Communications Act of 1934 — Chevron *Deference* — City of Arlington v. FCC

Nearly three decades ago the Supreme Court laid out the canonical formulation for judicial deference to agency interpretations of statutory law in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1]: first, a court must ask "whether Congress has directly spoken to the precise question at issue," and second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[2] Yet despite becoming "the most cited case in modern public law,"[3] certain questions surrounding *Chevron* remain unresolved. Last Term, in *City of Arlington v. FCC*,[4] the Court answered one of the most prominent of these questions, holding that *Chevron* applies to an agency's claim to deference in interpreting its own jurisdiction.[5] Despite the compelling theoretical grounds for casting a skeptical eye on such interpretations, the majority correctly focused on whether drawing a predictable distinction between jurisdictional and nonjurisdictional questions was feasible. In rejecting the distinction as unworkable, the Court reaffirmed the importance of *Chevron*'s role as a stable background rule.

The Telecommunications Act of 1996[6] modified the Communications Act of 1934[7] to impose "limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities."[8] The provision of the 1996 Act at issue in *Arlington*, 47 U.S.C. § 332(c)(7)(B)(ii), "requires state or local governments to act on wireless siting applications 'within a reasonable period of time after the request is duly filed.'"[9] Section 201(b) of the 1934 Act "empowers the Federal Communications Commission to 'prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions.'"[10]

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

[2] *Id.* at 842–43.

[3] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 823 (2006).

[4] 133 S. Ct. 1863 (2013).

[5] *Id.* at 1868.

[6] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[7] Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–615b (2006)).

[8] City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005) (discussing 47 U.S.C. § 332(c)(7)).

[9] *Arlington*, 133 S. Ct. at 1866 (quoting 47 U.S.C. § 332(c)(7)(B)(ii)).

[10] *Id.* (alteration in original) (quoting 47 U.S.C. § 201(b)). Justice Scalia noted that such "rulemaking authority extends to the subsequently added portions of the Act." *Id.*

In 2008, CTIA — The Wireless Association[11] petitioned the FCC "to clarify the meaning of § 332(c)(7)(B)(ii)'s requirement that zoning authorities act on siting requests 'within a reasonable period of time.'"[12] The FCC found that it had broad statutory authority to interpret the provisions of the 1934 Act, and thus that it had authority to interpret § 332(c)(7), which fell within the Act.[13] Pursuant to this authority, the FCC declared "that a 'reasonable period of time' is, presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications," although state and local governments could rebut that presumption.[14]

The cities of Arlington, Texas, and San Antonio, Texas, petitioned the Fifth Circuit for review of the Declaratory Ruling.[15] First, the cities argued that the FCC's failure to use notice-and-comment rulemaking violated the requirements of the Administrative Procedure Act.[16] Although the court expressed "serious doubts as to the propriety of the FCC's choice of procedures,"[17] it concluded that the error was harmless because the FCC had published notice of the petition in the Federal Register and a broad range of affected parties had submitted comments, and because the FCC had addressed the substantive issues that these parties raised.[18] Second, the cities argued that the FCC lacked the statutory authority to adopt the 90- and 150-day time frames because it did not have authority to interpret § 332(c)(7)(B)(ii) due to § 332(c)(7)(A).[19] This latter provision states that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the

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[11] Although Justice Scalia modestly declined to reveal the "secret, known only to wireless-service-provider insiders," of the acronym's origins, *id.* at 1867 n.1, the organization's website indicates that it stood for Cellular Telecommunications Industry Association and then Cellular Telecommunications & Internet Association until 2004. *See History of Wireless Communications*, CTIA — WIRELESS ASS'N, http://ctia.org/media/industry_info/index.cfm/AID/10392 (last updated Jan. 2013).

[12] *Arlington*, 133 S. Ct. at 1867.

[13] *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, 24 FCC Rcd. 13994, 14000–03 (2009) [hereinafter Declaratory Ruling].

