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## Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law

Lars Noah

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## INTERPRETING AGENCY ENABLING ACTS: MISPLACED METAPHORS IN ADMINISTRATIVE LAW

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### TABLE OF CONTENTS

INTRODUCTION .....	1464
I. COMPARING THE COMPETING METAPHORS .....	1468
<i>A. Enabling Acts as Corporate Charters</i> .....	1468
<i>B. Enabling Acts as Constitutions</i> .....	1472
<i>C. Enabling Acts as Sources of Common Law Norms</i> ..	1480
II. FLAWS IN THE LOOSE CONCEPTIONS OF AGENCY ENABLING STATUTES .....	1484
<i>A. Policing the Most Dangerous Branch:</i> <i>Judicial Supervision of Delegations</i> .....	1485
1. <i>The Remnants of the Nondelegation Doctrine</i> ....	1489
2. <i>Honoring Legislative Supremacy</i> .....	1492
3. <i>The Difficulty of Precluding Judicial Review</i> .....	1498
<i>B. Reinterring the Power to Make Federal Common Law</i>	1504
<i>C. Chevron Deference and "Jurisdictional" Questions</i> ..	1516
CONCLUSION .....	1530

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## INTRODUCTION

*Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.*

Benjamin N. Cardozo<sup>1</sup>

The rapid growth of the administrative state represents one of the most significant, and some would add alarming, political developments of the twentieth century. Federal regulatory agencies have proliferated, first as a centerpiece of the New Deal and then again during the 1960s, and their powers have expanded as well. Initially greeted with some suspicion, few today question their legitimacy or centrality as legal institutions.<sup>2</sup> More so than do the courts, federal agencies exercise pervasive control over economic and other activities in this country. Whatever their failings and accompanying calls for reform or more sweeping deregulation, these entities inevitably will continue to do the work of government.

Although many scholars have emphasized procedural rights and opportunities for judicial review as mechanisms for supervising and legitimizing agency actions, the initial delegation of authority from Congress must remain as the focal point for any such effort. Recently, however, it seems that enabling statutes have received insufficient attention as imposing limits on

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1. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.); see also *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (Hand, J.) (cautioning against the use of metaphors); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 395 (1986) ("Persuasive as rhetoric, metaphor is even more potent as a concealed form of argument by analogy . . . [and it] is a means of discovering new insights in law . . ."); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1160-71, 1199-206 (1989) (evaluating and generally criticizing metaphoric legal reasoning).

2. See James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1075 (1975); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1325 (1986). But cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (recognizing the general acceptance of the legitimacy of the modern administrative state, but arguing that it cannot be reconciled with various structural limitations found in the text of the Constitution).

agency power. Once regarded as akin to corporate charters, some commentators now regard these delegations more fluidly, analogizing an agency's organic act either to a constitution or to an even looser source of authority to fashion common law on a subject.

Actually, Professor James Landis captured this pragmatic spirit more than sixty years ago when he defended the growing reliance on administrative agencies during the New Deal:

One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions. Limitations upon his powers that counsel brought to his attention, naturally, he respected; but there is an enormous difference between the legalistic form of approach that from the negative vantage of statutory limitations looks to see what it must do, and the approach that considers a problem from the standpoint of finding out what it can do.<sup>3</sup>

In this respect, agency officials arguably resemble members of Congress who may pay little heed to constitutional constraints on their powers.<sup>4</sup> The imperative to find solutions to pressing problems of the day cannot, however, divert attention from questions about who if anyone within the federal government properly shoulders that task. Justice Cardozo offered a more skeptical perspective on the New Deal revolution, cautioning against the creation of "roving commission[s] to inquire into evils and upon discovery correct them."<sup>5</sup>

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3. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 75-76 (1938); see also *id.* at 49 n.2 (quoting the SEC's justification for liberally interpreting one of its enabling acts as consistent with the Supreme Court's "exposition of a great organic act [namely, the U.S. Constitution] in *McCulloch v. Maryland*" (citation omitted)).

4. Cf. Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609-11 (1983) (discussing Congress as an independent decision-making body that often fails to consider the constitutional limitations on its power).

5. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring). One might say that agencies abhor a vacuum. See *infra* notes 73-77 and accompanying text (discussing agencies' tendencies toward expansion); cf. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 277 (16th ed. 1992) (highlighting

Are agencies' enabling statutes best understood as charters, constitutions, or sources of common law norms? Each of these conceptions carries its own interpretive baggage,<sup>6</sup> and each finds apparent support in the Supreme Court's much cited and analyzed decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>7</sup> This Article does not seek to add to the wealth of literature evaluating *Chevron* and its aftermath,<sup>8</sup> except to suggest that the judiciary's rush to defer to reasonable agency interpretations of ambiguous statutory language has emboldened agencies to push the outer limits of their jurisdiction. In just the last year, for example, the Food and Drug Administration (FDA) confidently announced that it already enjoyed the power to restrict human cloning experiments, and the equally entrepreneurial Federal Communications Commission (FCC) floated a proposal to require that licensed television broadcasters provide free air time to candidates for public office.<sup>9</sup> Instead, this Article suggests that the nature of "jurisdictional" questions, in administrative law as elsewhere, demands special attention from the courts. By granting the government's petition for certiorari to review the lower court's invalidation of the to-

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Spinoza's remark that "[n]ature abhors a vacuum"); HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 22 (1962) ("Lack of definite standards creates a void into which attempts to influence are bound to rush; legal vacuums are quite like physical ones in that respect.").

6. See generally Max Black, *More About Metaphor*, in *METAPHOR AND THOUGHT* 19, 30 (Andrew Ortony ed., 2d ed. 1993) ("Every metaphor is the tip of a submerged model."); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1083 (1989) ("If we refuse to look at our metaphors and see the paradoxes they express, if we simply speak them, our metaphors can shelter us from our paradoxes.").

7. 467 U.S. 837, 842-43 (1984). Although the Court has not applied the *Chevron* framework consistently, it continues to defer to reasonable agency interpretations of ambiguous language in their enabling acts. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 423-32 (1999); *United States v. Haggard Apparel Co.*, 526 U.S. 380, 385-94 (1999); *Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 387-89 (1998); *Nationsbank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255-61 (1995).

8. See Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, LAW & CONTEMP. PROBS., Spring 1994, at 185, 229 n.116 ("The loss of forests necessary to make the paper to print all of the articles written on the proper standard of review in interpreting statutes following [*Chevron*] might well have justified requiring the Supreme Court to issue an environmental impact statement along with the opinion.").

9. For additional information regarding these initiatives, see *infra* notes 50, 76 and accompanying text.

bacco regulations promulgated by the FDA,<sup>10</sup> the Supreme Court appears poised to tackle the question directly this Term.

Part I summarizes the three competing metaphors. First, it develops the classic analogy between agency enabling statutes and corporate charters. From this perspective, a court reviewing a regulatory action not explicitly authorized by the statute would invalidate it as *ultra vires*. Next, Part I introduces the constitutional metaphor sometimes used to describe enabling statutes, coupled with a preference for a dynamic rather than textualist approach to their interpretation. From this perspective, organic acts are just that, living instruments that can adapt to new circumstances. Finally, Part I discusses the recently suggested common law metaphor for understanding the operation of enabling statutes, an even looser conception of how legislation operates to limit the range of permissible agency actions.

Part II attempts a synthesis of these competing metaphors, asking whether and to what extent courts should condone bureaucratic tendencies toward the expansion of delegated powers. In short, should concerns about "judicial activism" lead us to embrace administrative activism instead? Part II argues that judicial scrutiny of agency behavior remains necessary to ensure fidelity to the enabling statutes; that the same flaws inherent in recognizing the federal courts' power to make common law based on nothing more than the grant of subject matter jurisdiction apply with equal force to agencies; and that *Chevron* deference should not extend to the review of jurisdictional questions. Although formalism in law has become decidedly *déclassé*,<sup>11</sup> this

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10. See *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1495 (Apr. 26, 1999) (No. 98-1152). As this Article went to press, the Supreme Court agreed that the FDA lacked jurisdiction to regulate tobacco. See *infra* note 206; see also *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999) (*per curiam*) (invalidating regulations premised on an agency's interpretation of its enabling act that was so broad as to violate the nondelegation doctrine), *petitions for cert. filed*, 68 U.S.L.W. 3496 (Feb. 8, 2000) (Nos. 99-1257, 99-1263 & 99-1265).

11. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509-11, 548 (1988) (recognizing the pejorative connotations of the term, but arguing that contemporary aversions to it may be somewhat misplaced); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950-52, 1016 (1988) (acknowledging the criticism of formalism and defending against it). See generally Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

Article concludes that the more conventional corporate charter metaphor strikes the most defensible balance in this context.

### I. COMPARING THE COMPETING METAPHORS

The charter, constitutional, and common law metaphors—considered in turn below—reflect historical developments as much as they represent competing conceptions about regulatory statutes. Although they share important features as well as significant limitations, this Part attempts to tease apart these three approaches and highlight their differences as a prelude to the normative discussion reserved for Part II. Each metaphor suggests a distinct relationship between administrative agencies and the courts, accompanied by different expectations about the degree of fidelity government officials must accord to their delegations of legislative authority from Congress. As one moves from the charter to the constitutional and then to the common law metaphor, the permissible range of administrative initiative and creativity increases dramatically.

#### A. *Enabling Acts as Corporate Charters*

The very term “agency” implies some sort of principal-agent relationship. In 1819, Chief Justice John Marshall commented: “It is the plain dictate of common sense, and the whole political system is founded on the idea, that the departments of government are the agents of the nation, and will perform, within their respective spheres, the duties assigned to them.”<sup>12</sup> John Locke provided the foundation for the notion that government officials act as agents constrained by their delegated authority,<sup>13</sup> and the Framers of the Constitution enshrined it in their own “charter” for the federal government.<sup>14</sup> Although courts may imply powers reason-

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12. John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 15, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 207, 211 (Gerald Gunther ed., 1969).

13. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 224 (Thomas I. Cook ed., Hafner Press 1947) (1690) (“[W]hosoever in authority exceeds the power given him by the law, . . . ceases in that to be a magistrate and, acting without authority, may be opposed . . . .”); see also THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”).

14. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425,

ably incidental to those granted explicitly, empowering an agent to act on the principal's behalf typically does not make the agent the sole judge of whether an act falls within the scope of the agency: the agent still must abide by the principal's commands.<sup>15</sup>

Although the principal-agent model may be overly simplistic,<sup>16</sup> the more traditional notion regarding the place of administrative agencies usefully drew attention to their subordinate role to the enumerated branches of government.<sup>17</sup> Because the Constitution

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1432-37 (1987); *id.* at 1433-34 ("The analogy between corporate charters and political constitutions had profound implications. . . . [It] suggested that government power could be strictly bounded by its 'charter.'"); *id.* at 1436 ("Within the sphere of these delegated powers, government agents could legitimately compel obedience in the name of their sovereign principal, but those agents lacked authority to go beyond the scope of their agency.").

15. See *Thomas v. INS*, 35 F.3d 1332, 1339-43 (9th Cir. 1994) (explaining that implied authority is intended by the principal; it is not merely a function of the agent's independent control); *Lewis v. Washington Area Metro. Transit Auth.*, 463 A.2d 666, 670 n.7 (D.C. 1983) ("The doctrine of implied actual authority focuses upon the agent's understanding of his authority: whether the agent reasonably believed, because of conduct of the principal (including acquiescence) communicated directly or indirectly to him, that the principal desired him so to act."); see also *Stanford v. Otto Niederer & Sons, Inc.*, 341 S.E.2d 892, 894 (Ga. Ct. App. 1986) (explaining an agent's duty to follow the principal's instructions); RESTATEMENT (SECOND) OF AGENCY §§ 26, 33, 35, 44, 385(1) (1959) (same); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 69 (2d ed. 1990) (discussing the agent's duty of obedience to the principal's instructions).

16. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 131 (1997) ("[A]gencies may appear to behave more like independent entrepreneurs seeking funding from the Congress for projects of their own than like well-instructed agents implementing their principal's orders."); cf. Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 659-64, 729-30 (1996) (disputing the notion that a principal-agency relationship exists between Congress and the courts when judges interpret statutes).

17. See *Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J., concurring) ("It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ."); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it . . . ."); *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) ("[An agency] acts as a delegate to the legislative power. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function."); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."); see also Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1139 n.129 (1990) ("Principal-agent analyses of the relationship between Congress and



does not specifically provide for such agencies, Congress must first create them.<sup>18</sup> Thus, the enabling legislation essentially represents an agency's charter, and courts continue to describe actions taken beyond the scope of that delegated power as *ultra vires*,<sup>19</sup> a direct reference to the classical corporate law and principal-agency doctrines.<sup>20</sup> In England, the doctrine retains vitality as the primary basis for judicial review of agency action, with one leading treatise calling it "the central principle of administrative law."<sup>21</sup>

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administrative agencies are influential in the political science literature. . . . They are virtually absent, however, from the legal literature."); Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1206-07, 1213-16 (1981) (arguing that Congress rather than the President should be regarded as the principal); cf. Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1239-41, 1254 (1989) (painting a more complicated picture of multiple principal-agency interrelationships, and urging an emphasis on the relationship existing between the President and federal regulators).

18. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 592-93 (1994).

19. See, e.g., *Dalton v. Specter*, 511 U.S. 462, 472 (1994); *Animal Legal Defense Fund v. Quigg*, 900 F.2d 195, 196 (9th Cir. 1990), *aff'd*, 932 F.2d 920 (Fed. Cir. 1991); see also JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 41 (1927) ("The theory is that every public officer has marked out for him by law a certain area of 'jurisdiction.' . . . [I]f he oversteps those bounds, then the court will intervene. In this form, the law of court review of the acts of public officers becomes simply a branch of the law of *ultra vires*"); WILLIAM F. FOX, JR., *UNDERSTANDING ADMINISTRATIVE LAW* § 17 (3d ed. 1997) (describing the *ultra vires* doctrine as enforcing jurisdictional limits on agency action); Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 251-55 (1998) (discussing the courts' application of traditional agency principles to just compensation claims where a government official acted beyond the scope of her delegated authority); cf. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*").

20. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1305-07 (1984) (noting this parallel between formalistic approaches to both administrative and corporate law, but ultimately rejecting the principal-agency model as establishing meaningful constraints on bureaucratic behavior in either setting).

21. SIR WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 41 (7th ed. 1994); see also *id.* at 41-46 (elaborating on the continued application of the *ultra vires* doctrine to agencies in England); Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 CAMBRIDGE L.J. 122 (1996) (explaining that the *ultra vires* doctrine provides the essential foundation for judicial review).

rations could only exercise those powers and pursue those purposes specified in a grant of authority from a legislature. Any actions taken beyond such authority were void as *ultra vires*.<sup>22</sup> Moreover, courts narrowly construed corporate charters. One treatise writer explained at the end of that century: "[G]rants to private corporations shall be construed strictly against the grantees; and to prevail they must be express and clear beyond a doubt; a doubt defeats the power."<sup>23</sup> In part, this restrictive view grew out of the notion that corporations were organized to serve special purposes that would impact the public interest.<sup>24</sup>

As corporations instead became engines for private enterprise, conceptions of their status and freedom of action changed markedly. Nowadays, where the filing of articles of incorporation has replaced the issuance of a corporate charter, shareholders rarely succeed in claiming that a corporate decision was unlawful on *ultra vires* grounds because state statutes limit the application of this doctrine and, more importantly, provide that a corporation may pursue "any lawful purpose" without requiring a detailed enumeration of powers.<sup>25</sup> Have regulatory statutes similarly changed?

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22. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 518-19 (2d ed. 1985); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970*, at 13-57 (1970); see also *McDermott v. Bear Film Co.*, 33 Cal. Rptr. 486, 489 (Dist. Ct. App. 1963) ("[T]he phrase *ultra vires* describes action which is beyond the purpose or power of the corporation.").

23. REUBEN A. REESE, *THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATIONS* 12 (Fred B. Rothman & Co. 1981) (1897); see also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) ("Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."). Authorized actions are characterized as *intra vires*. See WADE & FORSYTH, *supra* note 21, at 44 ("Every administrative act is either *intra vires* or *ultra vires*; and the court can condemn it only if it is *ultra vires*.").

24. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 15-17 (1956).

25. See 1 MODEL BUS. CORP. ACT ANN. §§ 3.01(a), 3.02, 3.04 (3d ed. 1998); Michael A. Schaeffler, *Ultra Vires—Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81, 89-90 (1983). For a rare, modern decision applying the *ultra vires* doctrine in a shareholder suit, see *Amalgamated Sugar Co. v. NL Indus., Inc.*, 644 F. Supp. 1229, 1234-35 (S.D.N.Y. 1986).

### B. *Enabling Acts as Constitutions*

Even if one generally accepted the analogy to corporate charters, some observers have argued that organic acts represent a peculiar class of charters: charters that create government. From this perspective, enabling legislation resembles a mini-constitution that establishes the agency and grants it a fairly broad mandate, perhaps accompanied by provisions that operate like a necessary and proper clause. The American colonies were, after all, established through corporate charters.<sup>26</sup> Nowadays, municipal charters have precisely such a character,<sup>27</sup> though courts tend to construe governmental powers delegated to municipalities quite narrowly.<sup>28</sup> Although sometimes described as constitutions as well, charters establishing international organizations also tend to be narrowly construed.<sup>29</sup>

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26. See Amar, *supra* note 14, at 1432-33; cf. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1294-301 (1999) (describing recent exercises in constitution making around the world, and suggesting various explanations for why they differ in form as well as in substance).

