Bilski's vague abstraction-application distinction. Although the Court emphasized that the MOT test is still "a useful and important clue," it did not actually *apply* the MOT test to the applicants' hedging claim — thus signaling that the test might not be applicable to processes of organizing human activity.

Courts ought to balance broad property rights that encourage otherwise too-risky innovation against the stifling of entrepreneurship and the creation of an overbearingly litigious society. The *Bilski* Court was right to reject the MOT test and thus further the constitutional purpose of encouraging innovation in areas like medical diagnostic techniques. However, the Court was wrong to open the door wide to business method claims that *fail* the MOT test and are directed solely to nontechnological methods of organizing human activity — methods that are relatively costless to conceive and sufficiently incentivized without patent protection. By rejecting both rules at once, without clarifying what constitutes an "abstract idea," *Bilski* will usher in a great deal of litigation over dubious process patents "rang[ing] from the somewhat ridiculous to the truly absurd."[84]

E. Review of Administrative Action

National Labor Relations Act — Agency Jurisdiction. — Under the framework created in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] administrative agencies are usually given substantial deference in interpreting the organic statutes that authorize their operations. The National Labor Relations Board (NLRB or Board) is one such agency and is charged with interpreting and enforcing federal labor law. Last Term, in *New Process Steel, L.P. v. NLRB*,[2] the Supreme Court held that a two-member delegee group of the NLRB had no jurisdiction to adjudicate labor disputes.[3] The Court never addressed the *Chevron* framework. Although the Court may have meant that the Board's interpretation was unreasonable, *Chevron*'s absence and relevant precedent suggest that the *Chevron* framework may not apply to certain agency interpretations of the agency's own jurisdiction, especially when the issue is whether an agency (or its delegee group) is properly constituted. Such a "*Chevron* Step Zero" inquiry is well justified because *Chevron*'s rationales are particularly inapplicable in such cases.

The National Labor Relations Act[4] (NLRA) prohibits various unfair labor practices; it also created the NLRB, an administrative agen-

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[84] *In re* Bilski, 545 F.3d 943, 1004 (Fed. Cir. 2008) (en banc) (Mayer, J., dissenting).

[1] 467 U.S. 837 (1984).

[2] 130 S. Ct. 2635 (2010).

[3] *See id.* at 2644–45.

[4] 29 U.S.C. §§ 151–169 (2006).

cy with power to investigate violations of the Act, issue complaints for violations, hold adjudicatory hearings, issue orders, and have those orders enforced in federal courts.[5] The Labor Management Relations (Taft-Hartley) Act[6] amended the NLRA, changing the Board's total membership from three to five, raising the quorum requirement from two to three, and allowing the Board to delegate its powers to a group of three or more members in which the quorum requirement is two.[7]

Toward the end of 2007, a vacancy on the Board left it with four members; two more vacancies would occur when the recess appointments of two members expired at the year's end.[8] To ensure that the Board's functions continued, the Board first delegated to its General Counsel the power to initiate and conduct litigation that normally requires Board approval.[9] It also delegated all of its powers to a three-member group.[10] The Board believed that this arrangement would allow it to continue operating with only two members upon the third's departure.[11] The Board based its opinion on the NLRA's language and an Office of Legal Counsel (OLC) opinion[12] reaching the same conclusion.[13] The delegation of powers became effective on December 28, 2007, and on January 1, 2008, the Board began operating with only two members.[14] It operated that way for over two years, issuing almost 600 orders and decisions.[15]

New Process Steel operates several steel processing facilities.[16] In September 2006, the company began to negotiate a collective bargaining agreement with its employees at one facility through their union, the International Association of Machinists and Aerospace Workers, AFL-CIO.[17] Although the union approved an agreement, the company refused to acknowledge it, claiming that it had not been properly ratified; the company also withdrew recognition from the union.[18] The

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[5] *See id.* §§ 159–161.

[6] *Id.* §§ 141–187.

