, at 267.

339. BREYER ET AL., *supra* note 143, at 287–88. *Cf.* Starr, *supra* note 13, at 298 ("Despite its strengthening of the deference principle . . . *Chevron* has not made judicial review a dead letter.").

340. Michigan v. EPA, No. 14–46, slip op. 1 (June 29, 2015).

341. BREYER ET AL., *supra* note 143, at 359.

342. Kerr, *supra* note 149, at 4, 31.

343. Sales & Adler, *supra* note 21, at 1522–23.

perhaps even more so—as another significant moment in the trajectory of constitutional compromises effected for the maintenance of the administrative state.

CONCLUSION

Chevron fundamentally transformed the role of courts in the administrative state, "indisputably [effecting] an alteration of normal judicial functioning."[344] However, regardless of its merits, *Chevron* must now be viewed as firmly entrenched in the American legal landscape, exerting an equally significant impact on the behavior of courts, agencies and Congress. For proponents of *Chevron*, *Arlington* should represent a significant cause for concern because of its potential to distort or undermine *Chevron*'s theoretical underpinnings, as discussed in Section II of the Article. For *Chevron*'s proponents and critics alike, *Arlington* should be the subject of close and sustained examination due to the additional challenges that it poses to the constitutionally-enshrined separation of powers.

Given the breadth of "*Chevron*'s domain,"[345] any proposal to revise or pare back *Arlington* will most likely have to be situated within the *Chevron* framework in order to have any possibility of broader acceptance. On this basis, one possible judicial response, were the *Arlington* paradigm to be reconsidered, would be to introduce a presumption against the application of *Chevron* in jurisdictional cases as a feature of the "Step Zero" inquiry.[346] Such a presumption could either be framed as a presumption of de novo review of agencies' jurisdictional determinations, or as one of *Skidmore* deference to such determinations.[347] For the sake of doctrinal cohesion, the development could arguably be framed as an aspect of the "major questions" exception to *Chevron*.[348]

This proposal merely represents one possible method of addressing the theoretical and constitutional challenges represented

344. *See* Caust-Ellenbogen, *supra* note 7, at 787; *see also* Merrill, *supra* note 11, at 1001 ("The appellate review model tells courts to decide all questions of law independently, whereas *Chevron* interposes and instructs the court to hold off if there is reason to think that Congress has given the legal issues to the agency to decide.").

345. Merrill & Hickman, *supra* note 213.

346. *See* Sales & Adler, *supra* note 21, at 1527; Sunstein, Chevron *Step Zero*, *supra* note 21, at 234–35 (both discussing the "Step Zero" inquiry).

347. *See* Sales & Adler, *supra* note 21, at 1527; Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2665 (2005).

348. *See* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015); Sunstein, Chevron *Step Zero*, *supra* note 21, at 239.

by *Arlington*. Other methods are conceivable,[349] and may, for one reason or another, be preferable. Nevertheless, this proposal has at least two benefits. First, in accordance with Justice Scalia's inclinations, it has the advantage of providing a clear and simple rule that is capable of consistent application.[350] Secondly, and by far more significantly, such a rule would fully respect Article III's requirement of an independent judicial judgment on questions of law.[351]

Regardless of which method is adopted, there remains the possibility that some readjustment will be required—however minor—to the court/agency relationship.[352] No matter how clearly a "jurisdictional determinations" exception to *Chevron* is formulated, such an exception will almost certainly entail marginally higher decision costs, whether such costs are felt by courts when determining whether a jurisdictional question is presented or by agencies when considering how to initially respond to such questions (knowing that a court will undertake a subsequent independent review). However, these are costs which can, and should, be borne. Efficiency cannot—and, constitutionally, must not—be the basis on which such constitutional compromises are adjudged: "the fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."[353] Rather, the only way in which the Constitution will continue to remain vital in the face of the growing administrative state is "by taking seriously, and applying rigorously,"[354] the constitutional limitations so carefully laid out in the nation's blueprint for government.

---

349. *See, e.g.*, Gellhorn & Verkuil, *supra* note 150, at 994 (suggesting that this could be a step one inquiry, although the article was written before the true nascence of step zero in *Mead*).

350. *See* United States v. Mead Corp., 553 U.S. 218, 236 (2001); Sunstein, Chevron *Step Zero*, *supra* note 21, at 192. *See generally* Scalia, *supra* note 22, at 516.

351. *See* Sunstein, Chevron *Step Zero*, *supra* note 21, at 228, 248.

352. In relation to *Chevron*'s effect on the court/agency relationship, see *supra* notes 310, 330.

353. INS v. Chadha, 462 U.S. 919, 944 (1983); *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 864 (1986) ("[T]he Framers foreswore this sort of convenience in order to preserve freedom.") (Brennan, J., dissenting). *See generally* FALLON ET AL., HART & WECHSLER'S, *supra* note 253, at 356.

354. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).