

CHEVRON DEFERENCE AND AGENCY SELF-INTEREST

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I served as a member of the legal teams that represented the plaintiffs in the *Bank of America NT & SA* and *Student Loan Finance Corp.* cases cited *infra* note 150, and it was my work on those cases that sparked my interest in (and doubtless influenced my opinions on) the subjects considered in this article. Nevertheless, the views expressed herein are mine alone and should not be attributed to my firm or any of its clients.

I am grateful for the inspiration and support of my wife, Eisha Tierney Armstrong, in the preparation of this article. I also wish to extend special thanks to Fred Jacob for offering insightful comments on the draft. Finally, I gained a great deal from discussing the subjects considered herein with my father, Dr. David G. Armstrong, who also reviewed an early draft of this article. It is my enduring regret that my father’s death in June 2003 prevented him from seeing the benefit of his contributions in the final version. Although fully aware of the inadequacy of the tribute, I wish to dedicate this article, with gratitude and love, to the memory of my dad.

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INTRODUCTION

When a party aggrieved by a federal government agency's interpretation of a statute or regulation seeks judicial review,¹ the reviewing court typically applies the *Chevron* doctrine² and defers to the agency's interpretation so long as it is reasonable and not contrary to the statutory or regulatory text.³ In some cases, however, courts have refused to defer

¹ The judicial review chapter of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2003), provides the ordinary means for obtaining judicial review of federal agency action in the absence of a more specific statutory review provision. See 5 U.S.C. § 703. Congress may by statute place agency action beyond judicial review, 5 U.S.C. § 701(a)(1), subject to arguable, if ill-defined, constitutional limitations on the legislative power to circumscribe judicial authority. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129-30 (2002). Nevertheless, there is ordinarily a presumption in favor of judicial review of agency action. See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424-34 (1995).

² See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³ *Chevron* establishes a familiar two-step framework for assessing an agency's interpretation of a statute. The court first asks at step one whether the statute itself unambiguously contradicts the agency's position, for if it does, the inquiry is over, and the agency's interpretation cannot stand. See *Chevron*, 467 U.S. at 842-43; *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("We only defer, however, to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous.") (citations omitted). At this initial stage of the analysis, the agency's position receives no deference. See, e.g., *Bank of America, N.A. v. FDIC*, 244 F.3d 1309, 1319 (11th Cir. 2001) ("[C]ourts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation"); *Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110, 1127 n.14 (D.C. Cir. 1996) (Henderson, J., dissenting) ("An agency assertion of ambiguity does nothing to establish that the statute is in fact ambiguous."); *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991)

to an agency's legal interpretation because the agency itself benefited in some direct way from the interpretation it adopted—in other words, because the agency's interpretation implicated the agency's self-interest.⁴ When called upon to review an agency's self-interested legal interpretation, some courts, apparently suspicious of possible agency self-aggrandizement, have hesitated to defer and have instead subjected the agency's interpretation of law to noticeably more thorough scrutiny than is typical in *Chevron* cases.

This article reviews several cases in which courts have considered whether to accord *Chevron* deference to self-interested statutory and regulatory interpretations by administrative agencies. Although many courts have stated or implied that self-interested agency action warrants little judicial deference, they have generally failed to enunciate clear and consistent rationales for such a result. Nor have the courts generally specified whether an agency's self-interested interpretation should be evaluated within the deferential confines of the *Chevron* doctrine or

(holding that agency receives no deference on the question whether a statute is ambiguous); *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984) (refusing to defer to "the agency's parsing of statutory language or its interpretation of legislative history" when determining Congress' legislative intent). *Cf. Arizona v. Thompson*, 281 F.3d 248, 253–54 (D.C. Cir. 2002) (holding that agency erred in concluding that statute was unambiguous; agency's resulting interpretation did not rest upon exercise of its interpretive discretion and thus warranted no deference from court); *American Petroleum Inst. v. EPA*, 906 F.2d 729, 740–42 (D.C. Cir. 1990) (per curiam) (holding same). If the statute does not unambiguously resolve the issue, the court proceeds to the second, more deferential, step of the analysis. At step two of *Chevron*, the agency's interpretation will be upheld so long as it is reasonable. *See Chevron*, 467 U.S. at 843–45.

Courts also review an agency's interpretation of its own rules deferentially. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also infra* note 12. Only actual rules (in the APA sense, see 5 U.S.C. § 551(4)) may warrant deference, however; informal agency pronouncements that are not the product of rulemaking or adjudicatory proceedings may not be entitled to *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218 (2001) (refusing to extend *Chevron* deference to a tariff classification ruling); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (refusing to extend *Chevron* deference to an opinion letter). The Court has also suggested, however, that the promulgation of an interpretation through less formal means than full notice-and-comment rulemaking does not itself provide a sufficient basis to withhold *Chevron* deference. *See Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002). *Barnhart* is in some respects a puzzling opinion, and its significance for the *Christensen/Mead* line of cases is as yet uncertain. *See Robert A. Anthony, Keeping Chevron Pure*, 5 GREEN BAG 2D 371 (2002); William S. Jordan III, *Updating Deference: The Court's 2001-2002 Term Sows More Confusion About Chevron*, 32 ENVTL. L. REP. 11459, 11463–67 (2002). Agency interpretations not promulgated with sufficient formality to warrant *Chevron* deference may still receive some degree of judicial respect under the *Skidmore* rule, as described *infra* note 10. *See, e.g., Washington Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003). For an argument that all agency rules should receive, at most, judicial weight under the *Skidmore* rule rather than full *Chevron* deference, see John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

⁴ *See* discussion *infra* Parts I.A.1, I.B.3.

under an alternative analytical framework. Indeed, one may find support for either alternative in the case law and scholarly commentary on the issue.

This article concludes that three principles rooted in notions of due process weigh against according *Chevron* deference to interpretations implicating the self-interest of the issuing agency. First, to withhold an independent judicial evaluation of an agency's self-interested interpretation effectively cedes to the agency the power to act as judge in its own cause, a result incompatible with a long line of authority demanding disinterested and impartial governmental decision-making.⁵

Second, self-interest on the part of the issuing agency provides a reason to doubt the genuineness of the explanation the agency offers to justify its interpretation. That is to say, the fact that the agency's interpretation implicates the agency's self-interest invites doubt about whether the enunciated rationale for the agency's action truly supplied the basis on which the agency took that action. The law, however, clearly obliges agencies to describe accurately their reasons for adopting any particular position—in part because an accurate statement of an agency's reasoning is necessary for effective judicial review, but more generally because the government ought to speak the truth. Withholding an independent judicial evaluation of an agency's interpretation where the agency's self-interest casts doubt upon its stated rationale for that interpretation is incompatible with principles of governmental openness and transparency.⁶

Third, withholding an independent judicial evaluation of an agency's self-interested interpretation of law risks judicial endorsement of unseemly conduct, insofar as it potentially allows the government to "change the rules of the game" to its own advantage in a way that non-governmental actors cannot. To permit an agency to use its interpretive authority to negate its own duty to perform under a contract,⁷ for example, or radically to expand its regulatory sphere in ways it had previously disavowed,⁸ has corrosive effects on public confidence in governmental fairness that reach far beyond the parties directly affected by the agency's action. For this reason, too, the courts should not accord

⁵ See discussion *infra* Part II.B.1.

⁶ See discussion *infra* Part II.B.2.

⁷ See *infra* Part I.A.1.c (discussing *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996)).

⁸ See *infra* Part I.B.3 (discussing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

Chevron deference to interpretations of law that implicate the self-interest of the issuing agency.⁹

Therefore, this article concludes that the courts have correctly refused to defer to agency legal interpretations that implicate the interpreting agency's self-interest. It also concludes that the preferable analytical approach would be to evaluate claims that an agency has acted in a self-aggrandizing manner entirely outside the scope of the *Chevron* doctrine. That is, a court confronted with an arguably self-interested agency interpretation of law should evaluate the agency's interpretation *de novo*, as the courts would do in a statutory or regulatory interpretation case not involving agency action. The agency's self-interested interpretation may still be considered to the extent that it is persuasive,¹⁰ but should not receive the deferential review provided under the *Chevron* framework.

⁹ See *infra* Part II.B.3.

¹⁰ This formulation—giving the agency's interpretation persuasive, but not binding, force—derives from the Supreme Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that an agency interpretation is entitled to be given weight proportionate to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

The Court has reinvigorated the *Skidmore* rule in recent cases, applying *Skidmore* even where an agency advanced a colorable claim of entitlement to full *Chevron* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). A substantial body of literature has already begun to grow around these recent decisions. For an interesting assessment that places *Christensen* and *Mead* in historical context, with particular reference to those decisions' assumptions about legislative intent when statutory text fails to clearly show whether the legislature meant to confer on an agency the authority to promulgate rules with the force of law, see Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). For an argument that post-*Mead* case law shows *Christensen* and *Mead* to herald a new era of administrative law, representing a break from prior practice as pronounced in its way as was *Chevron* itself, see Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289 (2002). Professor Zick similarly sees in *Christensen* and *Mead* a return to pre-*Chevron* notions of judicial supremacy in matters of statutory interpretation. Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 WASH. & LEE L. REV. 839 (2002). Professor Coverdale anticipates substantial consequences for review of informal agency pronouncements in the specific field of tax law. John F. Coverdale, *Chevron's Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39 (2003).

I. JUDICIAL REVIEW OF SELF-INTERESTED AGENCY INTERPRETATIONS OF LAW

In most cases, we would not expect an agency's interpretation of a statute it administers¹¹ or its own regulation¹² to implicate the agency's

¹¹ One precondition to *Chevron* deference to an agency's statutory interpretation is that the statute be one that the agency is charged with administering. Compare, e.g., *Overseas Educ. Ass'n v. FLRA*, 872 F.2d 1032, 1033 (D.C. Cir. 1988) (per curiam) (recognizing that agency's interpretation of its enabling statute warrants "considerable deference") (citation omitted), with *IRS v. FLRA*, 902 F.2d 998, 1000 (D.C. Cir. 1990) (stating that agency's interpretation of bargaining proposal is not entitled to the deference that would be accorded to interpretation of its own statute). Thus, for example, where a statute authorizes parallel action by multiple agencies, deference to any individual agency's views may be inappropriate. See *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986). Cf. *Navajo Nation v. Dep't of Health & Human Servs.*, 285 F.3d 864, 872-73 (9th Cir. 2002) (finding that *Chevron* does not forbid deference to one agency's interpretation of statute administered by multiple agencies), vacated by 325 F.3d 1133, 1136 n.4 (9th Cir. 2003) (en banc) (finding *Chevron* inapplicable in view of unambiguous statutory text). A court will also not assume an agency receives *Chevron* deference when it advances an interpretation of a statute that another agency administers. See *United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1226 (D.C. Cir. 1996). This is so, the Court has suggested, because one of the rationales for deference is that Congress intended the specific agency to whom it delegated administration of the statute, and none other, to "fill in the blanks" where the statute alone proved inconclusive on an issue. See *IRS v. FLRA*, 494 U.S. 922, 933 (1990) (reasoning that when Congress delegates administration of a statute to an agency, part of the authority the agency receives is "the power to give reasonable content to the statute's textual ambiguities"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"). See also Michael Herz, *Judicial Review*, in *DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 1998-1999*, at 45, 46 (Jeffrey S. Lubbers, ed., 2000) ("By explicitly tying deference to the rulemaking powers granted by statute, and not mere linguistic ambiguity, the Court [in *United States v. Hagggar Apparel Co.*, 526 U.S. 380 (1999)] took another step in identifying such powers as the basis for the *Chevron* doctrine."); Daniel Lovejoy, Note, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879 (2002). Obviously, for the *Chevron* analysis to apply, the agency must have actually adopted a position on the meaning of the statute. See *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000).

For similar reasons, deference is not justified where an agency construes the interaction of its own statute with a separate statute it does not administer. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002); *Johnson v. United States R.R. Ret. Bd.*, 969 F.2d 1082 (D.C. Cir. 1992). But cf. *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 833 (D.C. Cir. 2000) (holding that, although overall statutory scheme was not administered by agency, agency was entitled to deference on issues principally arising from a subset of the statutory scheme that it did administer); *Individual Reference Servs. Group v. FTC*, 145 F. Supp. 2d 6, 23-24 (D.D.C. 2001) (holding *Chevron* deference applicable to interpretation jointly adopted by multiple agencies responsible for administration of statute at issue).

Agency interpretations of the APA, a statute not itself "administered" by any agency, receive no deference under *Chevron*. See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997); see also *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (arguing against *Chevron* deference for a statute "not administered by any agency but by the courts").

¹² See *United States v. Hagggar Apparel Co.*, 526 U.S. 380 (1999); cf. *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997); *National Treasury Employees Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994) (holding that courts need not defer to FLRA's interpretation of regulations promulgated by another agency); see generally Russell L.

self-interest.¹³ Nevertheless, courts and commentators alike have recognized the possibility that an agency may adopt a statutory or regulatory interpretation that represents an exercise in agency aggrandizement—that is, an interpretation that advances the agency’s own interests *vis-à-vis* the interests of other agencies, other governmental institutions or private parties.¹⁴ Such circumstances raise substantial questions about whether it is appropriate to apply the principle of *Chevron* deference to a self-interested agency interpretation.¹⁵

It is probably impossible to anticipate all the ways in which an administrative agency’s interpretation of law may serve to advance that agency’s own interests. Nevertheless, courts and commentators have identified two principal categories of cases in which an agency’s own self-interest may weaken the justifications for deferential review under *Chevron*. The first, and more commonly discussed, scenario occurs when an agency adopts a legal interpretation that affects the scope of its own jurisdiction.¹⁶ Although it is not impossible that an agency may

Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment*, 22 MEMPHIS ST. U. L. REV. 411 (1992) (discussing impact of *Chevron* on judicial review of agencies’ regulatory interpretations); Coverdale, *supra* note 10, at 58–64 (reviewing different doctrines courts have applied in judicial review of agency regulatory interpretations).

¹³ See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2101 (1990) (hypothesizing that “an agency might interpret a statute in a way that predictably lines up with agency self-interest or bias even while exercising delegated authority” in “rare cases”).

¹⁴ This is what I perceive is customarily meant by labeling an agency’s action “self-interested.” Of course, once an agency becomes embroiled in litigation over its interpretation, one might say it has a “self-interest” in prevailing. Indeed, one might trace financial costs directly to the agency’s success or failure in litigation—as, for example, if an agency had to conduct a costly new rulemaking in the event that a court struck down its interpretation. Yet this stake in prevailing in litigation is shared by every litigant and is not encompassed within the meaning of “self-interest” as used herein. Cf. *Texas v. United States*, 866 F.2d 1546, 1554 (5th Cir. 1989) (recognizing that mere fact that the agency must defend its own actions on appeal is not probative of agency bias). Rather, an agency interpretation might be said to be self-interested if, as in the principal cases discussed herein, the effect of the interpretation *ab initio*, irrespective of any subsequent challenge, is to advance the agency’s own economic or political interests at the expense of some other identifiable party.

¹⁵ See Sunstein, *supra* note 13, at 2101 (suggesting that certain scenarios might present “the likelihood of agency bias and self-dealing” and that “[i]t would be peculiar . . . to defer to the agency’s views” in such circumstances).

¹⁶ Some authors have used the term “aggrandizement” solely to describe jurisdictional “power grabs” by the agency. See, e.g., Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 992–93 (1999) (arguing for “independent judicial determination of jurisdictional issues outside the agency’s primary mandate or subject matter, even if contrary to an agency’s plausible interpretation (and some readings of *Chevron*[])”); *id.* at 994 (suggesting that “the justifications for [*Chevron*] deference fade” “[w]hen agency self-interest is directly implicated,” but giving as its sole illustration of such a self-interested agency decision as “when it must decide whether an area previously unregulated by the agency should now come within its jurisdiction”). But see Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency’s*

have self-interested reasons for construing its own jurisdiction narrowly,¹⁷ agency self-interest is more commonly thought to be at stake when an agency interprets its own jurisdiction expansively,¹⁸ such as

Jurisdiction, 61 U. CHI. L. REV. 957 (1994) (arguing in favor of deference in such circumstances).

¹⁷ An agency might choose to give its jurisdictional statute a narrow reading to avoid involvement in a controversial area, as for example where any action by the agency would invite strong political opposition, or may simply choose to avoid intruding on what it perceives to be the primary jurisdictional sphere of another agency or overcommitting its resources or personnel. See Sunstein, *supra* note 13, at 2101 (hypothesizing that self-interest may influence agency in deciding “whether it is compelled to undertake action that it prefers not to undertake . . . perhaps because of the pressures imposed by well-organized private groups”); see also *infra* note 318. Elsewhere, Professor Sunstein argues that agencies should “not receive deference when they are denying their authority to deal with a large category of cases.” Sunstein, *supra* note 13, at 2100. *But cf.* *New York v. FERC*, 535 U.S. 1, 25–28 (2002) (deferring to federal agency’s refusal to assert regulatory jurisdiction in a particular case); *Maier v. EPA*, 114 F.3d 1032, 1040 (10th Cir. 1997) (recognizing that change in circumstances may require agency to revisit, and justify anew, its prior decision not to regulate).

¹⁸ See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2127 (2002) (“[A]gencies have certain biases (such as a bias in favor of expanding their power) that might distort their interpretation.”); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 567–68 (2002) (“The rational administrator will act to maintain his position and to expand the authority of his agency”). Most commentators, save perhaps at the conservative political fringe, do not believe that agencies are solely, or even primarily, motivated to aggrandize their own power. For an example of the view that aggrandizement drives most agency action, see James V. DeLong, *The Chevron Doctrine: Running Out of Gas*, 23 REG. 5, 6 (Summer 2000), who argues that, towards the goal of self-aggrandizement, agencies:

expand their jurisdiction; keep their procedures and decision processes opaque; avoid collecting, analyzing, and disseminating information on costs and benefits; make decisions as complex as possible; trumpet their benefits and hide their harms; and treat similarly situated parties differently, often by emphasizing multi-[f]actor tests in which everything is relevant and nothing determinative.

See also Timothy S. Bishop, et al., *Do Federal Environmental Laws Regulate Commerce?*, 17 NAT. RESOURCES & ENV’T 7, 7–8 (Summer 2002) (suggesting that “the commonplace aggrandizements of regulatory authority found in agency interpretations” may be vulnerable to constitutional attack under *United States v. Morrison*, 529 U.S. 598 (2000), *Jones v. United States*, 529 U.S. 848 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995)). On the other hand, for the view that self-interest may be subordinate to other factors in influencing the behavior of governmental actors, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 563 (2000) (suggesting that agency officials, unlike private actors, may more likely be motivated by “[i]deology and civic virtue, not just self-interest”). *But cf.* Freeman, *supra*, at 562 n.66 (recognizing that “legislators and bureaucrats” may share private actors’ proclivity for self-interested action).

Whatever one’s beliefs on the significance of self-interest as a motivator of agency behavior, the question whether *Chevron* deference should extend to self-interested agency interpretations of law does not appear to cleave along the usual political lines. Many judges of the U.S. Court of Appeals for the D.C. Circuit, including noteworthy conservatives such as former Judge Bork and Judge Sentelle, have questioned the application of deference to an agency’s adoption of a legal interpretation that implicates its financial self-interest. See *infra* notes 42, 133–136 and accompanying text. Liberal former Supreme Court Justices Brennan, Marshall, and Blackmun also suggested that an agency’s self-interest should disqualify it from entitlement to deference when construing the extent of its own jurisdiction. See *infra* note 190 and accompanying text. Conversely, Justice Scalia favors deference to agency jurisdictional interpretations

when it claims newfound regulatory authority over a subject matter not previously thought to lie within its jurisdiction.¹⁹

Second, an agency might adopt a legal interpretation that inures to the agency's own financial interest. Although less frequently discussed in the literature,²⁰ this scenario has arisen in a number of cases.²¹

The following sections discuss several cases in which courts have considered whether to apply *Chevron* deference to agency legal interpretations that implicated the self-interest of the agency. In those opinions that expressly mention the impact of the agency's interpretation on the agency's self-interest, such self-interest is usually cited as a basis for withholding full *Chevron* deference. Even in cases not expressly invoking the agency's self-interest as a reason for withholding deference, one can discern a degree of judicial skepticism toward self-aggrandizing agency interpretations beyond what might be expected based solely on examination of the statutory text at issue. In still other cases, however, the courts have purported to find nothing untoward about deferring to an administrative agency's self-interested interpretation of law. Examination of a few of these authorities will help illuminate the contours and contradictions of current doctrine.

A. INTERPRETATIONS THAT ADVANCE AN AGENCY'S FINANCIAL INTEREST

1. *Contractual Interests*

Government agencies may enter into contracts with private entities;²² when they do so, the contractual relationship is generally governed

(see *infra* notes 195-201 and accompanying text), although when confronted with a case in which the Court's conservative majority believed that a federal agency had construed its own jurisdiction too broadly, Justice Scalia voted with the majority to strike down the agency's interpretation. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The *Brown & Williamson* decision is discussed at greater length *infra* Part I.B.3.

¹⁹ See Gellhorn & Verkuil, *supra* note 16, at 992-93. It seems reasonable to assume that self-interested agency jurisdictional interpretations will more commonly tend to expand, rather than to restrict, the agency's reach, in light of the observable benefits, such as greater budgets, influence, and prestige, that may accompany an expansion of the agency's responsibility. The recent case law in the area does seem to involve agency efforts to expand, rather than to limit, the agency's authority. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

²⁰ See 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) (citing examples of agency aggrandizement involving both expanded assertions of jurisdiction and financial self-interest).

²¹ See *infra* notes 29-137 and accompanying text.

²² In some cases, whether a government agency or official has actually created an obligation binding upon the government is itself a disputed issue. In such cases, proof of a valid contract requires a showing of "mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government." *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001) (internal

by the same neutral principles of contract law that would apply if the government were not involved.²³ Disputes involving the interpretation of government contracts present a fertile area of litigation.²⁴ An agency may advance its financial self-interest by issuing legal interpretations that work to its advantage in its contractual relations with third parties. Decisions of the U.S. Court of Appeals for the District of Columbia Circuit illustrate some of the ways an agency may use its regulatory power to advantage its own contractual interests. First, an agency might claim

quotations and citation omitted). In general, however, in the cases discussed in this section, the existence of the government's contractual obligation is clear.

²³ See *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) citing *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 607 (2000); *United States v. Winstar Corp.*, 518 U.S. 839, 887 & n.32 (1996).

²⁴ To take the best-known example, more than one hundred breach-of-contract lawsuits have been filed against the United States in connection with the Supreme Court's *Winstar* decision. In *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the Supreme Court held that the passage in 1989 of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989), breached contracts the government had entered into with comparatively healthy financial institutions to induce them to take over failing federally insured savings and loan institutions, and that the acquiring institutions were entitled to pursue breach-of-contract actions against the government notwithstanding various defenses the government sought to raise. The government made many such contracts with different financial institutions nationwide in the years before FIRREA, because arranging for healthy institutions to take over weaker ones delayed or prevented the government from having to liquidate the weaker institutions (and thus to expend the government's limited insurance fund to pay off the liquidated institutions' depositors) and gave the government more time to react to the burgeoning crisis in the industry. See *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1382 (Fed. Cir. 2001). There have been more than 120 *Winstar*-related cases filed against the government. *S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 52 Fed. Cl. 531, 533 (2002).

The *Winstar*-related litigation does not, in most instances, implicate the principles discussed herein. In the *Winstar* cases, it was the FIRREA statute itself, not any agency's statutory or contractual interpretation, that effectively altered the terms of the private financial institutions' bargain with the government. See *Winstar*, 518 U.S. at 858. Furthermore, the cases reflect that the government has seldom, if ever, claimed entitlement to deference to its interpretation of a *Winstar*-like contract under the *Chevron* rule. This may be due, in part, to the fact that the government agency that originally made the contracts was abolished by FIRREA, see *Winstar*, 518 U.S. at 856; thus, there may be no agency left to make a colorable claim of entitlement to deference. Cf. *supra* notes 11–12 and authorities discussed (deference attaches only to agency's interpretation of its own, not other agencies', statutes and regulations). Rather, to the extent that matters of contractual and statutory interpretation are at issue in the *Winstar* cases, they generally concern arguments propounded in the first instance by the Department of Justice, to whom it has fallen to defend the government in the *Winstar* cases, but whose interpretations plainly command no particular deference from the courts. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (An agency's "post hoc rationalization[]" merits no deference); see also *infra* notes 404–408 and accompanying text (discussing requirement that agency enunciate rationale for its interpretation outside of litigation). But cf. *Women Involved in Farm Econ. v. United States Dep't of Agriculture*, 876 F.2d 994, 997–1000 (D.C. Cir. 1989) (relying on rationale propounded by agency counsel where agency's interpretation was not required to be accompanied by contemporaneous statement of basis and purpose and explanation offered by counsel carried "special indicia of reliability").

to be entitled to deference with respect to its interpretation of the terms of the contracts. Unlike judicial review of agency statutory interpretation, however, the courts have taken divergent positions on agencies' claims of entitlement to *Chevron* deference in the contractual context. Some courts have questioned whether self-interested agency interpretations of contracts to which the agency is a party should command judicial deference,²⁵ and have reasoned that deference properly extends only to agency interpretations of law, not to interpretations of the agencies' own contracts.²⁶ Where agency self-interest is not implicated, however, the courts have found that some measure of deference to agencies' contractual interpretations is appropriate in some circumstances.²⁷

Second, an agency may advance its contractual self-interest by pro-pounding interpretations of various statutory and regulatory provisions

²⁵ See *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir. 1987); see also *infra* note 42 and accompanying text.

²⁶ See *Mesa Air Group, Inc. v. Dep't of Transp.*, 87 F.3d 498 (D.C. Cir. 1996). This case is further discussed *infra* Part I.A.1.b.