27. See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 746 (1996) ("For municipal charters, . . . the same characteristics of relative brevity, generality and permanence, and of special procedures for adoption, prevail."). Professor Strauss, however, distinguished such constitutional forms from "ordinary" legislation by virtue of the latter's judicial reviewability for consistency with constitutional limits, placing statutes (whether delegating broad or narrow power to the executive) one rung beneath constitutions, and one rung above agency regulations, in an institutional hierarchy of constitutive documents issued by government. See *id.* at 747-48, 750; see also Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1478 (1992) (adding that "courts will be much more aggressive in determining the authority question respecting legislative rules than statutes").

28. See *W.M. Schlosser Co. v. School Bd.*, 980 F.2d 253, 255 (4th Cir. 1992); *Cosgrove v. City of West Memphis*, 938 S.W.2d 827, 828 (Ark. 1997); *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 683-84 (Minn. 1997); *Premium Standard Farms, Inc. v. Lincoln Township*, 946 S.W.2d 234, 238-41 (Mo. 1997); *Bowers v. City of High Point*, 451 S.E.2d 284, 287-88 (N.C. 1994); 2A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 10.03, 10.09-12, 10.18-23 (3d ed. rev. 1996); cf. *City of Boca Raton v. State*, 595 So. 2d 25, 27-28 (Fla. 1992) (explaining that home-rule charters allow municipalities to exercise any powers not expressly prohibited).

29. See *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (July 20) ("These purposes [i.e., pursuing international peace and security] are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited."); see also G. Federico Mancini, *The Making of a Constitution for Europe*, in *THE NEW EUROPEAN COMMUNITY: DECISIONMAKING AND INSTITUTIONAL CHANGE* 177, 178 (Robert O. Keohane & Stanley Hoffmann eds., 1991) (explaining that a key function of a

Because they trump other sources of law and are designed to be relatively immutable, written constitutions enjoy a special rank and dignity.<sup>30</sup> Certain statutes may share these characteristics. For instance, the Supreme Court has analogized the Sherman Act<sup>31</sup> to a constitution, though one whose contours the federal courts define.<sup>32</sup> Similarly, a number of commentators have likened the Administrative Procedure Act (APA)<sup>33</sup> to a constitution, though mainly to capture its open-textured quality and evolving judicial constructions rather than to suggest tremendous flexibility for agency activities.<sup>34</sup> Such characterizations build upon the concept of "framework statutes," which seeks to distinguish certain foundational enactments from more mundane legislation.<sup>35</sup>

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charter is to keep the organization's powers under control); cf. JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 6-8 (1998) (using a constitutional metaphor to describe the WTO).

30. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 325-27 (1989); see also Reed Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773, 775, 780-81 (1987) (assessing the parallels between constitutions and statutes).

31. 15 U.S.C. §§ 1-4 (1994).

32. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) ("As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."); see also *California v. Federal Power Comm'n*, 369 U.S. 482, 490 (1962) ("Our function is to see that the policy entrusted to the courts [by the Clayton Act] is not frustrated by an administrative agency."); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 375-76 (1986) (criticizing the constitutional conception of the Sherman Act).

33. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)).

34. See, e.g., Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 49 (1996) (concluding that "the APA has worked reasonably well precisely because it has, like a constitution, evolved . . . especially through judicial clarification and refinement"); Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 626 n.189 (1998) (referring to the APA as "constitution-like"); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253 (1986); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 583 n.115 (1992) (suggesting that the APA "functions more like our Constitution than a statute"); see also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 90 (1998) (drawing an analogy between the APA and the Constitution).

35. See Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976) (coining this

Perhaps agency enabling acts also resemble a constitution. As a student enrolled in an administrative law course more than a decade ago, I recall seeing the following formulation on the chalkboard:

*Statute : Agency :: Constitution : Congress*

We were also told that the judiciary provided the primary check in both settings, though possible differences existed in the degree of deference that courts would extend in each context. This analogy was hardly novel. As Professor Cass Sunstein once suggested, "[t]he relation of the Constitution to Congress parallels the relation of regulatory statutes to agencies."<sup>36</sup> In 1943, Professor Hans Morgenthau traced it to language in Supreme Court decisions going back to the turn of the century.<sup>37</sup>

term to describe legislation, like the War Powers Resolution, that is designed to interpret ambiguities in constitutional text and establish procedures for resolving interbranch power struggles when the courts decline to intervene); Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 272-73 (1977) (calling such framework statutes "quasi-constitutional"); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1039 (1997) (calling the APA a framework statute with parallels to the U.S. Constitution). Along the same lines, some scholars have analogized enabling statutes to architectural blueprints. See Richard A. Merrill, *The Architecture of Government Regulation of Medical Products*, 82 VA. L. REV. 1753, 1757 (1996) ("[A]s in any long-running regulatory program, FDA officials have served as both general contractors and sub-contractors in constructing the modern legal framework from the legislature's working drawings."); cf. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990) (using an architectural metaphor to describe the Constitution).

36. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990) (adding that "[i]n both contexts, an independent arbiter should determine the nature of the limitation"); see also *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935) ("Where [the police power is exercised] by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature."); Alfred C. Aman, Jr., *Bargaining for Justice: An Examination of the Use and Limits of Conditions by the Federal Reserve Board*, 74 IOWA L. REV. 837, 885 (1989) (referring to an "agency's statutory (or 'regulatory constitutional') power").

37. See Hans J. Morgenthau, *Implied Regulatory Powers in Administrative Law*, 28 IOWA L. REV. 575, 586 n.36 (1943) (noting that "the relation between administrative regulation and statute is in principle identical with the one between statute and constitution"); *id.* at 600 ("[A]s Congress holds delegated powers not expressly enu-

This view, however, begs more serious questions about how and who best to interpret the Constitution. Without delving into this far broader debate,<sup>38</sup> it should suffice to say that proponents of this analogy for enabling statutes have assumed a dynamic rather than textual approach to that task. Thus, those who compare enabling statutes to the U.S. Constitution expect that the federal courts will construe grants of jurisdiction broadly just as they have done in the case of the Commerce Clause,<sup>39</sup> with a few remarkable recent exceptions.<sup>40</sup> In a sense, they view agency or-

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merated in the Constitution, so an administrative officer may have the authority to exercise delegated powers not expressly pointed out in the statute.”; *id.* (“Hence, there are implied powers vested in administrative agencies as there are implied powers vested in Congress, [though] the extent of those powers generally being proportionate to the extent of expressly delegated powers and therefore usually larger in Congress than in the administrative agencies.”).

38. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1118-20 (1997); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551 (1985); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235-49 (1995); Symposium, *Fidelity, Economic Liberty, and 1937*, 41 WM. & MARY L. REV. 1 (1999); Symposium, *Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1085 (1998).

39. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276-77 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 118-25 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-43 (1937); see also Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 321-22 (1992); cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting) (objecting to the notion “that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power”); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-55 (1987) (criticizing the expansive interpretation of the Commerce Clause ushered in during the New Deal Era); Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL’Y 1, 5 (1995) (rechristening it as the “Hey, you-can-do-whatever-you-feel-like Clause”).

40. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (striking down a federal statute that had prohibited the possession of guns in the vicinity of schools as beyond the power of Congress to regulate interstate commerce); *Brzonkala v. Virginia Polytechnical Inst. & State Univ.*, 169 F.3d 820, 889 (4th Cir. 1999) (en banc) (striking down part of the Violence Against Women Act on similar grounds), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999); see also Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV.

ganic acts as "living," or largely aspirational, constitutions. If, instead, courts were to choose originalism and strictly limit lawmakers to their enumerated powers,<sup>41</sup> then the constitutional metaphor for agency enabling acts seemingly adds nothing to the traditional analogy to corporate charters.

Commentators have invoked the constitutional metaphor to defend regulatory initiatives against claims that an agency had overstepped the limits on its jurisdiction.<sup>42</sup> In the early 1970s,

167 (1996) (criticizing the majority's unnecessary timidity in *Lopez*). See generally Symposium, *The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 635 (1996); Symposium, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995).

41. See *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) ("Under our Constitution, the Federal Government is one of enumerated powers."); *Lopez*, 514 U.S. at 552 ("We start with first principles. The Constitution creates a Federal Government of enumerated powers."); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 346 (1935) ("The Federal Government is one of enumerated powers . . ."); see also William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 361 (1999) ("When a specific clause of the Constitution . . . has been construed as containing general limitations on Congress's power, Congress may not avoid those limitations by legislating under another clause."); H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 369 (1998) (book review) (observing that "the past few years have seen a dramatic resurgence in the Supreme Court's interest in enforcing the limits on Congress's powers that derive from their enumeration in Article I"). The Tenth Amendment confirms that the federal government can only exercise power surrendered by the states. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); see also *Printz v. United States*, 521 U.S. 898, 919 (1997); *New York v. United States*, 505 U.S. 144, 156 (1992) ("[T]he two inquiries are mirror images of each other."); *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered."). At the state level, in contrast, specific enumeration of powers, coupled with a necessary and proper clause, is not essential. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 658 (1986) (noting "the well-established doctrine that American state constitutions are not grants of power but rather limitations," and adding that "a state exists independently of its constitution and thus its government may constitutionally take any action whatever, unless specifically restrained by some provision of the state constitution").

42. See James T. O'Reilly, *Tobacco and the Regulatory Earthquake: Why the FDA Will Prevail After the Smoke Clears*, 24 N. KY. L. REV. 509, 515 (1997) ("If the statute is a constitution then the FDA can reach anywhere and regulate anything not proscribed by Congress."); see also Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1291, 1287 (1996)

the FDA's Chief Counsel invoked the constitutional metaphor to justify an expansive reading of the agency's residual rulemaking authority.<sup>43</sup> Accordingly, unless explicitly prohibited, "the fact that Congress simply has not considered or spoken on a particular issue certainly is no bar to the [FDA] exerting initiative and leadership in the public interest."<sup>44</sup> The constitutional metaphor might also be invoked by agencies in the hope that courts will reduce their intensity of substantive review, using a minimum rationality test accompanied by presumptions of regularity extended to legislatures when courts are asked to review the merits of a statute. Generally, however, this tack has not succeeded.<sup>45</sup>

Beginning in the 1960s, both agencies and the courts became interested in the use of notice-and-comment rulemaking as an alternative to policy formulation by either formal and cumbersome rulemaking or incremental adjudication. Thus, the courts generally have implied broad rulemaking authority from less than clear delegations to agencies.<sup>46</sup> One court even cited the

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(conceding that "courts should prevent agencies from exceeding their delegated authority," but otherwise urging that, in cases of ambiguity, agencies be allowed to select "a less probable interpretation of a statute if that interpretation best serves current policy interests").

43. See Peter Barton Hutt, *Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act*, 28 FOOD DRUG COSM. L.J. 177, 178 (1973) ("[T]he Act must be regarded as a constitution. . . . The mission of the [FDA] is to implement [the Act's fundamental] objectives through the most effective and efficient controls that can be devised.").

44. *Id.* at 179; see also *United States v. Dotterweich*, 320 U.S. 277, 280 (1943) (suggesting that the FDA's enabling statute "be treated as a working instrument of government and not merely as a collection of English words"); Richard A. Merrill, *FDA and the Effects of Substantive Rules*, 35 FOOD DRUG COSM. L.J. 270, 273-75, 278-79 (1980) (elaborating on the FDA's residual authority to issue legislative regulations through informal rulemaking). Agency officials continue to take this expansive view of their jurisdiction. See, e.g., David A. Kessler & Wayne L. Pines, *The Federal Regulation of Prescription Drug Advertising and Promotion*, 264 JAMA 2409, 2411 (1990) ("Until further judicial decisions or congressional action clarifies the FDA's specific authority in the area of [drug product] promotion, the FDA will continue to assert broad jurisdiction.").

45. See *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 626-27 (1986) (plurality); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) ("We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate."). But cf. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935) (using a minimum rationality test when a state agency's order was challenged on substantive due process grounds).

46. See *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-14 (1991); National



article in which the FDA chief counsel had espoused his expansive view, though it regarded the constitutional metaphor as "hyperbole,"<sup>47</sup> thereby retaining for itself decisions about the powers and scope of jurisdiction granted to the agency instead of leaving those determinations to the agency's good judgment.

In decisions involving the Federal Communications Commission, some courts have openly endorsed a constitutional analogy. The enabling statute itself uses a vague "public interest" standard to guide the agency's licensing decisions, and the Supreme Court has long read this delegation quite generously.<sup>48</sup> More recently, some lower courts have characterized the Commission's general rulemaking authority as an administrative "necessary and proper" clause that "empowers the Commission to deal with the unforeseen—even if that means straying a little way beyond

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*Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 680 (D.C. Cir. 1973) (noting a "lack of hesitation in construing broad grants of rule-making power to permit promulgation of rules with the force of law"); *Public Serv. Comm'n v. Federal Power Comm'n*, 327 F.2d 893, 897 (D.C. Cir. 1964) ("All authority of the Commission need not be found in explicit language. . . . While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail."); see also *id.* at 896-97 ("While the Natural Gas Act is a statute and is not to be construed as a 'constitution,' nevertheless the problems placed under Commission administration, with consequent Commission responsibilities, call upon the courts to give the Act a scope reasonably necessary to permit the agency to perform its tasks consistently with the provisions and purposes of the legislation.").

47. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 248 n.10 (2d Cir. 1977) ("We do not take sides on the issue tendered, but we think Mr. Hutt's language to be conscious hyperbole. The test is . . . whether delegation may be fairly inferred from the general purpose.").

48. See, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-96 (1981); *National Broad. Co. v. United States*, 319 U.S. 190, 218-20 (1943); see also Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 174 (1978) (describing the Communications Act as "a grant of plenary power to the FCC to regulate electronic communications as it deems appropriate"); *id.* ("Broad, ill-defined, and self-enlarging powers are an attribute the FCC shares with many other federal agencies."); *infra* note 49. Other agencies have had less success in using "public interest" standards in their enabling statutes to justify expansions in their jurisdiction. See, e.g., *Business Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990) (rejecting an agency's effort to "advance into an area not contemplated by Congress"); see also *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670 (1976) (noting that "[t]he use of the words 'public interest' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination" in employment practices by regulated companies).

the apparent boundaries of the Act—to the extent necessary to regulate effectively those matters already within the boundaries.”<sup>49</sup> How far, however, could an agency stray? For instance, the Clinton administration recently suggested that the FCC demand that broadcasters provide free air time for advertisements by political candidates, which may generally comport with the “public interest” standard for licensing but, apart from the medium for transmission, seems well beyond the Commission’s authority and instead a task for Congress.<sup>50</sup> Nonetheless, if re-

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49. *North Am. Telecomm. Ass’n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) (adding that this provision “is not infinitely elastic” and “could not properly be used to regulate an activity unrelated to the communications industry”); *accord Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996). The Supreme Court previously had interpreted part of the enabling act as allowing the FCC to assert unenumerated powers or jurisdiction when “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also id.* at 165, 170-71 (adding that, “[d]espite its inability to obtain amendatory legislation, the Commission has, since 1960, gradually asserted jurisdiction over CATV,” but finding nothing improper with that expansion in its authority); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999) (sustaining the FCC’s “jurisdiction” to issue regulations permitting local competition by long-distance carriers); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 368-74 (1973) (upholding the Federal Reserve Board’s authority to issue rules under the Truth-in-Lending Act); *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) (“We are, in the absence of compelling evidence that such was Congress’ intention, unwilling to prohibit administrative action imperative for the achievement of an agency’s ultimate purposes.”); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (“Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.”). *But cf. GTE Serv. Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973) (rejecting the FCC’s assertion of authority over data processing services provided by common carriers); Robinson, *supra* note 48, at 198 n.67 (criticizing the constitutional metaphor in this context).

50. *See FCC Backs Away from Plan Aimed at Giving Free Air Time to Candidates*, WALL ST. J., Mar. 26, 1998, at B11; Harold Furchtgott-Roth, *No Such Thing as a Free Ad*, WALL ST. J., Apr. 10, 1998, at A10 (criticizing this suggestion as beyond the FCC’s authority); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 706-09 (1979) (holding that the Commission lacked jurisdiction to require that cable operators provide public access channels, in part because Congress had expressly prohibited the imposition of common carrier obligations on broadcasters); *Novel Procedures in FCC License Proceedings: Hearing Before the Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary*, 106th Cong. 18 (1999) (testimony of Prof. Lars Noah, Univ. of Florida College of Law) (arguing that the FCC should not be able to request concessions during licensing “that have no relevant relation to the statute, no matter how malleable the ‘public interest’ standard might be”); Glen O.

viewing courts view the organic act as an adaptable constitution, then the FCC's initiative might well have prevailed against an ultra vires challenge.

### *C. Enabling Acts as Sources of Common Law Norms*

An even more flexible variant of the constitutional metaphor views enabling legislation as expressing little more than broad goals to pursue, much like common law norms explicated by judges in the course of resolving private disputes. In his characteristically provocative manner, Professor Cass Sunstein recently promoted this idea—a thesis both descriptive and normative—in the course of defending the FDA's assertion of regulatory jurisdiction over tobacco products.<sup>51</sup> As he explained:

[W]ithout much fanfare, agencies have become modern America's common law courts, and properly so. The basic task of common law courts is to specify abstract standards (often involving reasonableness) and to adapt legal rules to particular contexts as facts, social understandings of facts, and underlying values change over time. Operating as common law courts, agencies have, as they should, considerable power to adapt statutory language to changing understandings and circumstances.<sup>52</sup>

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Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 927 (1998) (mentioning the FCC's brief flirtation with deploying the fairness doctrine in order to control tobacco and other television advertising).

51. See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1062 (1998) ("In applying the [Food, Drug & Cosmetic Act] to tobacco, the FDA performed a lawful common law function, one that also has a high degree of democratic legitimacy."). Twenty years earlier, Professor Glen Robinson had noted, but generally criticized, this tendency at another agency. See Robinson, *supra* note 48, at 174 n.13 ("The FCC's regulation of cable television is justifiable only by reference to a kind of common-law tradition that gives regulatory agencies organic independence from their original legislative mandates.").