[7] *See id.* § 153. Section 3(b) of the NLRA now reads: "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." *Id.* § 153(b).

[8] *New Process Steel*, 130 S. Ct. at 2638.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Quorum Requirements, 27 Op. O.L.C., 2003 WL 24166831 (Mar. 4, 2003).

[13] *New Process Steel*, 130 S. Ct. at 2638.

[14] *Id.* at 2638–39.

[15] *Id.* at 2639.

[16] New Process Steel, L.P. v. NLRB, 564 F.3d 840, 842 (7th Cir. 2009).

[17] *Id.*

[18] *Id.* at 842–44.

union sued through the NLRB, and an administrative law judge ruled against New Process Steel.[19] New Process Steel appealed this decision to the Board, which adopted the judge's findings and conclusions and also ordered New Process Steel to deal with the union.[20] The Board made these rulings in September 2008, when it had only two members.

The Seventh Circuit affirmed.[21] New Process Steel argued that the NLRB lacked jurisdiction and wrongly decided the merits.[22] It claimed that the delegation was improper because the third member was a "phantom member" who would not consider cases, so the actual delegation was to two members.[23] The NLRA provision permitting a "delegat[ion] to any group of three or more members," however, restricts the Board from taking action when there are fewer than three members.[24] The panel rejected this argument and agreed with the Board on the plain meaning of the statutory text: once a delegation is made to three members, a new vacancy therein does not invalidate the quorum, so the remaining two members can continue to act for the Board.[25] It noted that the opinions of the two other circuits that had previously examined the issue and the interpretation of OLC supported this reading.[26] The panel briefly discussed legislative history and arguably analogous cases but found both to be largely irrelevant.[27] The union also prevailed on the merits.[28]

The Supreme Court reversed.[29] Writing for the Court, Justice Stevens[30] read section 3(b) of the NLRA to require a delegee group of NLRB members to maintain three members in order to continue to be valid.[31] He framed his argument using three considerations. First, he

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[19] *Id.* at 844.

[20] New Process Steel, LP, 353 N.L.R.B. No. 13, 2008 WL 4490051, at *1 (Sept. 25, 2008); New Process Steel, LP, 353 N.L.R.B. No. 25, 2008 WL 4492578, at *2–3 (Sept. 30, 2008).

[21] *New Process Steel*, 564 F.3d 840.

[22] *Id.* at 845, 848–49.

[23] *Id.* at 845.

[24] *Id.* (quoting 29 U.S.C. § 153(b) (2006)).

[25] *Id.* at 845–46.

[26] *Id.* at 846.

[27] Finding the statutory text unambiguous, the panel stated that examining legislative history was unnecessary, though it noted that New Process Steel's interpretation would hinder Congress's desire for an efficient Board that quickly processes many cases. *Id.* at 846–47. New Process Steel had also argued that cases concerning the number of required Article III judges on a panel were analogous, but the panel saw those cases as inapposite because of differences in the statutory language and administrative law cases allowing public boards to operate despite vacancies. *Id.* at 847–48.

[28] *Id.* at 849–52.

[29] *New Process Steel*, 130 S. Ct. at 2645.

[30] Justice Stevens was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

[31] *New Process Steel*, 130 S. Ct. at 2640. This holding did not address whether the Board itself was without power with only two members, which could mean that the delegation of investigative power to the General Counsel was invalid. *See id.* at 2642 n.4.

invoked a canon of construction disfavoring interpretations that render any provision "insignificant," and he saw requiring three group members as the only way to "harmonize and give meaningful effect to all of the provisions in § 3(b)."[32] Requiring the group to maintain three members is consonant with the quorum requirement for the Board and gives "material effect" to the requirement of three members for a delegee group.[33] This reading still means that the vacancy clause allows the full Board to operate with vacancies and allows a group to act with only two members participating on a case-by-case basis.[34] Otherwise, the quorum requirement could be permanently circumvented by two members, and the three-member requirement would not stop a de facto two-member delegation.[35] Second, Justice Stevens stated that the statute as written would have been an odd way for Congress to grant the Board the ability to operate with only two members; had Congress intended for the Board to operate that way it could have said so more straightforwardly.[36] Third, not only was there no sign that Congress intended to allow operation with two members, but Justice Stevens also found that the Board's practices contradicted that possible interpretation.[37] Even though two members had issued decisions when the third member of a delegee group was disqualified, the Board usually reconstituted the group with three members if one left.[38]