[14] *Id.* at 14005. A "collocation" involves "the addition of an antenna to an existing tower or other structure." *Id.* at 14012.

[15] City of Arlington v. FCC, 668 F.3d 229, 236 (5th Cir. 2012). Under 28 U.S.C. § 2342(1) (2006), the courts of appeals have jurisdiction to review "all final orders of the Federal Communications Commission made reviewable by" 47 U.S.C. § 402(a) (2006), which provides for judicial review of final orders of the FCC.

[16] *Arlington*, 668 F.3d at 240.

[17] *Id.* at 242.

[18] *Id.* at 243–46.

[19] *Id.* at 247.

placement, construction, and modification of personal wireless service facilities."[20] Given that § 332(c)(7)(B)(v) granted jurisdiction over disputes under this section to the courts, the cities argued that Congress did not intend for the FCC to have interpretive authority over the phrase "reasonable period of time."[21] The FCC responded that § 332(c)(7)(A)'s carveout of § 332(c)(7)(B) left the interpretation of "reasonable period of time" within the general statutory grant of interpretive deference; the grant of jurisdiction to courts over disputes arising under the paragraph, meanwhile, only prohibited the FCC from imposing additional restrictions not mentioned in § 332(c)(7)(B).[22]

The Fifth Circuit answered the question that the Supreme Court would identify as central — whether the *Chevron* framework applied to the FCC's claim of interpretive authority over § 332(c)(7)(B)(ii) — in just three paragraphs.[23] Noting that "[t]he Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to the issue," the court deferred to Fifth Circuit precedent in "apply[ing] *Chevron* to an agency's interpretation of its own statutory jurisdiction."[24] Undertaking the *Chevron* analysis of the FCC's claim of interpretive authority, the court found that § 332(c)(7) was ambiguous with regard to the agency's authority, and that the FCC's interpretation granting itself authority was not impermissible.[25] The court similarly deferred to the FCC's interpretation of "reasonable period of time," finding that the 90- and 150-day time frames were "based on a permissible construction" of the statute.[26]

The Supreme Court granted certiorari limited to the question of "[w]hether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction"[27] and affirmed the Fifth Circuit.[28] Justice Scalia, writing for the majority,[29] held that "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."[30] Justice Scalia rested his argument on two grounds: pragmatism and precedent.

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[20] 47 U.S.C. § 332(c)(7)(A) (2006).
[21] *Arlington*, 668 F.3d at 247.
[22] *Id.*
[23] *Id.* at 247–48.
[24] *Id.* at 248 (citing, inter alia, Texas v. United States, 497 F.3d 491, 501 (5th Cir. 2007)).
[25] *Id.* at 251–54.
[26] *Id.* at 255–56.
[27] *Arlington*, 133 S. Ct. at 1867–68 (omissions in original).
[28] *See id.* at 1868.
[29] Justice Scalia was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan.
[30] *Arlington*, 133 S. Ct. at 1868.

Justice Scalia first argued that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage."[31] He explained that "every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction."[32] Invoking both canonical and more recent administrative law decisions in support of this thesis, he pointed out that agencies' adopted definitions of "outside salesman,"[33] "pole attachments,"[34] and "waters of the United States"[35] — each considered a quintessential *Chevron* question at the time of its decision — could be reframed as attempts to expand the scope of the agencies' respective jurisdictions.[36]

Justice Scalia then surveyed precedent to demonstrate that the Court had "consistently held 'that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'"[37] Justice Scalia characterized *Commodity Futures Trading Commission v. Schor*[38] as "[a] prime example of deferential review for questions of jurisdiction."[39] Turning to numerous cases that resulted in a deferential posture toward agency interpretations claiming expanded (or contracted) jurisdiction, Justice Scalia concluded that "[t]he U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction."[40]

Justice Scalia concluded by devoting "[a] few words" to responding to the dissent, which proposed to precede every *Chevron* analysis with a de novo look at whether the agency had interpretive authority over the statutory provision at issue.[41] Justice Scalia dismissed this proposal as unworkable. He acknowledged that *United States v. Mead Corp.*[42]

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[31] *Id.*

[32] *Id.* at 1870 ("To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending on how generally one wishes to describe the 'authority.'" (quoting Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment)) (internal quotation marks omitted)).