52. Sunstein, *supra* note 51, at 1019; see also *id.* at 1059 ("In a common law era, it was the job of common law judges to apply incompletely specified legal doctrines to new contexts and to supply new understandings of those doctrines, which were typically phrased as abstractions."); *id.* at 1060 (describing dynamic interpretation of statutes as "an administrative task, not a judicial one," and calling the common law decision making of agencies "an omnipresent feature of the modern legal landscape"); *id.* at 1068 ("As a matter of simple practice, administrative agencies have become America's common law courts. . . . In view of agency self-interest and the exercise of power by self-interested private groups, this development is not without risks. On

Previously, Professor Sunstein had explained that the emergence of administrative agencies signalled a "rejection of the common law system,"<sup>53</sup> though now he appears to endorse the recognition of common law authority in this newer set of legal institutions situated outside of the judicial branch.

*Chevron* deference provides the essential predicate for Professor Sunstein's view, which he characterizes as a "counter-Marbury" principle, by essentially allowing agencies to displace courts as the final arbiters of the meaning of their enabling statutes.<sup>54</sup> In short, he thinks that *Chevron*, rather than simply expressing a limited command to defer when undertaking judicial review, directed the federal courts to abdicate much of their supervisory role. Even if the lower courts have adopted such a highly deferential posture,<sup>55</sup> the Supreme Court and some commentators remain quite wary of the consequences of this strong reading of *Chevron*, and the FDA's tobacco regulations may test the outer limits of its call for deference.<sup>56</sup>

Just as proponents of the constitutional metaphor assume a dynamic interpretive approach, those favoring a common law analogy evidently imagine a bold and creative, rather than cau-

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balance, however, it is highly salutary."); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 550-55 (1997) (book review) (suggesting this notion in connection with an initial defense of the FDA's tobacco regulations).

53. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 892-93 (1987).

54. See Sunstein, *supra* note 51, at 1058 ("*Chevron* has granted agencies two important common law functions, those of specifying statutory terms and of adapting those terms to new facts and values. The question for post-*Chevron* law has involved the identification of limits on those common law functions."); see also *id.* at 1055 ("In the modern era, most of the key work of statutory interpretation is, of course, not done by courts, but rather by federal agencies."). But cf. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (reaffirming the modern presumption of judicial review of agency action, explicitly invoking *Marbury v. Madison*).

55. See 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, 30-31, 47 (1998) (finding fairly high rates of deference to agency interpretations of ambiguous language in their enabling statutes, but rejecting the "blank check" criticism); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058-59 (finding increased affirmance rates by the lower courts in the immediate wake of *Chevron*).

56. See Lars Noah, *Regulating Cigarettes: (Non)sense and Sensibility*, 22 S. ILL. U. L.J. 677, 685-86 (1998) (criticizing the FDA's request for serial *Chevron* deference, with each step compounding the initial error).

tiously incremental or interstitial, approach to agency decision making.<sup>57</sup> This approach is distinct from questions about whether the courts should develop a common law of judicial review of agency actions; just as some commentators have called the APA a constitution,<sup>58</sup> others have claimed that it simply restates a common law of administrative procedure.<sup>59</sup> If the heyday of making federal common law reflected a willingness to permit the transfer of legislative power from Congress to the courts,<sup>60</sup> then the recognition of an expansive common law power in federal agencies seemingly would affect a similar transfer from both the legislature and the courts to the executive branch.

This conception differs from the constitutional metaphor insofar as the responsibility for interpretation rests with the agency itself rather than the judiciary.<sup>61</sup> If agencies have such a com-

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57. A few scholars have defended a common law method of constitutional interpretation. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

58. See *supra* note 34; see also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that federal statutes "should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context"); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 240-43 (1999) (arguing that legislative enactments, as well as judicial interpretations, resemble the common law process of judging insofar as they are reactive, pragmatic, and evolving adjustments of existing rules).

59. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 130-38 (1998) (criticizing this view); cf. *Dickinson v. Zurko*, 119 S. Ct. 1816, 1819-22 (1999) (rejecting the argument that a distinct common law standard of review in patent cases survived the enactment of the APA). For a critique of one particular application of this notion to justify an innovative short-cut for issuing agency regulations that is not explicitly authorized by the APA, see Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401 (1999).

60. See Duffy, *supra* note 59, at 138; see also *infra* Part II.B (discussing federal common law).

61. In some respects, it would resemble the role played by the separate administrative judiciary (*Conseil d'Etat*) in France, which has developed something of an administrative common law, while a civil code governs much of private law in that and other continental legal regimes. See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 288-95 (5th ed. 1998); Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57, 67-76 (1994); Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 385-87 (1982); Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 75-77 (1997); Michael Wells, *French and American Judicial Opinions*, 19

mon law power, then Article III courts apparently would have essentially no supervisory role to play, just as the federal courts generally may not review the merits of state common law or statutory decisions absent some constitutional objection.<sup>62</sup> Indeed, one commentator recently has suggested that state agencies should receive *Chevron* deference when they must implement federal regulatory programs,<sup>63</sup> an idea that seems to comport nicely with the common law metaphor for enabling acts but also may highlight some of its intrinsic weaknesses, as elaborated in Part II.

Professor Sunstein defends *Chevron* for leaving essentially political judgments about the interpretation of ambiguous statutes in the hands of agencies on several familiar grounds: Congress implicitly delegated such power to an agency,<sup>64</sup> and agencies enjoy greater democratic accountability and technical expertise than do the courts.<sup>65</sup> Even if one accepts this strong reading

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YALE J. INT'L L. 81, 100 (1994).

62. See *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); *Griffin v. Wisconsin*, 483 U.S. 868, 880 n.8 (1987) (holding that the federal courts are bound by a state court's interpretation of a state regulation); *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1064 (11th Cir. 1996) (holding that a federal court sitting in diversity was obligated to follow the state supreme court's apparent misinterpretation of a state statute); see also Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 650-72 (1999) (canvassing the scholarly commentary and the case law on the federal courts' practice of certifying questions of unclear state law, including the meaning of statutes, to state courts for authoritative guidance); cf. *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (reiterating the rule that the Supreme Court lacks certiorari jurisdiction to review a state court's judgment that rests on an adequate and independent state law ground); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (same).

63. See Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 36 (1999) ("[T]he very point of cooperative federalism schemes—and the argument for deference to state agencies—is to allow states to adopt the approach that they deem to be the optimal regulatory strategy . . . whenever the statutory scheme authorizes them to make that decision in the first instance."); see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (noting that the Telecommunications Act of 1996's "attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel").

64. See Sunstein, *supra* note 51, at 1056 (calling this "[t]he central idea behind *Chevron*").

65. See *id.* at 1056-58; see also *Pension Benefit Guar. Corp. v. LTV Corp.*, 496

of *Chevron*, an issue taken up at greater length below, deference to reasonable agency interpretations of any ambiguities in their enabling statutes need not also mean, as Professor Sunstein now suggests, recognizing their power to adapt these acts "to new circumstances and new social understandings."<sup>66</sup> Whereas courts encounter disputes about statutory meaning episodically and acontextually, agencies live with their enabling acts and make interpretive judgments on a daily basis.<sup>67</sup> Such immersion can represent both a virtue and a vice when questions arise about the limitations on an agency's power.

## II. FLAWS IN THE LOOSE CONCEPTIONS OF AGENCY ENABLING STATUTES

This Part asks whether, and to what extent, the courts should condone bureaucratic tendencies toward the expansion of their delegated powers. First, it argues that judicial scrutiny of agency behavior remains necessary to ensure fidelity to their enabling statutes. Second, it contends that the same flaws inherent in recognizing the power of a federal court to make common law based on nothing more than a grant of subject matter jurisdiction apply with equal force to agencies. Finally, this Part refutes the claim that *Chevron* deference should extend to the review of "jurisdictional" questions. Courts must continue to take juris-

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U.S. 633, 651-52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference.").

66. Sunstein, *supra* note 51, at 1056. Notably, Professor Sunstein previously had criticized the *Chevron* decision. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 465-69 (1987); see also Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1229-32 (1988); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 6-9 (1986).

67. See Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 327-31, 334 (1990); *id.* at 329 (describing "[t]he organic nature of agency relationships with their statutes, that agencies essentially live the process of statutory interpretation"); David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 332 (1979) (noting that agencies develop expertise in reading their enabling statutes due to the "frequency of an agency's contact with the statute . . . [and] its immersion in day-to-day administrative operations").

dictional limitations seriously, whether they appear in the U.S. Constitution, legislation specifying the scope of the federal judicial power, or an agency's enabling statute.<sup>68</sup> The common law and, to a lesser extent, constitutional metaphors inappropriately disregard the need to police the outer boundaries of administrative power.

### *A. Policing the Most Dangerous Branch: Judicial Supervision of Delegations*

In contrast to the analogy drawn to corporate charters, the constitutional metaphor seeks to justify broad flexibility in defining the limits of an agency's power, and the common law metaphor would provide agencies with an apparently boundless range for operation. To be sure, the judiciary has given Congress substantial leeway under the Necessary and Proper Clause of Article I of the Constitution to embellish and expand upon its specifically enumerated powers.<sup>69</sup> Even so, whatever latitude it

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68. See Epstein, *supra* note 39, at 1390-91 ("Provisions [of the Constitution] that go to the question of jurisdiction are no less important to sound governance than those that govern individual rights. . . . [J]urisdictional limitations [are] an important, indeed, indispensable, limitation upon government power."); *id.* at 1396 ("The looseness of vague grants of power would have given rise to the possibility of massive abuse, a possibility the framers seemed determined to control. The federal government was to have supremacy in the areas under its control, but the quid pro quo was that these areas were to be limited by specific jurisdictional grants."); see also LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 15 (1986) (describing jurisdictional questions as boundaries between courts and legislatures—at the state and federal level—designed to maintain a balance of power); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 802-06 (1995) (urging courts to police the boundaries between federal and state lawmaking).

69. See U.S. CONST. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407-21 (1819); *id.* at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); see also *Printz v. United States*, 521 U.S. 898, 923 (1997) ("[T]he last, best hope of those who defend ultra vires congressional action, [is] the Necessary and Proper Clause."); Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 776-77, 791-93 (1997) (arguing that, rather than being used to allow an expansion of the legislature's enumerated powers, the Necessary and Proper Clause should be used as a standard against which to judge particular exercises of its enumerated powers); Epstein, *supra* note 39, at 1397-99 (defining the role of the Necessary and Proper Clause as administrative in nature, "to ensure that the Con-



has accorded to Congress, the Court has given the President less free range of operation. As the agent charged by the Constitution with "tak[ing] Care that the Laws be faithfully executed,"<sup>70</sup> the President enjoys only limited authority to deviate from the wishes of the legislative branch. Although the Court has recognized that the President must have certain implied emergency powers, the exercise of such powers must comport with and not contravene statute,<sup>71</sup> and the President may not instruct execu-

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gress shall have all means at its disposal to reach the heads of power that admittedly fall within its grasp," rather than authoritative, as an "automatic trump"); Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 519 (1995) ("Since a Constitution simply cannot list every permissible government action, we must infer some powers from those explicitly granted. Powers that are constituent elements of explicitly granted powers would seem to be at the core of implied powers."); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331-32 (1993) (defending a strict construction of the clause, with an emphasis on the word "proper" as a jurisdictional limitation designed to protect the states against encroachments by Congress if it attempted to assert unenumerated powers).

70. U.S. CONST. art. II, § 3; see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1177 n.119 (1992) (conceding that the President does not enjoy inherent authority to act contrary to statute); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24-32 (1993) (documenting presidential assertions of a power to contravene statutory law and the judiciary's rejection of these attempts).

71. See *Dames & Moore v. Regan*, 453 U.S. 654, 686-87 (1981) (upholding executive orders establishing an Iranian claims tribunal to secure the release of American hostages); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (plurality opinion) (invalidating the President's attempted seizure of domestic steel mills during the Korean War); *id.* at 655 (Jackson, J., concurring). The Justices dissenting in *Youngstown* thought that President Truman could seize the steel mills so long as Congress had not specifically prohibited such action. See *id.* at 701-03 (Vinson, C.J., dissenting). But cf. Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 31-32, 51 (1982) (warning that, "if the President could take any action that is compatible on its face with a statutory purpose, the practical consequence would be the adoption of Theodore Roosevelt's expansive theory that the President may take any action not forbidden by law"). See generally LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (4th ed. rev. 1997); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 182-96 (1994); Lars Noah, *The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference?*, 56 WASH. & LEE L. REV. 235 (1999) (drawing parallels between the power exercised by the President under the Line Item Veto Act, which the Supreme Court found violative of the Presentment Clause, and the judiciary's readiness to sever invalidated provisions from statutes).

tive officers to ignore legislative instructions.<sup>72</sup> Thus, the courts demand executive fidelity to legislation and recognize only limited extrastatutory powers inherent in the Constitution.

Concerns about agency tendencies toward expansion have long existed.<sup>73</sup> Although perhaps more apt as a gauge for legislative rather than administrative behavior, the insights of public choice theory suggest that agency officials may act to further their self-interest, whether by aggrandizing their own powers or placating powerful interest groups.<sup>74</sup> As Professor Sunstein con-

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72. See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610-13 (1838); *National Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169-71 (1803) (distinguishing between political powers vested in the President and ministerial duties imposed on executive branch officers by the legislature); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983) ("[U]nlike the legislature, administrative agencies can never pretend to an unlimited power to select among goals; the universe of each agency is limited by the legislative specifications contained in its organic act."); *id.* at 33 (noting similarities in the deferential judicial review of ultra vires challenges to both administrative and legislative acts).

73. See *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) (noting "the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission"); *Lubrizol Corp. v. EPA*, 562 F.2d 807, 819 (D.C. Cir. 1977) (mentioning the "seemingly growing popular conviction that government agencies too often transgress the statutorily imposed boundaries of their authority"); WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 5-12 (1971); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1113-19 (1954). These general fears go back centuries. See THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it."); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. XI, ch. 4, at 200 (David Wallace Carrithers ed., Berkeley, Univ. of Cal. Press 1977) (1750) (explaining that "constant experience sh[ow]s us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit").

74. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 51 (1982) ("Budget maximizing, jurisdictional expansion, and output maximizing in their various manifestations may increase private payoffs to agency personnel."); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 248 (1984); cf. Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 496 (1996) (summarizing the limitations of public choice theory in predicting the behavior of unelected officials). These tendencies are, of course, offset by competing regulatory demands and resource constraints. See Lars Noah & Richard A. Merrill, *Starting from Scratch?: Reinventing the Food Additive Approval Process*, 78 B.U. L. REV. 329, 421 & n.409, 433, 443 (1998) (noting that the FDA is "struggling to do more with fewer resources").

cedes, "both the vulnerability of agencies to factions and the interest of agencies in increasing their own power and authority argue against the common law analogy; at least common law judges had, and have, the virtues of comparative independence."<sup>75</sup> During the last quarter of a century, for instance, the FDA has been notoriously creative in construing its own statutory authority, most recently in announcing that it would control human cloning experiments.<sup>76</sup> Some might congratulate the agency for its adaptability to changing circumstances, but others have credibly accused it of overreaching.<sup>77</sup> As explained in the sections that follow, administrative tendencies toward expansion of agency jurisdiction and power generally should be condemned rather than applauded.

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75. Sunstein, *supra* note 51, at 1061. He concludes, however, that "[w]hen compared with common law courts, agencies have a greater understanding of relevant facts, and they also have a degree of political responsiveness, which is a virtue as well as a potential vice." *Id.* at 1061-62.

76. See Elizabeth C. Price, *Does the FDA Have Authority to Regulate Human Cloning?*, 11 HARV. J.L. & TECH. 619, 641 (1998) (disputing the FDA's claim that it already enjoys sufficient statutory authority to assert jurisdiction to restrict human cloning research); see also Gary E. Gamerman, Note, *Intended Use and Medical Devices: Distinguishing Nonmedical "Devices" from Medical "Devices" Under 21 U.S.C. § 321(h)*, 61 GEO. WASH. L. REV. 806, 831-50 (1993) (discussing the FDA's creativity in using its power to regulate medical devices to reach other types of products). Companies apparently have begun serious work to clone human embryos for applied fetal tissue research. See Rick Weiss, *Embryo Work Raises Specter of Human Harvesting: Medical Research Teams Draw Closer to Cloning*, WASH. POST, June 14, 1999, at A1.

77. See, e.g., 62 Cases of *Jam v. United States*, 340 U.S. 593, 600 (1951) ("In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."); *United States v. Parkinson*, 240 F.2d 918, 921 (9th Cir. 1956) ("The record of the past few decades is replete with examples of the tendency of executive agencies to expand their field of operations. A passion and a zeal to crusade affects their operations."); H. Thomas Austern, *Philosophy of Regulation: A Reply to Mr. Hutt*, 28 FOOD DRUG COSM. L.J. 189, 191 (1973) (criticizing the suggestion that "a well-motivated administrative agency can legally do what it alone deems desirable unless Congress has in advance specifically prohibited it"); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 911-12 (observing that the FDA's traditional practice of interpreting its enabling statute expansively "carries with it opportunities for abuse"); Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 ALA. L. REV. 1, 37 (1996) ("The FDA should not be free to ignore the outer boundaries of its delegated authority in pursuit of a well-meaning crusade against a public health problem.").