²⁷ The reported cases on judicial deference to agencies' interpretations of contracts make it impossible to state a principle of general application. It does appear that, where agency self-interest is implicated, judicial deference to agencies' contractual interpretations is at its nadir. See *infra* notes 29–42 and accompanying text. Even where the agency itself is not an interested party to the agreement whose interpretation is at issue, however, there appears to be no single rule on the appropriateness of *Chevron* deference. One agency, the Federal Energy Regulatory Commission ("FERC"), appears consistently to receive judicial deference to its interpretations of the terms of contracts between parties who are subject to its regulatory jurisdiction. See, e.g., *Balt. Gas & Elec. Co. v. FERC*, 26 F.3d 1129, 1135 (D.C. Cir. 1994); *Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 173 (D.C. Cir. 1993); *Washington Urban League v. FERC*, 886 F.2d 1381, 1386 (3d Cir. 1989); see also *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1568 (D.C. Cir. 1987) ("In a number of cases, particularly those in which this court reviews actions taken by the Federal Energy Regulatory Commission, a rule of deference has been stated."). But cf. *Idaho Power Co. v. FERC*, 312 F.3d 454, 461 (D.C. Cir. 2002) (withholding deference from FERC interpretation that was "inconsistent with prior agency interpretations" and "nonsensical"); *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1570 n.8 (D.C. Cir. 1993) (suggesting, without deciding, that agency's self-interest would disentitle it to deference as to its interpretation of "a contract provision which purportedly relinquishes some of the agency's statutory authority"). This level of deference afforded to FERC may stem from an unusually specific statutory grant of authority to the agency over matters of contractual interpretation. See *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 441–42 (D.C. Cir. 1988) (noting that "Congress expressly delegated to FERC broad powers over ratemaking, including the power to analyze relevant contracts"). Some other agencies fare less well when seeking judicial deference to their contractual interpretations. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201–03 (1991) (refusing to defer to NLRB's interpretation of collective bargaining agreement); *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995) (reviewing Armed Services Board of Contract Appeals' interpretation of contract *de novo*); *Granite-Groves v. Wash. Metro. Area Transit Auth.*, 845 F.2d 330, 333–34 (D.C. Cir. 1988) (holding no deference owed to Army Corps of Engineers Board of Contract Appeals' contractual interpretation). But cf. *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996) (observing that, although court would review *de novo* the conclusion of General Services Administration Board of Contract Appeals as to ambiguity of language in government contract, "we afford [the agency's] conclusion 'careful consideration and great respect'" (citation omitted).

that govern its relations with contracting parties, rather than interpreting the terms of a contract directly. Again, the courts have often hesitated to accept agency interpretations that inured to the financial advantage of the agency, although more recent decisions cast doubt upon the existence of any settled rule of general application.²⁸ Examination of a few cases will illustrate these points.

a. *National Fuel Gas, Transohio, and the Rule Against Deference to an "Interested Party"*

In *National Fuel Gas Supply Corp. v. FERC*,²⁹ a seller of natural gas sought judicial review of FERC's denial of its request for a retroactive rate increase.³⁰ The rates the seller could charge were limited by agency regulations issued pursuant to the Natural Gas Policy Act of 1978 (NGPA).³¹ When courts in an earlier case struck down an agency interpretation of the NGPA on which the rate-limiting regulations rested, however, the seller sought retroactively to increase the rates it had charged based on the agency's former analysis.³² The agency denied the requested rate increase partly because the former rates had been established in a settlement agreement between the seller and its customers, which the agency had approved pursuant to its statutory authority.³³ The agency interpreted the settlement agreement as failing to reserve to the seller any subsequent right to petition to increase the rates established therein retroactively.³⁴ Thus, the court of appeals noted, whether the seller was entitled to the retroactive rate increase it sought "depend[ed] on the [agency's] reading of the settlement agreement."³⁵

Although the panel acknowledged differences of opinion among the courts of appeals,³⁶ it concluded that the case presented a *Chevron* issue and called for judicial deference to the agency's interpretation of the settlement agreement.³⁷ The court believed deference was required based on "*Chevron* principles alone,"³⁸ but also cited the agency's superior technical expertise and the express authority Congress had conferred on

²⁸ See *infra* notes 46–48 and accompanying text; *infra* Part I.A.1.c.

²⁹ 811 F.2d 1563 (D.C. Cir. 1987).

³⁰ *Id.* at 1564.

³¹ *Id.* at 1565 (citing 15 U.S.C. §§ 3301–3332 (1982)).

³² *Id.* (referring to the case of *Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530 (5th Cir. 1981), *aff'd in part and vacated in part sub nom.* *Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983)).

³³ *Id.* at 1566 (citing *Nat'l Fuel Gas Supply Corp.*, 15 F.E.R.C. (CCH) ¶ 61,058 (Apr. 21, 1981)).

³⁴ *Id.* at 1566.

³⁵ *Id.* at 1568.

³⁶ See *id.* (addressing authorities from the Fifth and Sixth Circuits generally rejecting deferential review and from the Fourth and Seventh Circuits generally supporting it).

³⁷ See *id.* at 1569–70.

³⁸ *Id.* at 1570.

the agency to approve settlement agreements as considerations supporting deferential review.³⁹

Crucially, however, the court expressly qualified its application of *Chevron* deference by noting that the settlement agreement did not implicate the agency's self-interest.⁴⁰ If it had, the court declared, *Chevron* deference would be "inappropriate."⁴¹ Judge Bork explained:

There may, of course, be circumstances in which deference would be inappropriate. . . . In addition, *if the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract.* In this case, however, the Commission itself was not a party to the contract, though the Commission's staff actively participated in negotiating the settlement agreement between NFGS and the other interested parties. . . . [T]he status of the Commission's staff as a "party" to the settlement negotiations does not make the Commission itself an interested party to the settlement contract.⁴²

As the court observed, the agency itself was not a party to the contract at issue in *National Fuel Gas*.⁴³ Thus, the court's statements about the inappropriateness of *Chevron* deference where an agency's self-interest is at stake might be dismissed as dicta; indeed, the case has more often been cited for the proposition that agencies' contractual interpretations warrant *Chevron* deference,⁴⁴ rather than for the panel's dictum recognizing an exception to that proposition in cases of agency self-interest.⁴⁵

The court of appeals expanded upon *National Fuel Gas* in *Transohio Savings Bank v. Director, Office of Thrift Supervision*.⁴⁶ In *Transohio*, the court made clear that *National Fuel Gas*'s principle denying deference to self-interested agency interpretations was not confined to an agency's attempt to escape from its own contracts, but extended to include statutory interpretations that redounded to the agency's financial or

³⁹ *Id.* at 1570–71.

⁴⁰ *Id.* at 1571.

⁴¹ *Id.*

⁴² *Id.* at 1571–72 (emphasis added; footnote omitted).

⁴³ *Id.*

⁴⁴ See *Muratore v. United States Office of Pers. Mgmt.*, 222 F.3d 918, 921–23 (11th Cir. 2000); *Reed v. R.R. Ret. Bd.*, 145 F.3d 373, 375 (D.C. Cir. 1998); *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1549–50 (D.C. Cir. 1993); *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 441–42 (D.C. Cir. 1988); see also *infra* notes 122–123 and accompanying text.

⁴⁵ See *infra* note 109.

⁴⁶ 967 F.2d 598 (D.C. Cir. 1992).

contractual advantage.⁴⁷ Responding to an agency's invocation of the *Chevron* principle, the court said:

This Court has expressed concern about deferring to an agency interpretation of an agreement to which the agency is a party, *see National Fuel Gas* . . . and we think the same concern applies to an agency interpretation of a statute that will affect agreements to which the agency is party. In *National Fuel Gas*, Judge Bork explained for the Court that "deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." . . . We see the same danger when, as here, an agency interprets a statute as abrogating existing agreements.⁴⁸

Because the court concluded that the applicable statutory text "clearly conveys Congress' intention,"⁴⁹ it found no occasion to evaluate the agency's interpretation under Step Two of *Chevron*.⁵⁰

b. *Mesa Air Group* and Agency Contractual Interpretations

The court of appeals suggested in *National Fuel Gas* that it would be improper for a court to defer to an agency's self-interested interpretation of its own contract.⁵¹ That precise scenario was presented in *Mesa Air Group, Inc. v. Department of Transportation*.⁵² Although it did not cite *National Fuel Gas*, the court of appeals in *Mesa Air Group* rejected the agency's claim of entitlement to deference to a contractual interpretation that redounded to the agency's financial benefit.⁵³

Mesa Air Group involved the payment of federal subsidies to induce private air carriers to serve smaller and more remote communities that might have gone unserved if market forces alone had determined the car-

⁴⁷ *Id.* at 614.

⁴⁸ *Id.* (citations omitted).

⁴⁹ *Id.*

⁵⁰ The *Transohio* court concluded that the enactment of the FIRREA statute in 1989 did not breach contracts the government had previously entered into regarding the regulatory accounting treatment of supervisory goodwill by federally insured thrifts. *See id.* at 620–24 (holding that such contracts, even if made, were *ultra vires* and unenforceable). In this respect, the *Transohio* decision has been abrogated by the Supreme Court's contrary ruling in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). *See also supra* note 24. Nothing in *Winstar*, however, calls into question the *Transohio* court's skepticism about the propriety of judicial deference to agencies' financially self-interested statutory or regulatory interpretations.

⁵¹ *See supra* note 42 and accompanying text.

⁵² 87 F.3d 498 (D.C. Cir. 1996). The case was considered in some detail in Charles V. Webb, *Determining an Air Carrier's Right to Cancel Performance Under the Essential Air Service Program*, 65 GEO. WASH. L. REV. 928 (1997).

⁵³ *Mesa Air Group*, 87 F.3d at 503.

riers' actions.⁵⁴ The governing statute directed the agency to "pay compensation . . . at times and in the way the Secretary decides is appropriate" and authorized the agency to promulgate "guidelines governing the rate of compensation payable[.]"⁵⁵ The statute authorized the agency to enter into "agreements . . . to pay compensation" to private carriers, and specified that such agreements represented "a contractual obligation of the Government to pay the Government's share of the compensation."⁵⁶ The statute gave the agency authority to terminate the subsidy payments when they were found to be no longer necessary to assure that a particular market received "basic essential air service."⁵⁷ Thus, private air carriers could terminate their agreements with the agency upon ninety days' notice, subject to the agency's right to require the carrier to continue providing service until the agency found a replacement carrier.⁵⁸

The dispute in *Mesa Air Group* arose when Congress appropriated insufficient funds to enable the agency to meet all its contractual subsidy commitments.⁵⁹ Statements in the legislative history reflected Congress's apparent desire that the shortfall in appropriations be divided proportionately among all carriers, rather than resulting in cancellation of air service to any particular area.⁶⁰

The agency seized upon this language to issue an order providing for steep across-the-board reductions in subsidy payments to carriers.⁶¹ The carriers responded by terminating service to some of the communities affected by the subsidy reductions.⁶² The carriers relied on a clause in the agency's orders announcing the reduced subsidies that allowed them to "terminate or reduce the service provided" if the agency "terminates payments provided for under this order because of insufficient appropriated funds[.]"⁶³

The agency's response forbade the carriers to terminate service. The agency first found the quoted provision of the order to be inapplicable on the grounds "that it had merely 'reduced' the subsidy payments, not 'terminated' them."⁶⁴ It then recharacterized the carriers' "termination" notices as invoking their right to terminate service upon ninety

⁵⁴ See *id.* at 500.

⁵⁵ *Id.* (quoting 49 U.S.C. §§ 41733(d), 41737(a)).

⁵⁶ *Id.* (quoting 49 U.S.C. § 41737(d)).

⁵⁷ *Id.* (quoting 49 U.S.C. § 41733(d)).

⁵⁸ See *id.* (citing 49 U.S.C. § 41734).

⁵⁹ See *id.* at 500–01.

⁶⁰ See *id.* at 501 (quoting H.R. Rep. No. 286, 104th Cong., 1st Sess. 20 (1995)).

⁶¹ *Id.* at 501–02. For the carriers involved in the litigation, some of the subsidy cuts approached 50 percent. See *id.* at 502.

⁶² *Id.* at 502.

⁶³ *Id.* (citations omitted).

⁶⁴ *Id.* at 502.

days' notice and directed the carriers to continue serving the affected markets until the agency could secure replacement service.⁶⁵

The carriers sought judicial review. The court of appeals agreed with the carriers that *Chevron* was not implicated because an agency's performance of its contract, rather than its interpretation of a statute, was at issue:

The terms of the statute indisputably establish Congress' intent to make the subsidy agreements contracts, not administrative regulations. . . . They are therefore subject to interpretation under the neutral principles of contract law, not the deferential principles of regulatory interpretation.⁶⁶

On the merits, the court found that the agency had improperly attempted to alter unilaterally the terms of its bargain with the plaintiffs, and vacated the agency's interpretation.⁶⁷

Mesa Air Group's analysis, which refused to accord *Chevron* deference to the legal interpretation of an agency with a financial stake in that interpretation, appears entirely consistent with the approach suggested in *National Fuel Gas* and *Transohio*.⁶⁸ The above-quoted language from the *Mesa Air Group* opinion, however, is not entirely satisfactory. Read literally, *Mesa Air Group* seems to state that because the agency is interpreting a contract, its interpretation *ipso facto* warrants no judicial deference.⁶⁹ Yet such a rule would hardly be consistent with the many cases in which the same court expressly accorded *Chevron* deference to agen-

⁶⁵ *Id.* at 503; see also *supra* note 58 and accompanying text.

⁶⁶ *Mesa Air Group*, 87 F.3d at 503. The panel was unanimous that deferential review of an agency's interpretation of its contract was unwarranted, *id.*, although one judge accepted the agency's arguments that it had not "terminated" the payments (see *supra* note 64 and accompanying text) and, therefore, dissented from the court's holding in favor of the carriers. *Id.* at 506-08 (Wald, J., dissenting).

⁶⁷ *Id.* at 503-06.

⁶⁸ See *supra* notes 42, 48 and accompanying text.

⁶⁹ See *supra* note 66 and accompanying text. Commentators reviewing *Mesa Air Group* appear to have taken the opinion at face value, citing the case for the general proposition that deference cannot attach to agencies' contractual interpretations. See Webb, *supra* note 52, at 931; George S. Petkoff, *Recent Developments in Aviation Law*, 63 J. AIR L. & COM. 67, 139-40 (1997). This view is not without support in the case law. Indeed, then-Chief Judge Breyer appeared to expressly embrace the view that *Chevron* deference could never attach to any agency contractual interpretation in *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601 (1st Cir. 1991). See, e.g., *id.* at 605 ("*Chevron* does not dictate a reviewing court's attitude towards the language of a contract."); see also *Wetlands Water Dist. v. Patterson*, 864 F. Supp. 1536, 1542 (E.D. Cal. 1994) ("Although traditionally, an implementing agency is granted deference in its interpretation of statutes and regulations, where the rights at issue arise under contract the rule of agency deference is inapplicable.") (citing *Clay Tower Apts. v. Kemp*, 978 F.2d 478, 480 (9th Cir. 1992)).

cies' contractual interpretations.⁷⁰ The court should instead have emphasized that it was not merely the agency's contractual interpretation, but its *self-interested* contractual interpretation, that was at issue. *Mesa Air Group* converted the *National Fuel Gas* dictum about the inappropriateness of deferring to the legal interpretation of an "interested party"⁷¹ into a holding. It did so, however, without expressly drawing the crucial distinction, expressly stated in *National Fuel Gas*, between contractual interpretations that implicate an agency's self-interest and those that do not. Properly read, *Mesa Air Group* stands for the proposition that self-interested agency contractual interpretations deserve no *Chevron* deference,⁷² no matter whether deference may be accorded when an agency interprets a contract to which it is not a party.⁷³

c. *Indiana Michigan* and Financially Self-Interested Agency
Statutory Interpretations

An agency's statutory interpretation that had the incidental effect of advancing the agency's financial self-interest was at stake in *Indiana*

⁷⁰ See *Texaco Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998) (declaring, without citing *Mesa Air Group*, that the court would "defer to the agency's reasonable interpretation both of its own regulations and of contracts that are subject to its rules") (emphasis added); *Reed v. R.R. Ret. Bd.*, 145 F.3d 373, 375 (D.C. Cir. 1998) ("[W]e apply a *Chevron* analysis when reviewing an agency's interpretation of a contract.") (footnote omitted); see also *supra* notes 27, 44 and authorities cited.

⁷¹ See *supra* note 42 and accompanying text.

⁷² See *Indep. Petroleum Ass'n v. Armstrong*, 91 F. Supp. 2d 117, 124 (D.D.C. 2000) (citing *Mesa Air Group* as one of the cases standing for the proposition that "no deference is due an agency's interpretation of contracts in which it has a proprietary interest"), *rev'd in part sub nom.* *Indep. Petroleum Ass'n v. DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002). This case is further discussed *infra* Part I.A.1.d.

⁷³ This seems to me to be the correct rule, which is implicit in *Mesa Air Group* and is stated expressly in *National Fuel Gas* and *Transohio* (*supra* notes 42, 48 and accompanying text). But I do not wish to imply that it has been clearly recognized or adopted by the courts in general. See, e.g., *S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1357–58 (Fed. Cir. 2000) (reasoning that agency's interpretation of a regulation incorporated by reference into a contract qualified for deference where, "despite the fact that the government is a party to these contracts, it had no economic stake in the excess revenue that was to be distributed" and "the statutory and regulatory framework supports the application of judicial deference"); *Ambur v. United States*, 206 F. Supp. 2d 1021, 1029 (D.S.D. 2002) (recognizing "a split of authority whether the courts should give *Chevron* deference to an agency's interpretation of a contract in which the agency has a financial interest"); *N.Y. Inst. of Dietetics, Inc. v. Riley*, 966 F. Supp. 1300, 1314 (S.D.N.Y. 1997) (suggesting in dicta that agency's interpretation of contracts to which it was a party would be entitled to deference where record contained no evidence that agency "engaged in a self-serving interpretation of those agreements"). Particularly when one also considers state administrative law decisions as to which *Chevron* and its progeny remain merely persuasive rather than binding authorities, judicial views appear more muddled. Compare *Weslaco Fed'n of Teachers v. Texas Educ. Agency*, 27 S.W.3d 258, 263–64 (Tex. Ct. App. 2000) (refusing to defer to agency's interpretation of a contract to which it was a party) with *Wis. End-User Gas Ass'n v. Pub. Serv. Comm'n*, 581 N.W.2d 556, 558–59 (Wis. Ct. App. 1998) (refusing to defer to agency's interpretation of a contract to which it was not a party).

Michigan Power Co. v. Department of Energy.⁷⁴ In that case, the agency essentially interpreted the statute to excuse its own failure to perform under a contract through which it had collected millions of dollars in statutorily imposed fees.⁷⁵ The statute at issue was the Nuclear Waste Policy Act of 1982 (NWP) which, in relevant part, authorized the Secretary of Energy to strike the following bargain with owners and generators of certain radioactive wastes: the waste generators would pay fees to the Secretary according to a statutory schedule, and in return, “the Secretary, ‘beginning not later than January 31, 1998, [would] dispose of the . . . waste[.]’”⁷⁶ The statute provided that the agency would construct appropriate repositories for the interim storage and permanent disposal of the waste and required the private utility owners or waste generators to bear primary responsibility for storing the waste until the agency accepted it.⁷⁷

Acting pursuant to the authority the NWP conferred, the agency entered into contracts with private utility operators. The agency’s standard contract specified that the agency agreed to provide waste disposal services that “‘shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until . . . all [the waste subject to the contracts] has been disposed of.’”⁷⁸ The contracts thus added a phrase—“after commencement of facility operations”⁷⁹—not found in the statutory provision requiring the agency to “dispose of” the waste “‘beginning not later than January 31, 1998[.]’”⁸⁰ This required start date turned out to be crucial to the parties’ dispute, because the agency eventually acknowledged that it would not have any operating facilities ready to accept radioactive waste for storage by January 31, 1998.⁸¹

In 1995, the agency issued a final interpretation of the statute.⁸² The agency conceded that it would be unable to begin accepting waste for disposal or interim storage by the date specified in the statute, but denied that the statute required it to do so “in the absence of a repository

⁷⁴ 88 F.3d 1272 (D.C. Cir. 1996).

⁷⁵ *See id.* at 1274.

⁷⁶ *Id.* at 1273 (quoting 42 U.S.C. § 10222(a)(5)(B) (1994)).

⁷⁷ *Id.*

⁷⁸ *Id.* (quoting 10 C.F.R. § 961.11, Art. II (1996)).

⁷⁹ *Id.* (quoting 10 C.F.R. § 961.11, Art. II (1996)).

⁸⁰ *Id.* (quoting 42 U.S.C. § 10222(a)(5)(B) (1994)).

⁸¹ *Id.* at 1274; *see also* N. States Power Co. v. Dep’t of Energy, 128 F.3d 754, 757 (D.C. Cir. 1997) (noting agency’s “announc[ement] that it ‘will be unable to begin acceptance of spent nuclear fuel for disposal in a repository or interim storage facility by January 31, 1998’” and that the agency estimates that the contemplated “facility will not be operational until the year 2010”).

⁸² *Indiana Michigan*, 88 F.3d at 1274 (citing *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (May 3, 1995)).

or interim storage facility constructed under the NWPA.”⁸³ In response, the affected utilities sought judicial review.

The reviewing court recognized that the agency’s interpretation of the statute involved a *Chevron* problem,⁸⁴ but found it unnecessary to look beyond Step One.⁸⁵ The court first rejected the agency’s attempt to interpret the term “dispose,” which the statute did not define, in parallel to the term “disposal,” which the statute defined with reference to “the emplacement in a repository[.]”⁸⁶ The court of appeals remained unpersuaded, declaring “[t]he phrase ‘dispose of’” to be “a common term” that Congress intended to be used in its ordinary dictionary sense.⁸⁷ The court also found even the term “disposal” had not been used consistently in the statute in the restricted sense the agency suggested, and then declared that limiting the term to mean “emplacement in a repository” could not be squared with the court’s obligation to “interpret the section in light of the whole statutory scheme.”⁸⁸

The court next rejected a technical argument the agency advanced, pointing out that a separate provision of the statute contemplated a transfer of legal title to the agency of any radioactive waste accepted for disposal.⁸⁹ According to the agency, this transfer-of-title provision meant that Congress intended the agency to “take title to the waste before proceeding with disposal.”⁹⁰ This was a stretch at best, because the cited transfer-of-title provision on its face appeared to have nothing to do with the unambiguous statutory mandate directing the agency to begin disposing of waste by January 31, 1998. The court of appeals spared little

⁸³ *Id.* at 1274 (citing *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (May 3, 1995)). The agency separately contended that, even if its statutory interpretation was incorrect, the terms of its contracts included a Delays Clause that provided an administrative remedy for its failure to perform. *Id.* This contractual issue need not be considered further, as the court of appeals rested its decision solely on statutory grounds. *See id.* at 1277.

⁸⁴ *Id.* at 1274.

⁸⁵ *See id.* at 1277.

⁸⁶ *Id.* at 1275 (quoting 42 U.S.C. § 10101(9)).

⁸⁷ *Id.* The court also noted that the agency itself previously had rejected the view that “dispose” should be defined with reference to the term “disposal” in the statute. *See id.* In other contexts, though, the court has found that similar undefined statutory terms, akin to “dispose,” *must* be interpreted with reference to statutorily defined terms like “disposal.” *See Student Loan Mktg. Ass’n v. Riley*, 104 F.3d 397, 407-08 (D.C. Cir. 1997) (holding that agency erred in interpreting statutory term “holds” without reference to the statutory definition of the term “holder” and distinguishing *Indiana Michigan*). The point here is not to defend the strained statutory interpretation the agency advanced in *Indiana Michigan*, but only to observe that the definitional problem was probably not what really troubled the court in that case.

⁸⁸ *Indiana Michigan*, 88 F.3d at 1275–76 (citing *Bailey v. United States*, 516 U.S. 137, 145 (1995)).

⁸⁹ *Id.* at 1276 (citing 42 U.S.C. § 10143).

⁹⁰ *Id.*

effort to knock down the argument.⁹¹ It found that the disposal and transfer-of-title provisions established “two independent requirements,” each keyed to entirely different triggering events.⁹² It also found that the terms of the agency’s own contracts and the conduct of other federal agencies such as the Nuclear Regulatory Commission both seemed to distinguish between ownership of radioactive waste materials and a duty to dispose of that waste, such that the former did not necessarily imply the latter.⁹³ Thus, the court found that the transfer-of-title provision did not imply a substantive limitation on the agency’s duty to commence disposal of the waste.⁹⁴

The court reserved its strongest language, however, for condemning the agency’s interpretation as an exercise in self-aggrandizement. Under the agency’s view, the court explained, it had the right to keep the fees the utilities had been required to pay, without providing the services those fees were meant to fund.⁹⁵ The court’s condemnation of this arrangement was stern and unequivocal:

The Department’s treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase “not later than January 31, 1998,” but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. . . . Under the plain language of the statute, the utilities anticipated paying fees “in return for [which] the Secretary” had a commensurate duty. She was to begin disposing of the high-level radioactive waste . . . by a day certain. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government’s position to a Yiddish saying: “Here is air; give me money,” and asked counsel for the Department to distinguish the Secretary’s position. He found no way to do so, nor have we.⁹⁶

⁹¹ *Id.*

⁹² *Id.* (“DOE’s duty . . . to take title to the [waste] is linked to the commencement of repository operations and is triggered when a [utility] makes a request to DOE. DOE’s duty . . . to dispose of the [waste] is conditioned on the payment of fees by the [utility] and is triggered, at the latest, by the arrival of January 31, 1998.”).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (citation omitted). Of course, the merits of the case notwithstanding, it would be churlish not to acknowledge some sympathy for the unfortunate advocate who drew this particular question from the panel. The possibility that the court might draw upon Yiddish folklore as a source of analogous authority could scarcely have occupied much of the consciousness of agency counsel in preparing for oral argument.

The court concluded, without venturing beyond *Chevron* Step One, that the statute “creates an obligation in [the agency], reciprocal to the utilities’ obligation to pay, to start disposing of the [waste] no later than January 31, 1998.”⁹⁷ Because the agency’s interpretation acknowledged the utilities’ duty to pay but denied its own reciprocal duty to dispose of the waste, it could not be squared with the text of the statute, and was, accordingly, rejected.⁹⁸

d. *IPAA v. DeWitt*—A Return to Deference for Financially Self-Interested Agency Rulemaking?

More recently, and for reasons that do not appear particularly persuasive, the D.C. Circuit seems to have muddied the waters. In *Independent Petroleum Association of America v. DeWitt*,⁹⁹ the panel members disagreed among themselves on the application of *Chevron* deference to an agency’s regulation that had the effect of advantaging the agency’s financial self-interest.¹⁰⁰

DeWitt involved a challenge to regulations issued by the Department of Interior governing the payment of natural gas royalties by private lessees of federal and Indian lands.¹⁰¹ The Department of Interior, as lessor, entered into contracts with private natural gas producers to al-

⁹⁷ *Id.* at 1277.

⁹⁸ *Id.* at 1276–77. The court of appeals subsequently found it necessary to issue a writ of mandamus to direct the agency to comply with *Indiana Michigan*. *N. States Power Co. v. United States Dep’t of Energy*, 128 F.3d 754. (D.C. Cir. 1997). The same panel of the court of appeals which had heard *Indiana Michigan* described, with evident incredulity, what had transpired on remand from its decision in that case:

After issuing our decision in *Indiana Michigan*, we would have expected that the Department would proceed as if it had just been told that it had an unconditional obligation to take the nuclear materials by the January 31, 1998, deadline. Not so. Quite to the contrary, the Department informed the utilities and the states that it would be unable to comply with the statutory deadline that this court had just reaffirmed. . . . The Department recognized that the delay would affect “large number[s]” of contract holders, but nonetheless expressed “uncertainty as to when DOE will be able to begin spent fuel acceptance.”