[33] *Id.* (quoting Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2162, 2165 (2012)) (internal quotation marks omitted).

[34] *Id.* (quoting Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327, 331, 333 (2002)) (internal quotation marks omitted).

[35] *Id.* (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123, 131 (1985)) (internal quotation marks omitted).

[36] *Id.*

[37] *Id.* at 1871 (citing 1 R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.5, at 187 (2010)).

[38] 478 U.S. 833 (1986).

[39] *Arlington*, 133 S. Ct. at 1871. In *Schor*, the Court cited *Chevron* in upholding the Commodity Futures Trading Commission's claim of authority to adjudicate counterclaims. 478 U.S. at 844. It is unclear though whether the Court found the statute unambiguous under Step One or deferred to the agency under Step Two. *See* Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 962 (1994).

[40] *Arlington*, 133 S. Ct. at 1872.

[41] *Id.* at 1873–74.

[42] 533 U.S. 218 (2001).

had established a threshold inquiry into whether Congress had intended to delegate authority.[43] Yet Justice Scalia rejected the expansion of "th'ol' 'totality of the circumstances' test,"[44] as he had labeled it in *Mead*, to an exercise of formal rulemaking or adjudication within an agency's organic statute.[45] In his view, such an expansion was "an invitation to make an ad hoc judgment regarding congressional intent" and thus would "destroy the whole stabilizing purpose of *Chevron*."[46] He would instead find this test satisfied as long as Congress had conferred general rulemaking or adjudicative authority to the agency and the agency was exercising such authority.[47]

Justice Breyer concurred in part and in the judgment.[48] He agreed with the majority that "the distinction between 'jurisdictional' and 'non-jurisdictional' interpretations is a mirage."[49] Yet he sided with the dissent in arguing that "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill."[50] Justice Breyer identified at least ten different factors relevant to the determination of Congress's intent.[51] He then applied those factors,[52] "conclude[d] that § 332(c)(7)(B)(ii) — the 'reasonableness' statute — leaves a gap for the FCC to fill," and accordingly supported the FCC's interpretation.[53]

Chief Justice Roberts dissented.[54] Taking issue with how Justice Scalia (and, he acknowledged, "[t]he parties, *amici*, and court below") had construed the question, he insisted that the issue was not whether *Chevron* deference extends to an agency's interpretation of statutory provisions that concern the scope of its jurisdiction.[55] Rather, the question was whether courts should "defer to an agency on whether Congress has granted the agency interpretive authority over the statutory

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43 *See Arlington*, 133 S. Ct. at 1874.

44 *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

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

46 *Id.*

47 *See id.*

48 *Id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment).

49 *Id.* (quoting *id.* at 1868 (majority opinion)) (internal quotation marks omitted).

50 *Id.*

51 *See id.* at 1875–76 (pointing out the relevance of "'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, . . . the careful consideration the Agency has given the question over a long period of time[,]' [t]he subject matter of the relevant provision[,] . . . the statute's text, its context, the structure of the statutory scheme, . . . canons of textual construction[, and] . . . [s]tatutory purposes, including those revealed in part by legislative and regulatory history" (citation omitted) (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)).

52 *Id.* at 1876–77.

53 *Id.* at 1877.

54 *Id.* (Roberts, C.J., dissenting). Chief Justice Roberts was joined by Justices Kennedy and Alito.