The Court also rejected several arguments offered by the government. The government argued that the vacancy clause applies directly to the group quorum clause, allowing a vacancy that leaves two members of a delegee group to exercise the power of the Board.[39] Justice Stevens responded that the group quorum is a separate issue from whether the group is properly constituted; although a two-member quorum is necessary, it is not sufficient to exercise the Board's power.[40] Furthermore, the statute specifies that a vacancy need not affect the Board as a whole, but does not address its effect on a group; thus, a vacancy could impair the function of a group.[41] The Court also was not convinced by the government's argument that the statute should

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[32] *Id.* at 2640 (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted).

[33] *Id.*

[34] *See id.*

[35] *Id.* at 2640–41.

[36] *Id.* at 2641.

[37] *Id.*

[38] *Id.* The Court did note an example of the post-Taft-Hartley Board's operating with only two members, but said that it was for only a three-day period and that the two years in which the Board had been operating recently was "unprecedented." *Id.* at 2641 n.3.

[39] *Id.* at 2642.

[40] *Id.* at 2642–43.

[41] *Id.* at 2643.

be read to further the congressional goal of Board efficiency.[42] The increase in the quorum requirement for the Board and the requirement of three members for a group show that Congress was not concerned with keeping the Board operating at all costs.[43]

Justice Kennedy dissented.[44] He argued that the statute's text, structure, and purpose show that the Board's interpretation was correct.[45] First, he asserted that allowing two members to act for the Board does not render any provision meaningless; by stopping short of saying that provisions were truly insignificant under the Board's interpretation, the Court merely desired "that some provisions should have a greater role than provided by the text of the statute."[46] Indeed, he suggested that the plain meaning of the text refutes the Court's reading because the statute is "indifferent" as to why a delegee group drops below three members.[47] Rather than saying that a vacancy does not impair the power of the Board to operate, the statute actually says that it "shall not impair the right of the remaining members to exercise all of the powers of the Board," which is precisely what the two remaining members did.[48] Justice Kennedy also argued that cases cited by the Board concerning appellate panels were apposite because those decisions were based on similar statutory texts (rather than practice, as the Court argued).[49] Second, Justice Kennedy argued that Congress's failure to specifically state that two members could act for the Board resulted from its expectation that ideally three members would constitute a group.[50] Thus, the Board did not circumvent Congress's will. Third, the prudent practice of the Board to reconstitute groups upon a vacancy therein should not be used as evidence of the group's lack of authority since it only shows the Board's preference.[51] Justice Kennedy recognized that the Board's operating with only two members was suboptimal but consistent with Congress's intent to structure the NLRB efficiently when possible and to allow continued operation when not.[52] In changing the NLRA, Congress had meant to increase the Board's efficiency, not prevent it from performing its vital tasks.[53]

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[42] *Id.* at 2644.
[43] *Id.*
[44] Justice Kennedy was joined by Justices Ginsburg, Breyer, and Sotomayor.
[45] *New Process Steel*, 130 S. Ct. at 2645 (Kennedy, J., dissenting).
[46] *Id.* at 2647.
[47] *Id.*
[48] *Id.* at 2648 (quoting 29 U.S.C. § 153(b) (2006)) (internal quotation mark omitted).
[49] *Id.* at 2647.
[50] *Id.* at 2649–50.
[51] *Id.* at 2650.
[52] *Id.* at 2651–52.
[53] *Id.* at 2652.