N. States Power Co., 128 F.3d at 757 (D.C. Cir. 1997) (citations omitted). In essence, the agency invoked a clause in its contracts with the utilities providing that it had no obligation to compensate the utilities for “unavoidable” delays in its own performance. *See id.* The court of appeals, however, reiterated its holding in *Indiana Michigan* that the Department’s duty to dispose of the waste was conditioned only on the utilities’ payment of fees, a condition which had been satisfied. *Id.* at 758. The court rejected the agency’s contention that the contractual “unavoidable delay” clause exonerated it from liability, finding that the agency was “simply recycling the arguments rejected by this court in *Indiana Michigan*.” *Id.* at 760. The court of appeals “issue[d] a writ of mandamus precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility.” *Id.* at 761.

⁹⁹ 279 F.3d 1036 (D.C. Cir. 2002).

¹⁰⁰ *See id.*; *id.* at 1043 (Sentelle, J., concurring).

¹⁰¹ *Id.* at 1037–38.

low exploration and production on federal and Indian lands in exchange for a fractional royalty of production revenues.¹⁰² The terms of the leases specifically made the parties' agreement subject to existing or future regulations of the Department.¹⁰³ The lessees agreed to pay the government royalties computed based on gross production proceeds less certain allowed deductions.¹⁰⁴ The dispute in *DeWitt* arose when the Department of the Interior amended its regulations in 1997 to forbid parties from deducting certain costs from gross proceeds when computing the royalties due.¹⁰⁵

The natural gas producers and their representatives sued to challenge the Department's new royalty regulations.¹⁰⁶ The district court agreed with the producers that the Department's financial self-interest in increasing its own royalty revenues precluded the application of *Chevron* deference.¹⁰⁷ Indeed, the district court's opinion reads as a fair summary of then-existing Circuit precedent. Citing *Mesa Air Group*,¹⁰⁸ the district court declared that "no deference is due an agency's interpretation of contracts in which it has a proprietary interest."¹⁰⁹ The court continued,

¹⁰² *See id.* at 1037. The court regarded this exchange as typical of such contracts. *See id.*

¹⁰³ *See id.* Thus, one could plausibly contend that the terms of the contracts expressly assigned to the nongovernmental parties the risk of a change in law, precisely as the courts found had not been done in the *Winstar* line of cases. *See supra* note 24; *cf.* *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 616 (2000) (contractual provision requiring compliance with "all other applicable . . . regulations" extended only to regulations in force at the time the contract was made and did not render contract subject to subsequently adopted regulations). Nevertheless, the courts have not enunciated clear guidelines as to precisely what statutory language Congress should employ when it wishes to assign to a private contracting party, rather than to the government, the risk that a subsequent statutory or regulatory change will diminish the value of the party's bargain. Indeed, identical language has been interpreted in contradictory ways. *Compare*, *Guar. Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 999–1000 (11th Cir. 1991) (interpreting contractual provisions both requiring party's compliance with current regulations "or any successor regulation" and warning party that "subsequent amendments to such regulations may be made and that such amendments may increase or decrease the [party's] obligation," as assigning to private party the risk of regulatory change) *with* *Hometown Fin., Inc. v. United States*, 53 Fed. Cl. 326, 331, 337 (2002) (interpreting identical language as not imposing on private party the risk of regulatory change).

¹⁰⁴ *See DeWitt*, 279 F.3d at 1037.

¹⁰⁵ *Id.* at 1038 (citing *Amendments to Transportation Allowance Regulations for Federal and Indian Leases to Specify Allowable Costs and Related Amendments to Gas Valuation Regulations*, 62 Fed. Reg. 65,753, 65,753–54 (final rulemaking, Dec. 16, 1997)). By reducing allowable deductions, the regulations increased the gross proceeds upon which the lessee's royalty payment would be calculated and thus increased the royalties paid to the government.

¹⁰⁶ *Id.* at 1038.

¹⁰⁷ *See* *Indep. Petroleum Ass'n v. Armstrong*, 91 F. Supp. 2d 117, 128 (D.D.C. 2000), *rev'd in part sub nom.* *Indep. Petroleum Ass'n v. DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002).

¹⁰⁸ *Mesa Air Group, Inc. v. Dep't of Transportation*, 87 F.3d 498 (D.C. Cir. 1996). *See generally supra* Part I.A.1.b.

¹⁰⁹ *Armstrong*, 91 F. Supp. 2d at 124; *see also id.* at 127 (Although "[i]n certain instances, an agency's interpretation of contracts may be entitled to deference," "deference to an agency interpretation of a contract may be inappropriate where an agency has a proprietary interest in

citing *Transohio*:¹¹⁰ “an agency’s interpretation of its own regulations is not entitled to deference when it will affect contracts to which the agency is a party.”¹¹¹ Reviewing the Department’s regulations outside the deferential *Chevron* framework, the district court ultimately concluded that the regulations were inconsistent with the statute, which did not forbid the deduction of the marketing expenses at issue in the case from the producers’ gross proceeds when calculating the royalty payments owed to the government.¹¹²

The court of appeals, however, reversed in pertinent part.¹¹³ Specifically disagreeing with the district court, a two-judge majority held that the Department’s regulations were entitled to *Chevron* deference.¹¹⁴ Concurring separately, Judge Sentelle disagreed with the majority’s interpretation of *Chevron*, finding it “confusing, and indeed troubling,”¹¹⁵ but nevertheless voted with the majority to reverse the district court.¹¹⁶

The majority began by responding to the producers’ apparent contention, based on *Mesa Air Group*, that deference was inappropriate simply because “the case involves interpretation of contracts, not of a statute.”¹¹⁷ As discussed above, *Mesa Air Group* seemed to say that judicial deference to agencies’ interpretations of contracts was *per se* inappropriate,¹¹⁸ even though the interpretation at issue in that case was objectionable principally because it implicated the self-interest of the agency.¹¹⁹ The majority properly rejected the simplistic assertion that deference could never attach to an agency’s contractual interpretation, although it did so on the confusing ground that “here the contracts them-

the contract.”). As stated *supra* note 73, this seems to me to be the correct reading of *Mesa Air Group*.

¹¹⁰ *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992). See generally *supra* notes 46–48 and accompanying text.

¹¹¹ *Armstrong*, 91 F. Supp. 2d at 124 (citing *Transohio*, 967 F.2d at 614); see also *id.* at 126 (“While according appropriate deference to an agency’s reasonable interpretation of its own regulations, courts must view such interpretations with skepticism when they affect contracts to which the agency is a party”); *id.* at 130 (“[D]eference to an agency’s interpretation is dangerous where it abrogates existing contracts and leads ‘a court to endorse self-serving views that an agency might offer in post hoc reinterpretation of its contract[s].’”) (citing *Transohio*, 967 F.2d at 614).

¹¹² *Id.* at 130.

¹¹³ *Indep. Petroleum Ass’n v. DeWitt*, 279 F.3d 1036, 1043 (D.C. Cir. 2002).

¹¹⁴ *Id.* at 1040.

¹¹⁵ *Id.* at 1043 (Sentelle, J., concurring).

¹¹⁶ *Id.* (Sentelle, J., concurring).

¹¹⁷ *Id.* at 1039.

¹¹⁸ See *supra* note 66 and accompanying text.

¹¹⁹ See *supra* notes 70–73 and accompanying text. The district court in *Armstrong* (the precursor to *DeWitt*) clearly understood *Mesa Air Group* to forbid deference only to agencies’ self-interested contractual interpretations. See *supra* note 109 and accompanying text.

selves lead us back to the agency,”¹²⁰ which it followed with a rather opaque and probably unnecessary digression on the notion of retroactivity.¹²¹ The majority did cite *National Fuel Gas*¹²² as “applying a *Chevron* framework to agency interpretation of contracts[;]”¹²³ to that extent, *DeWitt* is harmonious with Circuit precedent recognizing that some agency contractual interpretations may be eligible for *Chevron* deference.¹²⁴

The majority, however, faltered at its next step, in considering whether the application of *Chevron* deference was “inappropriate for regulations that affect contracts in which Interior has financial interests.”¹²⁵ The majority here made the rather startling assertion that “no circuit appears ever to have ruled specifically on the issue of deference to financially self-interested agencies[.]”¹²⁶ If the majority intended to suggest that the issue remained open, its assertion is difficult to credit. Indeed, as the decision under review had expressly recognized,¹²⁷ that very court had ruled on precisely this question in *Mesa Air Group*.¹²⁸ The *Indiana Michigan* cases, which *DeWitt* ignored entirely, were also openly hostile to the notion that financially self-interested agency interpretations com-

¹²⁰ *DeWitt*, 279 F.3d at 1039. The panel here may have simply been reacting to poor briefing on the part of the producers. After stating that the producers argued that *Mesa Air Group* forbade giving deferential consideration to agencies’ contractual interpretations, the panel continued, “[t]hus the producers’ briefs point (rather summarily) to state court decisions, implicitly asking us to treat the matter as would a state court interpreting private leases.” *Id.* Assuming that the panel majority’s opinion correctly describes the producers’ argument, the majority was correctly hesitant to follow the producers down this road. State court decisions, which are not obliged to follow *Chevron* or its reasoning, have stated no consistent rule regarding deference to governmental agencies’ interpretations of contracts. *See, e.g., supra* note 73. Moreover, even if the producers were correct that *Chevron* deference could never attach to an agency’s contractual interpretation, it would not follow that the court of appeals should analogize to state contract law in reviewing the agency’s action. To the contrary, the Supreme Court has made clear that an agency interpretation that fails to qualify for *Chevron* deference may nevertheless be entitled to consideration under the less deferential rubric of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). *See generally supra* note 10.

¹²¹ *DeWitt*, 279 F.3d at 1039. Because the leases themselves apparently provided that they would be subject to future regulatory changes adopted by the Department, *see supra* note 103 and accompanying text, the actual application of such a later-adopted regulation to the interpretation of one of the leases would not appear to involve an objectionable retroactive upsetting of the lessees’ settled expectations.

¹²² *Nat’l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir. 1987). *See generally supra* notes 29–44 and accompanying text.

¹²³ *DeWitt*, 279 F.3d at 1039.

¹²⁴ *See supra* notes 44, 70 and accompanying text. Although this aspect of the majority’s opinion may perhaps be harmonized *post hoc* with precedent in this fashion, the majority itself failed to do so.

¹²⁵ *DeWitt*, 279 F.3d at 1039.

¹²⁶ *Id.* at 1040.

¹²⁷ *See supra* note 109 and accompanying text.

¹²⁸ 87 F.3d 498 (D.C. Cir. 1996). *See generally supra* Part I.A.1.b.

manded judicial deference.¹²⁹ All but ignoring Circuit precedent on the question, however, the *DeWitt* majority instead cobbled together a list of citations to cases from other Circuits and pre-*Chevron* cases for the general, and presumably uncontroversial, point that the Department of the Interior had the authority to promulgate regulations governing leases and that, when it did so, those regulations could be entitled to deferential review.¹³⁰ Unlike *Mesa Air Group*, *Indiana Michigan*, *National Fuel Gas*, *Transohio*,¹³¹ and the other D.C. Circuit cases the majority failed to consider, the cases it collected said nothing about whether the courts should apply the ordinary rule of deference when an agency's financial self-interest was demonstrably advanced by the interpretation it adopted. The panel concluded as follows:

In the end, of course, the availability of *Chevron* deference depends on congressional intent, but our application of such deference in the face of a recognized risk of agency self-aggrandizement, such as interpretations of their own jurisdictional limits, necessarily means that self-interest alone gives rise to no automatic rebuttal of deference. Indeed, given the ubiquity of some form of agency self-interest, . . . a general withdrawal of deference on the basis of agency self-interest might come close to overruling *Chevron*, a decision far beyond our authority. We see no indication here of a special intent to withhold deference.¹³²

Judge Sentelle found the panel majority's interpretation of *Chevron*, which permitted "deference to the interpretation of statutes governing contracts in which the agency has a financial interest" in all cases, to be "confusing, and indeed troubling."¹³³ Judge Sentelle did not dispute that deference was the general rule and that nothing in the statute showed any specific intent to withhold the measure of deference that would ordinarily

¹²⁹ *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996); *N. States Power Co. v. United States Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997). See generally *supra* Part I.A.1.c.

¹³⁰ See *DeWitt*, 279 F.3d at 1040 (citations omitted).

¹³¹ *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992). See generally *supra* notes 46–48. The *DeWitt* panel distinguished *Transohio* on the grounds that its language against deferring to self-interested agency interpretations was dicta. See *DeWitt*, 279 F.3d at 1040 ("[W]e ultimately found that Congress's intent was clear and thus had no occasion to grant (or withhold) deference.") (citing *Transohio* at 614–15). Yet this hardly answers the question of how the *DeWitt* panel majority's reasoning could be harmonized with *Transohio*, to say nothing of the cases, such as *Mesa Air Group* and *Indiana Michigan*, in which the court held that a financially self-interested agency interpretation was ineligible for *Chevron* deference.

¹³² *DeWitt*, 279 F.3d at 1040 (internal citations omitted).

¹³³ *Id.* at 1043 (Sentelle, J., concurring).

attach to the agency's interpretations.¹³⁴ He disagreed instead with the majority's assertion that cases concerning deference to agencies' interpretations of the extent of their own jurisdiction necessarily called for judicial acceptance of interpretations implicating agencies' *financial* self-interest.¹³⁵ If that were so, Judge Sentelle wrote, "[w]e might as well propose that judges can sit on cases in which they have a financial interest because we regularly sit on cases on which we might exercise self-aggrandizement by expansively interpreting our jurisdiction."¹³⁶ Judge Sentelle concluded that the majority's reasoning on this point was mere dicta, however, and accordingly concurred in the majority's disposition of the case.¹³⁷

DeWitt is a troubling opinion in several respects. As a basis for the tacit repudiation of a long line of Circuit precedent on point, the panel majority's reasoning appears paper-thin. First, the panel takes as a given that *Chevron* deference attaches to agency interpretations even "in the face of a recognized risk of agency self-aggrandizement,"¹³⁸ thus assuming away the very question to be decided. Second, it is hardly settled that *Chevron* deference attaches to all "agency . . . interpretations of their own jurisdictional limits[:]"¹³⁹ indeed, the Supreme Court had recently declined to defer to an agency jurisdictional interpretation in *FDA v. Brown & Williamson Tobacco Corp.*¹⁴⁰ Third, even if one believes that "self-interest alone gives rise to no automatic rebuttal of deference"¹⁴¹—a debatable, but certainly defensible, proposition—it does not follow, as the majority apparently believed, that agency self-interest was *entirely irrelevant* to a determination of the extent of deference owed, particu-

¹³⁴ *Id.* (Sentelle, J., concurring).

¹³⁵ *Id.* (Sentelle, J., concurring) (finding majority's reliance on *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994), "neither persuasive nor necessary").

¹³⁶ *Id.* (Sentelle, J., concurring).

¹³⁷ *Id.* (Sentelle, J., concurring). Judge Sentelle's characterization of the majority's language favoring deference for financially self-interested agency interpretations as dicta seems debatable. To accept the majority's statements as dicta, one must believe that the standard of review (*Chevron* deference versus something less, such as *Skidmore* consideration or *de novo* review) was of no consequence to the outcome of the case. Yet the majority's own statements, which rely expressly upon the reasonableness of the Interior Department's interpretation (*see infra* note 142), the classic *Chevron* Step Two inquiry, provide few clues from which one could infer that it would have reached the same result had it reviewed the agency's interpretation outside the deferential *Chevron* framework of review. Indeed, the only judge in the case to have reviewed the agency's interpretation *de novo*, rather than for mere reasonableness, was the district judge, who found the agency's interpretation inconsistent with the statute. *See supra* notes 107–111 and accompanying text.

¹³⁸ *DeWitt*, 279 F.3d at 1040.

¹³⁹ *Id.* That this principle remains very much a matter of dispute is clear from, e.g., *Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990) ("The Supreme Court cannot be said to have resolved the issue definitively."). *See also infra* notes 156, 204–205 (noting divergence of opinion on this issue).

¹⁴⁰ 529 U.S. 120 (2000). *See generally infra* Part I.B.3.

¹⁴¹ *DeWitt*, 279 F.3d at 1040.

larly at the *Chevron* Step Two reasonableness inquiry where the *DeWitt* majority ultimately resolved the case.¹⁴² Fourth, the general reference to the purported “ubiquity of some form of agency self-interest”¹⁴³ fails to persuade, given that agency *financial* self-interest of the sort at issue in *DeWitt* had consistently, up until that case, been found by the same court not to warrant *Chevron* deference.¹⁴⁴ Finally, few if any courts or commentators have ever believed that agency interpretations implicating the agency’s self-interest represent the rule, rather than the vanishingly rare exception.¹⁴⁵ For that reason, it is almost certainly untrue that withholding full *Chevron* deference in the small minority of cases involving self-interested agency interpretations “might come close to overruling *Chevron*.”¹⁴⁶

It is too soon to say whether *DeWitt* represents an enduring shift in the way the D.C. Circuit evaluates contentions that an administrative agency’s interpretation is flawed insofar as it advances the agency’s financial self-interest. By inaccurately describing the issue as an open one, rather than analyzing or distinguishing its own prior decisions on the subject, the majority’s decision effectively unmoored itself from precedent. The task of reconciling or harmonizing *DeWitt* with cases like *National Fuel Gas*, *Mesa Air Group* and *Indiana Michigan* may have to await a more thoughtful future panel or an *en banc* decision by the court

¹⁴² See *id.* (“We find nothing unreasonable in Interior’s refusal to allow deductions for so-called ‘downstream’ marketing costs.”); *id.* at 1042 (“[I]t was reasonable for Interior to rigorously apply its conventional distinction between marketing and transportation.”). As I will argue later in this article, incorporating an assessment of the agency’s self-interest into the *Chevron* Step Two reasonableness inquiry would present its own set of problems. See *infra* notes 369–374 and accompanying text. Nothing in the *DeWitt* majority’s opinion, however, suggests that its failure to give any consideration to the agency’s self-interest was based on a reasoned attempt to avoid these, or any other, interpretive problems. Although assessing the agency’s self-interest at Step Two of *Chevron* may not be the optimal approach, it is surely preferable to the panel majority’s alternative of simply ignoring the issue.

¹⁴³ *DeWitt*, 279 F.3d at 1040.

¹⁴⁴ See *supra* Parts II.A.1.a through II.A.1.c. As the previously discussed cases suggest, there appears to be little reason to doubt courts’ ability to differentiate between cases that truly present the specter of agency bias or financial aggrandizement and those that do not. See also, e.g., *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989) (rejecting allegation of governmental bias premised only upon “a general bias in favor of the alleged state interest or policy” that is being challenged); *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962, 986 (M.D. Tenn. 1981) (rejecting argument that agency acted in its financial self-interest; argument “proves far too much” because “[v]iewed from this perspective, government will always have a financial interest in governing”).

¹⁴⁵ See *supra* note 13. Only by defining the notion of “self-interest” with essentially all-encompassing breadth, which the panel did without citing a single precedent, see *DeWitt*, 279 F.3d at 1040, does the contention become remotely plausible. Certainly absent from virtually all the D.C. Circuit’s hundreds of annual administrative law decisions is any suggestion that the routine evaluation of an agency’s legal interpretation more often than not implicates the agency’s self-interest.

¹⁴⁶ *DeWitt*, 279 F.3d at 1040.

of appeals. The trend of decisions in the D.C. Circuit before *DeWitt* had been against judicial deference to agencies' financially self-interested interpretations of law. Although *DeWitt* reached a contrary result, it did nothing to undermine the reasoning of those earlier authorities, which continue to suggest more thoroughgoing scrutiny of interpretations that work to the agency's financial benefit. Nevertheless, the need for additional judicial guidance in the wake of *DeWitt* is acute.

2. *Competitive Interests*

Economic competition between the federal government and the private sector is a seldom-discussed fact of life. Although nominally discouraged from doing so under the FAIR Act,¹⁴⁷ the government nevertheless competes with private parties to provide several

¹⁴⁷ Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at note following 31 U.S.C. § 501 (2000)). The FAIR Act sought to distinguish "inherently governmental functions," defined as functions "so intimately related to the public interest as to require performance by Federal Government employees," *id.* § 5(2)(A), 112 Stat. at 2384, from other functions performed by government agencies. Federal departments and administrative agencies are directed to compile lists of non-"inherently governmental functions" they perform, quantify the cost to the government (measured in terms of full-time employee equivalents) and review the list to ascertain whether the government should "contract with a source in the private sector for the performance of an executive agency activity on the list[.]" *Id.* § 2(e), 112 Stat. at 2383. Although the FAIR Act seems to recognize the incongruity of the federal government's performance of quintessentially private-sector commercial functions, the statute has no teeth; it provides no mechanism for an entity that believes the government is competing unfairly or is involving itself in an area that should properly be left to the private sector, to challenge the government's actions. *Cf.* Courtney v. Smith, 297 F.3d 455, 465-66 (6th Cir. 2002) (noting limited reach of remedies available under the FAIR Act).

types of economic goods. Government agencies as diverse as the Federal Reserve Board,¹⁴⁸ NASA,¹⁴⁹ and the Department of

¹⁴⁸ In the Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of Title 12 of the United States code), Congress established a system of economic competition between the public and private sectors in providing certain payment services, including check clearing services and wire transfers. See 12 U.S.C. § 248a(b) (2000) (listing services covered by the Act). The statute required the Federal Reserve to promulgate a schedule of fees that it would charge depository institutions for the specified payment services. See *id.* § 248a(a). Before 1980, the Federal Reserve performed some of these services without charge. *Jet Courier Servs., Inc. v. Fed. Reserve Bank*, 713 F.2d 1221, 1222 (6th Cir. 1983). In an early case brought under the Act, the agency described this provision as showing Congress' "intent to provide nonmember financial institutions access to Federal Reserve services and to permit private firms to offer payment clearing mechanisms in competition with the Board." *Bank Stationers Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 704 F.2d 1233, 1236 (11th Cir. 1983). Thus, the legislation affirmatively established a system in which the Federal Reserve would stand in economic competition with the very institutions it also regulated.

So far as can be objectively determined, this competitive structure has not caused much friction between financial institutions and their regulator/competitor. Indeed, the only reported opinions dealing with this system have dismissed claims on grounds of standing because they were brought by parties other than the affected financial institutions (specifically, by parties whose operations would be rendered technologically obsolete by the statute's encouragement of electronic transactions—a class of plaintiffs Congress likely intended not to protect). See *Bank Stationers Ass'n*, 704 F.2d at 1236–37 (holding that printers of checks lacked standing to complain that statute would increase proportion of paperless transactions); *Jet Courier Servs.*, 713 F.2d at 1226–27 (holding that private air couriers lacked standing to complain that the Act would reduce banks' demand for courier services). Some plausible explanations for why this public-private competition has produced little litigation are apparent from the face of the statute and its legislative history. First, the Federal Reserve is prohibited to price its services below cost, and thus cannot make any service a "loss leader" in an effort to take market share from private competitors. See 12 U.S.C. § 248a(c)(3) (2000). Second, the statute requires all services to be "priced explicitly" and made available to all depository institutions on equal terms. See *id.* § 248a(c)(1), (2). Finally, legislative oversight is aimed in part at ensuring that the Federal Reserve competes fairly. The Federal Reserve is required annually to "make a detailed report" to the Congress of the cost basis for any fees charged "and the impact of its service offerings and the fees charged on competing or potentially competing service providers[.]" H.R. CONF. REP. NO. 96-842, 96th Cong., 2d Sess. at 71 (1980), *reprinted in* 1980 U.S.C.C.A.N. 298, 301. These requirements may help explain why courts to date have not had to consider whether the Federal Reserve has used its regulatory power to advance its own interests at the expense of its economic competitors.

¹⁴⁹ A four-part series of articles in *Wired News* discussed the current Administration's privatization initiative within NASA. See Ben Polen, *NASA's Mission: Fiscal Health*, *Wired News*, at <http://www.wired.com/news/politics/0,1283,48455,00.html> (Nov. 26, 2001); Declan McCullagh & Ben Polen, *NASA: Smelling the Coffee*, *Wired News*, at <http://www.wired.com/news/politics/0,1283,48643,00.html> (Nov. 28, 2001) [hereinafter *Smelling the Coffee*]; Ben Polen, *NASA Mulls Shuttle Shutting*, *Wired News*, at <http://www.wired.com/news/politics/0,1283,48743,00.html> (Dec. 3, 2001) [hereinafter *Shuttle Shutting*]; Ben Polen, *NASA: Taking Privatization Public*, *Wired News*, at <http://www.wired.com/news/politics/0,1283,48814,00.html> (Dec. 4, 2001). Among other points, the series describes the sale by NASA of high-resolution satellite imaging photos, placing it in direct economic competition with private companies that also offer such services. See *Smelling the Coffee, supra* ("Even though its stated objective is to sponsor research and development in the private sector, NASA sells its images for commercial use, competing with private companies such as Space Imaging of Thornton, Colorado."). NASA has also competed with private companies to provide cargo

Education¹⁵⁰ all offer services in direct economic competition with private sellers of substantially identical services.¹⁵¹

launching services since after the 1986 *Challenger* disaster. See *Shuttle Shuttling*, *supra* at <http://www.wired.com/news/politics/0,1283,48743-2,00.html>.

¹⁵⁰ Under the Federal Family Education Loan Program (“FFELP”), 20 U.S.C. §§ 1071 to 1087-4 (2000), formerly known as the Guaranteed Student Loan Program (“GSLP”), private financial institutions make loans to college students and their families. If the borrower defaults on a loan, the lender is repaid by an intermediary (functionally, an insurer) called a guaranty agency. See 20 U.S.C. § 1078(b). The Department of Education then reimburses the guaranty agency. See *id.* § 1078(c). Thus, repayment of private lenders’ FFELP loans is ultimately guaranteed by the U.S. Department of Education. See generally *Jackson v. Culinary Sch. of Wash. Ltd.*, 27 F.3d 573, 575–76 (D.C. Cir. 1994) (explaining mechanics of FFELP lending), *vacated and remanded*, 515 U.S. 1139, *reinstated in part and remanded*, 59 F.3d 254 (D.C. Cir. 1995). The Department of Education also makes interest payments to the holder of the loan while the borrower attends school, and during a six-month grace period after the borrower graduates. 20 U.S.C. § 1078(a) (2000). Additionally, if the loan holder’s rate of return falls below a statutorily defined minimum, the Department pays the holder a “special allowance” to make up the difference. See *id.* § 1087-1; *Bank of America NT & SA v. Riley*, 940 F. Supp. 348, 349 (D.D.C. 1996), *aff’d mem.*, 132 F.3d 1480 (D.C. Cir. 1997); *Tipton v. Sec’y of Educ.*, 768 F. Supp. 540, 546 & n.9 (S.D. W. Va. 1991). Because the Department of Education is ultimately liable for repayment of FFELP loans and for interim payments of interest and special allowances, it has promulgated detailed regulations governing all aspects of the FFELP lending and repayment process. See 34 C.F.R. § 682 (2002). As of the date of this writing, the various subparts and appendices to this regulation spanned more than 180 pages in the *Code of Federal Regulations*.