55 *Id.* at 1879.

ambiguity at issue."[56] Like Justice Breyer, he would have the Court "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."[57]

Chief Justice Roberts couched his stance in separation of powers concerns. Beginning with the *Federalist Papers* and concluding with *Marbury*, he launched a broadside against two features of the modern administrative state. First, expressing discomfort with the fact that "[t]he administrative state 'wields vast power and touches almost every aspect of daily life,'"[58] he pointed out that this power contains a commingling of all three principal governmental powers: administrative agencies "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules."[59] Second, he decried the functional independence and lack of oversight of the administrative branch, marshaling for support the academic writings of Justices Breyer and Kagan, among others.[60]

Arlington raised the issue of whether the Court should restrict the scope of *Chevron* by denying deference to agencies' claims of jurisdiction over statutory provisions. Justice Scalia's majority opinion sidestepped the murky theoretical arguments on granting deference in such cases and instead offered an overriding pragmatic one: because there is no principled basis for distinguishing those provisions that should be interpreted by agencies from those that should not, denying deference on "jurisdictional" questions would throw into doubt interpretive authority over a wide range of issues. By focusing squarely on the predictability of the jurisdictional/nonjurisdictional distinction, the majority reaffirmed *Chevron*'s commitment to providing a stable baseline from which to legislate.

Arlington stepped squarely into the debate over *Chevron*'s "Step Zero" — "the initial inquiry into whether the *Chevron* framework applies at all."[61] The first step toward Step Zero occurred in *Christensen v. Harris County*,[62] which introduced an inquiry into whether an agency's interpretation "lack[s] the force of law."[63] *Mead* and *Barnhart v.*

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[56] *Id.* at 1879–80.

[57] *Id.* at 1880.

[58] *Id.* at 1878 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010)).

[59] *Id.* at 1877–78.

[60] *See id.* at 1878 (citing, inter alia, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 110 (2010); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001)).

[61] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

[62] 529 U.S. 576 (2000).

[63] *Id.* at 587. *See* Sunstein, *supra* note 61, at 211–13.

Walton[64] further solidified this inquiry into whether an agency had acted pursuant to rulemaking authority.[65] By the time of *Arlington* it was clear even to Justice Scalia — who had vociferously objected to the majority's reasoning in all three Step Zero cases — that "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."[66] Both the dissent and concurrence thought it natural to extend the principles articulated in *Mead* and its compatriots, so that deference would always have to be preceded by an inquiry into whether Congress intended deference on the specific statutory ambiguity.[67] Justice Scalia, however, was correct to say that there had yet to be a case "in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference to an exercise of that authority within the agency's substantive field."[68] Yet neither had the possibility been foreclosed.

Into this breach stepped *Arlington*. The theoretical arguments in favor of deferring to agencies on their own jurisdiction are decidedly mixed. The prevailing justification for *Chevron* deference generally is that Congress intended to confer interpretive authority upon agencies.[69] Or, more precisely, that given the impossibility of accurate ex post determinations of congressional intent,[70] courts may as well adopt

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64 535 U.S. 212 (2002).

65 Sunstein, *supra* note 61, at 213–18.

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

67 *See id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 1880, 1882 (Roberts, C.J., dissenting).

68 *Id.* at 1874 (majority opinion). Chief Justice Roberts argued that *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), and *Gonzales v. Oregon*, 546 U.S. 243 (2006), had further bolstered the case for *Mead*'s extension, as in each case Congress had carved out a portion of a statute granting general rulemaking authority from the executive officer's control. *See Arlington*, 133 S. Ct. at 1880, 1882 (Roberts, C.J., dissenting). Neither precedent, however, can quite be stretched to cover the position taken by the dissent in *Arlington*: *Adams Fruit* involved a textually unmistakable grant of interpretive authority to the judiciary rather than to the Secretary of Labor, *see* 494 U.S. at 649, while the grant of rulemaking authority to the Attorney General in *Gonzales* was found to be quite restricted, *see* 546 U.S. at 259.

69 The authors of all three *Arlington* opinions have rested *Chevron* deference to agency interpretations primarily on the grounds of congressional intent. *See* 133 S. Ct. at 1877 (Roberts, C.J., dissenting) ("Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue."); *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 ("The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'" (quoting Process Gas Consumers Grp. v. U.S. Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc))).