### 1. *The Remnants of the Nondelegation Doctrine*

For a brief time during the New Deal, the United States Supreme Court employed the nondelegation doctrine to strike down sweeping federal legislation.<sup>78</sup> The Court soon retreated from the extreme position suggested in these opinions and subsequently upheld broad delegations of legislative authority to administrative agencies.<sup>79</sup> Although most courts and commentators regard the rule against delegation as a dead letter,<sup>80</sup> some have called for its reinvigoration.<sup>81</sup> At most, however, the nondelegation doctrine has become a justification for narrowly construing such

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78. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

79. See *Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947); *Yakus v. United States*, 321 U.S. 414, 423-27 (1944); *NBC v. United States*, 319 U.S. 190, 225-26 (1943); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 574-78 (1939); see also *Loving v. United States*, 517 U.S. 748, 757-59, 771 (1996) (upholding the delegation of power to the President to prescribe aggravating factors in military capital cases); *Skinner v. MidAmerica Pipeline Co.*, 490 U.S. 212, 219-24 (1989) (rejecting the claim that granting an agency the authority to impose user fees amounted to an impermissible delegation of Congress's taxing power); *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (upholding the delegation of rulemaking power to the United States Sentencing Commission).

80. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 469 (1998) (Scalia, J., concurring in part and dissenting in part) ("[T]he doctrine of unconstitutional delegation . . . is preeminently *not* a doctrine of technicalities."); *id.* at 485-86 (Breyer, J., dissenting) ("Indeed, the Court has only twice in its history found that a congressional delegation of power violated the 'nondelegation' doctrine."); *Federal Power Comm'n v. New Eng. Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring in part) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court . . . . This doctrine is surely as moribund as the substantive due process approach of the same era . . . .").

81. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Aranson et al., *supra* note 74, at 63-67; see also *Mistretta*, 488 U.S. at 416-17 (Scalia, J., dissenting) ("[W]e must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation."); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring in judgment) ("We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era."); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 419-20 (1987) (arguing that the doctrine deserves serious attention even though courts rarely invoke it). See generally Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731 (1999).

broad delegations to federal officials,<sup>82</sup> a technique that makes sense only if the courts then intend to monitor agency action for consistency with their more restrictive interpretation of such statutes.<sup>83</sup> As Judge Harold Leventhal once wrote: "Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits . . . ."<sup>84</sup>

Agencies routinely must implement incompletely specified statutory commands. As the Supreme Court explained one de-

82. See *Industrial Union Dep't*, 448 U.S. at 646 (plurality opinion); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); see also *Mistretta*, 488 U.S. at 373 n.7; cf. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999) (per curiam) (rejecting a broad EPA interpretation of the Clean Air Act because it created a nondelegation problem), *petition for cert. filed*, 68 U.S.L.W. 3496 (Feb. 8, 2000) (Nos. 99-1257, 99-1263 & 99-1265); *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1284 (5th Cir. 1983) (rejecting an expansive interpretation of the Commission's jurisdiction, and warning that to "constru[e] the National Transportation Policy, which paraphrased says little more than 'go forth and do good,' as a congressional grant of rulemaking authority might well amount to an unconstitutional delegation of legislative authority").

83. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 1.2.1, at 28 (1993) (explaining that the use of the nondelegation doctrine to construe enabling statutes narrowly helps "prevent power from growing, this time according to bureaucratic tendencies to expand their turf" by "requir[ing] that the courts be especially mindful about exactly how much power Congress has delegated to an agency"); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 189 (1992) ("Historically, the acceptance of broad delegations has rested in part on the assumption that agency action is subject to meaningful judicial review. To the extent *Chevron* is interpreted as letting the agency itself determine the consistency of its action with the terms of the delegation, it destroys this premise." (footnote omitted)).

84. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) (footnote omitted); see also *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) ("The claim of undue delegation of legislative power broadly raises the challenge of undue power in the Executive and thus naturally involves consideration of the interrelated questions of the availability of appropriate restraints through provisions for administrative procedure and judicial review."); *id.* at 745 ("An agency assigned to a task has its freedom of action circumscribed . . . by the perimeters described by the legislature as hedgerows defining areas open to the agency."); SUNSTEIN, *supra* note 36, at 143 ("If agencies are able to interpret ambiguities in these [broad statutory] directives, the delegation problem increases dramatically."); Monaghan, *supra* note 72, at 26 (suggesting that the nondelegation doctrine would "prohibit[, for example, a legislative scheme that is tantamount to making the agency interpretation of the reach of its statutory mandate wholly conclusive upon the courts").

cade ago, "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."<sup>85</sup> Although Congress typically delegates fairly sweeping substantive responsibilities to agencies, modern enabling statutes often limit the allowable range of regulatory methods available to pursue these broad purposes.<sup>86</sup> Moreover, agencies cannot impose sanctions on regulated entities unless specifically authorized by statute.<sup>87</sup> The APA also provides that "a substantive rule" may not be "issued except within jurisdiction delegated to the agency,"<sup>88</sup> a provision that

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85. *Mistretta*, 488 U.S. at 372; see also *id.* at 379 ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (noting that Congress deals with the impossibility of anticipating every violation of an Act by entrusting an expert agency with its administration); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985) (applauding broad delegations as allowing agencies to adapt to changing circumstances and voter preferences).

86. See David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 985 (1999); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 177-82 (1992); see also Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 821-45 (explaining that Congress has become more precise in its recent delegations, especially in the environmental area); Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 518 (1995) ("[T]he popular notion of unconfined delegation is a myth . . . Congress virtually always prescribes policy structures in sufficient detail so that agency choice of regulatory method is narrowed significantly.").

87. See 5 U.S.C. § 558(b) (1994) ("A sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law."); *SEC v. Sloan*, 436 U.S. 103, 111-12 (1978) (holding that an enabling statute did not authorize a series of summary suspension orders).

88. 5 U.S.C. § 558(b); see also H.R. REP. NO. 79-1980 (1946), reprinted in U.S. GOV'T ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 233, 274 (1946) ("An agency authorized to regulate only trade practices may not regulate banking, and so on. Similarly, no agency may undertake directly or indirectly to exercise the functions of some other agency. The section confines each agency to the jurisdiction delegated to it by law."); *id.* at 275 ("It has never been the policy of Congress to prevent the administration of its own statutes from being judicially

has received essentially no attention by the courts or commentators,<sup>89</sup> perhaps because they think that it merely restates the obvious. The Florida legislature recently codified a more emphatic constraint of this sort on the rulemaking authority of agencies in that state.<sup>90</sup>

## 2. Honoring Legislative Supremacy

The principle of legislative supremacy attempts to ensure that only Congress may enact or amend a statute.<sup>91</sup> From this perspective, enabling acts more closely resemble charters for agencies, and the courts must invalidate actions taken beyond the range of that statutory jurisdiction.<sup>92</sup> Administrative agencies

confined to the scope of authority granted . . . . [Otherwise,] statutes would in effect be blank checks drawn to the credit of some administrative officer or board."); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 88 (Wm. W. Gaunt & Sons 1979) (1947) ("The purpose of [Section 558(b)] is, evidently, to assure that agencies will not appropriate to themselves powers Congress has not intended them to exercise."). Anticipating the discussion of the power of the federal courts to fashion common law, see *infra* Part II.B, one might analogize this APA provision to the Rules of Decision Act, 28 U.S.C. § 1652 (1994).

89. See Ernest Gellhorn & Paul R. Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 994 n.28 (1999) ("This often overlooked provision articulates an independent APA ground for scrutinizing jurisdictional decisions."); *id.* at 1012 & n.121 (same).

90. See FLA. STAT. ch. 120.52(8) (1999) ("An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation . . . ."); see also *Department of Bus. & Prof'l Regulation v. Calder Race Course, Inc.*, 724 So. 2d 100, 102-03 (Fla. Dist. Ct. App. 1998) (construing a slightly different earlier version of this provision); *St. Johns River Water Management Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 77-81 (Fla. Dist. Ct. App. 1998) (same); cf. Jim Rossi, "Statutory Nondelegation": *Learning from Florida's Recent Experience in Administrative Procedure Reform*, 8 WIDENER J. PUB. L. 301 (1999) (criticizing this approach).

91. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 317-18 (1989); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 402 (1989); see also *Neal v. United States*, 516 U.S. 284, 295-96 (1996) (rejecting an agency's effort to override a prior judicial interpretation, which only Congress could do). The Constitution only empowers the President to "recommend" to Congress "such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3.

92. See 5 U.S.C. § 706(2)(C) (instructing reviewing courts to "hold unlawful and set aside agency action" found to be "in excess of statutory jurisdiction, authority, or

can no more amend their own organic statutes than the President or Congress could unilaterally amend the U.S. Constitution outside of the strictures of Article V.<sup>93</sup>

Under a once dominant conception of administrative law, agencies enjoyed only as much power as Congress chose to delegate and could utilize only those procedures set forth in their enabling statutes, with courts serving as a backstop to ensure that agencies abided by these substantive and procedural constraints.<sup>94</sup> Although other paradigms now compete with what some commentators have described as the rule-of-law ideal, none have fully replaced it,<sup>95</sup> and apparently all of them would con-

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limitations, or short of statutory right" (emphasis added)); *see also* Federal Labor Relations Auth. v. Aberdeen Proving Ground, 485 U.S. 409, 414 (1988); Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373 (1986) (invalidating the Federal Reserve Board's effort to exercise jurisdiction over certain nonbank acquisitions); Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979); Stark v. Wickard, 321 U.S. 288, 309-10 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress . . ."); Transohio Sav. Bank v. Office of Thrift Supervision, 967 F.2d 598, 621 (D.C. Cir. 1992); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 55 (1988) ("Administrative agencies may do lawfully only what congressional statutes authorize them to do.").

93. *See* U.S. CONST. art. V (requiring that constitutional amendments first be proposed by a two-thirds vote of either both houses of Congress or the states and then be ratified by three-fourths of the states); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 682, 721-63 (1993); *see also* Tribe, *supra* note 38, at 1241-45, 1282-301 (responding to various claims that the Constitution may be "amended" in a manner not provided for by Article V). *But cf.* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15, 66-67 (1998) (postulating alternative methods of amendment); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462-94 (1994) (providing historical and textual arguments to suggest that Article V is not the exclusive mechanism for constitutional amendment).

94. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671-76 (1975) (elaborating on the "traditional model" of administrative law).

95. *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985) (arguing that the courts recently turned away from an interest representation model in favor of "an expanded notion of fidelity, one that requires not only that the agencies not exceed their congressionally authorized powers, but also that they use those powers as Congress intended"); Linda R. Hirshman, *Postmodern*



demn efforts by agencies to arrogate undelegated power. Although it may have appropriately reduced the threat of judicial supremacy, *Chevron* did not entirely undermine the tradition of legislative supremacy by ushering in a preference for executive supremacy.

The acceptance of either the constitutional or the common law metaphor to describe an agency's enabling statute would result in a significant shift in the balance of power between the three branches of government.<sup>96</sup> Within broad limits, agencies could pursue any goal by any means not explicitly prohibited by Con-

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*Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 666-68, 703 (1988) (arguing in support of continued judicial review to ensure agency conformity to statute); Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 397-404, 441-42 (describing the rule-of-law ideal, which "permeates administrative law," as well as its limitations, and concluding that it remains "robust" even while it competes with alternative paradigms); Werhan, *supra* note 34, at 570 ("All approaches to administrative law which have prevailed from time to time in this country embody the core components of the traditional model."); *id.* at 626-27 (arguing in favor of a return to the traditional model). *But see* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1333-34 (1999) (assailing the conventional wisdom); *id.* at 1288-89, 1302 (doubting that judicial review is a necessary check on administrative ambitions).

96. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 464-65 (1989) ("Once these considerable power-shifting implications are recognized, the choice between independent judgment and deference becomes part of the vexing larger problem of managing the power generated by regulatory statutes."); *id.* at 476 n.98 ("One way to appreciate the magnitude of the step is to imagine that Congress enacts a statute requiring the Supreme Court to defer to the view of the Solicitor General whenever it encounters an unclear point of federal law."); Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 425 ("Although the elimination of unnecessary legal formalism in agency decisionmaking is a salutary goal for reform efforts, . . . we are in danger of pushing delegalization so far that we lose sight of the legal values that make administrative government acceptable in a system of checks and balances."); see also Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Power in the Post-Chevron Era*, 32 B.C. L. REV. 757, 833-34 (1991) (arguing that the strong reading of *Chevron* represents an unconstitutional transfer of judicial power to the executive branch). A similar point has been made with respect to the long-standing rule of deference to agency interpretations of ambiguous regulations. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) ("If an agency's rules mean whatever it says they mean (unless the reading is plainly erroneous), the agency effectively has the power of self-interpretation."); Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255 (2000).

gress. In commenting on the Supreme Court's decision in *Rust v. Sullivan*,<sup>97</sup> Professor Keith Werhan explained that:

The *Rust* decision represents a complete reversal of the traditional model of administrative law. Under the ultra vires principle that animates the model, as translated by legal process theory, the responsibility would be on HHS to show that its prohibition on abortion advocacy, counseling, and referral was consistent with the congressional purpose underlying the Act and the funding restriction. The utter silence in the legislative record that anyone contemplated or desired that HHS prohibit these activities by funding recipients would be disabling, not empowering.<sup>98</sup>

The consequence, as he explained, is that "the agency replaced Congress as the initiator of regulatory policy, and . . . Congress must replace the Court as a check on agency decisionmaking," but the President's likely veto would force Congress to secure supermajorities if it wanted to demand fidelity to its original enactment.<sup>99</sup> Should agencies really become the final arbiters of

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97. 500 U.S. 173 (1991). In this case, the Court upheld the "abortion gag rule," noting that Congress had not specifically prohibited such a restriction on federal funding of family-planning clinics. See *id.* at 184-85.

98. Werhan, *supra* note 34, at 622 (footnote omitted); see also *Thomas v. INS*, 35 F.3d 1332, 1348 (9th Cir. 1994) (Kozinski, J., dissenting) (disagreeing with the use of common law agency principles of implied authority for federal officers, asking, "Would Congress have to load committee reports with lists of powers not implicitly delegated to various government officials?").

99. Werhan, *supra* note 34, at 622; see also Gellhorn & Verkuil, *supra* note 89, at 1004 ("[T]he attitude that an agency may do whatever is necessary even though it is not directly authorized to do so is lawless, not merely creative."); Hirshman, *supra* note 95, at 674-75 (objecting to the "erroneous identification of judicial review of agency action for conformity to law with judicial review of legislation for its constitutionality," pointing out that the former does not pose the majoritarian problems of the latter because the courts are not asked to override the judgment of a coordinate, elected branch of government, and adding that, "unlike the troublesome open-textured provisions of the Constitution, realistically, most statutes offer the courts a substantially restricted sphere for creativity"); Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 261 ("It is unhealthy to assume, even as a theoretical starting point, that agencies that possess [a broad grant of discretionary authority] should generally be free to behave exactly as they please." (footnote omitted)); cf. Forsyth, *supra* note 21, at 123 ("[T]o abandon the [ultra vires] doctrine implies the abandonment of legislative supremacy. Such a profound change in the constitutional order, should not, it will be argued, be undertaken by the judiciary [in England] of their own motion."); *id.* at

the meaning of their enabling statutes? Indeed, are organic acts better understood as "disabling" statutes, creating constraints—as state constitutions often do—on the exercise of inherent governmental authority? Congress rarely includes explicit prohibitions on the scope of a federal agency's authority to regulate, sometimes called "zipper clauses," as a counterweight to fears about expansions in jurisdiction,<sup>100</sup> but the failure to impose such limits should not mean that Congress intended to give agencies carte blanche.

These questions replay the struggle between formalism and functionalism in the separation of powers context,<sup>101</sup> though on a microscale. Formalism, used as a prophylactic bright-line test that eschews balancing in cases where one branch appears to be aggrandizing itself or usurping power from another branch,<sup>102</sup>

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137 (concluding that judicial use of the ultra vires doctrine "marks the maintenance of the proper balance of powers between the elected and non-elected parts of the constitution").

100. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 537 (1983). The Consumer Product Safety Act provides one example. See 15 U.S.C. §§ 2052(a)(1), 2080(a) (1994) (restricting the Consumer Product Safety Commission's authority to regulate certain consumer product risks that fall within the jurisdiction of other specified agencies).

101. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732-44 (1996); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 503-04 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 510-26 (1987). See generally Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 209 (1989).

102. See *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (crediting "powerful reasons for construing constitutional silence on this profoundly important issue [permitting the President to exercise a line item veto] as equivalent to an express prohibition"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); *New York v. United States*, 505 U.S. 144, 187 (1992) ("The result may appear 'formalistic' in a given case . . . [.] [b]ut the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986) ("Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."); *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 476-78 (1991); see also Tribe, *supra* note 38, at 1248

may have stronger justification as a basis for trying to cabin administrative tendencies toward the expansion of jurisdiction. Agencies may issue legislative rules and help adjudicate disputes subject to certain limitations,<sup>103</sup> but the Constitution vests the "judicial power" in the federal courts,<sup>104</sup> and the Supreme Court has characterized the interpretation of specific congressional intent as a "quintessential[ly] judicial function."<sup>105</sup> The common law metaphor for agency enabling acts would turn this allocation of decision-making responsibility on its head, while the constitutional metaphor may lead judges to give short shrift to fairly specific legislative directions about the intended limits of an agency's power.

Although Congress can more easily correct agency misinterpretations of federal legislation than it can initiate constitutional amendments to permit some innovative form of governmental activity, a more formal insistence on agency fidelity to statute would place the onus on Congress to make its wishes reasonably clear in advance rather than expect it to serve a negative checking function on overzealous agency officials and overly forgiving judges.<sup>106</sup> Otherwise, one sacrifices legislative supremacy in or-

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("For the Constitution to serve as a *constitutive* document, some provisions require rigid definition; not all may be given a wide berth for evolution."); *id.* at 1248 n.91 (defending "an insistence on reading enabling provisions in a relatively rigid manner").