Since 1992, the Department of Education has also been in the business of making loans directly to college students and their families under the William D. Ford Federal Direct Loan Program. 20 U.S.C. §§ 1087a-1087j (2000). Thus, at the same time the Department regulates the eligibility of private financial institutions to make student loans and the terms upon which private lenders may lend, it also competes with those institutions for customers. Indeed, the Department appears to relish its competitive role, declaring its eagerness “to go toe-to-toe against the [private student loan] industry” in an interview published near the outset of the direct lending program. Rita Koselka & Suzanne Oliver, *Hairdressers, Anyone?*, *FORBES*, May 22, 1995, at 122 (quoting Leo Kornfeld, Special Advisor to the Secretary of Education). The two hats the Department of Education wears as simultaneously a regulator and a competitor of private industry have been a source of recurring friction between the Department and private participants in the student loan market. See *Partner Listening Session: Virginia—3/19/99*, at <http://web.archive.org/web/20000830115642/http://www.ed.gov/offices/OSFAP/CSTF/virginpart3.19.html> (last visited Oct. 29, 2003) (“The Department of Education is both our regulator and competitor. This is a very unique situation and results in distrust on both sides. We become suspicious that the Department regulations are developed to best serve Direct Lending with the ultimate goal of eliminating FFEL[P].”); *id.* (“The Federal [Activities] Inventory [Reform] Act states that the government should not compete with the public. Given that, what is Direct Lending?”). One case challenging the Department’s use of its regulatory authority to give itself an economic competitive advantage in the marketplace is currently pending in the U.S. District Court for the District of Columbia. See *Student Loan Finance Corp. v. Paige*, No. 1:00-CV-2660 (RWR) (complaint filed Nov. 3, 2000).

¹⁵¹ See also Jim Suber, *Crop Insurance Program is a Real Disaster: The View from Rural Route 8*, *Kansas Online*, at http://thekansas.com/stories/011399/vie_0113990015.shtml (Jan. 13, 1999) (“One of several fundamental problems today, said insurance expert Art Barnaby Jr., a Kansas State University agricultural economist, is that the [federal] government’s Risk Management Agency is attempting to be both regulator and competitor to the [crop] insurance industry.”).

Still another potential source of friction between an agency’s regulatory and competitive interests may arise in light of the phenomenon of increasing federal ownership interests in private

Although infrequently discussed in the case law, a federal agency could advance its own financial position in its competitive relationships in precisely the same manner as it can with respect to its contractual relationships: namely, by propounding statutory or regulatory interpretations that serve the agency's own financial self-interest at others' expense. Because courts have generally shown skepticism when reviewing agencies' self-interested interpretations that affect their own contractual rights,¹⁵² one would logically expect the same skepticism to accompany judicial review of agencies' interpretations that advance the agency's

firms. Following the aircraft hijackings and terror attacks of September 11, 2001 and the ensuing lengthy disruption of commercial aviation, Congress created a new agency within the Department of Transportation, the Air Transportation Stabilization Board (ATSB), to make federal cash grants and loan guarantees to private air carriers affected by the attacks. See Air Transportation Safety and System Stabilization Act ("ATSSSA"), Pub. L. No. 107-42, § 102, 115 Stat. 230, 231-32 (2001) (codified at note following 49 U.S.C.A. § 40101 (Supp. 2003)). The statute required the agency to "ensure that the Government is compensated for the risk assumed in making" loan guarantees and specifically contemplated that the agency would "participate in the gains" of the borrowers "through the use of such instruments as warrants, stock options, common or preferred stock, or other appropriate equity instruments." *Id.* § 102(d)(1), (2). Pursuant to this authority, the ATSB has taken equity stakes in a number of private air carriers in exchange for federal loan guarantees. For example, on December 28, 2001, the ATSB approved a \$445 million loan guarantee to America West Airlines in exchange for warrants representing 5.3% of the carrier's common stock. See Press Release, Office of Public Affairs, Air Transportation Stabilization Board Conditionally Approves Application By America West (Dec. 28, 2001), available at <http://www.ustreas.gov/press/releases/po890.htm>. See also Daniel Gross, *The Government's Cram-Down Artists: Tough Love for Troubled Airlines*, Slate, at <http://slate.msn.com/?id=2074534> (Nov. 22, 2002) ("[W]ithin a few years, if the economy recovers and the commercial airline industry returns to health, the federal government could wind up with a significant portfolio of airline equities.").

The government has an undeniable self-interest in the financial health of a private entity in which it holds a significant equity stake. Nevertheless, there may be less reason to fear that the government's self-interest in this context will distort its incentives to regulate with an even hand. First, the agency holding the equity stake may not be the private parties' primary regulator. To take the example of air travel, it appears from the ATSSSA that Congress intended the ATSB, rather than the Federal Aviation Administration ("FAA"), to take an equity stake in carriers that participate in the federal bailout. See generally Pub. L. No. 107-42, 115 Stat. 230. Even if one assumes that inter-agency coordination could still lead the regulator to so regulate as to advantage the equity-holding agency, the difficulties inherent in such coordination, coupled with the lack of any institutional self-interest on the part of the regulatory agency, present a qualitatively different scenario than exists when an agency regulates to its own direct financial advantage. Second, regulating for the financial advantage of a publicly held company in which the government holds an equity stake benefits not only the government, but all shareholders in the company—by implication, the public at large—and not to the financial detriment of the regulated entity. This seems far less objectionable than the scenarios present in the cases previously discussed, such as *Indiana Michigan* or *Mesa Air Group*, in which a government agency propounded regulatory interpretations that redounded to its own financial benefit at the direct expense of the regulated party. On the other hand, suppose that the government applied its regulatory power to give its partly owned carrier some competitive or financial advantage over its non-governmentally owned rivals. Such a scenario would again raise the specter of improper financial self-dealing such as was at issue in the *Indiana Michigan/Mesa Air Group* type of cases.

¹⁵² See *supra* Parts I.A.1.a through I.A.1.c.

own competitive interests. The case law is still underdeveloped in this area, however, making prediction difficult.

B. INTERPRETATIONS THAT EXPAND AN AGENCY'S JURISDICTION

1. *Deference to Agency Jurisdictional Interpretations in General*

Before *Chevron*, some courts declared that "close scrutiny" should apply to any statutory interpretation by an administrative agency that expanded or restricted the scope of the agency's statute.¹⁵³ The Supreme Court appeared to adopt a rule against deference to agencies' jurisdictional interpretations, declaring that "[t]he 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."¹⁵⁴

In the wake of *Chevron*, the question whether courts owe deference to an agency's interpretation of a statute conferring jurisdiction on the agency has provoked much discussion.¹⁵⁵ The Supreme Court has declined opportunities to resolve the issue,¹⁵⁶ and the question was described as a "long-standing unsettled issue" as recently as early 2000.¹⁵⁷ Although some initially believed that *FDA v. Brown & Williamson Tobacco Corp.* would provide the Supreme Court with the opportunity to lay the issue to rest,¹⁵⁸ the Court again dodged the issue: because it con-

¹⁵³ See, e.g., *Celebrezze v. Kilborn*, 322 F.2d 166, 168 (5th Cir. 1963); *Strompolos v. Premium Readers Serv.*, 326 F. Supp. 1100, 1103 (N.D. Ill. 1971) (citing *Celebrezze*).

¹⁵⁴ *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). See also *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) (although a long-standing agency interpretation commands judicial respect, "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate"); *Soc. 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.") (footnote omitted, collecting cases); *Texas & Pac. Ry. Co. v. United States*, 289 U.S. 627, 640 (1933) ("Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the courts.").

¹⁵⁵ See, e.g., Crawford, *supra* note 16 (arguing in favor of deference in such circumstances); cf. Hume Cofer, *Judicial Review of Agency Law Decisions on Scope of Agency Authority*, 42 BAYLOR L. REV. 255 (1990) (principally addressing deference to state administrative agencies by state courts).

¹⁵⁶ See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 765-66 (1999) (acknowledging agency's claim of entitlement to *Chevron* Step Two deference on issue of scope of its own jurisdiction, but finding it unnecessary to resolve the issue because the agency's interpretation was commanded by the statutory text at *Chevron* Step One); see also *Bus. Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990) ("The Supreme Court cannot be said to have resolved the issue definitively."). But cf. *Dole v. United Steelworkers*, 494 U.S. 26, 54-55 (1990) ("*Chevron* itself and several of our cases decided since *Chevron* have deferred to agencies' determinations of matters that affect their own statutory jurisdiction.") (White, J., dissenting) (citations omitted) (collecting authorities); 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.5, at 157 (4th ed. 2002) ("[W]hile the Court has never explicitly held that *Chevron* applies to jurisdictional disputes, it has often applied *Chevron* to such disputes.").

¹⁵⁷ Herz, *supra* note 11, at 48.

¹⁵⁸ See *id.* at 50-51 (noting that the Court had granted certiorari in *FDA v. Brown & Williamson*). But cf. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Com-*

cluded that the FDA's interpretation was contrary to the policies established in the applicable statute and related statutes, it did not consider whether the FDA might have been entitled to deference had the analysis proceeded to Step Two of *Chevron*.¹⁵⁹

The arguments for and against deference to agencies' jurisdictional interpretations were aired in the concurring and dissenting opinions in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.¹⁶⁰ The case addressed whether the Federal Energy Regulatory Commission (FERC)'s order requiring an electric utility to pay a certain wholesale rate for power precluded a state regulatory commission from separately inquiring whether that rate was prudent in the course of setting retail rates for consumers.¹⁶¹ The appellant in the case, Mississippi Power & Light (MP&L), was one of four utility companies that jointly constructed and operated a nuclear power plant at Port Gibson, Mississippi.¹⁶² The construction project suffered huge cost overruns, however, and wholesale rates for power from the completed plant were thus much higher than had been expected at the time of initial construction.¹⁶³ Pursuant to the terms of a unit power sales agreement filed with FERC, MP&L obligated itself to purchase 31.63% of the completed plant's capacity.¹⁶⁴

FERC commenced an administrative proceeding to determine whether the companies' agreements concerning the operation and sale of power from the completed plant were "just and reasonable" as the applicable statute required.¹⁶⁵ FERC Administrative Law Judges found, and the full Commission agreed, that the companies' agreements were "unduly discriminatory" because they did not allocate the costs of constructing the power plant among the companies proportionate to their relative demand for power.¹⁶⁶ Accordingly, FERC modified the companies' agreement to include an allocation of the companies' proportionate costs of constructing and operating the plant, with 33% of the capacity costs

mon Law Courts, 47 DUKE L.J. 1013, 1063-64 (1998) (arguing in favor of judicial deference to agency interpretations of their own jurisdiction, but questioning whether jurisdictional considerations were truly at issue in the FDA tobacco case).

¹⁵⁹ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131-61 (2000); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 851 (2001) (noting that the question whether "*Chevron* appl[ies] to interpretations that modify the scope of an agency's jurisdiction" was "raised, but not resolved, in *Brown & Williamson*") (citation omitted).

¹⁶⁰ 487 U.S. 354 (1988).

¹⁶¹ *Id.* at 368-69.

¹⁶² *Id.* at 357-58.

¹⁶³ See *id.* at 359-60 & n.5.

¹⁶⁴ *Id.* at 360.

¹⁶⁵ See *id.* at 360 & n.6 (citing 16 U.S.C. §§ 824d(a), 824e(a)).

¹⁶⁶ See *id.* at 361-63.

being allocated to MP&L.¹⁶⁷ FERC's cost allocation was upheld on judicial review.¹⁶⁸

Because of the huge cost overruns during construction of the plant, the 33% cost allocation threatened MP&L with a potentially disastrous shortfall in revenue.¹⁶⁹ Therefore, even before the FERC proceeding was complete, MP&L instituted proceedings before the Mississippi Public Service Commission (MPSC) for an increase in the rates it charged to retail power customers.¹⁷⁰ The MPSC was, at that very moment, challenging the 33% cost allocation to MP&L in the ongoing FERC proceeding.¹⁷¹ Nevertheless, in response to MP&L's application, the MPSC reluctantly concluded that it had to allow the requested rate increase or risk MP&L's insolvency.¹⁷²

Joined by consumer representatives, the Mississippi Attorney General challenged the MPSC's grant of MP&L's requested rate increase.¹⁷³ In the state court proceedings, the challengers advanced an argument that had not previously been raised before FERC or the MPSC: they contended that the huge costs involved in the construction of the nuclear plant had been imprudently incurred.¹⁷⁴ The applicable state regulatory scheme restricted utility companies to recovery of "a fair return," defined as "'one which, *under prudent and economical management*, is just and reasonable to both the public and the utility.'" ¹⁷⁵ Thus, the plaintiffs argued, the MPSC's failure to perform a "prudence review" of the costs MP&L sought to recoup through its rate increase meant that the MPSC's granting of the requested increase was improper as a matter of state law.¹⁷⁶ The Mississippi Supreme Court agreed,¹⁷⁷ rejecting the argument that the U.S. Constitution's Supremacy Clause prohibited the

¹⁶⁷ *Id.* at 363.

¹⁶⁸ *See id.* at 364 & n.8 (citing *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987), *modified in part on grant of rehearing and remanded*, 822 F.2d 1104 (D.C. Cir. 1987)).

¹⁶⁹ *See id.* at 365-66 (noting evidence of \$327 million revenue shortfall, enough to render MP&L insolvent, attributable entirely to expenses associated with construction and operation of the nuclear plant).

¹⁷⁰ *Id.* at 365.

¹⁷¹ *See id.* at 366.

¹⁷² *See id.* at 365-66.

¹⁷³ *Id.* at 366.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (emphasis added) (citing *S. Bell Tel. & Tel. Co. v. Miss. Pub. Serv. Comm'n*, 113 So. 2d 622, 656 (Miss. 1959); *Miss. Pub. Serv. Comm'n v. Miss. Power Co.*, 429 So. 2d 883 (Miss. 1983)).

¹⁷⁶ *See id.* The U.S. Supreme Court noted that arguments about the prudence of the construction costs could have been raised before the FERC or the MPSC, or on judicial review, but were not. *See id.* at 375 ("[t]he question of prudence was not discussed, however, because no party raised the issue"); *id.* at 366 (noting that the MPSC's "order made no reference to the prudence of the investment in [the power plant]").

¹⁷⁷ *Id.* at 366 (citing *Mississippi ex rel. Pittman v. Miss. Pub. Serv. Comm'n*, 506 So. 2d 978, 979 (Miss. 1987)).

MPSC from reviewing the prudence of costs incurred by FERC mandate.¹⁷⁸

The U.S. Supreme Court reversed and held that Mississippi was obliged under the Supremacy Clause to accept FERC's cost allocation to MP&L as fair and reasonable,¹⁷⁹ forbidding the MPSC to conduct its own "prudence review" of the costs FERC had ordered MP&L to bear.¹⁸⁰ The Court reasoned that because such "prudence" issues could have been addressed before FERC in the cost allocation proceedings, but had not been raised, they could not be raised for the first time in the state retail rate-setting procedure.¹⁸¹

The concurring and dissenting opinions identified a *Chevron* issue not discussed in the majority's opinion. Three Justices, led by Justice Brennan, dissented on the ground that, even if the MPSC was required to accept FERC's allocation of costs to MP&L, taking the existence of the nuclear power plant as a given, the MPSC nevertheless could, without offending federal interests, review the prudence of MP&L's earlier decision to participate in the construction project.¹⁸² The dissenting Justices perceived a jurisdictional limitation on FERC's authority to conduct the "prudence review" that the majority would have permitted the agency to

¹⁷⁸ *Id.* at 366–67.

¹⁷⁹ *See id.* at 369–77. Although the Court's holding on the Supremacy Clause seems unobjectionable, the brevity of its description of precisely how Mississippi's "prudence review" conflicted with federal interests now seems like something of a relic of another era, given the Court's more recent federalism jurisprudence. *Cf., e.g.,* Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Post-secondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

¹⁸⁰ *See Miss. Power*, 487 U.S. at 369–77 (principally citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986)).

¹⁸¹ *See id.* at 375 ("appellees failed to raise the matter of the prudence of the investment in [the power plant] before FERC though it was a matter FERC easily could have considered in . . . allocating . . . power" and setting rates); *id.* at 376 ("The MPSC cannot evaluate either the prudence of [MP&L's parent company's] decision to invest in [the power plant] and bring it on line or the prudence of MP&L's decision to be a party to agreements to construct and operate [the plant] without traversing matters squarely within FERC's jurisdiction.") (footnote omitted). Thus, the Court's decision puts a federalist gloss on the notion of collateral estoppel, precluding a state from relitigating issues that could have been raised, but were not, in federal administrative proceedings. The Court may find it necessary in future cases to determine whether this reasoning can be reconciled with *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002), in which a badly divided Court held states immune from compelled participation in federal administrative proceedings. If a state is not required to respect a federal administrative tribunal's jurisdiction in any event, it seems much more difficult to argue that the state must accept the administrative tribunal's resolution even of issues never submitted to the tribunal.

¹⁸² *See id.* at 383–84 (Brennan, J., dissenting). Justices Marshall and Blackmun joined Justice Brennan's dissent. Because none of the *Mississippi Power* dissenters sits on the Court today, their views may be poor guides to how the Court as presently constituted would resolve the issue.

perform.¹⁸³ Although the dissent agreed with the majority that “FERC has jurisdiction to determine whether a wholesaling utility has incurred costs imprudently,”¹⁸⁴ the statute gave FERC no say over “whether it might be imprudent, given other purchasing options, for a retailing utility to *purchase* power at the FERC-approved wholesale rate.”¹⁸⁵ That is, in the dissent’s view, “although a state utility commission cannot decide that a retail utility should have bought wholesale power from a given source at other than the FERC-approved wholesale rate, it can decide that the utility should not have bought power from that source at all.”¹⁸⁶

FERC contended—and the majority agreed—that it did indeed have the authority to direct MP&L to purchase power from the nuclear plant rather than from other sources.¹⁸⁷ The dissenters acknowledged that the agency’s view of that question would be entitled to deference if *Chevron* applied, but argued that *Chevron* did not apply because the issue concerned the agency’s jurisdiction.¹⁸⁸

The dissenters considered three rationales for *Chevron* deference and found each inapplicable in the context of agency jurisdictional interpretations. First, they contended, *Chevron* deference is appropriate when an agency has resolved “conflicts between policies that have been committed to the agency’s care.”¹⁸⁹ The question of jurisdiction *vel non* could not be considered in the same category, however. Rather, the dissenters stated, statutory limitations on the agency’s jurisdiction “by definition, have not been entrusted to the agency and . . . may indeed conflict not only with the statutory policies the agency *has* been charged with advancing but also with the agency’s institutional interests in expanding its own power.”¹⁹⁰ Second, the dissenters argued, *Chevron* deference is appropriate when an agency has resolved matters within its specialized expertise, but no agency can claim to have “special expertise in interpreting a statute confining its jurisdiction.”¹⁹¹ Finally, the dissenters noted, although *Chevron* presumed that Congress meant to delegate to the agency the authority to fill in gaps in statutory meaning, there could be no presumption that Congress meant for the agency to fill in “gaps” in its jurisdiction, for the mere act of statutorily delimiting the jurisdiction of an agency “manifests an unwillingness to give the agency the freedom to

¹⁸³ *Id.* at 385 (Brennan, J., dissenting).

¹⁸⁴ *Id.* (Brennan, J., dissenting) (citations omitted).

¹⁸⁵ *Id.* (Brennan, J., dissenting) (citations omitted).

¹⁸⁶ *Id.* (Brennan, J., dissenting) (citations omitted).

¹⁸⁷ *Id.* at 369.

¹⁸⁸ *See id.* at 386–87 (Brennan, J., dissenting).

¹⁸⁹ *Id.* at 387 (Brennan, J., dissenting) (citations omitted).

¹⁹⁰ *Id.* (Brennan, J., dissenting).

¹⁹¹ *Id.* (Brennan, J., dissenting).

define the scope of its own power.”¹⁹² For these reasons, the dissenters declared “this Court has never deferred to an agency’s interpretation of a statute designed to confine the scope of its jurisdiction.”¹⁹³ Reviewing the issue of FERC’s jurisdiction without reference to *Chevron*, the dissenters found that state utility commissions, rather than FERC, held the authority to determine whether a utility’s purchase decision represented a “prudent purchase decision[] that can be passed on to retail customers.”¹⁹⁴

Justice Scalia’s concurrence responded to the dissent’s reading of *Chevron*.¹⁹⁵ He declared it to be “settled law that the rule of deference applies even to an agency’s interpretation of its own statutory authority or jurisdiction.”¹⁹⁶ Justice Scalia wrote that the Court had previously rejected the very arguments that the dissent advanced for withholding deference from agency jurisdictional interpretations, “namely, that agencies can claim no special expertise in interpreting their authorizing statutes if an issue can be characterized as jurisdictional . . . and that the usual reliance on the agency to resolve conflicting policies is inappropriate if the resolution involves defining the limits of the agency’s authority[.]”¹⁹⁷

¹⁹² *Id.* (Brennan, J., dissenting) (citations omitted).

¹⁹³ *Id.* (Brennan, J., dissenting). To bolster this assertion, the dissenters did find it necessary to distinguish some authorities that could, indeed, be read to support deference to agency jurisdictional interpretations. They distinguished *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986), on the ground that the statute at issue in that case expressly granted to the agency the authority to resolve the jurisdictional issue presented. *See Miss. Power*, 487 U.S. at 387 (Brennan, J., dissenting). The dissenters also appeared to distinguish *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984), a pre-*Chevron* case, on the ground that the issues there did not involve a question of the agency’s own jurisdiction. *See Miss. Power*, 487 U.S. at 387 (Brennan, J., dissenting).

¹⁹⁴ *Id.* at 391 (Brennan, J., dissenting).

¹⁹⁵ *See id.* at 377–83 (Scalia, J., concurring). Although the majority opinion did not specifically respond to the *Chevron* issue the dissenting Justices raised, one may fairly infer that the majority Justices were not persuaded of the need to withhold deference in the circumstances presented.

¹⁹⁶ *Id.* at 381 (Scalia, J., concurring).

¹⁹⁷ *Id.* (Scalia, J., concurring) (citations omitted). Justice Scalia argues here that the dissent’s position contravenes settled law, and accordingly, it is worthwhile to evaluate the concurrence on the basis of how well it defends that position. Judged purely from the standpoint of its use of precedent, the concurrence appears to overplay its hand. First, many of the cases Justice Scalia cites as treating agency jurisdictional interpretations deferentially themselves antedated *Chevron*, and thus are minimally useful on the question whether *Chevron*’s rationale required courts to defer to agency jurisdictional interpretations. *See, e.g., NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *FTC v. Bunte Bros., Inc.*, 312 U.S. 349 (1941) (all cited in *Miss. Power*, 487 U.S. at 381 (Scalia, J., concurring)). A fair canvassing of the authorities cited in the concurrence suggests that the question was, at a minimum, far more open to debate than Justice Scalia suggests. Second, Justice Scalia relied repeatedly on the *Schor* and *City Disposal* decisions without ever addressing the dissent’s contentions that those cases were not on point. *See supra* note 193.

Justice Scalia then defended the deference principle on practical grounds. In what has become the most frequently invoked rationale for treating agency jurisdictional interpretations identically to all other agency statutory interpretations when applying *Chevron*, he first contended that it was essentially impossible to separate the two except as a matter of pure semantics:

[Deference] is *necessary* because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority."¹⁹⁸

He then wrote that deference to agency jurisdictional interpretations would be "*appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction."¹⁹⁹ Congress would not, Justice Scalia be-

There may have been plausible arguments that the dissent misread those cases, but Justice Scalia advanced none.

Third, although Justice Scalia portrays the dissent's arguments as contrary to settled law, he responds to only two of the three arguments the dissent actually raised. The dissent contended that agencies could make no claim of specialized expertise in matters of jurisdiction, see *supra* note 191 and accompanying text, which Justice Scalia found to be inconsistent with *Schor*; and that the issue of agency jurisdiction was different from the types of policy conflicts *Chevron* suggested Congress likely intended agencies to resolve, see *supra* notes 189-190 and accompanying text, which Justice Scalia found to be inconsistent with *City of New York v. FCC*, 486 U.S. 57 (1988). See *Miss. Power*, 487 U.S. at 381 (Scalia, J., concurring). The dissenters also contended, however, that the very establishment by Congress of statutory limits on agency jurisdiction evidenced an intent to *withhold* from the agency the power to determine its own authority, rather than an intent to make the kind of delegation of interpretive authority to the agency that *Chevron* presumes. See *supra* note 192. Although Justice Scalia makes an argument that deference to agency jurisdictional interpretations would still be "appropriate" and "consistent with the general rationale for deference," see *infra* note 199 and accompanying text, he neither contends nor shows that the dissent's third argument is foreclosed by precedent.

¹⁹⁸ *Miss. Power*, 487 U.S. at 381 (Scalia, J., concurring).

¹⁹⁹ *Id.* at 381-82 (Scalia, J., concurring). Here, the qualifying phrase, "within broad limits," drains a great deal of force from Justice Scalia's argument. It is not difficult to understand why Justice Scalia might have thought it necessary to add that qualification; if one omits it from his sentence, the result is a patent absurdity, for neither Congress, nor Justice Scalia, nor anyone else would believe that agencies enjoy the *sole* authority to define their own jurisdiction. Cf., e.g., *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986) ("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."). Yet to say that agencies should be free to resolve jurisdictional ambiguities "within broad limits" is to provide no analytical guidance on what courts should do when called upon to determine whether those limits have been transgressed. Presumably, any

lieved, intend “that every ambiguity in statutory authority would be addressed, *de novo*, by the courts.”²⁰⁰ For those reasons, he concluded that FERC could permissibly construe its jurisdiction to include evaluating the prudence of MP&L’s participation in the plant construction project.²⁰¹

Echoing the Court’s own division, lower courts and commentators have taken divergent positions on the question whether courts should defer to an agency interpretation concerning the scope of the agency’s own jurisdiction. The Court of Appeals for the Federal Circuit, for example, has generally declined to defer to an agency’s interpretation of the reach of its own jurisdiction,²⁰² but other courts have held that an agency is entitled to deference even when construing its statutory authority.²⁰³ In the academic literature, the views expressed can, without undue oversim-

agency would contend, even in cases of jurisdictional aggrandizement, that it only acted within the “broad limits” Congress must have meant for it to have in determining the extent of its own authority. To say that agencies should be able to determine their own authority “within broad limits” unavoidably raises the questions of how to determine what those limits are and whether courts owe deference to agencies that exceed them. On these questions, however, Justice Scalia’s concurrence has nothing to offer.

²⁰⁰ *Miss. Power*, 487 U.S. at 382 (Scalia, J., concurring).

²⁰¹ *See id.* at 382–83 (Scalia, J., concurring).