70 *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–70 (1930) (describing "the intent of the legislator" as a "transparent and absurd fiction [upon which] it ought not to be necessary to dwell"); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–66 (1990) (discussing the several critiques of legislative intent and their influence on the

such an ex ante presumption to enable Congress to indicate clearly desired deviation.[71] Yet while the desirability of stability warrants adherence to the clearly established parameters of *Chevron* doctrine, Chief Justice Roberts was correct to point out that, in an open question such as that presented in *Arlington*, no deference and deference are equally plausible baselines.[72] Choosing which baseline to adopt thus requires reference to other factors.

In *Chevron* itself, the Court seemed to rest deference to the EPA on agency expertise and accountability rather than congressional intent.[73] It makes sense to defer to agencies' interpretations of the details of "technical and complex" regulatory schemes such as power plant emission regulation,[74] but there is somewhat less reason to think that agencies are well positioned to divine the allocation of interpretive authority within a statutory scheme. It may be an overstatement to suggest that "agencies . . . have *no* institutional advantage over courts in resolving jurisdictional disputes"[75] — the FCC in *Arlington* believed that its ability to interpret § 332(c)(7)(B) would help to facilitate the smooth functioning of the statutory scheme as a whole[76] — but it is reasonable to worry that an agency claiming deference is as likely to be falling prey to a desire for self-aggrandizement[77] as it is to be applying its expertise to the question in a neutral fashion.

Court). *But see* Stephen Breyer, Lecture, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending the use of legislative history).

[71] *See* Scalia, *supra* note 69, at 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway. . . . [A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."). Some scholars, meanwhile, have suggested that the stable background is *itself* a fiction, given actual drafters' ignorance of some canons of statutory interpretation. *See* Abbe R. Gluck & Lisa Shultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

[72] *See Arlington*, 133 S. Ct. at 1885 (Roberts, C.J., dissenting).

[73] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government."); *see also* Sunstein, *supra* note 61, at 196–97. It is worth noting that Justice Scalia has previously rejected agency expertise as a justification for judicial deference. *See* Scalia, *supra* note 69, at 514.

[74] *Chevron*, 467 U.S. at 865.

[75] Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1535 (emphasis added).

[76] *See* Declaratory Ruling, *supra* note 13, at 14004–05.

[77] *See* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 567–68 (2002) ("The rational administrator will act to maintain his position and to expand the authority of his agency."); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2099 (1990) ("Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers. To accord such power to agencies would be to allow them to be judges in their own cause, in which they are of course susceptible to bias."). *See generally* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203 (2004) (arguing against deference on statutory jurisdiction when agency self-aggrandizement is implicated). Of course, agencies can

The accountability of agencies also presents a mixed case for deference in the jurisdictional context. If, as Justice Scalia argued, a line cannot be drawn between jurisdictional questions and policy questions, then the accountability argument applies with equal force to the question in *Arlington*.[78] Some scholars have argued that even if the questions *can* be distinguished, agencies should still receive deference because such statutory interpretations reflect political judgments.[79] Yet the dissent powerfully attacked the notion that agencies are, in practice, accountable to Congress or the President.[80] Given the questionable motives of agencies interpreting the scope of their jurisdiction, the theoretical possibility of ex post correction or accountability provides meager justification for interpretive deference.

Yet if the theoretical argument for deference to agencies on jurisdictional questions is mixed, the pragmatic arguments are far less so. Numerous scholars support Justice Scalia's argument that a line cannot be drawn between jurisdictional and nonjurisdictional disputes,[81] and Justice Breyer explicitly conceded it.[82] Moreover, as Justice Scalia pointed out, the illusory nature of this line threatened to throw the vitality of *Chevron* deference into doubt.[83] Not for nothing did Justice Scalia liken the question of jurisdictional deference to "the Hound of the Baskervilles, . . . conjured by those with greater quarry in sight,"[84] and the Solicitor General cautioned that such a restriction on *Chevron* deference would open a "Pandora's Box."[85]

Furthermore, because the line between jurisdictional and nonjurisdictional questions is illusory, the theoretical arguments against such

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also make contested jurisdictional judgments that involve disclaiming authority. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 528 (2007).