103. See *Schor*, 478 U.S. at 847-58; *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 592-93 (1985); Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1062-89 (1999).

104. See U.S. CONST. art. III, § 1. Many formalists would, however, defend a strong reading of *Chevron* as a legitimate aspect of the executive power vested in the President and subordinate executive officers. My reference in the text to formalist approaches to the constitutional separation of powers has less to do with attempts to pigeonhole the specific powers exercised by government officials than with an insistence on strictly enforcing text-based limits on the extent of their powers.

105. *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 98 n.8 (1983); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (explaining that "the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law"); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980); *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function."). This comports with Chief Justice Marshall's famous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

106. On the relative difficulty of legislating to override judicial misinterpretations of

der to promote administrative expediency. Unless Congress expressly made such a choice and did not overstep the outer limits of the nondelegation doctrine, the APA's preference for jurisdictional fidelity and judicial supervision creates the most plausible system of checks and balances, not unlike the dynamic equilibrium established by the Constitution itself.<sup>107</sup> 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.

### 3. *The Difficulty of Precluding Judicial Review*

Agencies sometime pursue results without much attention to the niceties of legal constraints on their missions; consequently, courts serve an essential checking function.<sup>108</sup> In response to the above argument concerning legislative supremacy, proponents of the constitutional and common law metaphors would respond that they honor congressional preferences in abiding by implicit delegations to agencies of the power to interpret the meaning of their enabling statutes. The implicit delegation rationale said to underlie *Chevron*, at least according to those who favor a strong form of deference, has serious shortcomings as a default assumption about the probable intent of Congress. Indeed, the subsequent behavior of the legislative branch in supervising agencies—ranging from formal oversight and consideration of appropriations requests to informal casework by individual members

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a statute, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 416 (1991) (concluding that Congress should "be concerned that its monitoring of Supreme Court statutory decisions yields few overrides"); John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1275 & n.25, 1281 (1996).

107. See Farina, *supra* note 96, at 497.

108. See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 323 (1965) ("From the point of view of an agency, the question of the legitimacy of its action is secondary to that of the positive solution of a problem. . . . [T]he maintenance of legitimacy requires a judicial body independent of the active administration."); see also *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) ("[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds."); Monaghan, *supra* note 72, at 7 (explaining that "our tradition is that the court's role is simply to keep the administrative agencies within the boundaries of delegated power").

on behalf of constituents—cuts against the notion that Congress grants agencies unreviewable powers of statutory interpretation. At the very least, the prevalence of such practices belies the suggestion that enabling acts enjoy the same dignity as relatively immutable constitutional texts whose contours generally are not shaped by subsequent political negotiations.

Imagine that Congress had decided to strip the courts of authority to review agency actions for consistency with its enabling act.<sup>109</sup> As the Supreme Court has demonstrated in the past, resistance is likely, particularly in response to efforts aimed at precluding review of constitutional questions,<sup>110</sup> but also with respect to statutory issues.<sup>111</sup> “We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.”<sup>112</sup> Where judicial review of statutory (*ultra vires*) claims is unavailable, litigants have tried without success to recast these in constitutional

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109. In commonwealth countries, these provisions are called “ouster” clauses. See Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 645-48 (1986); Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 694-96 (1986).

110. See *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Johnson v. Robison*, 415 U.S. 361, 366-73 (1974); see also *Weinberger v. Salfi*, 422 U.S. 749, 760-62 (1975) (allowing partial preclusion of judicial review where parties retained a right to present constitutional challenges in a different setting); *Bartlett v. Bowen*, 816 F.2d 695, 699-700 (D.C. Cir. 1987) (summarizing this pattern of resistance).

111. See *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993); *Traynor v. Turnage*, 485 U.S. 535, 541-45 (1988); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 791 (1985); *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958) (holding that a preclusion provision did not prevent review of an *ultra vires* challenge); see also *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 42-44 (1991) (allowing partial preclusion of judicial review of *ultra vires* challenge to regulation, thereby distinguishing *Kyne*); *Evergreen State College v. Cleland*, 621 F.2d 1002, 1008 (9th Cir. 1980) (holding that preclusion provision did not prevent review of an agency's authority to issue regulations); cf. *Briscoe v. Bell*, 432 U.S. 404, 409-15 (1977) (finding unmistakable evidence of congressional intent to preclude judicial review of the legality of certifications or other determinations by the attorney general under the Voting Rights Act).

112. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986). Restrictive standing doctrine would, however, limit this review function. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

terms.<sup>113</sup> Even so, if agency action did not spring from authority delegated by the enabling act, then any express preclusion of judicial review found in the enabling act might not apply.<sup>114</sup>

*Chevron* did not extend the political question doctrine, which directs courts not to review the exercise of discretion by the executive or legislative branch when the Constitution delegates such discretion,<sup>115</sup> to agencies when they implement their en-

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113. See *Dalton v. Specter*, 511 U.S. 462, 472 (1994) ("Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution."). But see Larry Alexander & Evan Tsen Lee, *Is There Such a Thing as Extra-constitutionality?: The Puzzling Case of Dalton v. Specter*, 27 ARIZ. ST. L.J. 845 (1995) (criticizing this aspect of *Dalton*); Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 751-53, 774-75 & n.159 (1983) (suggesting that ultra vires challenges, though not of constitutional dimension, share similarities with the latter so that statutory preclusion should not necessarily prevent judicial review in such cases).

114. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978) ("[C]ourts have jurisdiction to review suspension orders to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority."); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282-85 (1978) (holding that a preclusion provision will not apply until the government meets its burden of proving that the regulation falls within the agency's statutory authority); see also *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts ultra vires, courts are normally available to reestablish the limits on his authority. Rarely, if ever, has Congress withdrawn courts' jurisdiction to correct such lawless behavior . . ."); *NLRB Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 195-97 (D.C. Cir. 1987) (declining to apply a statute of limitations for challenging rules to bar an ultra vires objection); Forsyth, *supra* note 21, at 130 (explaining that, under English precedents, "it was clear that if the regulations were ultra vires, judicial review would not be precluded by the ouster clause").

115. See *Nixon v. United States*, 506 U.S. 224, 228-38 (1993) (invoking the political question doctrine to decline reviewing the manner of impeachment proceedings); *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 456-59 (1992) (rejecting application of the doctrine in a challenge to a reapportionment decision); *Gilligan v. Morgan*, 413 U.S. 1, 7-10 (1973) (declining to invade "critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government"); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (suggesting that judicial review is inappropriate when there is, among other things, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it"). The question concerning whether the Constitution should be understood as lodging such unreviewable discretion in a political branch must itself remain subject to judicial interpretation. See *id.* at 211 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court . . ."); see

abling statutes. The APA does preclude review of decisions "committed to agency discretion by law,"<sup>116</sup> but the Supreme Court has applied this provision grudgingly, finding preclusion of review on this basis in only quite limited cases.<sup>117</sup> Thus, the strong reading of *Chevron* that undergirds the common law metaphor conflicts with the Court's deeply ingrained presumption of reviewability.

Just as it would be odd for the federal courts to abdicate their function of reviewing the constitutionality of legislation to Congress, one would not expect the courts to cede their role of ensuring that agency action finds authorization in statute. Congress does have the opportunity and some obligation to take account of constitutional constraints,<sup>118</sup> as does the President,<sup>119</sup>

also ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* 99-105 (1987) (objecting to the political question doctrine insofar as it entrusts to a politically accountable body the responsibility for enforcing a text designed to restrain it); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1045-50 (1984-1985) (same); *id.* at 1060 ("[T]he Court must draw the final constitutional calculus.").

116. 5 U.S.C. § 701(a)(2) (1994).

117. See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 192-94 (1993) (allocation of funds from a lump-sum appropriation); *Webster v. Doe*, 486 U.S. 592, 600-01 (1988) (termination of a CIA employee thought to pose a security threat); *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (refusal to grant a petition for reconsideration); *Heckler v. Chaney*, 470 U.S. 821, 831-38 (1985) (decision not to take enforcement action against drugs used for lethal injection); see also *Webster*, 486 U.S. at 608-09, 614 (Scalia, J., dissenting) (drawing the parallel between 5 U.S.C. § 701(a)(2) and the political question doctrine); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that the APA precludes review only when there is no law to apply); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 702-34 (1990) (elaborating on the Supreme Court's evolving gloss on this basis for precluding judicial review); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 675-83 (1985) (explaining that the presumption of judicial reviewability continues to apply to a variety of agency inaction).

118. See Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 61-65, 82 (1986); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 743-47 (1985); Vik D. Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1122-23 (1988).

119. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1284-88, 1329-30 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 321-22 (1994); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation*



and the courts sometimes take into consideration the interpretations of the Constitution tendered by their coequal branches,<sup>120</sup> but federal judges presumably would never treat such views as conclusive or binding in the course of satisfying their Article III duties.<sup>121</sup> Where Congress has asked courts to play the same role vis-à-vis agencies, whether in the APA or an enabling statute, the courts should not regard an agency's view as to the outer limits of its delegated authority as definitive. Indeed, whatever one may think about the competing interpretive authority concerning the Constitution exercised by the three branches of government,<sup>122</sup> little doubt should exist about the proper locus of

*tion of Powers*, 15 CARDOZO L. REV. 137 (1993).

120. Moreover, several amendments to the Constitution contain enforcement clauses delegating a power of implementation to Congress. See U.S. CONST. amends. XIII, XIV, XV, XIX, XXIII, XXIV, XXVI. The most notable of these has been Section 5 of the Fourteenth Amendment. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982); *Katzenbach v. Morgan*, 384 U.S. 641, 651-56 (1966); see also Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 184 (1997) (arguing that the courts should extend something like *Chevron* deference to Congress when it interprets the Constitution under this section).

121. See *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990) ("[C]ongressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361-62 (1997) (arguing that the judiciary should have the final word); Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 273 (1993) ("[L]egislatures are less disinterested than courts when it comes to enforcing constitutional limits on government power. . . . [W]hen legislatures enforce constitutional guarantees they face an inherent conflict of interest."); Lawson & Moore, *supra* note 119, at 1274-79 (distinguishing between legal and epistemological deference, and explaining that courts may, but need not, defer to interpretations of the Constitution by coordinate branches of government); Paulsen, *supra* note 119, at 302, 321-22, 332-37 (arguing for executive review of judicial rulings, but rejecting suggestions favoring executive supremacy); cf. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (rejecting a suggestion that state officials could ignore judicial pronouncements on the constitutionality of their actions, and asserting that "the federal judiciary is supreme in the exposition of the law of the Constitution"). This point is distinct from presumptions of constitutionality and highly deferential minimum rationality review when courts resolve challenges to the substantive merits of legislation as opposed to questions about the legislature's jurisdiction to act at all.

122. See generally Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 RUTGERS L. REV. 771 (1994) (providing a history of the competing views on this issue).

interpretive authority concerning the scope of agency enabling acts: Congress has vested it in the judiciary. Furthermore, particular enabling statutes do not receive the sustained interbranch and academic attention given to the U.S. Constitution, so judicial abdication might leave agencies largely unsupervised in this respect.

Thus, viewed from the perspective of judicial insistence on a power to review certain types of objections to governmental actions, the constitutional metaphor usefully helps to illustrate the shortcomings of the common law metaphor. If courts retain this review function, then the question remains as to the degree of fidelity to demand to the enabling statute, whether narrow (in the classical sense of a charter) or flexible (as with an adaptable constitution).<sup>123</sup> Perhaps *Chevron's* two step analysis provides a method for distinguishing between the broad, constitution-like enabling statutes (where ambiguity is most likely) and the narrower, charter-like delegations that a court may resolve at step one,<sup>124</sup> especially if the courts use textualism to find clarity in arguably ambiguous delegations from the legislature.<sup>125</sup>

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123. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasizing that "we must never forget that it is a *constitution* we are expounding" as distinguished from a detailed code).

124. See *Mayburg v. Secretary of Health & Human Servs.*, 740 F.2d 100, 106-07 (1st Cir. 1984) (Breyer, J.); *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 181 (D.C. Cir. 1983); *Wilkins & Hunt*, *supra* note 86, at 523 ("Congress almost always speaks at length to at least the primary questions of policy design and structure, thus sharply limiting agency choice of regulatory method and generally precluding the possibility of *Chevron* deference on those questions."); cf. *Easterbrook*, *supra* note 100, at 544-47, 551-52 (contrasting broad enactments such as the Sherman Act that invite courts to fashion common law with more precise enactments whose gaps should not be filled); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 869 (1994) ("[S]tatutory schemes occupy the entire spectrum between simplicity and complexity, specificity and abstraction.").

125. See *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499-503 (1998); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225-29 (1994); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990); see also Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 417-23 (1996) (refuting claims that textualism has systematically distorted the Court's application of *Chevron*); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 366-73 (1994) (explaining why the ascendancy of textualism appears to be re-

In the end, no single metaphor accurately captures the variety of organic acts, and Congress may have shifted from the open-ended and aspirational delegations of earlier this century to the somewhat more precise and constrained enabling statutes of today. Nonetheless, the charter metaphor makes the most sense as a default position. Even if some older enactments have more of a constitution-like quality, one should not adopt this more forgiving perspective across the board when interpreting other types of enabling statutes. Finally, even accepting some limited role for the constitutional metaphor, the common law metaphor has no legitimate place in thinking about how to interpret agency enabling acts, as further elaborated below.

### *B. Reinterring the Power to Make Federal Common Law*

With the decline of a previously expansive notion of federal authority to make common law in the courts,<sup>126</sup> the proposal to locate a comparable power in administrative agencies should arouse suspicion. The opportunity given agencies to revise interpretations of their enabling statute does, of course, resemble the common law tradition of revisiting precedents when conditions change,<sup>127</sup> and the failure to defer where unforeseen circumstan-

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ducing deference to agency interpretations).

126. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 856 (1997) ("Courts and scholars generally agree that federal common law must be authorized in some fashion by the Constitution or a federal statute."); Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 974-75 (1996) ("[C]ourts generally reserve the development of federal common-law rules for extraordinary circumstances . . . ." (footnotes omitted)); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 339 (1980) (arguing that federal common law is invalid "if it transgresses what the legislature intends by its implicit delegation of lawmaking power to the courts").

127. See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 416-20 (1993) (deferring to an agency's latest interpretation of ambiguous statutory language even though its interpretation apparently had changed over time); David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 704-05 (1997); cf. *United States Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 340-41 (1999) (rejecting an agency's revised interpretation of the Census Act as allowing statistical sampling, noting that the agency had not argued for *Chevron* deference in light of its long history of inter-

ces render an enabling statute's command anachronistic may lead to absurd results.<sup>128</sup> Thus, in order to combat obsolescence in antiquated enabling statutes that Congress has failed to revisit, agencies may enjoy some updating function.<sup>129</sup>

This freedom is not, however, unconstrained. Courts must still determine whether a revised interpretation is reasonable, and the negative checking function undertaken by judges when they review agency interpretations of an enabling statute does not mean that federal courts thereby have formulated a common law based on the statute that could just as easily be lodged in the agency.<sup>130</sup> Where the Supreme Court itself has previously interpreted an enabling statute, an agency cannot disregard that precedent.<sup>131</sup> For similar reasons, courts have not generally em-

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preting the statute to preclude sampling).

128. See Margaret Gilhooly, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267, 279-80 (1988); see also *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results."); cf. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in judgment) (criticizing the majority's "loose invocation of the 'absurd result' canon"). See generally Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994).

129. See *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739-41 (1996) (extending *Chevron* deference to the comptroller of the Currency's new regulation concerning the treatment of credit card late-payment fees under the National Bank Act of 1864); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 718 (1987) (noting the role of judicial deference to agency interpretations of the Glass-Steagall Act); cf. *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935) ("A statute valid when enacted may become invalid by change in the conditions to which it is applied."); Robinson, *supra* note 48, at 178, 197-99 (discussing the obsolescence of the Communications Act of 1934 and the obligation of Congress rather than the FCC to update it in response to technological advances).

130. See *MCI Telecomms.*, 512 U.S. at 234 ("[O]ur estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the federal Communications Act of 1934."); *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 400 (1974) (concluding that the Commission lacked the authority to rely on market prices even if the competitive structure of the natural gas industry had changed significantly in the decades since passage of the relevant enabling statute because this updating function properly belonged to Congress); cf. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 542-48 (1978) (rejecting a common law approach to dictating appropriate agency procedures).

131. See *Neal v. United States*, 516 U.S. 284, 295-96 (1996); cf. *Jahan Sharifi*,

braced agency nonacquiescence in prior judicial holdings.<sup>132</sup> As with judicial resistance to statutory preclusion of review, these limitations on the range of permissible agency interpretations of their organic acts suggest that the courts will continue jealously to guard the judicial prerogative. As a descriptive thesis, therefore, Professor Sunstein's common law metaphor seems overstated. It fares even less well as a normative claim.

In *Erie Railroad Co. v. Tompkins*,<sup>133</sup> the Supreme Court declared emphatically that "[t]here is no federal general common law,"<sup>134</sup> and it subsequently explained that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."<sup>135</sup> Nonetheless, the

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Comment, *Precedents Construing Statutes Administered by Federal Agencies After the Chevron Decision: What Gives?*, 60 U. CHI. L. REV. 223, 252 (1993) (urging a modification to this limitation on the application of *Chevron*). In addition, where the agency has previously interpreted one of its own regulations in a certain way, it cannot simply revise such an interpretation as conditions change but must instead undertake notice-and-comment rulemaking to promulgate an amendment. See *National Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235-40 (D.C. Cir. 1992).