²⁰² *See, e.g.*, *Manley v. Dep’t of Air Force*, 91 F.3d 117, 119–20 (Fed. Cir. 1996); *King v. Briggs*, 83 F.3d 1384, 1387 (Fed. Cir. 1996); *Roche v. U.S. Postal Serv.*, 80 F.3d 468, 470 (Fed. Cir. 1996); *Forest v. Merit Sys. Protection Bd.*, 47 F.3d 409, 410 (Fed. Cir. 1995); *Borlem S.A.—Empredimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) (holding that court is not required to defer to agency’s decision “when the issue is the legal scope of an agency’s authority”).

As previously noted, the state courts, which remain free to evaluate the issue without applying *Chevron*, have stated no consistent view on the question of deference to agencies’ interpretation of contracts. *See supra* note 73. On the question of agencies’ scope-of-jurisdiction interpretations, however, the states more uniformly withhold deference, in line with the Federal Circuit’s views. *See, e.g.*, *Lake County State’s Attorney v. Ill. Human Rights Comm’n*, 558 N.E.2d 668, 671 (Ill. App. Ct. 1990); *Vann v. Employment Sec. Bd. of Review*, 756 P.2d 1107, 1109 (Kan. Ct. App. 1988); *Morningstar Water Users Ass’n v. New Mexico Public Utility Comm’n*, 904 P.2d 28, 32 (N.M. 1995); *Iversen v. Wall Bd. of Educ.*, 522 N.W.2d 188, 193 (S.D. 1994) (“Questions involving authority require no deference to the decision maker.”); *Harmon v. Ogden City Civil Serv. Comm’n*, 917 P.2d 1082, 1084 (Utah 1996); *In re Elec. Lightwave, Inc.*, 869 P.2d 1045, 1051 (Wash. 1994); *Wis. Power & Light Co. v. Pub. Serv. Comm’n*, 511 N.W.2d 291, 293 (Wis. 1994). *Cf. Moderate Income Hous., Inc. v. Bd. of Review*, 393 N.W.2d 324, 326 (Iowa 1986) (“An administrative agency has the authority and duty to determine its own limits of statutory authority, although it is the function of the judiciary to finally decide the limits of the authority of the agency.”); *Christesson Reporting Serv. v. Okla. Employment Sec. Comm’n*, 903 P.2d 336, 337 (Okla. Ct. App. 1995) (explaining that, in reviewing a state agency order, court will not “accept as conclusive the [agency’s] findings of fact concerning a jurisdictional question, but will weigh the evidence and make its own independent findings of fact”).

²⁰³ *See, e.g.*, *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1171 (D.C. Cir. 2000). *But cf. Bank of America, N.A. v. FDIC*, 244 F.3d 1309, 1321 (11th Cir. 2001) (reasoning that, where the agency “fundamentally misunderstands the source of its [statutory] authority,” the court owes no deference to the agency’s jurisdictional interpretation articulated in litigation).

plification, be divided between those who believe that jurisdictional questions are no different from any other legal questions for which courts owe agency interpretations *Chevron* deference,²⁰⁴ and those who believe that, whether because of the risk of agency aggrandizement or otherwise, agency jurisdictional issues should receive some more searching form of review.²⁰⁵

²⁰⁴ See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 759 n.354 (1990) (“At various times in the history of administrative law, writers have proposed that so-called ‘jurisdictional’ issues should be subjected to especially searching judicial review. None of these efforts has endured, and it is doubtful that any convincing justification for such a distinction can be devised.”); Crawford, *supra* note 16.

²⁰⁵ See Merrill & Hickman, *supra* note 159, at 909-14 (arguing for a “scope-of-jurisdiction exception” to the general rule of deference); Jeffrey M. Gaba, *Regulation By Bootstrap: Contingent Management of Hazardous Wastes Under the Resource Conservation and Recovery Act*, 18 YALE J. ON REG. 85, 120-21 (2001) (listing a number of considerations weighing against deference to agency jurisdictional interpretations, “ranging from concerns about agency aggrandizement and self-interest, to traditional common law restraints on an entity’s judging the scope of its own jurisdiction, to problems arising when agencies enter areas beyond the scope of their expertise”) (footnote omitted); Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1516-29 (2000); *id.* at 1522 (“It is not impossible to find a line of demarcation between jurisdictional and other statutory questions.”); E. Livingston B. Haskell, Note, “*Disclose-or-Abstain Without Restraint: The Supreme Court Misses the Mark on Rule 14e-3 in United States v. O’Hagan*,” 55 WASH. & LEE L. REV. 199, 244 (1998) (“[d]eference may not be appropriate in situations in which an agency is interpreting limits on its own statutory power.”); Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 90 (1994) (“Even when deference is shown, as in judicial review of statutory interpretations by administrative agencies, deference with regard to the scope of the agency’s own jurisdiction raises the most troubling issues.”) (footnote omitted); Leonard Bierman & Donald R. Fraser, *The “Source of Strength” Doctrine: Formulating the Future of America’s Financial Markets*, 12 ANN. REV. BANKING L. 269, 291 (1993) (finding judicial deference to agency jurisdictional aggrandizement “a bit ridiculous” on the grounds that agencies lack special expertise on the issue and that Congress would not, and could not consistently with the separation of powers, delegate to agencies the authority to determine their own jurisdiction; “[i]n short, courts should not defer to agencies in situations where the potential for ‘agency aggrandizement’ exists”); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487-88 (1989) (arguing that the nondelegation doctrine, which presupposes the availability of independent judicial review to ensure that agencies act within the limits of delegated authority, is inconsistent with a rule allowing agencies to define “the limits of their organic statutes”); *cf.* Amanda Frost, *Judicial Review of FDA Preemption Determinations*, 54 FOOD & DRUG L.J. 367, 371 & nn.41-43 (1999) (noting controversy over deference to agency’s self-interested jurisdictional interpretations without expressly taking sides).

It has long been suggested that *Chevron* deference itself represents abdication of the judiciary’s constitutional duty “to say what the law is,” in *Marbury*’s famous phrase. See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 993-98 (1992) (criticizing *Chevron*’s resolution of the “*Marbury* problem” without directly arguing that *Chevron* is unconstitutional); Rosenkranz, *supra* note 1, at 2131 (“*Chevron* may well be wrongly decided as a matter of constitutional law.”). This complaint has been raised in the specific context of deference to agencies’ interpretations of their own jurisdiction. See, e.g., E.P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 818-20 (1992) (arguing that post-*Chevron* case law leaves the agency “the final judge of the scope of its own power,” with the result that “[a]gency irresponsibility is easily masked by a ceremonial nod in the direction of *Chevron* and a complete abdication of the

Professor Pierce's treatise, the successor to Professor Davis's, takes the pro-deference position.²⁰⁶ He notes that the Supreme Court's "pattern of decisions" shows that "*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers."²⁰⁷ Most of the decisions of the courts of appeals, he continues, do so as well, although generally without discussing the issue directly.²⁰⁸ The only court of appeals decision Professor Pierce cites as squarely confronting the issue, however, reached the opposite result.²⁰⁹ Professor Pierce criticizes this decision on two grounds. First, he essentially contends that the court should have seen the handwriting on the wall: he argues that the Supreme Court's tacit endorsement of *Chevron* deference to agency jurisdictional interpretations should have been enough to bring the lower court into line.²¹⁰ Second, Professor Pierce adopts a version of Justice Scalia's argument from *Mississippi Power*,²¹¹ arguing that courts, in the face of skillful lawyering, will find themselves unable to distinguish jurisdictional from non-jurisdictional interpretations:

[C]ourts will routinely encounter intractable characterization problems if they attempt to distinguish between jurisdictional and nonjurisdictional disputes. Any good lawyer can make a plausible argument that a high proportion of disputes about the meaning of ambiguous language in agency-administered statutes are jurisdictional disputes.²¹²

judicial role"). See generally Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw. U. L. REV. 1239, 1242-43 (2002) (noting debates before and after *Chevron* about implications of *Chevron*-like reasoning for *Marbury* and for the separation of powers).

²⁰⁶ PIERCE, *supra* note 156, § 3.5, at 157-58.

²⁰⁷ *Id.* at 157.

²⁰⁸ *Id.* (citing *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598 (3d Cir. 1996); *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995)). It is possible that no party in these cases even advanced an argument opposing the application of *Chevron*, which would render the courts' *sub silentio* treatment of the issue unsurprising. A skeptical reader might question whether these cases, which concededly say nothing about the issue, represent especially persuasive authorities supporting what Professor Pierce describes as settled law. On the other hand, for another example of a judicial opinion that defers to an agency's assertion of jurisdiction without acknowledging that deference in jurisdictional matters presents any unique issues, see *New York v. FCC*, 267 F.3d 91 (2d Cir. 2001).

²⁰⁹ See *id.* (citing *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606 (7th Cir. 1999)).

²¹⁰ See *id.*

²¹¹ See *supra* note 198 and accompanying text.

²¹² PIERCE, *supra* note 156, § 3.5, at 157-58. This formulation seems to me to omit the possibility that sufficiently skillful judging may succeed in untangling what skillful lawyers might try to obfuscate. Professor Elhauge's formulation of Justice Scalia's principle, which does not depend on assumptions regarding the competence of judges, is thus perhaps more apt. See Elhauge, *supra* note 18, at 2153-54 ("[E]very statutory interpretation implicates the scope

Professor Schwartz's treatise argues the opposite view.²¹³ He reasons that the very existence of statutory clauses delimiting the scope of agency authority provide reason to believe that Congress did not intend to delegate the question of authority to the agency itself:

Agencies have no special expertise in deciding their own jurisdiction. In addition, statutory provisions confining an agency's authority manifest an unwillingness to give the agency freedom to define the scope of its own power. To give effect to the confining intent, the ultimate word on jurisdiction should be with the courts, not the agencies.²¹⁴

Can these conflicting approaches be reconciled? Perhaps not; it would surely be a defensible intellectual position to insist that all agency statutory interpretations are equal in the eyes of *Chevron* and that no distinctions can be drawn between those interpretations that involve jurisdictional matters and those that do not. Yet many of the scholarly authorities collected above seem to skirt an issue that could be considered determinative of the appropriate scope of deference, namely, agency aggrandizement or self-interest. It could easily be argued that agencies' jurisdictional interpretations warrant *Chevron* deference *except* when those interpretations serve to aggrandize power in the agency or otherwise advance the agency's self-interest. In the context of agency *financial* self-interest, courts seem to have had little conceptual difficulty differentiating between agencies' disinterested contractual interpretations, which may warrant deference,²¹⁵ and their self-interested interpretations, which may not.²¹⁶ Applying the same criterion of agency self-interest or disinterest to agencies' jurisdictional interpretations could provide an avenue for reconciling the pro- and anti-deference arguments collected above and for harmonizing *Brown & Williamson* with the Court's other post-*Chevron* precedents.²¹⁷ On the other hand, if every statutory

of agency jurisdiction by defining what comes within the statutes over which the agency has uncontested jurisdiction. A 'scope of jurisdiction' exception thus does not helpfully distinguish a set of cases that differ from others where deference is warranted.") (footnotes omitted). Ultimately, however, neither side seems to advance much in the nature of an actual reasoned argument supporting this contention. It appears that either one believes that all statutory interpretation disputes are essentially jurisdictional, or one does not; advocates of each side seem to make their respective assertions and simply leave it at that.

²¹³ BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.36, at 707 (3d ed. 1991).

²¹⁴ *Id.* The *Mississippi Power* dissenters made substantially the same point. *See supra* note 192 and accompanying text.

²¹⁵ *See supra* note 44 and accompanying text.

²¹⁶ *See supra* note 72 and accompanying text.

²¹⁷ *See* Mark Seidenfeld & William S. Jordan III, *Judicial Review*, in ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 1999-2000, at 89, 92 (2001) (*Brown & Williamson* suggests that

question can be reasonably thought to implicate the agency's jurisdiction,²¹⁸ and if agency self-interest is truly at issue in every *Chevron* case,²¹⁹ then it may serve no useful analytical purpose to say that a given statutory interpretation represents an effort by the agency to aggrandize its own jurisdiction. Fortunately, however, the courts have not found it impossible to distinguish instances of agency aggrandizement from routine *Chevron* cases,²²⁰ as the following discussion should illustrate.

The extent to which an agency interpretation concerning its own jurisdiction warrants judicial deference has arisen in a variety of contexts, some examples of which are considered below. The cases presenting the most substantial *Chevron* issues fall into two loose categories. In the first category, an agency might stake a jurisdictional claim to a regulatory sphere that arguably falls within the jurisdiction of another agency.²²¹ If the second agency has advanced a jurisdictional interpretation of its own statute that gives it exclusive jurisdiction over the regulated subject matter, then the *Chevron* analysis yields an impasse, for judicial deference to either agency's view yields a result incompatible with deference to the views of the other agency.²²² In the second category, an agency might assert regulatory jurisdiction over a subject matter

"there is a good argument that Congress would not delegate significant jurisdictional questions to agencies because that would give agencies the authority to expand their own power.") (footnote omitted) (citing Gellhorn & Verkuil, *supra* note 16, at 1008). As I will discuss below, the section of *Brown & Williamson* dealing directly with the agency's aggrandizement of jurisdictional authority seems substantially more persuasive than the sections of the Court's opinion that deal only with the statutory text and history. See *infra* notes 263-346 and accompanying text.

²¹⁸ See *supra* note 198 and accompanying text.

²¹⁹ See *supra* note 132 and accompanying text.

²²⁰ As previously noted, the standard argument against withholding judicial deference from agency jurisdictional interpretations is that the courts cannot usefully differentiate such cases from routine statutory construction by the agency as to which deference undeniably extends. See, e.g., *supra* notes 132, 198, 212 and accompanying text. Although the issue arises infrequently, the available evidence does not seem to suggest that courts have found it difficult to segregate credible assertions of agency self-aggrandizement from ordinary statutory interpretation cases. Rather, litigants' assertions that agencies' routine performances of their duties amounted to an exercise in self-aggrandizement have been met with healthy judicial skepticism. See *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962, 986 (M.D. Tenn. 1981) (rejecting argument that interest in receiving federal highway funds tainted state agency's consideration of proposed construction project; the plaintiff's argument "proves far too much" because "[v]iewed from this perspective, government will always have a financial interest in governing").

²²¹ See, e.g., Crawford, *supra* note 16, at 970-71 (considering a hypothetical attempt by the Equal Employment Opportunity Commission to regulate cable television); cf. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962) (warning agencies to exercise caution to avoid trenching on each other's jurisdiction).

²²² In this case, courts should engage in an independent construction of the statute or statutes at issue. See *infra* note 226 and accompanying text. As suggested below, the outcome should depend neither on which agency first adopted its interpretation of the relevant statutory provision, nor upon which agency's interpretation is first tested on judicial review. -

Congress did not intend to be regulated by any agency—where, for example, Congress meant a subject area to be unregulated or reserved regulatory authority for itself. This latter scenario was presented in the Supreme Court’s *Brown & Williamson* decision.²²³

2. *Inter-Agency Jurisdictional Conflicts*

Consider first the scenario in which one agency asserts exclusive jurisdiction over a subject matter also exclusively claimed by another.²²⁴ Assuming that both agencies have adopted their respective interpretations with the requisite formality,²²⁵ and assuming that neither accedes to the other’s superior claim of regulatory authority, then *Chevron* analysis, standing alone, may not resolve the dispute, for deference to either agency’s view offends the principle of deference to the view of the other.

a. Agency Disagreement on Jurisdictional Issues

The case for independent judicial determination is strongest when the affected agencies disagree about the relative extent of their respective jurisdiction. When two agencies advance mutually exclusive claims of jurisdiction over a given statutory subject matter, it is not difficult to see that judicial deference to either agency’s view will award exclusive jurisdiction to the agency that happens to reach the courthouse first. Resolution of the conflicting jurisdictional claims, however, ought to rest upon legislative intent, not happenstance or timing. Accordingly, in such circumstances courts should not accord deference to either agency’s jurisdictional claim and instead reason through the applicable statutes to ascertain what Congress most likely intended.²²⁶

The Supreme Court resolved such an apparent jurisdictional conflict between two agencies in *ETSI Pipeline Project v. Missouri*,²²⁷ although it did so without considering whether the statute called for deference to either agency’s view. In that case, the Secretary of the Interior entered

²²³ 529 U.S. 120 (2000).

²²⁴ There has been some discussion of this scenario in the literature. See, e.g., Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35 (1991); Tracy N. Tool, Note, *Begging to Defer: OSHA and the Problem of Interpretive Authority*, 73 MINN. L. REV. 1336 (1989).

²²⁵ See *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that *Chevron* deference does not extend to informal agency pronouncements). See generally *supra* note 10.

²²⁶ See *United Parcel Serv. v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996); *Dep’t of the Navy v. FLRA*, 836 F.2d 1409 (3d Cir. 1988) (interpreting naval pay statute, without regard to interpretation advanced by FLRA, as giving the Navy sole discretion over challenged pay practices); cf. *Ackley-Bell v. Seattle Sch. Dist. No. 1*, 940 P.2d 685, 688 (Wash. Ct. App. 1997) (courts should “consider the expertise of both agencies” when they advance “conflicting legal interpretations”).

²²⁷ 484 U.S. 495 (1988).

into a contract with a private party allowing the party to withdraw a specified quantity of water for industrial use from a large federal reservoir.²²⁸ Several states sued to enjoin performance of the contract on the grounds that the Secretary of the Interior had no statutory authority to enter into such a contract.²²⁹ They alleged that, under the applicable statute, the authority to approve any such withdrawal of water from the reservoir lay instead with the Secretary of the Army.²³⁰ It was apparently undisputed that the reservoir had been constructed, and was operated, by the Army Corps of Engineers.²³¹

The statute at issue, the Flood Control Act of 1944, contemplated that both the Department of the Interior and what was then known as the Department of War would have roles in the development of the reservoir, and allocated funds to both agencies to pursue their respective functions.²³² The statute also required consultations and information-sharing between the agencies on any other projects within the affected area.²³³ Most importantly, the statute conferred authority on both Departments to take certain other actions in connection with the operation of the reservoir.²³⁴ The statute specifically authorized “‘the Secretary of War . . . to make contracts . . . at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department.’”²³⁵

This express grant of authority to the Secretary of War, the Court reasoned, left no support for the argument that the various powers granted to the Secretary of the Interior could permit the contracts that Department had concluded with the private parties.²³⁶ Any such contracts, the Court reasoned, expressly required the concurrence of the Secretary of the Army, to whom the statutory text and structure granted the authority to make such agreements.²³⁷

The Court rejected the Secretary of the Interior’s claim of entitlement to deference for the Department’s statutory interpretation under the

²²⁸ See *id.* at 497-98.

²²⁹ *Id.* at 498.

²³⁰ *Id.*

²³¹ Both lower courts so found. See *id.* at 498 (district court found that “the dam was built by the Corps of Engineers, now part of the Department of the Army . . . , which has always maintained and operated the reservoir”); *id.* at 499 (court of appeals affirmed decision for plaintiffs “primarily because the Army built the reservoir and controls its operation”).

²³² See *id.* at 502.

²³³ See *id.* at 503.

²³⁴ *Id.* at 503-05.

²³⁵ *Id.* at 504 (citing the Flood Control Act).

²³⁶ *Id.* at 505.

²³⁷ *Id.* (“Only two provisions of the Act provide for the Interior Secretary to exercise any authority whatsoever at Army reservoirs, and in both instances the Act clearly states that the Interior Secretary’s authority is subordinate to that of the Army Secretary, who does after all ‘control’ those reservoirs.”).

Chevron doctrine.²³⁸ The argument failed at Step One, for the statute “indicate[d] clearly that the Interior Secretary may not enter into a contract to withdraw water from an Army reservoir for industrial use without the approval of the Department of the Army.”²³⁹ Thus, although the statute plainly delegated to the Department of the Interior *some* authority over the ongoing administration of the project and was silent on the question whether that Department had contractual authority, the Court found that the specific reference to contractual authority in the terms of the delegation to the Secretary of the Army compelled the conclusion that the Department of the Interior lacked the authority to contract.²⁴⁰

b. Agency Agreement on Jurisdictional Issues

On the other hand, when two agencies agree on a single consistent interpretation regarding the allocation of their statutory authority, the courts may justifiably show less sympathy toward an argument that the agencies’ self-interest undermines the rationale for *Chevron* deference. *Air Courier Conference of America/International Committee v. U.S. Postal Service* confronted this issue.²⁴¹ In that case, a trade association representing providers of domestic and international letter and parcel delivery services challenged the U.S. Postal Service’s reduction in the postage rate for certain international express mail.²⁴² The plaintiffs contended that the applicable statute assigned authority over international postal rates not to the U.S. Postal Service, but to the Postal Rate Commission, a separate agency.²⁴³ The court of appeals essentially resolved the issue at *Chevron* Step One,²⁴⁴ holding that the plain meaning of the

²³⁸ *See id.* at 515–17.

²³⁹ *Id.* at 517.

²⁴⁰ *Id.*

²⁴¹ 959 F.2d 1213 (3d Cir. 1992).

²⁴² *See id.* at 1214–15.

²⁴³ *See id.* at 1214. More specifically, the applicable statute created a lengthy bureaucratic process for the approval of changes in domestic postal rates. Under the statute, domestic rate changes were proposed by the Postal Service to the Postal Rate Commission. *Id.* at 1216 (citing 39 U.S.C.A. § 3622(a)). The Commission then reviewed the proposed rate change and submitted a recommendation to the Postal Service Board of Governors. *Id.* (citing 39 U.S.C.A. § 3624(d)). The Board of Governors (excluding the Postmaster General and Deputy Postmaster General) held the final authority to approve, reject or modify a recommended rate change, or to allow the change to take effect under protest. *See id.* (citing 39 U.S.C.A. § 3625(a)). The plaintiffs contended that the statute required the same process to be followed when changes in international, rather than domestic, postage rates were proposed. *Id.*

²⁴⁴ The court declared *Chevron* “controlling,” *id.* at 1225, and one may infer that it resolved the case at Step One because it found the statutory text to support the agency’s position. It is impossible to offer a more definitive characterization of the court’s reasoning, however, for elsewhere in its opinion it appeared to downplay the relevance of *Chevron*’s deferential framework of review. *See id.* at 1217 (declaring, without citing *Chevron*, that “[p]lenary review is doubly appropriate here because the single question this appeal presents is a legal issue of statutory construction or interpretation”).

statutory text gave the Postal Service, not the Postal Rate Commission, sole and unilateral authority over international rates.²⁴⁵ Nevertheless, the court buttressed its conclusion with a *Chevron* Step Two reasonableness analysis.²⁴⁶ In the latter analysis, the court repeatedly emphasized that *both* agencies had interpreted the statute to assign sole authority over international rates to the Postal Service, not the Postal Rate Commission.²⁴⁷

In an interesting but puzzling aside, the court of appeals stated that the plaintiff's "argument that deference is inappropriate because the Postal Service is arguing in its own bureaucratic self-interest runs counter to *Chevron*."²⁴⁸ The quoted sentence represents the court of appeals' entire reasoning on the subject of deference to self-interested agency jurisdictional interpretations; as such, it seems disappointingly cursory. A few factors tend to undercut the usefulness of *Air Courier Conference* as authority for the proposition that self-interested agency jurisdictional interpretations warrant full *Chevron* deference, however. First, the quoted statement is mere dictum: the court's holding rested on its conclusion that the plain text of the statute compelled a ruling for the Postal Service at *Chevron* Step One regardless of whether the agency would have been entitled to deference if the analysis had proceeded to Step Two.²⁴⁹ Second, contrary to the quotation's implication, *Chevron* itself is hardly authoritative one way or the other on the question whether a self-interested agency interpretation commands deference, for the agency itself surely had no stake in the pollution regulation at issue in that case.²⁵⁰ Third, one wonders what to make of the court's labeling of the Postal Service's interpretation as advancing the agency's "bureaucratic self-interest,"²⁵¹ which the court did not attempt to define or explain. This may have simply been a parroting of the plaintiff's argument and not reflective of the court's own view. In any event, it is difficult to perceive in the Postal Service's interpretation the sort of jurisdictional aggrandizement that commentators have suggested may dilute the rationale for *Chevron* def-

²⁴⁵ See *id.* at 1217–23 (analyzing the statutory text and legislative history); *id.* at 1222 (declaring that the statute, "read as a whole, . . . plainly authorizes the Postal Service to 'establish' international postage rates") (citations omitted).

²⁴⁶ See *id.* at 1223–25.

²⁴⁷ See *id.* at 1215 ("our decision is buttressed by the Postal Service's longstanding reasonable construction of the Act as giving it power to 'establish' international rates—a construction the Commission concurs in"); *id.* at 1223 ("[o]ur holding . . . is strengthened by the long-standing interpretation both the Postal Service and the Commission have given the statute"); *id.* at 1225 n.10 ("Here, we have one statute consistently construed by both the Postal Service and the Commission.").

²⁴⁸ *Id.* at 1225 (footnote omitted).

²⁴⁹ See *supra* notes 220–245 and accompanying text.

²⁵⁰ See *Chevron*, 467 U.S. at 837.

²⁵¹ *Air Courier Conference*, 959 F.2d at 1225.

erence, because that interpretation was held to be (1) compelled by the statutory text, (2) long-standing and settled, and (3) shared by the Postal Rate Commission, which also disavowed any authority over international rates. These factors tend to undercut any perception that the agency was engaged in a “power grab” for authority not conferred on it by statute. Thus, whether or not the agency’s “bureaucratic self-interest” was truly at stake, the court’s decision appears to be correct.

3. *Brown & Williamson and Agency Aggrandizement*

An agency’s attempt to dramatically expand its substantive jurisdiction was the focus of the Supreme Court’s recent decision in *FDA v. Brown & Williamson Tobacco Corp.*²⁵² Although the decision may be best known for its narrow holding that the FDA lacked regulatory authority over cigarettes and tobacco products,²⁵³ the means by which the Court reached that conclusion also bear scrutiny.²⁵⁴

The statute at issue gave the FDA regulatory jurisdiction over “drugs,” defined in relevant part as any “‘articles (other than food) intended to affect the structure or any function of the body[;]’”²⁵⁵ and “‘devices,’” defined in relevant part as “‘instrument[s], apparatus, implement[s], machine[s], contrivance[s], . . . or other similar or related article[s], including any component[s], part[s], or accessor[ies], which [are] . . . intended to affect the structure or any function of the body.’”²⁵⁶ From the agency’s inception until 1995, the FDA consistently disavowed that it had any jurisdiction to regulate tobacco products under the statute.²⁵⁷ In 1995, however, the agency reversed course and later declared nicotine to be a “drug” and found cigarettes and smokeless tobacco to be “devices” for the delivery of that drug, as the statute defined those

²⁵² 529 U.S. 120 (2000).

²⁵³ *See id.* at 126 (“Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”).

²⁵⁴ Commentators began debating whether the *Brown & Williamson* decision would have broader implications for administrative law immediately after the decision was issued. *See, e.g.,* Marcia Coyle, *More to FDA Ruling than Tobacco? Some Think Justices have made ‘Historic’ Switch on Regulation*, NAT’L L.J., Apr. 3, 2000, at A4; Thomas W. Kirby, *Giving Agencies Less Deference: Tobacco Decision Looked Broadly for Congress’ Intent*, LEGAL TIMES, Mar. 27, 2000, at 66.