The Supreme Court has never addressed whether the *Chevron* framework applies to agencies' interpretations of their own statutory jurisdiction, and *New Process Steel* strongly suggests that, in at least some cases, it does not apply. This Comment will first examine *Chevron* jurisprudence and why *New Process Steel* is likely a simple statutory construction opinion. It will conclude by discussing why this result is particularly appropriate for questions of proper constitution.

Under *Chevron*, courts are to engage in a two-step inquiry regarding an agency's interpretation of a statute that it administers. First, they ask "whether Congress has directly spoken to the precise question at issue," and if it has and "the intent of Congress is clear" then courts "must give effect to [that] unambiguously expressed intent"; second, if "the statute is silent or ambiguous" on the issue, courts must determine whether the agency's interpretation is a "permissible construction."[54] The Court later held in *United States v. Mead Corp.*[55] that this framework applies only when the agency exercises a congressional delegation of authority to make the type of interpretive decision in question with the force of law,[56] an inquiry termed "*Chevron* Step Zero."[57] The rationale for judicial deference to agency decisionmaking was that Congress implicitly delegated interpretative authority based on agencies' political accountability, expertise, and investigative powers.[58] The Court has held numerous times that the NLRB receives *Chevron* deference in interpreting many of the NLRA's provisions.[59]

Yet *New Process Steel* is special in that it addresses an agency's interpretation of its own jurisdiction. It seems the Court has consciously avoided acting decisively on this issue. Justices most expressly addressed it in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.[60] There the Court upheld an agency's novel assertion of exclusive jurisdiction, accepting the agency's interpretation without mentioning *Chevron* or deference.[61] Justice Scalia concurred in the judgment, citing cases in support of the idea that "it is settled law that the rule of [*Chevron*] deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."[62] He claimed that this

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[54] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[55] 533 U.S. 218 (2001).

[56] *Id.* at 226–27.

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

[58] *See Chevron*, 467 U.S. at 865–66.

[59] *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 B.U. L. REV. 189, 192 & n.13 (2009) (compiling Supreme Court cases that granted the NLRB deference).

[60] 487 U.S. 354 (1988).

[61] *Id.* at 374.

[62] *Id.* at 381 (Scalia, J., concurring in the judgment).

deference is necessary because there is no principled way to separate jurisdictional matters from others, and Congress would expect the agency to resolve ambiguities in its jurisdiction.[63] Justice Brennan dissented, arguing that the Court had never deferred where the statute confined an agency's jurisdiction, as in *Moore*.[64] He reasoned that deferring to agencies in such situations would lead to self-aggrandizement and work against an agency's purpose, that it is not necessary because agencies have no special expertise in those situations, and that such statutes manifest congressional unwillingness to allow agencies to define their own jurisdiction (so they cannot be "administering" that statute).[65]

Since then the Court has remained noncommittal. On the one hand, it has either cited *Chevron* or addressed deference explicitly in the significant majority of cases involving an agency's jurisdictional interpretation — nearly the only exceptions involve constitutional issues or prior statutory interpretations (neither of which is at issue here) and do not include NLRB cases.[66] On the other hand, the Court has not relied on *Chevron* but rather on the statute's being clear or on a pre-*Chevron* interpretation.[67] The Roberts Court has been particularly nondeferential toward agencies' interpretations regarding their own jurisdiction, even while addressing *Chevron*.[68] The circuits differ over whether and how Court precedent decides the issue.[69] Although the majority of circuits that have decided the issue have held that agencies

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[63] *Id.* at 381–82.

[64] *Id.* at 386 (Brennan, J., dissenting).

[65] *Id.* at 386–87.