132. See *Heckler v. Lopez*, 464 U.S. 879, 887 (1983) (Brennan, J., dissenting) (objecting that an agency "ha[d] not paid due respect to a coordinate branch of Government by expressly refusing to implement the binding decisions of the Ninth Circuit"); *Johnson v. United States R.R. Retirement Bd.*, 969 F.2d 1082, 1091 (D.C. Cir. 1992) ("Intracircuit nonacquiescence has been condemned by almost every circuit court of appeals that has confronted it."); see also Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1388-432 (1991) (arguing that intracircuit nonacquiescence violates separation of powers principles); Erin Margaret Masson, Note, *Social Security Administration Nonacquiescence on the Standard for Evaluating Pain*, 36 WM. & MARY L. REV. 1819, 1840-53 (1995) (criticizing this practice in one particular context); cf. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 718-53 (1989) (generally defending the practice).

133. 304 U.S. 64 (1938).

134. *Id.* at 78; see also *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-31 (1996) (applying *Erie*); *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (noting that "we are not in the free-wheeling days antedating *Erie*"). The precise basis for this conclusion remains obscure but has generated a wealth of academic commentary. See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1989); Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

135. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (citation omitted) (declining to recognize a right of contribution in private antitrust litigation); see also *Miree v. DeKalb County*, 433 U.S. 25, 28-33 (1977) (declining to gen-

Court has crafted a variety of limited qualifications to these seemingly sweeping prohibitions.<sup>136</sup> First, in addition to granting the federal courts jurisdiction over a category of cases, Congress may invite them, expressly or impliedly, to develop substantive rules of decision.<sup>137</sup> More frequently, federal common law operates interstitially as the courts interpret vague statutory language.<sup>138</sup> In a sense, as with *Chevron* applied to agency enabling acts, ambiguities in other types of statutes might represent implicit though limited delegations of lawmaking authority to the

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erate federal common law in a lawsuit between private parties absent some federal interest).

136. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1264-71 (1996) (describing the "enclaves" of federal common law, but arguing that only some of these are consistent with *Erie's* dual concerns over federalism and separation of powers); *id.* at 1375 ("Many of these [federal common law] rules can be justified in terms of the constitutional structure because they govern matters beyond the legislative competence of the states and implement various aspects of the constitutional scheme."); *cf.* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885-95, 906-12 (1986) (identifying enclaves of federal common law and arguing in favor of an even broader recognition of the power to generate it); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 807-09, 851 (1989) (favoring the development of federal common law on the basis of "carefully considered national substantive policy").

137. See *Texas Indus.*, 451 U.S. at 642 ("Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." (emphasis added)); *see also* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (ERISA); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (Sherman Act); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (Taft-Hartley Act).

138. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-17 (1981) (holding that federal common law became unnecessary when new legislation clarified a previously ambiguous question); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) ("[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts."); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law . . . ." (footnote omitted)); Field, *supra* note 136, at 888-89, 895, 927-30 (explaining that a federal court need only point to some federal enactment, such as the Constitution, a statute, or even an agency regulation, in order to justify generating federal common law).

federal courts,<sup>139</sup> but even this understanding represents a controversial claim.<sup>140</sup>

In addition, federal courts may generate common law in order to promote the interests of the federal government<sup>141</sup> or where

139. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 261 (1994) ("It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue . . . , Congress viewed the matter as an open issue to be resolved by the courts."); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988); *McNally v. United States*, 483 U.S. 350, 373 (1987) (Stevens, J., dissenting) ("The wide open spaces in statutes such as [the Sherman Act] are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication."); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982); Robert N. Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711, 715 (1982) ("[L]egislatures sometimes use intentionally vague or broad language in order to delegate to judges the authority to refine the meaning of a statute in the context of applying it to specific cases."); Field, *supra* note 136, at 935-42; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 32-46 (1985); Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23, 30-31 (1956).

140. See Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 785, 789, 792-99 (1989) (distinguishing between genuine judicial interpretation of statutes and the creation of federal common law); *id.* at 792 ("[T]here can be no such thing as 'federal common law,' at least to the extent it is used to provide a 'rule of decision' and to the extent the phrase 'common law' is construed as a category of lawmaking distinct from constitutional or statutory 'interpretation.'"). Of course, Congress has delegated explicit power to the federal courts to promulgate rules of procedure. See 28 U.S.C. § 2072 (1994); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999). Yet, even then, the Court gives its own handiwork only a limited presumption of validity when addressing a challenge to a rule. See Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1071-72 & 1072 n.153 (1993).

141. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512-13 (1988) (government contractor defense); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979) (federal lending programs); *Little Lake Misere*, 412 U.S. at 592-94 (land acquisition); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964) (uniform federal "act of state" doctrine); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (commercial paper). But see *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-89 (1994) (declining to generate federal common law based on an alleged federal interest); Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 915 (1996) ("Only in the last few years have the Court's opinions [such as *O'Melveny*] signalled a substantial decline in the common law making powers of the federal courts.").

necessary to resolve disputes that arise between states.<sup>142</sup> For a period of time in the 1960s and 1970s, moreover, federal courts seemed quite willing to make common law and recognize private rights of action for statutory infractions so long as Congress had not expressly foreclosed such a remedy.<sup>143</sup> That permissive era has now passed as the Supreme Court demands evidence that Congress actually intended to provide for private rights of action.<sup>144</sup>

The Court has offered various rationales for limiting the occasions for making federal common law, some of which may resonate in the administrative arena to undermine claims that agencies should act in a capacity somehow akin to common law courts. A separation of powers justification may underlie the Supreme Court's decision in *Erie* insofar as the assertion of the power to announce common law amounts to a usurpation of the

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142. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *Texas v. New Jersey*, 379 U.S. 674, 677 (1965); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). The admiralty and maritime jurisdiction of the federal courts has also provided the basis for the development of a body of common law. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

143. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979) (conceding "that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one," but declining to find one for the violation of a provision of the Securities Exchange Act); see also *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979) (implying a private right of action under Title IX of the Education Amendments of 1972 in part because, at the time of enactment, Congress must have been aware of the Supreme Court's liberal approach to this question); *id.* at 718 (Rehnquist, J., concurring) (conceding that past decisions implying a private right of action "gave Congress good reason to think that the federal judiciary would undertake this task"); *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-31 (1964) (implying a private right of action for the violation of a provision of the Securities Exchange Act).

144. See *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992); *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989) ("Congress undoubtedly was aware . . . that the Court had departed from its prior standard . . . and that such issues were being resolved by a straight-forward inquiry into whether Congress intended to provide a private cause of action."); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, . . . what must ultimately be determined is whether Congress intended to create the private remedy asserted . . . .").



legislative function by the federal courts, at least absent an express delegation of such a power from Congress.<sup>145</sup> Concerns about federalism as well as equal protection for similarly situated litigants provide other rationales against the creation of federal common law.<sup>146</sup> Although these concerns seemingly would have less force in the administrative context, the courts do promote federalism goals there when they prevent agencies from displacing state law absent specific statutory authority to preempt.<sup>147</sup>

Somewhat ironically, Professor Sunstein draws parallels between *Chevron* and *Erie* insofar as both decisions rejected the notion that "federal courts could neutrally declare 'the law'" and then "reallocate[d] legal authority from federal courts to other

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145. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-17 (1981); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938); see also George D. Brown, *Of Activism and Erie: The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 620-22, 646-49 (1984); Duffy, *supra* note 59, at 145 ("No mere coincidence explains the uncanny resemblance between the requirement that federal courts have statutory or constitutional authority for generating common law and the similar requirement that executive authorities must have such a basis for taking executive action.").

146. See *Erie*, 304 U.S. at 74-80; see also *Hanna v. Plumer*, 380 U.S. 460, 467-69 (1965) (emphasizing *Erie*'s equal protection strand); *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) (noting *Erie*'s federalism strand); Field, *supra* note 136, at 902-05, 931-34 (canvassing the possible constitutional and statutory rationales underlying the *Erie* decision).

147. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."). As the Court went on to emphasize: "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." *Id.* at 374-75; see also *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 744 (1996) (assuming without deciding that a court must independently determine "whether a statute is pre-emptive"); *California State Bd. of Optometry v. FTC*, 910 F.2d 976, 981-82 (D.C. Cir. 1990); Jack W. Campbell, IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. PITT. L. REV. 805, 844 (1998) ("Instead of asking whether anything in the statute indicates that Congress would disapprove of the agency's decision to preempt, the court should ask whether the statute evinces clear congressional intent to delegate preemptive power."); Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 353 (1994) (discussing the power of agencies to preempt state regulation). But cf. *City of New York v. FCC*, 486 U.S. 57, 66-70 (1988) (upholding an agency's assertion of jurisdiction over cable television systems and preemption of state law notwithstanding statutory ambiguity on this score).

institutions.”<sup>148</sup> It is important, however, to understand precisely to which other institutions the authority was reallocated—state courts and/or Congress. The former have a distinctly broader range of subject matter jurisdiction than do federal agencies, and viewing *Erie* instead as announcing a preference for legislative over judicial lawmaking would undermine his thesis. Like Professor Sunstein’s characterization of *Chevron* as “counter-*Marbury*,” this analogy to *Erie* serves more to obfuscate than illuminate,<sup>149</sup> though it does provide an appropriate transition into the closely related issues concerning the legitimate subject matter jurisdiction of federal courts and agencies.

Unlike state courts, federal courts lack general subject matter jurisdiction.<sup>150</sup> Federal courts have jurisdiction to determine

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148. Sunstein, *supra* note 51, at 1057 n.215; see also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (“[W]hile not abdicating their ultimate judicial responsibility to determine the law, . . . judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter’s lawmaking is not irrational.”).

149. His reference to *Erie* apparently also suggested a more general proposition, unrelated to the particular question of whether the courts or agencies should have the power to make federal common law, about the potential consequences of changed background understandings on doctrine: in *Erie*, about the very nature of the common law; here, about the prominence of agencies. Professor Lessig has described this “*Erie*-effect” model as follows:

The pattern has two steps: the first, the emergence of a kind of contestability about a practice within a legal institution (brought about by either a change in that practice, a change in the understandings about that practice, or a change in both); the second, a restructuring of that practice to avoid the rhetorical costs of that contestability. In *Erie*, the contestability was about the judicial role in the articulation of federal general common law. The response was to transfer the practice to another institution—the states. In other cases, the contestability will differ, and so will the response.

Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1795 (1997).

150. See *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (“[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.”); *Aldinger v. Howard*, 427 U.S. 1, 15 (1976); *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986) (“Federal courts are courts of limited jurisdiction by origin and design, implementing a basic principle of our system of limited government.”); Field, *supra* note 136, at 899; cf. Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695 (1999) (urging that state courts emulate, for entirely prudential reasons, the jurisdic-

whether they have subject matter jurisdiction over a particular case.<sup>151</sup> Nonetheless, federal courts recognize the importance of exercising self-restraint for reasons of both separation of powers and federalism, and, therefore, they narrowly construe congressional grants of jurisdiction, which are the equivalent of enabling statutes for the judiciary.<sup>152</sup> In the same year that it decided *Erie*, the Supreme Court explained: "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators."<sup>153</sup> Indeed, courts start with a presumption that they

tional caution evident in the federal courts).

151. See *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970) (noting "the truism that a court always has jurisdiction to determine its own jurisdiction"); *Shannon v. Shannon*, 965 F.2d 542, 545 (7th Cir. 1992) ("A primordial element of our jurisprudence is that federal courts have jurisdiction to determine whether they have subject matter jurisdiction.").

152. See *Finley v. United States*, 490 U.S. 545, 556 (1989); *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 584 (1982); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, C.J.); *Bingman v. Ward*, 100 F.3d 653, 658 (9th Cir. 1996); see also *Guisseppi v. Walling*, 144 F.2d 608, 620-22 (2d Cir. 1944) (drawing a parallel between delegations to agencies and courts); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 502 (1995) ("The Supreme Court has aggressively used federalism as the basis for limiting federal judicial power . . ."); cf. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 135 (1998) ("[F]ederal jurisdiction cases present unique concerns because they involve the judiciary interpreting its own power—often construing legislative and constitutional provisions that say nothing about the judiciary having any prerogative to define its own authority."). But cf. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 567 n.138 (1985) (noting occasionally expansive judicial interpretations of jurisdictional statutes).

153. *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); see also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (explaining that "federal courts are under an independent obligation to examine their own jurisdiction"); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) (emphasizing that subject matter jurisdiction should be "carefully guarded against expansion by judicial interpretation"). For overviews of the longstanding controversy about the constitutional authority of Congress to regulate the subject matter jurisdiction of the federal courts, see Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Colloquy, *Article III and the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Symposium, *Congress and the Courts: Ju-*

lack subject matter jurisdiction and place the burden of demonstrating otherwise on the party seeking to invoke the judicial power.<sup>154</sup>

Thus, the Supreme Court recently repudiated the assertion of "hypothetical jurisdiction," which lower courts had begun to use in order to reach the merits and dismiss with prejudice clearly unmeritorious lawsuits rather than trying to resolve more complicated questions of subject matter jurisdiction in such cases.<sup>155</sup> It also has rejected the theory of "protective jurisdiction," which some had suggested as a basis for asserting federal question jurisdiction—with or without a concomitant common law power—notwithstanding complete congressional silence on the matter.<sup>156</sup> For similar reasons, agencies should not be able to assert a general lawmaking competence whenever Congress fails to forbid it explicitly. Like the federal (as opposed to state) courts, agencies can exercise only whatever limited subject matter jurisdiction Congress has decided to grant them.<sup>157</sup>

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*risdiction and Remedies*, 86 GEO. L.J. 2445 (1998).

154. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citations omitted)); *Coury v. Prot.*, 85 F.3d 244, 248 (5th Cir. 1996) (describing the "presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court").

155. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("We decline to endorse [a hypothetical jurisdiction] approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."); see also Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 280-337 (1999) (applauding the Court's decision to repudiate this doctrine, but suggesting that it is not dead yet); *id.* at 241 ("[A]s a general matter, Article III courts tend to construe their conferred jurisdictional authority narrowly.").

156. See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("[N]or does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts."); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) ("It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress."); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 473-77 (1957) (Frankfurter, J., dissenting); see also Field, *supra* note 136, at 923-27 (discussing *Erie's* ambiguity with regard to the lawmaking powers of the federal courts).

157. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988

Apart from how they might affect institutional relationships, the competing metaphors suggest quite different decision-making styles. As Edward Levi explained half a century ago, courts approach statutory, constitutional, and common law questions with distinct types of reasoning.<sup>158</sup> For instance, common law decision making typically involves the accumulation of particular decisions followed by their application to new cases, while text-based decision making requires the application of general, often ambiguous, provisions to particular cases.<sup>159</sup> State courts of general subject matter jurisdiction may look to statutes for guidance in common law decision making outside of the boundaries covered by statute,<sup>160</sup> but federal courts and agencies do not enjoy the same preexisting general subject matter jurisdiction. Although they sometimes overlap, the common law metaphor for agency enabling acts inappropriately conflates these generally distinct styles of decision making.

In particular, today's broad rulemaking initiatives do not comport as well as adjudicatory decision making by agencies with the common law metaphor, which connotes an incremental and cautious lawmaking model. Perhaps, as Professor Sunstein suggests, the NLRB is appropriately viewed as comparable to a common law tribunal.<sup>161</sup> As the Supreme Court once noted:

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DUKE L.J. 257, 262 ("Unlike courts, commissions have jurisdiction over limited types of subject matter; they are called upon to decide complex or routine matters on a repetitive basis.").

158. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5-8, 27-28 (1949). For other works expressing varying views on these similarities and differences, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-80 (1982); MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 50-103 (1988); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 247-61, 286-302 (1990); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 167-90 (1996).

159. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 186-90 (1986).

160. See Robert E. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law*, 50 GEO. WASH. L. REV. 554, 556-57, 599 (1982); see also William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 823-26 (1985) (describing the Progressive Era's claim that courts could use statutes as sources from which to draw analogies and the subsequent repudiation of this view); Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 415-24 (1968). Resorting to legislative history or dynamic approaches to statutory interpretation does, however, bring a common law style to the enterprise.

161. See Sunstein, *supra* note 51, at 1061.

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of . . . national labor law would misconceive the nature of administrative decision-making. . . . The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.<sup>162</sup>

The FTC and the SEC may merit the same characterization,<sup>163</sup> but it hardly follows that other agencies that engage primarily in rulemaking, like the EPA or the FDA, deserve the same appellation.

In the past, the Supreme Court has drawn distinctions between these various types of regulatory bodies, sustaining restrictions on the President's power to remove officers of independent agencies precisely because of their quasi-judicial functions.<sup>164</sup>

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162. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975), *quoted with approval in NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); *see also NLRB v. Hearst Publications Inc.*, 322 U.S. 111, 130-31 (1944); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274-82 (1991) (explaining the NLRB's traditional preference for adjudication). These delegations also may call for fairly close involvement by Article III courts as happens when the NLRB must petition for the enforcement of one of its adjudicatory orders. *See* 29 U.S.C. § 160(e) (1994).

163. *See FTC v. Texaco, Inc.*, 393 U.S. 223, 225-26 (1968); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 367-68 (1965); *see also* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 401 (1981) ("The three decades from the New Deal to the mid-1960's were the halcyon days of incrementalist thought in administrative law."); *cf. SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) ("Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act."). *Chenery* recognized that there is "a very definite place for the case-by-case evolution of statutory standards," *id.* at 203, though still subject to judicial review, *see id.* at 207. *But cf. id.* at 212 (Jackson, J., dissenting) (criticizing the Court's "holding that absence of a legal basis is no ground on which courts may annul" an administrative order).