²⁵⁵ *Brown & Williamson*, 529 U.S. at 126 (quoting 21 U.S.C. § 321(g)(1)(C)).

²⁵⁶ *Id.* (quoting 21 U.S.C. § 321(h)) (alteration in original).

²⁵⁷ *See id.* at 144 (referring to “the FDA’s consistent and repeated statements that it lacked authority under the FDCA [the Food, Drug, and Cosmetic Act] to regulate tobacco absent claims of therapeutic benefit by the manufacturer”); *id.* at 145–46 (noting that in 1964, “FDA representatives testified before Congress that the agency lacked jurisdiction under the FDCA to regulate tobacco products” and the agency’s “disavowal of jurisdiction was consistent with the position that it had taken since the agency’s inception”).

terms.²⁵⁸ Based on these findings, the agency concluded that it had jurisdiction under the statute to regulate cigarettes and tobacco products, and, acting pursuant to that authority, promulgated several restrictions on the sale and marketing of cigarettes.²⁵⁹

Makers and sellers of tobacco products sought judicial review. The district court upheld the agency's assertion of jurisdiction,²⁶⁰ but the court of appeals reversed,²⁶¹ and the Supreme Court granted the agency's petition for certiorari.²⁶²

The Court gave essentially three reasons for agreeing with the court of appeals that the agency had exceeded the statutory limits on its jurisdiction. First, the Court found that the FDA's interpretation conflicted with the statutory text.²⁶³ As discussed below, however, the statutory text appears, at a minimum, to be much more ambiguous than the Court's opinion suggests. Second, the Court found that the agency's interpretation was not compatible with the agency's own prior public statements or with other legislation not administered by the FDA.²⁶⁴ Again, however, this aspect of the Court's discussion is not wholly convincing, both because administrative agencies are free to alter or abandon previously adopted statutory interpretations in the face of changed circumstances, and because the provisions of other agencies' statutes appear only tangentially relevant to the question whether the FDA's application of the authority delegated in its own statute exceeded that authorized by Congress. Most telling, however, was the Court's third argument, which addressed directly whether the agency's action amounted to a jurisdictional power grab and rejected the agency's interpretation as an exercise in self-aggrandizement.²⁶⁵

²⁵⁸ See *id.* at 127 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996)). The Supreme Court did not actually dispute either of these findings in its decision.

²⁵⁹ See *id.* at 128–29.

²⁶⁰ *Id.* at 129 (citing *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D. N.C. 1997)).

²⁶¹ *Id.* at 130 (citing *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998)). Some commentators immediately pointed out inconsistencies between the court of appeals' reasoning and the *Chevron* doctrine. See Joseph A. Fazioli, Note, *Chevron Up in Smoke?: Tobacco at the Crossroads of Administrative Law*, *Brown & Williamson Tobacco Corp. v. Food & Drug Administration*, 153 F.3d 155 (4th Cir. 1998), 22 HARV. J.L. & PUB. POL'Y 1057 (1999); Marguerite M. Sullivan, Note, *Brown & Williamson v. FDA: Finding Congressional Intent Through Creative Statutory Interpretation—A Departure from Chevron*, 94 NW. U. L. REV. 273 (1999). These commentators' arguments would also tend to support the opinions expressed in the popular legal press at the time of the Supreme Court's decision, that in upholding the Fourth Circuit, the Supreme Court departed from what had been the traditional mode of *Chevron* analysis. See *supra* note 254.

²⁶² *FDA v. Brown & Williamson Tobacco Corp.*, 526 U.S. 1086 (1999).

²⁶³ See *infra* notes 267–313 and accompanying text.

²⁶⁴ See *infra* notes 314–341 and accompanying text.

²⁶⁵ See *infra* notes 344–346 and accompanying text.

First, the Court contrasted the agency's interpretation with the statutory text.²⁶⁶ The Court recognized that, because the case involved an agency's interpretation of a statute it administered, *Chevron* and its progeny supplied the relevant analytical framework.²⁶⁷ However, the agency's interpretation failed at Step One of the *Chevron* analysis because, as the Court saw it, "Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products."²⁶⁸

The Step One analysis, the Court stated, required it to evaluate the statute's words "'in their context and with a view to their place in the overall statutory scheme'"²⁶⁹ rather than "examining [the] particular statutory provision in isolation."²⁷⁰ Endeavoring to read the statute as a cohesive whole, the Court found that the FDA's interpretation of the "drug" and "device" provisions stood in considerable tension with other parts of the statute.²⁷¹ The other statutory provisions all suggested that, if cigarettes and tobacco products truly were classifiable as "devices" under the statute, the agency would have no alternative but to ban them from commerce.²⁷² The Court gave essentially three reasons in support of this conclusion: (1) all "misbranded" devices must be banned, and tobacco products are "misbranded" as a matter of law; (2) all devices that are unsafe if used as directed must be banned, and tobacco products fall into that category as well; and (3) the agency's own prior statements purportedly acknowledged that tobacco products would have to be banned from commerce if found to be "devices" under the statute.²⁷³

The Court first considered the statutory provision forbidding the introduction into interstate commerce of any "misbranded" drug or device.²⁷⁴ It gave two reasons for concluding that cigarettes and tobacco products would necessarily be "misbranded," and therefore banned from commerce, if found to be "devices" under the statute. First, the Court observed, any device is "misbranded" if it is dangerous when used as directed.²⁷⁵ Because the FDA's own findings "make clear that tobacco products are 'dangerous to health' when used in the manner prescribed" in their packaging,²⁷⁶ such products would necessarily satisfy the statu-

²⁶⁶ See *Brown & Williamson*, 529 U.S. at 132–43.

²⁶⁷ *Id.* at 132.

²⁶⁸ *Id.* at 133.

²⁶⁹ *Id.* (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

²⁷⁰ *Id.* at 132.

²⁷¹ See *id.* at 134–35.

²⁷² *Id.* at 135 ("[I]f tobacco products were 'devices' under the FDCA, the FDA would be required to remove them from the market.").

²⁷³ See *id.* at 135–37.

²⁷⁴ *Id.* at 135 (citing 21 U.S.C. § 331(a)).

²⁷⁵ *Id.* (citing 21 U.S.C. § 352(j)).

²⁷⁶ *Id.*

tory definition of “misbranded” if found to be “devices” under the statute.²⁷⁷ Second, the Court explained, the statute deems a device to be “misbranded” if its labeling does not contain directions for safe use.²⁷⁸ The agency’s own findings, however, made clear that “there are no directions that could adequately protect consumers” or “make tobacco products safe for obtaining their intended effects.”²⁷⁹ Thus, for this reason, too, a finding that tobacco products were “devices” as defined in the statute would necessarily imply that they were “misbranded” and therefore “could not be introduced into interstate commerce.”²⁸⁰

The Court next turned to another provision of the statute that suggested that tobacco products would have to be banned from commerce if found to be “devices.”²⁸¹ This provision required the FDA to assign all regulated devices to one of three specified classifications, with separate “degree[s] of control and regulation” tailored to each classification.²⁸² Although the agency had not issued a classification for tobacco products in its initial regulations, the Court had little hesitation in concluding that, “[g]iven the FDA’s findings regarding the health consequences of tobacco use, the agency would have to place cigarettes and smokeless tobacco in Class III because, even after the application of the Act’s available controls, they would ‘presen[t] a potential unreasonable risk of illness or injury.’”²⁸³ Placing tobacco products in Class III, however, would subject them to the statutory requirement that no Class III device may be marketed without a prior “‘showing of reasonable assurance that such device is safe under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof.’”²⁸⁴ Because it would be impossible to provide such a reasonable assurance of safety based on the record the FDA developed, “once the FDA fulfilled its statutory obligation to classify tobacco products, it could not allow them to be marketed.”²⁸⁵

Thus, both the “misbranding” and classification provisions of the statute suggested that tobacco products must be banned from commerce if found to be “devices.”²⁸⁶ The agency itself, the Court noted, had rec-

²⁷⁷ *See id.*

²⁷⁸ *See id.* (citing 21 U.S.C. § 352(f)(1)).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 135–36.

²⁸¹ *Id.* at 136.

²⁸² *Id.* (alteration in original) (citing 21 U.S.C. § 360c(b)(1); 61 Fed. Reg. 44,412 (Aug. 28, 1996)).

²⁸³ *Id.* (citing 21 U.S.C. § 360c(a)(1)(C)).

²⁸⁴ *Id.* (citing 21 U.S.C. § 360e(d)(2)(A)).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 137.

ognized this potential outcome previously in congressional testimony.²⁸⁷ Even though the agency declared that it intended only to regulate tobacco products, not to ban them, the Court found that the statute would inescapably require such a ban if tobacco products were found to be “devices” as defined in the statute.²⁸⁸

The Court then examined the statutory history of tobacco legislation and concluded that a ban on the sale of tobacco products, which it believed to be required under the FDA’s interpretation, would squarely contradict legislative intent.²⁸⁹ Although Congress had enacted tobacco-specific legislation on several occasions since the 1960s, the Court observed, every one of its enactments rested on the assumption “that cigarettes and smokeless tobacco will continue to be sold in the United States.”²⁹⁰ This legislative tinkering with cigarette labeling and marketing requirements “reveal[ed] [Congress’] intent that tobacco products remain on the market.”²⁹¹ For that reason, the Court concluded, the “ban of tobacco products by the FDA” that it believed inevitable under the agency’s statutory interpretation “would therefore plainly contradict congressional policy.”²⁹²

²⁸⁷ *Id.* (citing congressional testimony of administration officials in the 1960s and 1970s that tobacco products would have to be banned from commerce if found to be within the FDA’s jurisdiction).

²⁸⁸ *Id.* at 136. Although the Court did not cite the case, its reasoning—which measured the legality of the agency’s claimed authority not by the specific authority the agency claimed, but by examining the furthest extension that authority might logically reach—parallels the landmark decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall’s famous declaration that “the power to tax involves the power to destroy,” *id.* at 431, was the stated basis for striking down the state tax law at issue in that case—even though the state did not actually attempt to destroy the bank, but only to tax it and, indeed, even though destruction of the bank would have been quite antithetical to the state’s interest in maintaining tax revenues. To evaluate an agency’s statutory interpretation by *reductio ad absurdum*, however, seems less than appropriately respectful of the agency’s competence in drawing lines and tailoring policy responses to the particulars of the problem it seeks to confront.

²⁸⁹ *See Brown & Williamson*, 529 U.S. at 137 (“Congress, however, has foreclosed the removal of tobacco products from the market.”).

²⁹⁰ *Id.* at 137–39.

²⁹¹ *Id.*

²⁹² *Id.* The words “congressional policy” were no doubt carefully chosen, for the Court at no time identified any specific statutory language that forbade the FDA to ban the sale of tobacco products, assuming *arguendo* that the Court correctly identified a ban as the necessary consequence of the agency’s interpretation. This was something of a departure from the customary analysis under *Chevron* Step One, which typically asks whether Congress has spoken *in statutory text* directly to the issue presented. *See, e.g., United States v. Haggard Apparel Co.*, 526 U.S. 380, 392 (1999) (explaining that agency regulation is not controlling where “a court . . . conclude[s] the regulation is *inconsistent with the statutory language* or is an unreasonable implementation of it”) (emphasis added); *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (observing that the fact that an agency’s interpretation “flies against the plain language of the statutory text exempts courts from any obligation to defer to it”); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 128 (1991) (recognizing that, in applying *Chevron* test, “we begin with *the language of the statute* and ask whether Congress has spoken on the subject before us”) (emphasis added); *see also* Heather Steiner, Note, *Administrative Law:*

The agency sought to avoid the necessary consequence of this reasoning by arguing that tobacco would not need to be banned because it was actually a “safe” product as the statute employed that term.²⁹³ Intuitively, the statutory term “safe” might reasonably be thought to have more than one identifiable meaning, and the agency’s interpretation of the ambiguous term seems to provide a classic occasion for judicial deference under the *Chevron* rule. Nevertheless, the Court concluded that it owed no deference to the FDA’s assertion that tobacco products could be considered “safe” within the meaning of the statute.²⁹⁴ Although the statute did not define the term “safe,” the Court nevertheless cobbled together a meaning of the term from various other statutory language, with which it then judged the FDA’s interpretation inconsistent.²⁹⁵

According to the Court, the FDA argued that a device was “safe” if the health consequences of banning it exceeded those of leaving it on the market.²⁹⁶ A ban on the sale of tobacco products, the agency reasoned, would itself produce an enormous public health crisis: it would produce withdrawal symptoms in millions of smokers far beyond the capacity of the health care system to treat and would also drive tobacco sales underground to a “black market” where “cigarettes even more dangerous than those currently sold legally” could become available.²⁹⁷ Thus, banning cigarettes would be more “unsafe” than allowing them to be sold.²⁹⁸ The agency reasoned that a statute aimed at protecting public health could not be read to mandate such an unsafe result, and that, as the statute used the term, tobacco products were “safe” and not susceptible to being banned.²⁹⁹

Although this is certainly not the only meaning one could ascribe to the statutory term “safe,” it does no violence to the statutory text and

Food & Drug Administration v. Brown & Williamson Tobacco Corp., 28 *ECOLOGICAL L.Q.* 355, 355 (2001) (arguing that in *Brown & Williamson*, “[r]ather than turn to the plain meaning of the statute, the Court expanded *Chevron*’s first step to include the ‘context’ of the regulatory scheme”). This change in the Court’s emphasis may sow confusion in future cases. For example, one commentator noted that:

The *Brown & Williamson* Court sacrificed transparency and accessibility by being more aggressive than it had in prior cases and by relying much more heavily on statutory context. The Court focused so much on finding the right answer in the case at hand that it overlooked its responsibility for maintaining a coherent doctrine of judicial review across cases.

Molot, *supra* note 205, at 1325. See also *id.* at 1326–27.

²⁹³ *Brown & Williamson*, 529 U.S. at 139.

²⁹⁴ See *id.* at 140.

²⁹⁵ *Id.* at 140–43.

²⁹⁶ *Id.* at 139.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

seems quite consistent with the public policies underlying the FDCA.³⁰⁰ Nevertheless, the Court found that the statute “require[s] the FDA to determine that the *product itself* is safe as used by consumers. That is, the product’s probable therapeutic benefits must outweigh its risk of harm.”³⁰¹ The Court cited two examples of statutory provisions that established a different meaning of the term “safe” from that advanced by the agency. First, the Court cited a statutory provision specifying that “the safety and effectiveness of a device are to be determined” in part by “weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use.”³⁰² This provision, by its terms, required the agency to “weigh the probable therapeutic benefits of the device to the consumer against the probable risk of injury.”³⁰³ As the Court saw it, however, under the agency’s interpretation, the “therapeutic benefit” to be weighed in the balance was not a “benefit” at all.³⁰⁴ Rather, the agency’s approach balanced the risk of injury against the risk of *continued tobacco use*, which, the record established, was itself harmful.³⁰⁵ “In other words,” the Court explained, “the FDA is forced to contend that the very evil it seeks to combat is a ‘benefit to health.’ This is implausible.”³⁰⁶

Second, the Court again invoked the statute’s misbranding provision, which it had previously cited as a basis for holding that the statute would require tobacco products to be withdrawn from the market if read as the agency suggested.³⁰⁷ The statute provided that a product was “‘misbranded’ if ‘it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.’”³⁰⁸ This was a “different inquiry”³⁰⁹ from the one the agency proposed, to wit, whether it would be

³⁰⁰ The statutory text at issue in *Brown & Williamson* appeared sufficiently ambiguous to place the case most naturally in the *Chevron* Step Two category, and several commentators have remarked upon the great efforts that the Court required to resolve the case at Step One. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1257 (2001) (arguing that based on language of FDCA statute, “[a]t first blush, [the *Brown & Williamson*] case would appear easy . . . Surely the FDA has jurisdiction[.]”); Mark Seidenfeld, *An Apology for Administrative Law in The Contracting State*, 28 FLA. ST. U. L. REV. 215, 223 (2000) (observing that *Brown & Williamson* “stretch[ed] to find clarity in seemingly ambiguous language”) (footnote omitted).

³⁰¹ *Brown & Williamson*, 529 U.S. at 140 (citing *United States v. Rutherford*, 442 U.S. 544, 555 (1979)).

³⁰² *Id.* at 140–41 (quoting 21 U.S.C. § 360(a)(2)).

³⁰³ *Id.* at 141.

³⁰⁴ See *id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*; see also *supra* notes 274–280 and accompanying text.

³⁰⁸ *Id.* (quoting 21 U.S.C. § 352(j)).

³⁰⁹ *Id.*

would be worse to ban the product than to leave it on the market.³¹⁰ The statute, in the Court's view, "focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures."³¹¹ For those reasons, the Court concluded, the agency's position that tobacco products were "safe" as customarily marketed could not be squared with the statutory text.³¹²

Thus, the Court concluded, the statute would require the FDA to ban tobacco products as misbranded and dangerous if it was interpreted to confer the regulatory authority the agency claimed for itself.³¹³ In the second major portion of its analysis, however, the Court found evidence in other legislation that Congress did not intend tobacco products to be banned.³¹⁴ The other statutes the Court cited were not statutes administered by the FDA; nevertheless, the Court found them relevant in determining whether the agency's interpretation of its own statute could withstand scrutiny at Step One of *Chevron*.³¹⁵

The Court noted that Congress had repeatedly addressed the question of tobacco regulation over the preceding 35 years.³¹⁶ In each instance, the Court noted, "Congress has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco[.]"³¹⁷ In 1964, FDA officials testified before Congress that existing statutory law gave the agency no authority to regulate tobacco products.³¹⁸ The agency reiterated this conclusion in congressional testimony in 1972, stating that the agency believed that Congress had retained for itself exclusive regulatory authority over tobacco products.³¹⁹ In the late 1970s and early 1980s, the FDA denied various efforts by private advocacy groups to establish greater regulatory controls over tobacco, citing its own long-standing conclusion that it had no such authority under existing law.³²⁰ In 1980, the D.C. Circuit upheld the agency's restrictive jurisdictional interpretation.³²¹ In 1983, the agency again reaffirmed in congressional testimony its view that Congress had reserved regulatory authority over tobacco for itself and that

³¹⁰ *See id.*

³¹¹ *Id.*

³¹² *See id.* at 142.

³¹³ *See id.* at 143.

³¹⁴ *See id.* at 143–55.

³¹⁵ *Id.*

³¹⁶ *Id.* at 143.

³¹⁷ *Id.* at 144.

³¹⁸ *Id.* at 145. Interestingly, the agency actually requested in 1964 that Congress *not* grant it regulatory authority over tobacco, in light of the political consequences that would flow from the cigarette ban that the agency believed would inevitably result. *See id.* at 145–46.

³¹⁹ *Id.* at 151–52.

³²⁰ *Id.* at 152–53.

³²¹ *Id.* (citing *Action on Smoking & Health v. Harris*, 655 F.2d 236, 243 (D.C. Cir. 1980)).

the agency neither possessed, nor sought, regulatory authority over tobacco.³²² FDA officials repeated that the agency did not have authority to regulate tobacco in testimony in 1988.³²³

Why did the Court devote so much attention to the agency's public pronouncements as to the scope of its jurisdiction to regulate tobacco products? As the Court portrayed it, Congress's enactment of tobacco-specific statutes against the background of the FDA's disavowals of regulatory authority was tantamount to legislative ratification of the agency's position.³²⁴ Yet this hardly seems like a complete answer, for as even the Court recognized, agencies to which Congress has delegated authority to administer an ambiguous statute remain free to change their interpretations of that statute as circumstances warrant.³²⁵ Before *Brown & Williamson*, the federal courts do not appear to have contemplated that an agency's enunciation of one interpretation, no matter how frequently repeated, would estop the agency from changing that interpretation in the future.³²⁶ Furthermore, even if the Court had qualms about the agency's disavowal of its own statements to Congress, it hardly follows that the agency was not entitled to the normal rules of judicial deference to its duly promulgated statutory interpretation. On the contrary, for the Court to step in in such circumstances displays an almost paternalistic attitude toward Congress, which, after all, retains an ample arsenal of persuasive and coercive tools to employ against an agency that Congress believes to be flouting legislative will.

Reviewing Congress's other enactments on the subject of tobacco, the Court found that Congress had both rejected legislation that would have expressly granted the FDA the regulatory authority it now claimed to possess, and had enacted other legislation that effectively occupied the

³²² *Id.* at 153.

³²³ *Id.* at 154–55.

³²⁴ *Id.* at 156.

³²⁵ *See id.* at 156–57 (citations omitted).

³²⁶ *See, e.g.,* *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335, 351 (1978) (“An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.”); *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950, 956 (9th Cir. 1991) (reasoning that agency's interpretation is still subject to deferential *Chevron* standard of review even where it conflicted with agency's own prior views); *International Association of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 776–77 (3d Cir. 1988) (“[O]ur function as a reviewing court is to determine the reasonableness of the [agency's] present reading of [the statute], regardless of any earlier pronouncement”); *see also* *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring) (“[O]nce it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference.”).

field, leaving no room for the FDA.³²⁷ In the 1960s, Congress four times considered and rejected legislation to extend the FDA's regulatory jurisdiction to cover "smoking products."³²⁸ It rejected three similar measures between 1987 and 1989.³²⁹ In 1965, Congress enacted a statute to govern "'cigarette labeling and advertising[.]'"³³⁰ Significantly, in the Court's view, this legislation "explicitly pre-empted any other regulation of cigarette labeling[.]"³³¹ Because the FDCA also contained provisions governing labeling which could not be given effect in the face of the 1965 statutory preemption, the Court reasoned, the 1965 enactment confirmed that Congress could not have intended the FDA to regulate tobacco.³³² Indeed, the Court declared, Congress did not intend *any* federal agency to regulate tobacco, as shown by its express repudiation of an effort to regulate cigarettes by the Consumer Product Safety Commission under the Hazardous Substances Act in 1975.³³³ In the 1980s, Congress enacted other statutes governing cigarette warning labels and smoking education programs.³³⁴ Again, as the Court saw it, these efforts showed a legislative unwillingness to delegate regulatory authority over tobacco products to any agency and indicated Congress's intent to reserve such matters for itself.³³⁵

Surely no rational scheme of statutory interpretation would preclude a reviewing court from inferring the legislature's likely intent based on the totality of its enactments on a subject, rather than requiring the court to consider each legislative act in isolation. But a fair-minded reader might question why *Brown & Williamson* relied, as a basis for inferring legislative intent *sub silentio*, on a set of statutes that seemed quite attenuated from the issue before the Court. Virtually without exception, the statutes the Court discussed focused not on health or safety regulation of tobacco products, but on marketing.³³⁶ Moreover, none of the statutes the

³²⁷ *Brown & Williamson*, 529 U.S. at 147–54.

³²⁸ *Id.* at 147–48.

³²⁹ *Id.* at 155 (citations omitted).

³³⁰ *Id.* at 148.

³³¹ *Id.*

³³² *Id.* at 148–49. Although this statute was originally subject to a four-year sunset provision, Congress in 1969 indefinitely extended the prohibition, thus effectively permanently forbidding any agency from imposing more stringent labeling requirements on cigarettes. *Id.* at 150.

³³³ *Id.* at 150–51.

³³⁴ *Id.* at 153–54.

³³⁵ *Id.*

³³⁶ To be sure, certain regulatory restrictions that the FDA adopted concerned marketing of tobacco products, not merely health and safety issues. *See id.* at 128–29. There may indeed have been a preemption issue as to some of the specific marketing restrictions the FDA proposed. To comport with the requirement that coequal statutes each be given their proper scope, see *infra* note 341, however, would require a close, careful parsing of the respective provisions at issue—just the opposite of the Court's broad-brush approach.

Court cited concerned the regulatory jurisdiction of the FDA or even related to programs administered by the FDA. Consequently, it is difficult to imagine that Congress actually formulated any identifiable intention concerning the FDA's regulatory jurisdiction when it enacted the statutes on which the Court relied.³³⁷

The Court's treatment of the labeling issue is particularly unsatisfactory. Among other facets of its regulatory authority, Congress required the FDA to regulate the labeling of products within its jurisdiction.³³⁸ Separately, Congress established a different regulatory regime for the labeling of cigarettes that expressly preempted all other federal regulations on the subject.³³⁹ The Court reasoned from this that, because Congress did not want the FDA to regulate the *labeling* of cigarettes, it must not have wanted the agency to regulate tobacco *at all*.³⁴⁰ Yet this is hardly the only, or the most natural, inference that one could draw from the record. Could not Congress have intended the labeling statute to preempt other federal regulation of cigarette *labeling*, while leaving other provisions of federal law, such as health and safety regulations, unaffected? This reasoning would better comport with what the Court has long described as a judicial duty to harmonize conflicting statutes and give each as full a reading as possible.³⁴¹

³³⁷ *But see* Nutritional Health Alliance v. FDA, 318 F.3d 92, 102 (2d Cir. 2003) (citing *Brown & Williamson* in dicta for the proposition that reasonableness of FDA's statutory interpretation must be measured against other statutes not administered by FDA); *cf.* Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 483–84 (5th Cir. 2002) (King, C.J., dissenting) (arguing that *Brown & Williamson* does not authorize reviewing court to draw inferences about Congress's later-expressed intent from provisions of an earlier, more general enactment). More persuasive are the instances in which Congress considered, but did not enact, bills that would have expressly conferred regulatory jurisdiction over tobacco products on the FDA. *See supra* notes 328–329 and accompanying text. This would appear tantamount to a recognition, at least by the sponsoring legislators, that existing law did not provide the agency with the jurisdiction contemplated in the proposed amendments. But the contrary might also be true; a legislator might vote against such an amendment because he or she finds it superfluous in light of the jurisdiction already granted the agency under existing law. Uncertainties of this sort probably explain why courts seldom base definitive conclusions on the legislature's *failure* to act.

³³⁸ 21 U.S.C. § 352 (2000).

³³⁹ *Brown & Williamson*, 529 U.S. at 148 (citing Federal Cigarette Labeling and Advertising Act (FCLAA), Pub. L. 89-92, 79 Stat. 282 (1965)).

³⁴⁰ *Id.* at 149.

³⁴¹ *See, e.g.*, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 265–66 (1992) (“Judges ‘are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.’”) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (“[H]armonizing different statutes and constraining judicial discretion in the interpretation of the laws” are “superior values” in statutory construction.); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484–85 (1989) (reasoning that statutes “should be construed harmoniously” where they “constitute interrelated components of the federal regulatory scheme”) (internal quota-

Neither the Court's analysis of the applicable statutory text nor its evaluation of Congress's prior tobacco-related legislation thus appears to provide more than lukewarm support for the decision the Court reached. The statutory text was far more ambiguous than the majority opinion declared it to be, and the other tobacco-related legislation the Court discussed, although interesting, actually provided the Court with much less than the decisive support it declared it had found there. The last section of the majority's opinion, however, provides a source of insight that does a great deal to explain why the majority decided the case the way it did.