[66] In an exhaustive survey of all cases from *Chevron* through *Hamdan* in 2005, Professors William Eskridge and Lauren Baer coded all cases involving potential agency interpretations that could be analyzed under *Chevron* for 156 different variables. *See* 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, 1099–1100 (2008). One variable was jurisdictional questions. *See id.* at 1131–32. The data is available at http://www.georgetownlawjournal.com/extras/96.4. I examined only cases involving agency jurisdiction that were decided after *Moore* (when the Court was still developing the *Chevron* doctrine). After excluding cases that addressed constitutional questions, facial challenges (in which case it is not clear that the agency should be given deference under *Chevron*), settled precedent, or cases that had no actual agency interpretation on point, the vast majority of the remaining cases discussed the *Chevron* framework or at least deference. All the NLRB cases mentioned *Chevron*. *See* Modified Data Set (on file with the Harvard Law School Library); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1513–17 (reviewing the most significant jurisdiction cases, all citing *Chevron*).

[67] *See* Sales & Adler, *supra* note 66, at 1513–17.

[68] Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 146–58, 171–72 (2010).

[69] Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 828 & n.191 (2010).

receive deference on jurisdictional questions, several have held that they do not, or that they do not on certain types of questions.[70]

In *New Process Steel*, the Court appeared to be choosing the better of two statutory interpretations rather than applying *Chevron*, suggesting that *Chevron* does not apply to at least some jurisdictional interpretation questions. The Court's failure to refer to *Chevron*, deference, a lack of ambiguity, or even the possibility that the statute *could* be ambiguous is fairly unique among opinions addressing agency assertions of jurisdictional authority, particularly with the NLRB and in a case presenting no constitutional question.[71] The opinion began by giving two ways to interpret the language of section 3(b), the government's view or the view that the clause requires the delegee group to maintain three members to be valid, not recognizing a middle path of ambiguity.[72] Throughout, the Court gave persuasive but not definitive arguments for preferring the second. After comparing the two options, the Court found the second reading to be "*a* sound one";[73] it reflects "*a* straightforward understanding of the text, which . . . points [the Court] toward *an* interpretation."[74] The Court's concern was what Congress more likely meant rather than what was reasonable.

Moreover, had the *Chevron* framework applied in *New Process Steel*, the Court's practice and precedent show that the Court should have deferred to the Board's interpretation for two main reasons. First, the Court's language suggested that the statute was ambiguous. The Court came closest to claiming the opposite, that the statute was unambiguous and the Board's interpretation unreasonable (perhaps without explicitly mentioning *Chevron*, as occurs in areas other than jurisdiction[75]), by asserting that requiring a continuous three-member group is "the only way to harmonize and give meaningful effect to all of the provisions in § 3(b)."[76] The Court explained that "while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of § 3(b)'s provisions functionally void."[77] Yet this language, if anything, is an admission of the statute's ambiguity. An agency's interpre-

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[70] Sales & Adler, *supra* note 66, at 1518. While the Seventh, Eighth, D.C., and Federal Circuits have held in the past that agencies receive no deference when interpreting their statutory jurisdiction, more recently the Eighth and D.C. Circuits appear to have joined four others in holding that they do. *See id.* at 1518 & nn.119–21. The D.C. Circuit has held, contrary to *Chevron,* that statutory silence in a jurisdictional provision precludes deference. *See* Am. Bar Ass'n v. FTC, 430 F.3d 457, 469–70 (D.C. Cir. 2005).

[71] *See* Craig, *supra* note 68, at 142–58; *supra* note 66.

[72] *New Process Steel*, 130 S. Ct. at 2640.

[73] *Id.* (emphasis added).

[74] *Id.* at 2642 (emphases added).

[75] *See* Beermann, *supra* note 69, at 829–32.

[76] *New Process Steel*, 130 S. Ct. at 2640.