164. *See Wiener v. United States*, 357 U.S. 349, 353-56 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628-30 (1935), *cited with approval in Bowsher v. Synar*, 478 U.S. 714, 724-25, 739 (1986); *see also Mistretta v. United States*, 488 U.S. 361, 380-97 (1989) (upholding the constitutionality of an independent rulemaking agency); *Morrison v. Olson*, 487 U.S. 654, 670-97 (1988) (sustaining the constitutionality of an independent prosecutorial agency); Greene, *supra* note 71, at 156-77 (defending the constitutionality of independent agencies, without respect to the characterization of their functions, as diffusing concentrated power away from the President); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth*

Although one legitimately may quibble with these sorts of characterizations and associated judgments about the constitutionality of such arrangements,<sup>165</sup> these decisions usefully draw attention to the somewhat distinct decision-making styles, only some of which comport with the common law process. In short, Professor Sunstein's metaphor sweeps too broadly. Only when Congress establishes an adjudicatory agency somewhat insulated from the President's direct supervision can one legitimately argue that it has delegated a common law task, and even then the agency must be constrained to operate only in a clearly demarcated field.

### C. Chevron Deference and "Jurisdictional" Questions

To the extent that it more clearly lodges primary interpretive authority in agencies rather than the courts,<sup>166</sup> *Chevron* generally supports the common law metaphor for enabling statutes. When agencies lack rulemaking or similar authority to implement their enabling statute, however, courts have accorded them no special deference on questions of statutory interpretation.<sup>167</sup>

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*Branch*, 84 COLUM. L. REV. 573, 667-69 (1984) (concluding that agencies play a role in maintaining the balance between the President and Congress). *But see* Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 404-06 (1990) (questioning the constitutional status of independent agencies). *See generally* Symposium, *The Independence of Independent Agencies*, 1988 DUKE L.J. 215.

165. *See* *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) ("The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.").

166. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969-70 (1992) ("[R]ead for all it is worth, the decision would make administrative actors the primary interpreters of federal statutes and relegate courts to the largely inert role of enforcing unambiguous statutory terms."); Mark Seidenfeld, *A Syncompated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994) (claiming that a "strong reading of *Chevron* essentially transfers the primary responsibility for interpreting regulatory statutes from the courts to the agency authorized to administer the statute").

167. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *Merck & Co. v. Kessler*, 80 F.3d 1543, 1549-50 (Fed. Cir. 1996); *Atchison, T. & S.F. Ry. v. Peña*, 44 F.3d 437, 441-42 (7th Cir. 1994) (en banc), *aff'd sub nom.* *Brotherhood of Locomotive Eng'rs v. Atchison, T. & S.F. R.R.*, 516 U.S. 152 (1996); *cf.* *Sutton v.*

*Chevron* deference also does not extend to agency interpretations of ambiguous language in statutes other than those entrusted to that agency to administer. Thus, in the course of complying with a collateral statute such as the National Environmental Policy Act (NEPA),<sup>168</sup> an agency would receive no particular solicitude from a reviewing court.<sup>169</sup> The same happens when multiple agencies administer a statute,<sup>170</sup> even though a proponent of the common law metaphor might well cherish the experimentation brought to the interpretive task if various federal and state agencies received *Chevron* deference when construing statutes other than their own enabling acts.<sup>171</sup> Finally, courts do not ex-

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United Air Lines, Inc., 119 S. Ct. 2139, 2145-46 (1999) (declining to decide what deference should be given to the EEOC's regulations defining "physical impairment" where the ADA had not delegated authority to interpret the term "disability" to any agency); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) (extending deference to an agency with the power to make policy through case-by-case adjudication); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115-16 (1988) (deferring to an agency's reasonable interpretation of ambiguous statutory language because it enjoyed primary enforcement responsibility); *Trans Union Corp. v. FTC*, 81 F.3d 228, 230-31 (D.C. Cir. 1996) (suggesting that the lack of rulemaking power should not matter).

168. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4361 (1994)).

169. See *American Fed'n of Gov't Employees v. Federal Labor Relations Auth.*, 46 F.3d 73, 76 (D.C. Cir. 1995); *Air N. Am. v. United States Dep't of Transp.*, 937 F.2d 1427, 1436-37 (9th Cir. 1991); *Board of Governors of Univ. of N.C. v. United States Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990); *Parola v. Weinberger*, 848 F.2d 956, 959 (9th Cir. 1988) ("[W]here agencies interpret statutes outside their administrative ken, it is not clear that their interpretations are entitled to any particular deference, because they are not 'specialists' in the operation of those statutes."); *Alaska Ctr. for the Env't v. West*, 31 F. Supp. 2d 714, 721 (D. Alaska 1998) (holding that an interpretation of NEPA by the Army Corps of Engineers was not entitled to *Chevron* deference).

170. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151-58 (1991); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986); *Rapaport v. United States Dep't of Treasury*, 59 F.3d 212, 216-17 (D.C. Cir. 1995); *Benavides v. United States Bureau of Prisons*, 995 F.2d 269, 272 n.2 (D.C. Cir. 1993); see also *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 547 (7th Cir. 1989) ("Our difficulty is not any logical conundrum in deferring to both agencies when they disagree. It is instead that a dispute about the agencies' jurisdiction is a zero-sum game . . . ."); Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35, 73 (1991) ("In many instances where administrative authority is divided between two or more agencies, no single agency's authority is necessarily superior. Courts have been unable to apply the deference rule in these situations.").

171. Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic*



tend *Chevron* deference to prosecutorial agencies such as the Department of Justice (DOJ), in part because of their incentives to interpret criminal statutes expansively.<sup>172</sup>

The reason for declining to extend deference in these contexts turns on the failure of Congress to delegate implicit interpretive authority to that agency, one of the main premises underlying *Chevron*.<sup>173</sup> In *Chevron*, the Court had deferred to an agency's

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*Experimentalism*, 98 COLUM. L. REV. 267, 315 (1998) ("A central lesson of the limitations of New Deal institutions is that effective government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions . . . ."); Weiser, *supra* note 63, at 39-44 (challenging assumptions about the benefits of uniformity in the interpretation of federal statutes, and arguing that the extension of *Chevron* deference to state agencies involved in cooperative federalism schemes will promote beneficial experimentation).

172. See *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring); *United States v. Harden*, 37 F.3d 595, 599 n.2 (11th Cir. 1994); *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987); see also Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 62-63 (1996) (defending the refusal to extend *Chevron* deference to the interpretation of criminal statutes). But cf. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 488-89, 496-99 (1996) (advocating "Chevronizing" federal criminal law by extending deference to the Justice Department's interpretations, in part to counteract the risk of self-dealing and overreaching by individual U.S. attorneys when they pursue novel prosecutorial theories). Courts would not defer to agency interpretations of constitutional provisions even in those situations where agency personnel could provide valuable expertise, such as the likely consequences of competing interpretations of the Fourth Amendment on law enforcement activities or of the Fifth Amendment on the operation of welfare programs. Cf. David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 114-16, 123 (1993) (explaining that, although executive officials inevitably interpret constitutional provisions, they receive no deference from reviewing courts).

173. See *Martin*, 499 U.S. at 153 (explaining that "familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court"); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984); *Sea-Land Serv., Inc. v. United States Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 25, 32-35 (1990) (discussing *Chevron's* distinction between explicit and implicit delegations of interpretive authority); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 310 (1986) (noting *Chevron's* recognition that imprecise enabling legislation reflects "an implicit, but nonetheless valid, delegation of authority to the agency"). A different rationale is grounded on the separation of powers, premised on the supposedly greater though indirect political accountability of agencies than the courts. See *Pauly v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991);

interpretation of an ambiguous statutory provision "within the limits of that delegation,"<sup>174</sup> in part on the notion that such an ambiguous delegation invited interstitial lawmaking. As the Supreme Court explained in a more recent decision, "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"<sup>175</sup> Where an agency with rulemaking authority purports to implement its enabling act but arguably exceeds its jurisdiction, the question may be harder to resolve; the rationale against extending deference, however, would be the same. If the agency had not, in fact, been authorized to regulate a particular activity based on a reviewing court's best understanding of the meaning of the statute, then the agency's contrary view should deserve no special attention because, as found by that court, Congress never intended to delegate to that agency any such interpretive power.

Courts and commentators remain divided about the advisability and practicality of extending *Chevron* deference to questions of an agency's jurisdiction under its enabling statute.<sup>176</sup> Some have argued against any deference in these situations because of an agency's vested interest in expanding its jurisdiction.<sup>177</sup> Indeed,

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Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 823-24 (1990).

174. *Chevron*, 467 U.S. at 865.

175. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)); accord *SEC v. Sloan*, 436 U.S. 103, 119 (1978); see also *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) ("[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.").

176. See *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (explaining that "it is unclear whether deference is appropriate under such circumstances").

177. See, e.g., *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 386-87 (1988) (Brennan, J., dissenting); *Federal Maritime Comm'n v. New York Shipping Ass'n*, 854 F.2d 1338, 1363 & n.9 (D.C. Cir. 1988); Gellhorn & Verkuil, *supra* note 89, at 1006-18; Bernard Schwartz, *Some Crucial Issues in Administrative Law*, 28 TULSA L.J. 793, 806-08 (1993); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1564-65 & n.261 (1992); Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986, 1005-07 (1987); cf. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 595-96, 598 (1985) (arguing that the courts should "consciously restrict their independent judgments to the 'cognitive' core of interpretation where constitutional notions of legislative supremacy and conventional notions of institutional competence conspire most strongly against administrative hegemony" (footnote omitted)); Herz, *supra* note 83, at 216-21 (dis-

Professor Sunstein once made this claim quite persuasively.<sup>178</sup> Others have taken the position that no clear demarcation exists between jurisdictional and nonjurisdictional questions, which means that *Chevron* deference should apply across the board.<sup>179</sup> Professor Sunstein now espouses this position.<sup>180</sup>

The Supreme Court has provided confusing signals on this question. For instance, in one recent decision, the Court refused

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agreeing with the strong reading of *Chevron* even if jurisdictional issues are not readily distinguishable from other statutory questions).

178. See Sunstein, *supra* note 66, at 467-68; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2097-101 (1990) (arguing against deference on jurisdictional questions, but also recognizing the strength of contrary arguments); *id.* at 2099 ("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."). He apparently continues to recognize the potential strength of these arguments against deference in this context. See Sunstein, *supra* note 51, at 1063 ("[P]erhaps an agency does not have, under *Chevron*, the power to determine its own jurisdiction. As a matter of first principles, it is unclear whether *Chevron* deference should be due to an agency involved in a jurisdictional determination."); *id.* ("The likelihood of bias and self-dealing might well be taken to argue against deference to jurisdictional judgments.").

179. See, e.g., *Dole v. United Steelworkers*, 494 U.S. 26, 54-55 (1990) (White, J., dissenting); *Mississippi Power*, 487 U.S. at 381-82 (Scalia, J., concurring); *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 676-77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting) ("Indeed, any issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed. . . . Such pliable labels should not control the scope of review."); *Oklahoma Natural Gas Co. v. Federal Energy Regulatory Comm'n*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994); *Air Courier Conference of Am./Int'l Comm. v. United States Postal Serv.*, 959 F.2d 1213, 1223-25 (3d Cir. 1992); *Puerto Rico Maritime Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552-53 (3d Cir. 1988); Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 968-83 (1994) (arguing in favor of deference on jurisdictional questions).

180. See Sunstein, *supra* note 51, at 1064 ("*Chevron* is in part a recognition of the comparative advantages of agencies over courts, stemming from the agencies' greater factfinding power and electoral legitimacy, and those comparative advantages seem to apply to jurisdictional determinations as well."); *id.* at 1063-64 (agreeing that "[t]his is a thin and shifting line; most assertions of agency power can be deemed 'jurisdictional,'" adding that the FDA's determination that a category of products is a "drug" under its regulatory jurisdiction "is more in the nature of an application of a statutory term to a disputed case than a judgment that the FDA has authority over a whole class of cases that may or may not fit within a statutory term"). In an earlier article urging that courts could review agency inaction, he characterized just such an FDA determination as "jurisdictional." Sunstein, *supra* note 117, at 676-77.

to defer to an agency's expansive interpretation of its jurisdiction under its enabling act but failed to mention *Chevron*,<sup>181</sup> while in a few other recent decisions, the Court extended *Chevron* deference to agency interpretations narrowing the reach of their jurisdiction.<sup>182</sup> Such an asymmetry in approach would make sense if the Supreme Court was more concerned about the undue expansion as opposed to contraction of agency powers.<sup>183</sup>

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181. See *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 93-97 (1994).

[W]e do not think that the provisions discussed above, authorizing the FEC to litigate in the federal courts, are the sort of provisions that can be said to be within the province of the agency to interpret. [A prior Supreme Court decision,] relied upon by the FEC, dealt with the FEC's interpretation of a substantive provision of the FECA, not with the provisions authorizing independent litigation.

*Id.* at 97; see also *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 226-29 (1994) (declining to extend *Chevron* deference to the FCC's effort to exempt certain long-distance carriers under its authority to "modify" the tariff-filing provisions of its enabling act); *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992) (declining to extend *Chevron* deference to the attorney general's expansive interpretation of his jurisdiction to review changes in a local government under the Voting Rights Act because the statute is unambiguous); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 367-75 (1986) (rejecting the Board's broad interpretation of the jurisdictional term "banks"); *Transpacific Westbound Rate Agreement v. Federal Maritime Comm'n*, 951 F.2d 950, 953-54 (9th Cir. 1991) (holding that the term "common carrier" limits the Commission's jurisdiction). *But cf.* *California Dental Ass'n v. FTC*, 526 U.S. 756, 766 (1999) (sustaining, without needing to extend *Chevron* deference, the Commission's assertion of jurisdiction over certain nonprofit trade associations as representing the better interpretation of its enabling act); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841-47 (1986) (accepting, without needing to extend *Chevron* deference, an agency's assertion of adjudicatory jurisdiction over common law counterclaims, though adding that it would have deferred if the jurisdictional question had been ambiguous); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-39 (1985) (upholding an expansive interpretation of the scope of the Army Corps of Engineers' authority over "navigable waters" to include adjacent freshwater wetlands).

182. See *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 526 U.S. 449, 452-56 (1999) (deferring to the agency's position that it did *not* have "jurisdiction to review a fiscal intermediary's refusal to reopen a reimbursement determination"); *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (extending *Chevron* deference to the ICC's determination that it did *not* have jurisdiction to award reparations); *Massachusetts v. Morash*, 490 U.S. 107, 116-19 (1989); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232-33, 241 (1986). Courts rarely order agencies to exercise jurisdiction that they have declined. See *Office Employees Int'l Union v. NLRB*, 353 U.S. 313, 318-20 (1957); *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 674-76, 685 (1954).

183. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38

It also conforms to the implicit delegation rationale of *Chevron* insofar as one thinks it implausible that Congress would have given agencies free reign to expand their range of operations.<sup>184</sup>

It is not impossible to find a line of demarcation between jurisdictional and other statutory questions.<sup>185</sup> Courts do so all of the time in other contexts, undeterred by the genuine difficulties that they encounter in making appropriate characterizations.<sup>186</sup> For

ADMIN. L. REV. 363, 371, 379-81 (1986); Merrill, *supra* note 166, at 1024 (suggesting that the Court sometimes fails to invoke *Chevron* because of its sense that a critical function of judicial review is to police overreaching or other abuses of power by agencies).

184. See Gellhorn & Verkuil, *supra* note 89, at 1011 ("It is presumptively unlikely that Congress intended to allow an agency to decide for itself whether an area of regulation is within its regulatory jurisdiction where the enabling legislation is silent on that authority."); see also *id.* at 1018 ("By its terms, *Chevron* does not apply to extension of an agency's jurisdiction beyond its core powers. In making such extra-territorial judgments, the agency is no longer filling gaps but annexing new territory."); Note, *A Pragmatic Approach to Chevron*, 112 HARV. L. REV. 1723, 1725-27, 1731, 1735-39 (1999) (elaborating on the implicit delegation theory, and suggesting a refinement that distinguishes between different types of ambiguity in statutory language); *id.* at 1736 ("[V]ague terms are continuous . . . . Agencies can resolve such indeterminacies through line-drawing and the balancing of relevant factors and interests. Ambiguous terms, however, have discontinuous meanings and thus often require interpreters to choose between what are essentially two different laws."); *id.* at 1739 ("Dividing labor in this fashion not only comports with congressional intent, but also allocates distinct tasks to agencies and courts that fit their respective expertise and roles in government.").

185. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999) (sustaining the FCC's assertion of "jurisdiction" to issue regulations permitting local competition by long-distance carriers); *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (suggesting that "a pivotal distinction exists between statutory provisions that are jurisdictional in nature—that is, provisions going to the agency's power to regulate an activity or substance—and provisions that are managerial—that is, provisions pertaining to the mechanics or inner workings of the regulatory process" (citations omitted)). For example, courts must draw such lines in assessing claims that municipalities have acted in an ultra vires fashion. See 2A MCQUILLIN, *supra* note 28, § 10.18.10, at 366.

186. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) ("Jurisdiction," it has been observed, "is a word of many, too many meanings." (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996))); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996) (recognizing that, while the distinction "appears straightforward in theory, it is often much more difficult in practice"); Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 687-96, 721-24 (1981) (lamenting the unpredictability and incoherence of the rules of federal subject matter jurisdiction); Idleman, *supra* note 155, at 321-32 (cataloging some of the difficulties in characterizing issues as "jurisdictional"); see also *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) ("[W]e need not and do not

instance, lack of subject matter jurisdiction is one of the only preliminary objections not considered waived by a failure to assert it promptly after the commencement of an action.<sup>187</sup> Defects in subject matter jurisdiction cannot be cured by consent; indeed, a court may raise the issue *sua sponte* even for the first time on appeal,<sup>188</sup> which presupposes that judges can distinguish between jurisdictional and other objections raised during litigation.