In the last section, the Court suggested that *Chevron* analysis might not have been appropriate in any event, because the issue of the reach of its own regulatory authority is not one Congress would have intended to leave for the agency itself to decide.³⁴² *Chevron*, the Court wrote, is premised on the notion of legislative delegation to the agency to resolve matters the legislature left ambiguous.³⁴³ However, where the issue involves an "important" or "major" question of law, the Court reasoned, Congress is less likely to have wanted the agency itself to resolve it.³⁴⁴ The Court disapprovingly noted the great "breadth of authority that the FDA has asserted" after decades of denying that it had any authority at all.³⁴⁵ In view of the importance of the issue and the generality of the statutory text on which the agency based its action, the Court declared itself "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."³⁴⁶ In these concluding paragraphs, the Court rejected the agency's assertion of jurisdiction precisely because it represented an exercise in self-aggrandizement far beyond the scope of authority Congress likely intended to delegate to the agency.³⁴⁷

It may yet be too early to say whether *Brown & Williamson* will carry much force outside the unique legal context of federal tobacco reg-

tions and citation omitted); *FMC v. Pac. Maritime Ass'n*, 435 U.S. 40, 56 (1978) ("[T]he courts must give all due effect to each of two seemingly overlapping statutes."); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962) ("The policies of the Interstate Commerce Act and the [National Labor Relations Act] . . . must be accommodated, one to the other."); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.") (citations omitted); *Beals v. Hale*, 45 U.S. (4 How.) 37, 51 (1846) ("[S]tatutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis, and validity given to each.").

³⁴² *Brown & Williamson*, 529 U.S. at 159.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 159–60.

³⁴⁶ *Id.* at 160; *see also id.* at 133 ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

³⁴⁷ *Id.* at 160–61.

ulation.³⁴⁸ Does the decision really herald a new calibration of the *Chevron* Step One inquiry to take account of the agency's attempt to expand its own delegated powers? Or should *Brown & Williamson*, like *Bush v. Gore*,³⁴⁹ instead be considered a ticket "good for this train, and this train only,"³⁵⁰ resting on the unique characteristics of tobacco regulation? There is no language in *Brown & Williamson* purporting to restrict its application, and the lower courts appear to be integrating the decision into the broader body of *Chevron* jurisprudence.³⁵¹ *Brown & Williamson*, accordingly, would appear to provide a rationale for questioning any interpretation that serves to expand the reach of an administrative agency's regulatory authority.

II. TOWARD A FRAMEWORK FOR ANALYSIS OF SELF-INTERESTED AGENCY ACTION

A. AT WHAT STAGE IS AGENCY SELF-INTEREST RELEVANT?

1. *Consequences for Outcomes on Judicial Review*

If agency self-interest is relevant to the measure of deference owed to the agency's self-interested action—and the cases certainly seem to suggest that it is—then at what stage of the analysis should courts evaluate whether the agency interpretation at issue is an exercise in aggrandizement? The question has important consequences. *Chevron* requires judicial acceptance of some agency action in circumstances where, but for the involvement of a federal agency, *de novo* review would apply.³⁵²

³⁴⁸ See Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 835–36 (2002) ("It is possible that *Brown & Williamson* is a peculiar decision resting on its own unusual facts and that the Court would be reluctant in other cases to rely so heavily on subsequent legislative developments.") (footnote omitted).

³⁴⁹ 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. . . .").

³⁵⁰ See Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001); see also, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 81–84 (2001); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 386–87 (2001); Pamela S. Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in Bush v. Gore*, 64 OHIO ST. L.J. 265, 281–82 (2003).

³⁵¹ See, e.g., *Ramirez-Zavala v. Ashcroft*, 336 F.3d 872, 875–76 (9th Cir. 2003); *AFL-CIO v. FEC*, 333 F.3d 168, 172–73 (D.C. Cir. 2003); *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001); *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 185 (3d Cir. 2000); *General Services Employees Union, Local No. 73 v. NLRB*, 230 F.3d 909, 912–13 (7th Cir. 2000); *Pharmanex v. Shalala*, 221 F.3d 1151, 1153–54 (10th Cir. 2000); *National Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 132, 137 (D.C. Cir. 2000).

³⁵² One frequently cited article labels *Chevron* a rule of judicial "acceptance" of agency interpretations, while the rule of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which applies where *Chevron* does not, merely calls for judicial "consideration" of the agency's view. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3, 13 (1990). Professor Strauss's treatise also proposes similar terminology to

Thus, where *Chevron* governs, we would expect courts to uphold agency actions more often than if courts apply a more searching standard of review.³⁵³

Some empirical studies have sought to measure the extent to which application of the *Chevron* doctrine influences case outcomes on judicial review, although it is probably not appropriate to place inordinate weight on their conclusions.³⁵⁴ Nevertheless, some studies have suggested that application of the *Chevron* doctrine will tend to increase the likelihood that courts will uphold the agency's interpretation. Professors Schuck and Elliott's often-cited study, based on 1984-1985 data, found that the application of *Chevron* by the courts of appeals tended to increase the rate of agency affirmances while decreasing the rate both of reversals and of remands to the agency for further proceedings.³⁵⁵ Schuck and Elliott found that "*Chevron* significantly altered the proportion of agency cases affirmed by the appellate courts over a period of time during which judicial membership and preferences apparently were stable,"³⁵⁶ and that "the *Chevron* decision appeared to make it more difficult for a reviewing court to reverse or remand an administrative decision for an error of law

sharpen the distinction between the *Chevron* and *Skidmore* inquiries. See PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 371 & n.104 (2d ed. 2002) (offering "*Chevron* obedience" and "*Skidmore* weight" as more accurate descriptors of the degree to which reviewing courts must accept agency interpretations).

³⁵³ But see Elhauge, *supra* note 18, at 2158 n.469 (arguing that, because "*Chevron* did not so much state a new legal rule as codify an existing practice . . . one would not expect outcomes to change greatly after the date of the *Chevron* decision").

³⁵⁴ Methodological difficulties may hamper empirical inquiry in this area. It is impossible to conduct controlled experiments to isolate the effect of one variable—application, or non-application, of the *Chevron* doctrine—on the outcome of a single series of cases. That is to say, one cannot examine a set of cases in which *Chevron* did not apply, and then re-run history to determine whether application of the *Chevron* doctrine in those cases would have altered judicial outcomes. As discussed *infra*, scholars have instead settled on analyzing what is probably the best available alternative source of data, to wit, temporal comparisons of pre-*Chevron* and post-*Chevron* outcomes. The pre- and post-*Chevron* cases represent two different datasets, however, and there is an unavoidable "apples and oranges" quality in comparing them. In particular, it may not be possible to rule out, or control for, the extent to which factors other than *Chevron* influenced the outcome in the "post-*Chevron*" datasets. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 36–37 (2002); cf. 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, 1246 n.71 (1996) (noting "the fundamental problem of comparing apples to oranges because post-*Chevron* decisions do not necessarily pose the same issues as those decided in *Chevron*"); Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 91 (Spring 1994) (discussing some ways in which lower court reactions can skew post-*Chevron* data).

³⁵⁵ Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1029–31 & tbls.3–4.

³⁵⁶ *Id.* at 1032.

in construing a statute.”³⁵⁷ These results should come as no great surprise to the extent that they comport with the normative bias stated in *Chevron* itself towards agency interpretations and away from judicial interpretations. *Chevron* requires a court to accept an agency’s reasonable interpretation of ambiguous statutory language even where the court, had it been free to construe the text *de novo*, would not have adopted the agency’s interpretation.³⁵⁸

The question whether *Chevron* applies at all is thus potentially of great consequence to judicial outcomes. So, too, is the question whether the court resolves the dispute at Step One or Step Two of the *Chevron* analysis. A study of *Chevron* cases in the federal courts of appeals in 1995-1996 found that courts that applied *Chevron*’s two-step framework upheld the agency’s interpretation 71% of the time.³⁵⁹ As one might expect, agencies fared far better in cases resolved at the deferential second step of *Chevron* than in the independent judicial inquiry of the first step. The study found that agencies prevailed in fully 89% of cases resolved at Step Two of *Chevron*, compared with only 42% of cases at Step One.³⁶⁰

³⁵⁷ *Id.* (footnote omitted). More recently, a study of D.C. Circuit decisions through 1996 involving the Environmental Protection Agency found a slight increase, post-*Chevron*, in the rate of judicial affirmance of EPA’s interpretations of environmental statutes. See Aaron P. Avila, *Application of the Chevron Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L.J. 398, 426-27 & tbl.5 (2000).

³⁵⁸ See *Chevron*, 467 U.S. at 843 n.11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”); see also *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998); *Serono Labs. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998) (“[C]ourts are bound to uphold an agency interpretation as long as it is reasonable—regardless whether there may be other reasonable, or even more reasonable, views.”); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (recognizing that courts must defer even to agencies’ “regulatory interpretations that diverge significantly from what a first-time reader of the regulations might conclude was the ‘best’ interpretation of their language” and “even where the petitioner advances a more plausible reading of the regulations than that offered by the agency”); *Himes v. Shalala*, 999 F.2d 684, 689 (2d Cir. 1993) (“In determining whether the Secretary’s construction is permissible, a court need not find that it would have interpreted the statute in the same manner.”) (citation omitted).

³⁵⁹ 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, 31 fig. A (1998).

³⁶⁰ *Id.* at 31 & fig. A; see also Avila, *supra* note 357, at 428 tbl.7 (finding that agency’s interpretation was rejected in 29 of 48 cases resolved at *Chevron* Step One, compared with just 2 of 105 cases resolved at *Chevron* Step Two). The data may be less clear if one reviews only Supreme Court decisions rather than those of the lower courts of appeals. Professor Merrill found that the Supreme Court did not faithfully apply *Chevron* in agency administrative cases in the early years after *Chevron* was decided, while Professors Cohen and Spitzer proposed that Professor Merrill’s data suggested a more nuanced conclusion when one accounted for the Supreme Court’s signaling function to lower courts in the federal hierarchy. Compare Merrill, *supra* note 205, at 980-85, with Cohen & Spitzer, *supra* note 354, at 91-108. See generally Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 701 n.86 (2002) (summarizing research); Jonathan T. Molot, *The Judicial Perspec-*

2. *Stages at Which Courts May Consider an Agency's Interest*

Analytically, a court considering a claim that an agency's statutory interpretation reflects self-interest or agency aggrandizement has three distinct opportunities for assessing the effect of the agency's self-interest on its entitlement to deference. First, a court might inquire whether the agency's statutory interpretation is affected by self-interest when making the initial determination whether to apply the *Chevron* doctrine at all in reviewing the agency's interpretation of law.³⁶¹ Assuming that the court finds *Chevron* applies, the first and second steps of *Chevron* itself provide two more opportunities for assessing the impact of the agency's self-interest on the permissibility of its interpretation. A court might inquire at Step One whether the scope of the agency's legislatively delegated authority includes the authority to promulgate interpretations that advance the agency's own interests. Stated differently, Congress might presume that any grant of interpretive authority to an administrative agency will be exercised neutrally and impartially, and a self-interested interpretation might be judged to fall outside the permissible scope of the interpretive authority Congress meant to commit to the agency's discretion. At *Chevron* Step Two, a court might find that an agency's interpretation is more likely to be unreasonable if it is the product of agency self-interest or bias. These three analytical opportunities differ in the thoroughness of the judicial inquiry that courts allow at each step; therefore, it is appropriate to consider their respective strengths and weaknesses in turn.

First, a court might find it improper to apply to the two-step *Chevron* framework at all when called upon to review an interpretation that implicates the agency's self-interest. A court might reason, for example, that *Chevron*'s rule of judicial deference to agency action presupposes that the agency's interpretation represents an impartial and disinterested exercise of its interpretative authority and that, where that assumption is shown to be incorrect, the *Chevron* approach has no application.³⁶² Al-

itive in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role, 53 STAN. L. REV. 1, 82 n.333 (2000) (same). In view of the exceedingly small proportion of cases that reach the Supreme Court on the merits, however, it is the court of appeals outcomes that appear more probative in any event when assessing *Chevron*'s impact on the likelihood that any given agency statutory interpretation ultimately will prevail in court.

³⁶¹ To extend the popular *Chevron* nomenclature, we might call this "Step Zero" of the analysis. See Merrill & Hickman, *supra* note 159, at 912–13.

³⁶² Professors Gellhorn and Verkuil appear to have something similar to this analysis in mind when they recommend *de novo* review of at least some agency assertions of substantive regulatory authority. See Gellhorn & Verkuil, *supra* note 16, at 1004–06; see also *id.* at 1006 & n.103 (reasoning that expansive agency "assertion[s] of authority warrant[] special skepticism because of the agency's obvious self-interest" and that disputes over such interpretations "can, and probably should, be decided by a reviewing court without deference to the agency's views").

ternatively, a court might find that other concerns trump the application of *Chevron* where the challenged legal interpretation implicates the self-interest of the issuing agency.³⁶³ The Supreme Court in *Brown & Williamson* asked whether Congress would likely have intended to delegate to the FDA the authority to regulate tobacco, in light of the importance of the issue and the historical pattern of legislative enactments on the subject.³⁶⁴ Applying a similar analysis, a court might question generally whether it is likely that Congress would delegate to the agency the authority to adopt a legal interpretation that served to advance the agency's own self-interest. If the answer is "no," *Brown & Williamson* suggests, then *Chevron* does not apply.

Even if a court determines that the *Chevron* doctrine applies, it may consider the agency's self-interest as bearing on the scope of the legislative delegation at Step One. Here, too, *Brown & Williamson* is instructive. The Court's Step One search for the meaning of the statutory provision at issue ranged well beyond the statutory text the FDA had actually construed. The Court claimed to find, in other parts of the statute, evidence of a clear legislative meaning for seemingly ambiguous terms such as "safe."³⁶⁵ It also relied on the history of prior tobacco-related legislation, even of statutes not administered by the FDA, as a source of "congressional policy" that it interpreted as the functional equivalent of unambiguous statutory text at Step One.³⁶⁶ The Court's approach appears to invite judicial scrutiny of other provisions of the statute, other statutes entirely, and the history and pattern of prior enactments on related subjects, all toward the end of determining whether the statutory provision at issue has a clear meaning at *Chevron* step one. The difficulty with this approach, however, is that it departs in some respects from the typical first step of a *Chevron* inquiry, which focuses on the statutory language.³⁶⁷ To base a decision on a supposition about likely legislative intent may be problematic when the legislature's intention is not actually stated in statutory text. Some reviewing courts may prove more reluctant than the *Brown & Williamson* Court to consider whether all the surrounding circumstances support the agency's assertion of dele-

³⁶³ See Sunstein, *supra* note 13, at 2112 ("When constitutionally based norms conflict with an agency's interpretation, it is highly probable that the agency's view will not prevail. . . ."); *id.* at 2113-14, 2115-16; see also *infra* Part II.B.

³⁶⁴ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion . . ."); see also *supra* note 346 and accompanying text.

³⁶⁵ *Id.* at 140-43.

³⁶⁶ *Id.* at 147-54.

³⁶⁷ Indeed, this criticism has been applied to *Brown & Williamson* itself. See *supra* notes 292, 300 and accompanying text.

gated authority.³⁶⁸ Such courts may well be unmoved by the suggestion that the agency's advancement of its own self-interest weighs against a finding that it has acted within the limits of the interpretative authority the legislature delegated to it.

Still a third alternative for a reviewing court is to consider agency self-interest as going to the reasonableness of the agency's interpretation at Step Two of *Chevron* (assuming, of course, that the Step One analysis does not dispose of the case).³⁶⁹ The notion of a disinterested decision on the merits, supported by a rationale adequate to justify the agency's interpretation, might be thought implicit in the notion of "reasonableness."³⁷⁰ A reviewing court might reasonably question whether an interpretation that advances the agency's self-interest was actually the product of such a process and thus deserving of deference at the second step of *Chevron*.

At least two difficulties, however, would accompany such an analysis. First, it is hardly clear that a court would be receptive to including an assessment of the agency's self-interest as part of the reasonableness inquiry. *Chevron* itself provides little guidance on the content of the reasonableness inquiry, and there is nothing in the decision to suggest that it would be proper for a court to measure the reasonableness of an agency's interpretation against the criterion of the agency's self-interest. *Chevron* differs in this respect from the Court's decision in *Skidmore v. Swift & Co.*,³⁷¹ which expressly incorporated a list of factors courts should consider when assessing the persuasiveness of the agency's views.³⁷² The lack of any comparable language in *Chevron* and its progeny might be thought to preclude judicial inquiry into the pre-*Chevron* factors as part of the Step Two reasonableness analysis.³⁷³ Under this view, an agency

³⁶⁸ See *supra* note 348; but cf. William S. Jordan, III et al., *Judicial Review, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2000-2001*, at 65, 82 (Jeffrey S. Lubbers, ed., 2002) (finding subsequent Supreme Court and court of appeals decisions to be broadly consistent with "*Brown & Williamson . . .*, in which the Court engages in far-reaching inquiries into the likely meaning of statutory language that appears on its face to permit the agency interpretation") (footnote omitted).

³⁶⁹ See Gellhorn & Verkuil, *supra* note 16, at 1009 ("The principle of deference under *Chevron*'s step two is limited to reasonable agency interpretations precisely because of a concern that 'the decision to regulate may be motivated by designs for agency aggrandizement rather than by a disinterested assessment of statutory authority and appropriate policy.'") (quoting Merrill, *supra* note 205, at 1024).

³⁷⁰ Cf. *infra* notes 398-446 and accompanying text (discussing requirement that agencies provide reasoned explanation for actions taken).

³⁷¹ 323 U.S. 134 (1944).

³⁷² See *supra* note 10 (quoting *Skidmore*); see also *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) ("Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise.").

³⁷³ See Merrill, *supra* note 205, at 977-78 ("The question whether an interpretation is reasonable in light of . . . traditional norms of judicial interpretation likewise provides no place

might successfully argue that the reasonableness of its interpretation must stand or fall solely on the text and structure of the statute itself, without considering the impact of the interpretation on the agency's self-interest.

A second problem is that, in view of the heavy substantive bias in the agency's favor at Step Two,³⁷⁴ a rule that the agency's self-interest may be considered only as part of the Step Two reasonableness inquiry necessarily presents a greater risk that a court will believe itself required to uphold a self-interested agency interpretation that would not withstand scrutiny under a stricter standard of review. Thus, premitting consideration of the agency's self-interest until Step Two of *Chevron* makes it more likely for a biased interpretation to be upheld.

Reviewing courts, thus, may have several opportunities to consider the agency's self-interest before and during the *Chevron* analysis, and reasonable minds may differ as to which of these competing alternatives is most likely to yield a correct and persuasive result. It may clarify the issue to consider the potential constitutional concerns that would accompany any rule permitting *Chevron* deference to attach to a self-interested agency interpretation of law. Consideration of due process principles suggests that it is preferable for courts to evaluate an agency's self-interested legal interpretation entirely outside the *Chevron* framework.

B. DUE PROCESS ISSUES

Judicial deference to an agency interpretation that has the inherently advances the agency's self-interest conflicts with a number of settled norms associated with due process. First, because the practical effect of *Chevron* is to shift the locus of interpretive decisionmaking from a court to the agency, judicial deference in cases of agency self-interest effectively makes the agency the judge in its own cause.³⁷⁵ Second, self-interest can give an agency an incentive to conceal or obfuscate the rationale underlying its action, for it is a rare administrator indeed who will confess that pursuit of self-interest drove the agency's conduct. Constitutional principles of good government in general, and the edifice of judicial review in particular, however, rest upon the notion of governmental transparency: that is, that the publicly declared rationale for agency action be should the rationale that actually motivated the agency's conduct. Where the agency's self-interest gives reason to doubt that the stated

for the various contextual factors that played such an important role in the pre-*Chevron* era.”). On the other hand, for a thoughtful argument that courts *should* apply *Skidmore*'s “persuasiveness” factors when assessing the reasonableness of an agency's interpretation at *Chevron* Step Two, see Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105 (2001).

³⁷⁴ See *supra* notes 358-360 and accompanying text.

³⁷⁵ See *infra* Part II.B.1.

reasons for its statutory or regulatory interpretation are those actually justifying the interpretation it adopted, one of the foundational assumptions underlying judicial deference to the agency's interpretation will be weakened or, indeed, entirely removed.³⁷⁶ Finally, because judicial deference to self-interested agency action may free the government to effectively alter bargains it has struck, or otherwise change the rules of the game in its dealings with private parties, deference in such circumstances risks undermining public confidence in the fairness of government—a result difficult to square with the government's obligation of scrupulous impartiality and fair dealing.³⁷⁷ These issues will be considered in turn.

1. *Disinterestedness and Impartiality*

The ancient axiom that no one should be a judge in his own cause³⁷⁸ is a long-settled part of our common-law tradition, inherited from England³⁷⁹ and recognized as an elemental principle from the time of the Revolution³⁸⁰ to the present.³⁸¹ The principle requires, at a Constitutional minimum, recusal or disqualification of an adjudicative officer

³⁷⁶ See *infra* Part II.B.2.

³⁷⁷ See *infra* Part II.B.3.

³⁷⁸ See BARTLETT'S FAMILIAR QUOTATIONS 99 (Justin Kaplan ed., 16th ed. 1992) ("No one should be a judge in his own case.") (quoting Publius, Maxim 545); ARISTOTLE, *Politics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1986, 2031 (B. Jowett trans., Jonathan Barnes, ed., 1984) bk. III, ch. 9 ("[M]ost people are bad judges in their own case. . .").

³⁷⁹ See, e.g., JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 9 (Thomas P. Peardon, ed., 1952) (1690). Sir Edward Coke's reference to a Latin maxim that translates as "one should not be judge in his own cause, indeed it is unjust for one to be a judge of his own matter," is often cited on this point. Dr. Bonham's Case, 8 Coke Rep. 114 (1610), *reprinted in part in* DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 340, 342 (1999). Elsewhere in the same portion of his opinion, Lord Coke remarked that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void[.]" *Id.* This latter clause has acquired considerable renown, prefiguring as it does the contemporary doctrine of judicial review. See, e.g., COQUILLETTE, *supra*, at 319; JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM ch. 3 (1992); CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 315–16 (1956). Although less celebrated, Lord Coke's application of the principle against judging one's own cause seems no less worthy.

³⁸⁰ "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST No. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961).

³⁸¹ See, e.g., 2 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 35.09 (2d ed. 1997); 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 17.8, at 100–04 (3d ed. 1999); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-16 (2d ed. 1988).

who has a “direct, personal, substantial pecuniary interest”³⁸² in the matter *sub judice*.³⁸³

The rule against judging one’s own cause extends to administrative proceedings.³⁸⁴ For example, an accused’s due process rights are violated where a government official or agency stands to receive a direct financial benefit from rendering an adverse decision.³⁸⁵ Although the rationale extends to forbid some types of indirect or non-personal financial interests,³⁸⁶ the principle is not implicated where the adjudicator’s

³⁸² *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”); *see also* *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–27 (1986) (distinguishing financial interest of one state supreme court justice, whose recusal was required, from *de minimis* financial interests of court’s other justices, who remained eligible to participate in case).

³⁸³ 28 U.S.C. § 455(b)(4) (2000) codifies an even broader version of this principle as a matter of statutory law, requiring disqualification of any federal judge who “knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding[.]” *See also id.* at § 455(b)(5)(iii) (extending this principle to individuals related within the third degree to the judge or the judge’s spouse, and such individuals’ spouses, whom the judge knows “to have an interest that could be substantially affected by the outcome of the proceeding”); *id.* at § 455(c) (requiring judge to keep informed about personal, familial, and fiduciary financial interests); *id.* at (d)(4) (defining “financial interest”). Even some non-pecuniary interests, however, may suffice to give a judge a stake in the outcome of a dispute sufficient to suggest impropriety in the judge’s continued participation. *See, e.g.,* Karlan, *supra* note 350, at 268–69, 277–78.

³⁸⁴ *See Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (listing circumstances, including administrator’s financial interest in outcome of dispute, in which actual or perceived administrative bias amounts to due process violation); *Arnett v. Kennedy*, 416 U.S. 134, 197–99 (1974) (White, J., concurring in part and dissenting in part) (arguing that federal employee’s due process right to impartial adjudicator should have precluded employee’s superior, whom employee had publicly accused of attempted bribery, from deciding employee’s challenge to validity of his termination); *see also* Bernard Schwartz, *Bias in Webster and Bias in Administrative Law—The Recent Jurisprudence*, 30 TULSA L.J. 461, 462 (1995).

The Administrative Procedure Act includes a statutory provision for disqualification of an administrative adjudicator for bias. *See* 5 U.S.C. § 556(b) (2000). The statute, however, is silent on the issue of the agency’s *institutional* self-interest, as distinguished from the self-interest of an individual adjudicator. Nor, of course, does anything in the APA speak directly to the question of what weight a reviewing court owes to the agency’s self-interested statutory or regulatory interpretations when applying the *Chevron* doctrine.

³⁸⁵ *See, e.g.,* *Stivers v. Pierce*, 71 F.3d 732, 741–46 (9th Cir. 1995) (holding that state licensing board member’s financial interest in denying license to an economic competitor, together with repeated unfavorable rulings of the board, created dispute of material fact as to whether board was unconstitutionally biased against license applicant); *United Church of the Med. Ctr. v. Med. Ctr. Comm’n*, 689 F.2d 693, 699 (7th Cir. 1982); *cf. Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 154 (2d Cir. 1992) (finding proof of injury, for standing purposes, adequately demonstrated by allegation that statutory scheme “create[d] a powerful economic and professional incentive” for hearing officers to rule for the state body that appointed them).

³⁸⁶ *See, e.g.,* *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973) (holding it unconstitutional for state board of optometry to adjudicate proceedings seeking to revoke privately employed optometrists’ licenses, where board was composed of optometrists who stood

interest in the outcome is deemed to be too remote or contingent,³⁸⁷ or

potentially to benefit financially from loss of competition from respondent optometrists); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 59–60 (1972) (holding it unconstitutional for adjudicator to preside where fines collected from adjudication would flow to government agency for whose finances adjudicator was responsible); *see also* *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 138–40 (3d Cir. 1986) (finding that pension fund’s trustees’ fiduciary interest in maximizing revenues of fund, coupled with their own contingent personal liability to fund, violated due process rights of employers who were required to make additional contributions in exchange for withdrawal from the fund), *aff’d by an equally divided Court sub nom.* *Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987); *Jaguar Cars v. Cottrell*, 896 F. Supp. 691, 694 (E.D. Ky. 1995) (holding that new automobile dealers who were members of state motor vehicle commission had financial stake in commission proceeding seeking to stay automobile manufacturer’s termination of another dealer’s franchise), *remanded*, 1997 WL 63346 (6th Cir. 1997) (remanding for further consideration in light of new state statute altering motor vehicle commission’s procedures).