[77] *Id.* at 2641.

tation's being "permissible" generally means that both steps of *Chevron* are satisfied.[78] In the rare cases that the Court has found an agency interpretation to be unworthy of *Chevron* deference at Step One because it was "implausible," this conclusion was based on a narrow textual reading;[79] the Roberts Court especially has focused on individual words.[80] The Court has never found an interpretation to be "permissible" in one way yet "impermissible" or "implausible" in another. Second, had *Chevron* applied, the Court also should not have called for "straightforward language" of Congress's intent[81] because with *Chevron*, gaps in the organic statute call for deference to the agency to interpret them. Congress clearly granted the NLRB such interpretive authority.[82] Under *Chevron*, the Court should have gone to Step Two and determined whether the Board's interpretation was "reasonable."[83]

The conflicting interpretations of section 3(b) further demonstrate why the Board's interpretation was reasonable. Of the six circuits to address the delegee group's validity in 2008, four expressly stated that the court owed the NLRB *Chevron* deference and agreed with the Board's interpretation,[84] and the Seventh Circuit found the statute commanded the Board's view unambiguously.[85] Only the D.C. Circuit disagreed with the Board, but it did so on different grounds than the Court.[86] The Court has found that deeply conflicting interpretations by lower courts can demonstrate ambiguity, weighing in favor of defer-

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[78] *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009).

[79] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (discussing "adequate margin" and "requisite"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 141 (2000) ("benefit to health"); Brown v. Gardner, 513 U.S. 115, 119–20 (1994) ("result of"); Pittston Coal Grp. v. Sebben, 488 U.S. 105, 115 (1988) ("criteria").

[80] *See* Craig, *supra* note 68, at 142–44, 149–58. Conflicting strands of the *Chevron* doctrine disagree over whether all the "traditional tools" of statutory construction (championed by Justice Stevens) or only the plain meaning of the text should be used in Step One. *See* Beermann, *supra* note 69, at 818–21. Yet the "best example" of the traditional tools approach, *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990); *see* Beermann, *supra* note 69, at 818, has been cited primarily for supporting narrow textual interpretation. *See, e.g.*, Logan v. United States, 128 S. Ct. 475, 482 (2007). Justice Stevens's approach functionally becomes one of *no deference*. *See infra* note 91.

[81] *New Process Steel*, 130 S. Ct. at 2641.

[82] 29 U.S.C. § 156 (2006) ("The Board shall have authority . . . to make, amend, and rescind . . . rules and regulations as may be necessary to carry out the provisions of this subchapter.").

[83] Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009).

[84] *See* Teamsters Local Union No. 523 v. NLRB, 590 F.3d 849, 850–52 (10th Cir. 2009); Narricot Indus., L.P. v. NLRB, 587 F.3d 654, 658–60 (4th Cir. 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410, 415–16, 423–24 (2d Cir. 2009); Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36, 41 (1st Cir. 2009).

[85] *See* New Process Steel, L.P. v. NLRB, 564 F.3d 840, 845–46 (7th Cir. 2009).

[86] *See New Process Steel*, 130 S. Ct. at 2642 n.4; Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 475 (D.C. Cir. 2009).

ence to the agency's interpretation,[87] so the Board's interpretation can survive Step One by the Court's own precedent. The persistent validation of the Board's position also shows it to be a reasonable one, entitling it to deference under Step Two.

The issue in *New Process Steel* — jurisdiction based on a properly constituted agency — is one for which *Chevron* deference and Justice Scalia's arguments in *Moore* make the least sense, and for which Justice Brennan's dissent makes the most sense. The inquiry does not suffer from problems common to other jurisdictional inquiries. Justice Scalia's greatest objection was the blurry line between jurisdictional and nonjurisdictional inquiries; noted commentators have agreed that only subject matter experts know the bounds of their expertise.[88] Yet this problem does not occur in *New Process Steel*. An agency's organic statute usually lays out its organization separately from substantive subject-matter law, and most agencies' structures and functions (unlike the areas of law they administer) are similar. Indeed, the majority and the dissent in *New Process Steel* implicitly recognized that provisions like a quorum requirement are widely applicable.[89] The Court even created a rule: proper constitution depends on whether the agency has standing power to consider all cases that come before it (as opposed to particular cases based on subject matter or temporary changes).[90] Such jurisdictional questions can be cleanly delineated from others for they involve no special agency expertise; the task is not policy determination, but textual interpretation and statutory construction, which the courts are probably more competent than agencies to perform. Indeed, Justice Stevens (the *New Process Steel* opinion's author) has made this argument against *Chevron* deference in such cases.[91]