In addition, valid jurisdictional objections should lead to a dismissal without prejudice, whereas the failure to state a claim requires a judgment on the merits.<sup>189</sup> Moreover, when asked to accord *res judicata* effect to a prior judgment or to enforce a foreign judgment, courts occasionally may inquire into the subject matter jurisdiction or competence of the rendering court even though they generally will not entertain other collateral attacks on the judgment.<sup>190</sup> Thus, in civil litigation, courts must

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address the thorny question of the FDA's jurisdiction."); *id.* at 833 n.4 (noting that the courts may review agency inaction "based solely on the belief that it lacks jurisdiction").

187. See FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 786 (2d Cir. 1994).

188. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Insurance Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908); see also *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999) (rejecting the suggestion that, at least in the removal context, a court must address objections to subject matter jurisdiction before personal jurisdiction and other threshold questions).

189. See *Bell v. Hood*, 327 U.S. 678, 682 (1946) (noting that "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction"); *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993) (same). Where a statute provides the basis for asserting a claim, the distinction may blur. See, e.g., *Nowak*, 81 F.3d at 1187-89; cf. *Steel*, 523 U.S. at 90-93 (treating the right to bring a citizen suit under the statute as nonjurisdictional); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994) ("The question of whether a federal statute creates a claim for relief is not jurisdictional").

190. See *Kalb v. Feuerstein*, 308 U.S. 433, 438-39, 444 (1940) (allowing collateral attack on state court foreclosure judgments against farmers entered without subject matter jurisdiction because federal bankruptcy petitions were then pending); see also *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 n.2 (2d Cir. 1996) (explaining that "a judgment rendered by a court assuming subject-matter jurisdiction and sustained on direct appeal is entitled to preclusive effect as long as the District Court did not 'plainly usurp jurisdiction' over the action"); RESTATEMENT (SECOND) OF

routinely draw distinctions between subject matter jurisdiction and other types of potentially dispositive issues.

Jurisdiction is a concept recognized in administrative law as well. The APA utilizes the term to describe limits on agency powers and grounds for judicial invalidation.<sup>191</sup> In the years before the Court decided *Chevron*, Congress seriously considered amending the APA to reinforce the judicial function in reviewing statutory questions, particularly on jurisdictional issues.<sup>192</sup> Courts occasionally also have to mediate "turf battles" between agencies with apparently overlapping jurisdiction.<sup>193</sup> The Su-

JUDGMENTS § 12 (1982) (allowing limited collateral attacks based on the absence of subject matter jurisdiction); cf. *Durfee v. Duke*, 375 U.S. 106, 111 (1963) ("[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) (same); Karen Nelson Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 560-63 (1981) (arguing that normal res judicata rules generally should bar collateral attacks based on objections to a rendering court's subject matter jurisdiction); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 222-23 (1977) (same).

191. See 5 U.S.C. § 558(b) (1994) ("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."); *id.* § 706(2)(C) (instructing reviewing courts to "hold unlawful and set aside agency action" found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

192. See H.R. 746, 97th Cong. § 203(c) (1982) (proposing to require that courts independently determine "whether the agency's action is within the scope of the agency's jurisdiction"); see also Ronald M. Levin, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355, 366-78 (criticizing this proposal for promoting indiscriminate deregulation and resting on a false dichotomy between jurisdictional and other statutory questions); *supra* note 90 (discussing a similar amendment to Florida's APA); cf. S. 343, 104th Cong. § 627(a) (1995) (proposing that "any rule that expands Federal power or jurisdiction beyond the level of regulatory action needed to satisfy statutory requirements shall be prohibited"); Easterbrook, *supra* note 100, at 535-36 ("The distinction between [statutory] application and interpretation is a line worth drawing—however difficult to maintain—because, . . . before courts begin the process of 'construction,' they ascertain that the legislature has conferred the power of interpretation."); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 62 (1985) (concluding, in evaluating another aspect of the Bumpers Amendment, that "the task of identifying questions of law during judicial review of administrative action need not be nearly as elusive or subjective as is widely believed").

193. See, e.g., *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-8 (1985) (*per curiam*); *American Pharm. Ass'n v. Weinberger*, 377 F. Supp. 824, 830-31 (D.D.C. 1974) (invalidating FDA restrictions on the distribution of methadone as a

preme Court once suggested characterizing as "jurisdictional" certain factual issues in the course of defining the appropriate intensity of judicial review of agencies' adjudicatory decisions.<sup>194</sup>

In applying exhaustion requirements, which are sometimes characterized as a recognition of an agency's "primary jurisdiction" to resolve a disputed matter,<sup>195</sup> courts have recognized a

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condition of drug approval because the DEA properly exercised this power), *aff'd*, 530 F.2d 1054 (D.C. Cir. 1976) (per curiam); *cf.* Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 93-97 (1994) (holding that only the DOJ and not the FEC could petition the Court for certiorari in this case); Exec. Order No. 12,146, § 1-401, 44 Fed. Reg. 42,657, 42,658 (1979) ("Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General."). The same issues arise when courts must allocate regulatory jurisdiction between federal and state agencies. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377-86 (1999); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-49 (1930); *see also supra* note 147 (discussing limits on regulatory preemption).

194. *See* *Crowell v. Benson*, 285 U.S. 22, 54 n.17 (1932) ("In relation to administrative agencies, the [jurisdictional] question in a given case is whether it falls within the scope of the authority validly conferred."). Although the Court in *Crowell* sustained the delegation of adjudicatory authority to a federal agency subject only to limited judicial review, it demanded *de novo* review of facts underlying the assertion of jurisdiction. *See id.* at 54-57. This notion has, however, been criticized. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 138 (4th ed. 1999) (noting that *Crowell's* jurisdictional-fact doctrine "has suffered much criticism, and doubts have often been expressed by judges and commentators alike as to its continued vitality" (footnotes omitted)); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 249, 259-60 (1985). *But cf.* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 989-91 (1988) (defending this distinction).

195. *See* *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (distinguishing between doctrines of primary jurisdiction and exhaustion); *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 304-08 (1973) (allowing agency to first exercise its probable "jurisdiction"); *id.* at 310 (Marshall, J., dissenting) ("An agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place."); *AMAN & MAYTON, supra* note 83, § 12.11; Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037 (1964). Primary jurisdiction is, in part, a form of judicial abstention to pending agency proceedings or expertise, though sometimes it represents a determination that the agency enjoys exclusive jurisdiction over a matter initially lodged in a court. *See* *Communications Workers v. Beck*, 487 U.S. 735, 742-44 (1988); *Weinberger v. Bentex Pharms., Inc.*, 412 U.S. 645, 653-54 (1973); *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496-98 (10th Cir. 1996). Similarly, federal courts may abstain when a state agency proceeding is pending. *See* *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 360-61 (1989); Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co. and*



futility exception in situations where they find that an agency lacks the jurisdiction to pursue a pending matter.<sup>196</sup> In addition, some lower courts have treated justiciability rules codified by the APA as jurisdictional limits on the availability of judicial review.<sup>197</sup> Although one may disagree with some of these different characterizations, and although they undoubtedly present difficulties in particular cases, courts do not hesitate to distinguish between jurisdictional and nonjurisdictional issues when necessary.

Professor Sunstein's apparent change of heart on this question is especially interesting. Initially, and speaking as a general matter, he argued quite forcefully against deferring to agency interpretations of the reach of their jurisdiction.<sup>198</sup> More recently,

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*Kindred Doctrines*, 42 DEPAUL L. REV. 859, 929-33 (1993) (drawing a parallel between *Burford* abstention and the doctrine of primary jurisdiction).

196. See *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992); *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989); *Mathews v. Eldridge*, 424 U.S. 319, 330-32 (1976); *Leedom v. Kyne*, 358 U.S. 184, 188-91 (1958); see also *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952) (suggesting that a genuine jurisdictional issue could be raised for the first time on judicial review of agency action). Where a party only challenges the factual basis for an agency's assertion of adjudicatory jurisdiction over it, however, courts have required exhaustion. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 47-51 (1938) (requiring that a company first challenge the claim that it operated in interstate commerce in an unfair labor practices proceeding before the NLRB).

197. For decisions characterizing the APA's finality requirement as jurisdictional, see *DRG Funding Corp. v. Secretary of Housing & Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996); *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990). In addition, courts have treated non-APA justiciability rules as jurisdictional because they have been derived from Article III. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96-97 (1998) (standing); *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (mootness); *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995) (exhaustion); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995) (ripeness). But cf. *American Train Dispatchers Ass'n v. ICC*, 949 F.2d 413, 414 (D.C. Cir. 1991) ("Of these three requirements for review [i.e., finality, ripeness, and exhaustion], only finality is jurisdictional . . ."). Courts sometimes treat prudential limitations on judicial review as a weaker form of jurisdictional objection. See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 669 n.13 (7th Cir. 1998). But cf. *Johnsrud v. Carter*, 620 F.2d 29, 32 (3d Cir. 1980) (holding that the application of the political question doctrine means that the plaintiff has failed to state a claim rather than that the court lacks subject matter jurisdiction).

198. See *supra* note 178; see also SUNSTEIN, *supra* note 36, at 143 (contending that "the notion that administrators may interpret statutes they administer is inconsistent with separation-of-powers principles"); *id.* ("Institutions limited by a legal restriction are not to be permitted to determine the nature of the limitation, or to

and in the course of defending the FDA's tobacco regulations, Professor Sunstein equivocated on this question, suggesting that courts should defer on these questions after all.<sup>199</sup> Undergirding his shift on this issue was not so much a concern about the inability to distinguish between jurisdictional and other questions, which he had previously conceded, but rather a more fundamental reconceptualization of the nature of enabling statutes. Whereas he originally analogized organic acts to the Constitution and emphasized the necessity for some independent judicial supervision on questions of agency jurisdiction, Professor Sunstein now generally appears to regard enabling statutes as broad delegations of power to agencies inviting them to generate common law principles, in effect displacing the role of the judiciary entirely.

The claim for the relative institutional competence of agencies as compared to the courts makes little sense with regard to questions concerning statutory authority. Just as some argue that courts can adapt federal statutes in the face of changing circumstances better than the legislature,<sup>200</sup> notwithstanding

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decide on its scope"); *id.* at 224 ("A cardinal principle of American constitutionalism is that those who are limited by law should not be empowered to decide on the meaning of the limitation: foxes should not guard henhouses. The *Chevron* rule disregards this principle by permitting agencies to interpret laws that limit and control their authority.").

199. See *supra* note 180. Ultimately, he concludes that agencies have become "common law courts in a distinctive sense," recognizing that "the updating and particularizing functions of administrative agencies must be disciplined by statutory boundaries . . . and, as a general rule, ambiguous terms should not be taken to cover cases far beyond the contemplation of the enacting legislature." Sunstein, *supra* note 51, at 1069. But who will best police those boundaries?

200. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21, 42-46, 56-61 (1988) (defending a "nautical" rather than "archeological" metaphor for the process of statutory interpretation undertaken by the federal courts, though recognizing the increasingly significant interpretative role played by administrative agencies); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1016 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 493-97 (1989) (arguing that courts should play an updating function when interpreting statutes in the face of changed circumstances or obsolescence); *id.* at 440 (explaining why the judiciary's independence and deliberative capacity makes it superior to the legislature); see also Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1108 (1998) (emphasizing "the courts' superior institutional ability to keep statutes abreast of changes in the underlying structure of administrative law");

their lack of expertise or electoral accountability, courts have important advantages over regulatory agencies when construing enabling acts. An agency's familiarity with a statute and expertise in its application may well influence a court, but the court must remain the final arbiter of statutory meaning. Federal judges are insulated from politics (usually considered a good thing when it comes to resolving legal disputes),<sup>201</sup> which helps counteract the self-interested behavior of agency officials.<sup>202</sup> Judges also can take a broader view than the "tunnel vision" that may afflict bureaucrats.<sup>203</sup> Jurisdictional disputes become even more pointed when several agencies vie for primary regulatory authority over a field.<sup>204</sup>

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*id.* at 1110 n.464 (adding that the courts are also to be preferred to agencies in many cases: "A system of indiscriminate deference to agency interpretations would sometimes permit agencies to evade the duties that would be imposed by the best readings of statutes").

201. See generally Symposium, *Judicial Independence and Accountability*, LAW & CONTEMP. PROBS., Summer 1998, at 1.

202. See Sunstein, *supra* note 66, at 467-68; Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 289 & n.97, 291-92 (1986); see also CALABRESI, *supra* note 158, at 56 ("To allow the truly dependent agency to act to update our laws would, in fact, be to cut through our checks and balances by allowing a majoritarian but unrestrained executive to enforce its views of the popular will . . ."); Gellhorn & Verkuil, *supra* note 89, at 1009 (explaining that "agencies have no comparative advantage in reading statutes and that agency self-interest may cloud its judgment"). Indeed, agency accountability, in the sense of responsiveness to White House pressure, may actually undercut the agency expertise rationale. See Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 250-51, 258-62, 270-71 (1993) (providing a detailed account of President Bush's success in countermanding an expert EPA interpretation of one of its enabling acts).

203. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 10-19 (1993) (describing the problem of tunnel vision); CALABRESI, *supra* note 158, at 46-51 (noting that agencies may prefer to ignore inconsistencies between their enabling statutes and other legislation); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 493-94 (1982).

204. See *supra* note 170 (noting *Chevron's* inapplicability when multiple agencies interpret a statute). In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), Justice Brennan argued:

Deference is particularly inappropriate where . . . 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.

The FDA's tobacco regulations, which Professor Sunstein has strained to defend even if it meant changing his position on the appropriateness of *Chevron* deference to jurisdictional questions, provide a good illustration of these points. As he concedes, President Clinton got behind the FDA's previously unthinkable initiative as a campaign gambit; the jurisdictional questions required an understanding of the interrelationships of multiple statutes enacted decades apart (only one of which was entrusted to the FDA); and no particular scientific or technical expertise helped inform its resolution.<sup>205</sup> Thus, Professor Sunstein's example undercuts his broader thesis. When it resolves the tobacco industry's challenge to the agency's novel assertion of regulatory jurisdiction later this Term, the Supreme Court will have an important opportunity to recalibrate the balance of power between the three branches of government.<sup>206</sup>

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*Id.* at 388 (Brennan, J., dissenting); see also 15 U.S.C. § 21(a) (1994) (dividing the power to enforce the Clayton Act among five different agencies); 49 U.S.C. § 1133 (1994) (granting the National Transportation Safety Board the power to review the decisions of certain agencies within the DOT); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 389-90 (1999) (treating the Customs Service as the administering agency whose regulations were entitled to *Chevron* deference even though other agencies provided input); *United States Dep't of the Navy, Military Sealift Command v. Federal Labor Relations Auth.*, 836 F.2d 1409, 1415 n.11 (3d Cir. 1988) ("If this case did not involve a conflict between two statutes whose interpretation is entrusted to different agencies, these decisions would be entitled to deference."); Diver, *supra* note 177, at 596 (arguing that "courts must independently resolve jurisdictional disputes between agencies"); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 349 (1987) (concluding that a broad delegation "is particularly dangerous when regulatory responsibilities are divided between two agencies"); David Barboza & Jeff Gerth, *Who's in Charge? Agency Infighting and Regulatory Uncertainty*, N.Y. TIMES, Dec. 15, 1998, at C14 (describing hostile reaction by the Federal Reserve Board, the SEC, and the Department of Treasury to an announcement by the chairperson of the Commodity Futures Trading Commission that the Commission might assert jurisdiction over the derivatives market); Stephen Barr, *Tasks Sliced Many Ways*, WASH. POST, Jan. 26, 1999, at A17 ("Congress over the years has given numerous agencies conflicting or fragmented responsibilities that have created much of the current bureaucratic confusion."); Andrea Foster, *OSHA Regs Disputed*, NAT'L L.J., May 3, 1999, at B1 (describing a possible conflict between recent OSHA proposals and the NLRB's interpretations of its enabling statute).

205. On the contrary, the enormous factual record amassed by the FDA may have helped mask a fairly straightforward legal question.

206. As this Article went to press, the Supreme Court affirmed, in a 5-4 decision, the lower court's judgment invalidating the tobacco product regulations because the

## CONCLUSION

Even if they provide a useful means of illustration, undue reliance on such metaphors may suggest overly facile answers to difficult legal questions.<sup>207</sup> In the case of agency enabling statutes, this Article suggests that some of the analogies recently proposed by scholars tend to conceal more than they reveal. Although provocative, Professor Sunstein's common law model for understanding the operation of regulatory statutes seems the least defensible of the three general metaphors reviewed. Analogizing enabling acts to constitutions has greater appeal but implicitly carries with it a particular interpretive methodology that may have less justification in the administrative context. If, instead, we conceive of organic statutes as charters, or as constitutions of specifically enumerated powers that can be embellished somewhat by a necessary and proper clause but not significantly expanded, then agencies will not as easily upset the balance of power among the three main branches of government. The rush to defend seemingly desirable regulatory initiatives should not blind us to the potentially serious institutional consequences of adopting a stance of excessive faith in administrative agencies.

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FDA lacked jurisdiction. At the end of the majority opinion, Justice O'Connor emphasized that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152, 2000 WL 289576, at \*23 (U.S. Mar. 21, 2000). In dissent, Justice Breyer unsuccessfully invoked the constitutional metaphor to defend the FDA's assertion of jurisdiction over tobacco products. *See id.* at \*23-\*24 (Breyer, J., dissenting).

207. Cf. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1034 (1994) (concluding that "both the statutory and contractual metaphors for treaties have failed to satisfy," and that, "without a sense of place for international agreements in the constitutional order and the hierarchy of law, treaty interpretation will remain a frustrating, inconclusive, and potentially dangerous exercise").