[78] *See* Crawford, *supra* note 39, at 977 ("[I]n a world where policy decisions are intertwined with an agency's jurisdictional interpretation, . . . agencies, which are more politically accountable than courts, should make the policy determinations.").

[79] *See* Sunstein, *supra* note 61, at 235–36. *But see* Crawford, *supra* note 39, at 977 ("If agency interpretations were either purely jurisdictional or purely nonjurisdictional, and courts could distinguish the two, then the separation-of-powers rationale for *Chevron* would support a rule giving courts the power to interpret statutory questions of jurisdiction.").

[80] *Arlington*, 133 S. Ct. at 1877–80 (Roberts, C.J., dissenting). Justice Scalia responded that such concerns are immaterial because Congress can always either preemptively limit or subsequently claw back an agency claim of jurisdiction. *See id.* at 1873 n.4 (majority opinion).

[81] *See* 1 R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.5, at 188 (5th ed. 2002); Crawford, *supra* note 39, at 974–75; Sunstein, *supra* note 61, at 235; *cf.* Torrey A. Cope, Note, *Judicial Deference to Agency Interpretations of Jurisdiction After* Mead, 78 S. CAL. L. REV. 1327, 1340–42 (2005) (calling for an examination of agency self-interest rather than the jurisdictional nature of the question); Sunstein, *supra* note 77, at 2097–100 (acknowledging the difficulty and advocating a simplified line based on the breadth of the determination). *But see* Sales & Adler, *supra* note 75, at 1555–56 (defending the viability of the jurisdictional/nonjurisdictional distinction).

[82] *Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring in part and concurring in the judgment).

[83] *Id.* at 1870 (majority opinion).

[84] *Id.* at 1872–73.

[85] Transcript of Oral Argument at 33, *Arlington*, 133 S. Ct. 1863 (Nos. 11-1545, 11-1547).

deference deteriorate. As noted above, the anti-jurisdictional-deference arguments regarding agency expertise and accountability quite plainly rest on the ability to distinguish between policy questions and statutory interpretation questions. Yet even more centrally, the dissent's argument on congressional intent — that, on the open question of whether to defer on jurisdictional questions, deference and no deference form equally plausible baselines — presumes that there is a distinct category of questions on which a baseline can be imposed. If neither Congress nor an agency can ever be sure whether they are in the jurisdictional zone or the nonjurisdictional zone, then they cannot reliably predict whether courts will grant deference.

Justice Breyer's concurrence demonstrates why the inquiry into whether to defer to agencies over a given provision necessarily leads to an inquiry into whether the provision is "jurisdictional." Justice Breyer used *Arlington* to demonstrate how his "framework has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency."[86] In listing "factors [that] favor the agency's view" that it deserved deference, Justice Breyer casually noted that "the provision concerns an interstitial administrative matter."[87] Yet Justice Breyer's mere interstitial matter was, to the petitioners, a substantive intrusion into areas of traditional state and local concern.[88] Had the dissent succeeded in remanding the case for a de novo determination of the allocation of interpretive authority, the case might well have turned on whether the panel regarded 47 U.S.C. § 332(c)(7)(B)(ii) as an "interstitial administrative matter" or as an expansion of FCC authority — that is, as nonjurisdictional or as jurisdictional.

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 at issue would throw this system into disarray. While the theoretical arguments for entrusting jurisdictional determinations to a neutral third party are tempting, they deservedly fell to Justice Scalia's demonstration of the impossibility of drawing such a line. *Chevron* remains best served by allowing Congress to predict confidently what the law will be and who will be interpreting it.

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[86] *Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring in part and concurring in the judgment).
[87] *Id.*
[88] *See* City of Arlington v. FCC, 668 F.3d 229, 252–53 (5th Cir. 2012).