Justice Brennan's other arguments are also compelling here. He argued that there is a conflict between a statute confining jurisdiction, particularly by defining an agency's (or delegee group's) validity, and

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[87] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 495–96 (1996) ("The different views expressed by the Courts of Appeals regarding the appropriate scope of federal pre-emption under § 360k demonstrate that the language of that section is not entirely clear." *Id.* at 495).

[88] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 235 (2006).

[89] *See New Process Steel*, 130 S. Ct. at 2642; *id.* at 2647 (Kennedy, J., dissenting).

[90] *See id.* at 2642–43 (majority opinion).-

[91] In a 2008 Term partial dissent, Justice Stevens called for courts to decide (without deference) "pure question[s] of statutory construction" that do not implicate *Chevron*'s rationales, particularly agency expertise. Negusie v. Holder, 129 S. Ct. 1159, 1170–71 (2009) (Stevens, J., concurring in part and dissenting in part) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)) (internal quotation mark omitted). His tendency to use all tools of statutory construction to resolve *Chevron* Step One leads to this same place; the natural consequence of using such strong tools to discern such weak intent is the practical uselessness of the *Chevron* framework. *See* Beermann, *supra* note 69, at 818–22 (calling for *Chevron* to be discarded).

"the agency's institutional interests in expanding its own power";[92] commentators have similarly noticed the conflict of interest.[93] Agency self-aggrandizement reaches its zenith here, for if an agency (or delegee group) is not properly constituted, officials have no power and their office is essentially worthless. Agency leaders will often view the agency's continued operation to be at least as vital as Congress does, and probably far more so. Deference would result in continuing operation beyond Congress's intent. Justice Brennan also argued that a statute limiting jurisdiction showed a Congressional intent *not* to delegate to the agency the power to administer the statute or fill in gaps;[94] if anywhere this is true, it seems to be where the law being interpreted is whether the agency has law-interpreting power at all. Under *Mead*, this ought to be a Step Zero inquiry.[95]

It may be some time before the import of *New Process Steel* is clear. Ambiguity over proper constitution of a delegee group is rare. Yet this issue could prompt reconsideration of the deference owed to agencies when they interpret jurisdictional provisions of their organic statutes that are not within their subject matter expertise. Although more *Chevron* Step Zero variants may complicate analysis, they may also prevent agency self-aggrandizement without any harm to legitimate agency action that furthers Congress's intent.

F. RICO Act

Proximate Causation. — In 1949, Congress passed the Jenkins Act[1] to help facilitate the collection of state tobacco taxes. Out-of-state vendors are not responsible for collecting state taxes themselves, but the Act requires them to file a report with the state tobacco tax administrator providing the names and addresses of state residents who have purchased their products, along with the quantities of cigarettes purchased.[2] Congress prescribed criminal penalties for failure to comply with the Act, but declined to include a provision that would give individual litigants a right of action to enforce it.[3] Last Term, in *Hemi Group, LLC v. City of New York*,[4] the Supreme Court held that New York City could not use the Racketeer Influenced and Corrupt Orga-

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92 Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting).

93 *See, e.g.*, Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 244–46, 287 (2004); Sales & Adler, *supra* note 66, at 1548–49.

94 *Moore*, 487 U.S. at 386–87.

95 *See* Sales & Adler, *supra* note 66, at 1510.

1 Pub. L. No. 363, 63 Stat. 884 (1949) (codified as amended at 15 U.S.C. §§ 375–378 (2006)), *amended by* Pub. L. No. 111-154, 124 Stat. 1087 (2010).

2 *Id.*

3 *Id.*

4 130 S. Ct. 983 (2010).