³⁸⁷ *See* *Schweiker v. McClure*, 456 U.S. 188, 195–97 (1982) (finding insufficient proof to sustain lower court’s finding of financial interest on part of administrative adjudicator); *Dugan v. Ohio*, 277 U.S. 61, 64–65 (1928) (holding the rule of *Tumey v. Ohio* inapplicable where adjudicator received the same salary irrespective of whether accused party was held liable or not). *See also* *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm’n*, 198 F.3d 1, 14–15 (1st Cir. 1999) (holding that a “highly attenuated” financial interest of administrative adjudicators did not disqualify them from case); *Northern Mariana Islands v. Kaipat*, 94 F.3d 574, 574–75 (9th Cir. 1996) (finding no due process violation where statute earmarked civil and criminal fines towards construction of new court buildings); *NLRB v. Ohio New and Rebuilt Parts, Inc.*, 760 F.2d 1443, 1451–52 (6th Cir. 1985) (holding that possibility of performance award based on efficient discharge of duties did not suffice to give administrators financial stake in outcome of proceedings before them); *Chrysler Corp. v. Texas Motor Vehicle Comm’n*, 755 F.2d 1192, 1198–99 (5th Cir. 1985) (finding suggestions that automobile dealers who served on state body for arbitration of consumers’ warranty claims were financially predisposed against auto manufacturers insufficient to show violation of manufacturers’ due process rights); *Wolkenstein v. Reville*, 694 F.2d 35, 42–44 (2d Cir. 1982) (finding state administrator’s financial stake in dispute too insubstantial to violate due process where administrator had no responsibility for disposition of funds and where governmental revenues within administrator’s influence were minimal in comparison with cases in which due process objections had been sustained); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 698 (3d Cir. 1979) (holding allegations of pecuniary interest too attenuated to show due process violation where challenged action was taken by voluntary association from whose membership plaintiffs had not been excluded); *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962, 985–86 (M.D. Tenn. 1981) (holding that fact that state transportation department would receive federal highway funds if it approved proposed construction of interstate highway did not give the agency an impermissible pecuniary stake in the regulatory approval process); *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 848 P.2d 848, 853–54 (Ariz. Ct. App. 1992) (upholding administrative tribunal’s decision where no showing made that board members had personal pecuniary interest in outcome of dispute), *vacated on other grounds*, 869 P.2d 500 (Ariz. 1994); *Secretary v. Upper Valley Reg’l Landfill Corp.*, 705 A.2d 1001, 1005–07 (Vt. 1997) (holding that possibility that administrative tribunal’s decision could indirectly affect other court proceedings to which agency was a party, to agency’s potential financial detriment, was insufficient to require disqualification of administrative hearing officer); *Serian v. West Virginia ex rel. West Virginia Bd. of Optometry*, 297 S.E.2d 889, 894–96 (W. Va. 1982) (labeling as “speculative” appellant optometrist’s assertion that members of state regulatory body had pecuniary stake in outcome of proceedings to revoke optometrist’s license, and thus finding no violation of due process).

where the allegation of bias is overbroad.³⁸⁸ The courts also have been less receptive to allegations that financial interest resulted in unconstitutional governmental bias where the challenged governmental conduct was nonjudicial in nature.³⁸⁹

When an agency has a stake in the statutory or regulatory interpretation it has propounded, it is hardly difficult to perceive the tension between the principle of *Chevron* deference and the rule against judging one's own cause. *Chevron* stands for the proposition that, so long as it does not contravene the statutory text or legislative purpose,³⁹⁰ an agency may adopt whatever reasonable statutory or regulatory interpretation it wishes. Upon a determination that the agency's interpretation does not contradict the statute, *Chevron* restricts the judicial role to merely determining whether the agency's interpretation is reasonable—requiring a reviewing court to affirm the agency's reasonable interpretation even if the court would not have adopted the agency's interpretation on *de novo* review, and even if the court believes a different interpretation to be *more* reasonable than the one the agency has adopted.³⁹¹ By circumscribing the judicial role, the practical effect of *Chevron* is to shift the locus of interpretive authority from the court to the agency and thereby to weaken or remove what would otherwise amount to a check on the agency's power to adopt incorrect interpretations of law.

Where the agency adopts an interpretation that advances its self-interest, *Chevron*'s alteration of the balance of interpretive power in the

³⁸⁸ See *Doolin Sec. Sav. Bank, F.S.B. v. FDIC*, 53 F.3d 1395, 1407 (4th Cir. 1995) (rejecting argument "that the entire decisionmaking apparatus of the FDIC is biased because Congress has required the FDIC to consider the needs of the insurance fund in determining assessments"); *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989) ("[T]he entire government of a state cannot be disqualified from decisionmaking on grounds of bias when all that is alleged is a general bias in favor of the alleged state interest or policy.")

³⁸⁹ See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 18–19 (1979) (holding that Constitutional rights of commercial optometrist were not violated by fact that majority of state regulatory body consisted of professional optometrists alleged to be unsympathetic to commercial practice of optometry, where regulatory body had not instituted any disciplinary action against commercial optometrist); *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 656–57 (1977) (Rehnquist, J., dissenting) (arguing that due process principles did not forbid government body from making legislative, rather than adjudicative, determinations even where deciding matter in one way rather than another would increase compensation of body's members); *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, 198 F.3d 1, 13–14 (1st Cir. 1999) (due process did not forbid performance of legislative functions by state agencies that included representatives of regulated industry); *Baran v. Port of Beaumont Navigation Dist.*, 57 F.3d 436, 444–46 (5th Cir. 1995) (port authority acting as "administrative prosecutors" or "policymakers" held not constitutionally disqualified from acting on application for increase in pilotage rates). For a review of the significance of political or policy bias, as opposed to financial self-interest, in agency decisionmaking, see Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990).

³⁹⁰ See *supra* note 292 and accompanying text.

³⁹¹ See *supra* note 358 and accompanying text.

agency's favor poses special risks. If the agency's self-interested interpretation were challenged on judicial review, the agency would no doubt argue that courts must respect the agency's interpretation under the *Chevron* doctrine. Yet a government agency, like every other decision-maker, can hardly be presumed to have made an impartial decision where its own self-interest is at stake.³⁹² To withhold an independent judicial interpretation of the statute or regulation at issue, as *Chevron* commands, necessarily removes a check on possible agency self-aggrandizement. In the face of the agency's adoption of a self-interested interpretation of law, unrestricted application of *Chevron* deference thus effectively permits the agency to judge its own cause.³⁹³

2. Openness and Transparency

Governmental transparency is a recognized characteristic of a well-functioning democracy,³⁹⁴ a principle that finds expression in settings so numerous and varied as to defy summation. A number of constitutional provisions work to undermine attempts to shroud the inner workings of government in secrecy.³⁹⁵ Statutes provide an additional layer of protec-

³⁹² See Sunstein, *supra* note 13, at 2099 (arguing that conferring on agencies the authority to determine the scope of their own jurisdiction "would be to allow them to be judges in their own cause, in which they are of course susceptible to bias").

³⁹³ As already noted, allegations of impermissible bias on the part of a governmental agency have sometimes fared less well than allegations of self-interest on the part of an individual judge or administrative decisionmaker. See *supra* notes 386-388. Where it is the agency's own interest, rather than the interest of any individual, that is directly advanced by the interpretation the agency adopts, however, the principle against judicial acceptance of a decisionmaker's self-interested decision appears fully applicable. See generally *supra* Part I.

³⁹⁴ It is probably impossible even to begin to canvass the literature on this topic. Principles of governmental openness and transparency are always developing, sometimes with unexpected consequences. For an argument that principles of governmental transparency weigh against permitting federal courts to bar litigants from citing unpublished opinions, see Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001). Note that governmental transparency is not a concern unique to American law. See, e.g., Jacqueline Klosek, *The Development of International Police Cooperation within the EU and Between the EU and Third Party States: A Discussion of the Legal Bases for Such Cooperation and the Problems and Promises Resulting Thereof*, 14 AM. U. INT'L L. REV. 599, 648-49 (1999).

³⁹⁵ The constitutional guarantee of a free press, of course, is foremost among these. U.S. CONST. amend. I. In the criminal law context, to take only a few of many possible examples, the guarantees of indictment and trial by jury, and the prohibition on *ex post facto* laws, operate to protect citizens against the imposition of penalties for violations of a standard of conduct of which they and their fellow citizens had no cause to be aware, thus affirmatively requiring governmental disclosure of the relevant standards of conduct in advance of any prosecution. See U.S. CONST. art. I, §§ 9-10; art. III, § 2; amends. V, VI. Direct popular election of legislators, too, might reasonably be thought to presuppose that the government would communicate information about its functioning to citizens sufficient to prevent the exercise of the franchise from becoming an empty gesture. See U.S. CONST. art. I, § 2; amend. XVII.

tion for the right of public information about governmental operations,³⁹⁶ and the courts have generally placed a strict burden on agencies attempting to deviate from the general rule of governmental openness.³⁹⁷

In the administrative law context, the Supreme Court's two decisions in *SEC v. Chenery Corp.*³⁹⁸ establish an important judicial standard of agency transparency. In the *Chenery* cases, the Court considered a ruling by the Securities and Exchange Commission effectively barring a corporation's officers and directors from trading in preferred stock of the corporation while the Commission was considering a proposal to reorganize the company.³⁹⁹ The Commission originally adopted this rule because it believed the result was required by a number of equity cases concerning the fiduciary obligations of corporate management.⁴⁰⁰ Before the Supreme Court, however, the agency presented a different argument: rather than contending that principles of equity compelled the rule it adopted, the Commission instead argued that the special strategic position occupied by management during a corporate reorganization, considered in light of the Commission's own experience in the field, supported the restrictions the Commission had imposed.⁴⁰¹ The Commission also relied on its general statutory powers to protect the investing public against market manipulations by corporate insiders.⁴⁰²

Although the Supreme Court did not disagree with the agency's arguments, it nevertheless held that they could not be considered as a basis for upholding the agency's rule, because the agency's adoption of the rule had not in fact been based upon the rationale it later articulated before the Court.⁴⁰³ The agency's interpretation must stand or fall, the Court reasoned, on the soundness of the rationale upon which the agency

³⁹⁶ See Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). FOIA establishes a strong presumption in favor of governmental disclosure of information. The exemptions listed in § 552(b) are required to be narrowly construed, with the government bearing the burden of demonstrating the need for secrecy. See, e.g., *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151–53 (1989); *Ray v. Turner*, 587 F.2d 1187, 1197 (D.C. Cir. 1978) (holding that, even where national security is at issue, agency must identify specific portions of document that are exempt from FOIA disclosure and disclose the rest). Other pertinent statutes include the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified in scattered sections of titles 5 and 39 of the United States Code, including, e.g., 5 U.S.C. § 552b note (“It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.”)) and the Presidential Records Act, 44 U.S.C. §§ 2201–2207 (2000).

³⁹⁷ See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

³⁹⁸ *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) [hereinafter “*Chenery I*”]; *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) [hereinafter “*Chenery II*”]. For a general discussion of the *Chenery* doctrine, see, e.g., PIERCE, *supra* note 156, § 8.5; SCHWARTZ, *supra* note 214, § 10.4.

³⁹⁹ See *Chenery I*, 318 U.S. at 81–85.

⁴⁰⁰ See *id.* at 87.

⁴⁰¹ See *id.* at 90.

⁴⁰² See *id.* at 90–92.

⁴⁰³ *Id.* at 87.

actually based it.⁴⁰⁴ The Court held that the validity of the agency's rationale "must be measured by what the Commission did, not by what it might have done"⁴⁰⁵ and established the principle "that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."⁴⁰⁶ Because the case law did not support the agency's original reliance on general equitable principles, the Court held that the case must be remanded to the agency for further consideration notwithstanding the alternative rationales that the Commission had articulated during judicial review.⁴⁰⁷ The Court suggested that this rule—requiring that the agency's action be sustainable upon the grounds it actually employed—would promote clarity and orderliness in judicial review.⁴⁰⁸

On remand, the agency adopted substantially same rule, this time grounding its view on two provisions of the Holding Company Act, rather than on the equity cases that the Court had held provided no support.⁴⁰⁹ On this revised rationale, the agency's rule was affirmed.⁴¹⁰ *Chenery II* usefully emphasized a different aspect of agency transparency: the requirement that the agency's rationale be stated clearly. In the Court's words:

⁴⁰⁴ See *id.* ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *id.* at 92 ("[T]he difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based.").

⁴⁰⁵ *Id.* at 93–94.

⁴⁰⁶ *Id.* at 95.

⁴⁰⁷ See *id.* at 88 ("If, therefore, the rule applied by the Commission is to be judged solely on the basis of its adherence to principles of equity derived from judicial decisions, its order plainly cannot stand."); *id.* at 93 (reasoning that because the agency "purported merely to be applying an existing judge-made rule of equity," its rule could survive judicial review "only if [the Commission] found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers. . . . The record is utterly barren of any such showing.").

⁴⁰⁸ See *id.* at 94 ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. The administrative process will best be vindicated by clarity in its exercise.") (internal quotations and citation omitted).

⁴⁰⁹ See *Chenery II*, 332 U.S. at 199.

⁴¹⁰ See *id.* at 207–09 (reversing decision of lower court, which had overturned agency's rule as inconsistent with *Chenery I*). Justice Jackson, plainly flummoxed by the *Chenery II* majority's decision to uphold an agency rule that was identical in substance and practical effect to the rule the Court had vacated in *Chenery I*, quoted Twain in his dissent. See *id.* at 214 (Jackson, J., dissenting) ("I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'"). As amusing as the quotation is, it is not truly difficult to reconcile the Court's two decisions. What the Court was plainly reviewing in *Chenery I* was not the substance of the agency's rule, but only the force of the rationale that the agency had relied upon in adopting it. There is no logical inconsistency in holding that, although one particular line of reasoning is insufficient to sustain an agency's rule, a different line of reasoning may provide adequate support.

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."⁴¹¹

Principles of administrative transparency also underlay the Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*⁴¹² There, a group of insurance companies sought judicial review of the National Highway Traffic Safety Administration's (NHTSA) rescission of an order mandating the installation of passive restraints in all new automobiles.⁴¹³ The rescission undid a long series of agency steps, taken over the course of more than a decade, incrementally to tighten automobile safety requirements.⁴¹⁴ These measures culminated in 1977, when the Carter Administration promulgated a rule mandating the installation of air bags or automatic seatbelts

⁴¹¹ *Id.* at 196-97 (quoting *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 294 U.S. 499, 511 (1935)).

⁴¹² 463 U.S. 29 (1983).

⁴¹³ *See id.* at 39.

⁴¹⁴ *Id.* at 34-39. In 1967, the Department of Transportation promulgated a rule requiring that manufacturers install seatbelts in all automobiles. *Id.* at 34. Due to widespread public non-use of seatbelts, the government soon began evaluating whether to require so-called passive restraints—"devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle." *Id.* at 34-35. The primary types of passive restraints the agency considered were automatic seatbelts and air bags, both of which, studies suggested, would greatly reduce highway fatalities and injuries. *Id.* at 35. In 1969, the government initiated proceedings leading to promulgation of a rule requiring passive restraints in all new automobiles. *Id.*

In 1972, after a number of parries and counter-thrusts between the agency and the regulated industry over the specifics of the regulatory requirement and the timing of its implementation, the agency mandated (1) that all vehicles manufactured after August 15, 1975 include full passive protection for all front seat occupants, and (2) that all vehicles built between August 1973 and August 1975 include either passive restraints or a combination of seatbelts and an ignition interlock that would prevent the car from being started until the seatbelts were fastened. *See id.* at 35. For the interim period, most automobile manufacturers elected the ignition interlock alternative, which the Court described as "highly unpopular." *Id.* at 36. The public outcry led Congress to outlaw ignition interlocks by statute in 1974—a victory for manufacturers in their ongoing resistance to safety regulation. *See id.* In 1975, the agency extended by one year the date for mandatory installation of passive restraints. *Id.* Shortly before the Ford Administration left office, however, the Secretary of Transportation permanently suspended the passive restraint requirement and indefinitely extended the optional alternatives to passive restraints. *See id.* at 36-37.

in all large cars by model year 1982, and in all cars by model year 1984.⁴¹⁵

The incoming Reagan Administration reversed the Carter-era rule, citing the difficult economic circumstances in the automobile industry and the likelihood that overwhelming public non-compliance would vitiate the safety benefits that the passive restraint rule had been intended to generate.⁴¹⁶ The agency found that, instead of a near-even split between airbags and automatic seatbelts, virtually all manufacturers apparently intended to comply with the regulatory mandate solely through the installation of automatic seatbelts that drivers could detach and permanently disable.⁴¹⁷ Because the passive restraint rule would yield few safety benefits in the face of widespread public disabling of the automatic seatbelts, the agency declared that it could no longer justify the costs that the rule would impose on manufacturers.⁴¹⁸ Rather than promulgate an amended rule tailored to address these perceived weaknesses, however, the agency rescinded the passive restraint requirement in its entirety.⁴¹⁹

Assessing the agency's stated rationale under the arbitrary and capricious standard,⁴²⁰ the Court identified a fundamental disconnect between the agency's premises and its conclusion.⁴²¹ Assuming that the agency was correct that manufacturers' adoption of detachable seatbelts, coupled with widespread disabling of the seatbelt devices by purchasers, would limit the safety benefits of the passive restraint rule, it did not follow that the rule should be rescinded *in toto*.⁴²² The Court identified two alternatives that the agency should logically have considered, but did not. First, the agency offered no rationale for refusing to require all auto-

⁴¹⁵ *Id.* at 37.

⁴¹⁶ *See id.* at 38–39.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 39.

⁴¹⁹ *Id.* at 38.

⁴²⁰ *Id.* at 41. Arbitrary and capricious review of agency rulemaking precludes a court from substituting its own judgment for that of the agency. *See id.* at 43. It thus may be thought of as a close cousin to the *Chevron* deference doctrine that courts apply where an agency's statutory or regulatory interpretation is at issue. *See, e.g.,* Navy Charleston Naval Shipyard v. FLRA, 885 F.2d 185, 187 (4th Cir. 1989) (applying arbitrary and capricious standard to agency's statutory interpretation); *cf. Arrington v. Wong*, 237 F.3d 1066, 1070 (9th Cir. 2001) (explaining relationship between *Chevron* and arbitrary-and-capricious review); Nat'l Mining Ass'n v. Slater, 167 F. Supp. 2d 265, 280 (D.D.C. 2001) (differentiating between *Chevron* and arbitrary-and-capricious review). The courts remain free, however, to scrutinize the rationale enunciated by the agency to justify its result. As the Court stated, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *accord Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002) (criticizing agency for adopting a presumption lacking any "empirical or logical basis").

⁴²¹ *See generally State Farm*, 463 U.S. at 46–57.

⁴²² *Id.* at 48–49.

mobile manufacturers to install airbags rather than automatic seatbelts.⁴²³ Although the agency might have remained free to reject an airbags-only rule after informed evaluation, it had neglected to give any sign that it had even considered the possibility.⁴²⁴ The agency's own reasoning, accordingly, could not justify wholesale abandonment of the passive restraint rule, which had rested upon prior findings that airbags would be effective means of achieving the statutory purpose of improved safety.⁴²⁵ "[G]iven the judgment made in 1977 that airbags are an effective and cost-beneficial lifesaving technology," the Court ruled, "the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement."⁴²⁶

Second, the Court identified two flaws in the agency's assumption that the safety benefits of automatic seatbelts would be vitiated by consumers detaching the belts. While suggesting that the lower courts imposed too heavy a burden on the agency by requiring it to seek additional evidence to illuminate the issue,⁴²⁷ the Court nevertheless found the agency's interpretation of the statistical evidence on seatbelt usage unconvincing.⁴²⁸ The agency's own data, based on field studies, suggested that automatic seatbelts were used at more than twice the rate of manual belts.⁴²⁹ The agency reasoned, however, that the higher usage rates shown in the field studies were biased, due to certain atypical characteristics of the individual drivers and also by the use of ignition interlocks in the cars equipped with automatic seatbelts.⁴³⁰ The Court reasoned that, although the agency was within its rights to find that the conclusions of these field studies could not be generalized to predict that the passive restraint rule would produce a real-world increase in safety,⁴³¹ the agency's reasoning was nevertheless insufficient to support rescission of the passive restraint rule because it failed to account for the differ-

⁴²³ *See id.* at 46–47.

⁴²⁴ *See id.* at 48 ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment. But the agency not only did not require compliance through airbags, it also did not even consider the possibility in its 1981 rulemaking . . .").

⁴²⁵ *Id.* at 48–49. Although agency counsel before the Court sought to raise some doubts about making airbags mandatory, the Court, citing *Chenery*, rejected these arguments because they had never been enunciated by the agency itself. *See id.* at 49–50.

⁴²⁶ *Id.* at 51.

⁴²⁷ *See id.* at 51–52 (describing and rejecting treatment of agency's finding by the court of appeals).

⁴²⁸ *Id.* at 52.

⁴²⁹ *Id.* at 53.

⁴³⁰ *See id.*

⁴³¹ *Id.* The Court based this conclusion on the substantive expertise of the agency. *See id.* ("[I]t is within the agency's discretion to pass upon the generalizability of these field studies. This is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to intrude.").

ences between automatic and manual seatbelts.⁴³² The agency's survey data had shown user inertia or inaction to be a powerful factor in explaining patterns of seatbelt usage.⁴³³ The effects of user inaction, however, pointed in opposite directions when automatic and manual seatbelts were considered.⁴³⁴ A user who neglected to fasten a manual seatbelt might neglect to disable an automatic one.⁴³⁵ The effect of inertia, therefore, provided "grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts."⁴³⁶ The agency's rationale for rescinding the passive restraint rule failed to address this clear implication of the data on which it purported to rely.⁴³⁷

Just as the agency had failed to explain its failure to even consider the alternative of mandating airbags,⁴³⁸ the Court noted, it also failed, without explanation, to consider mandating the alternative of nondetachable automatic seatbelts.⁴³⁹ This alternative would have avoided the risk that drivers would simply disable the automatic seatbelts and thereby vitiating the hoped-for safety benefits of the regulation.⁴⁴⁰ The agency's failure to recognize the alternative, led the Court to conclude that the reasons given for the agency's action failed the test of rationality.⁴⁴¹ These shortcomings led the Court to conclude that "the agency's explanation for rescission of the passive restraint requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking."⁴⁴²

Chenery and *State Farm* illuminate the requirement of reasoned decisionmaking by administrative agencies.⁴⁴³ Although judicial appli-

⁴³² See *id.* at 54.

⁴³³ *Id.* at 54 & n.18.

⁴³⁴ *Id.* at 54.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ See *id.* ("Whether this is in fact the case is a matter for the agency to decide, but it must bring its expertise to bear on the question . . .").

⁴³⁸ See *supra* notes 423-426 and accompanying text.

⁴³⁹ *State Farm*, 463 U.S. at 55.

⁴⁴⁰ See *id.* at 55-56.

⁴⁴¹ *Id.* at 56.

By failing to analyze the continuous seatbelts option in its own right, the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard. . . . The agency also failed to offer any explanation why a continuous passive belt would engender the same adverse public reaction as the ignition interlock, and, as the Court of Appeals concluded, 'every indication in the record points the other way.'

Id.

⁴⁴² *Id.* at 52.

⁴⁴³ See also *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998):

Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which,

cation of the reasoned decisionmaking requirement has sometimes proved controversial at the margins,⁴⁴⁴ there is at least some reason to believe that the requirement both improves the thoughtfulness and rigor of agency action⁴⁴⁵ and facilitates judicial review.⁴⁴⁶

though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce.

Id. (citations omitted). See also *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 298 (3d Cir. 1986) ("We must defer to an agency's expert judgment when it is acting within the scope of the statute, but we cannot allow expertise to shield an irrational decision-making process."). For a persuasive argument that courts should inquire into the rationality of an agency's statutory interpretation when assessing its reasonableness at *Chevron* Step Two, see Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128–32 (1994).

⁴⁴⁴ Commentators have suggested, for example, that the reasoned decision-making requirement can be applied too strictly to overturn agency decisions that are in fact rational but that conflict with the policy preferences of the reviewing court. See, e.g., Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1264 (1989) (summarizing several commentators' arguments for and against reasoned decisionmaking requirement of *State Farm*). Even Judge Wald, while disputing the criticism's validity, "acknowledged [the] impossibility of specifying the components of 'adequate explanation' inevitably leaves courts open to the charge that the results of our review are inconsistent and reflect the political or philosophical preferences of the judges on the panel rather than any objective standard." Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 234 (1996). For an argument that inconsistent judicial application of the reasoned decisionmaking requirement can slow the rulemaking process by forcing agencies to over-document their own analyses, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410–26 (1992). Of course, essentially the same criticisms may be leveled against any standard of review, not just the requirement of reasoned decisionmaking; the power of judicial review, like any other power, carries with it the risk of abuse. Scholarly commentary on the reasoned decisionmaking requirement, however, is far from being universally or even predominantly critical. For example, for an argument that the reasoned decisionmaking requirement, among other administrative law principles, should be extended to apply to judicial review of state ballot initiatives, see Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395 (2003).

⁴⁴⁵ See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59–60 (1975) (arguing that "rigorous judicial review" improves the performance of agencies who anticipate that their actions will be closely scrutinized after the fact and "give[s] those [within the agency] who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not").

⁴⁴⁶ One court, for example, found inadequate an agency's rationale that,

[s]tripped of bureaucratic doublespeak, . . . simply state[d] that the agency does not believe the statutory criteria have been met. . . . Such laxity on the part of the agency not only prevents the court from fulfilling its mandate under the statute, it even prevents the petitioner from making a reasoned determination as to whether to seek further review.

Bagdonas v. Dep't of Treasury, 93 F.3d 422, 426 (7th Cir. 1996). See also *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 741 (D.C. Cir. 1988) (recognizing that *Chenery* requirement that agency state the actual reasons for its action prevented judiciary from overstepping its bounds by supplying its own basis for the agency's decision and "facilitates judicial review by ensuring that a court has a clear statement of the rationale it is reviewing"); see also *supra* note 408 and accompanying text.

If there is a basic principle to be derived from the “reasoned decisionmaking” requirement of cases like *Chenery* and *State Farm*, it is that agencies must be truthful and accurate when explaining the rationale for their actions. *State Farm* teaches that an agency must give a reviewing court a logical explanation of why it took a particular action,⁴⁴⁷ and *Chenery* establishes that the proffered explanation must be the “real” one; that is, it must be the rationale actually employed by the agency when it acted.⁴⁴⁸

Self-interest on the part of the agency, however, undermines the public interest in administrative transparency by calling into doubt the agency’s publicly stated rationale for its action. A reviewing court presented with an explanation, even a facially reasonable one, for a self-interested agency action faces precisely the same dilemma as a court trying to evaluate a rationale that is illogical or was articulated for the first time in litigation: in each instance, the court cannot be certain that the proffered reason truly formed the basis for the agency’s action. Any agency that adopts a statutory or regulatory interpretation advancing its own self-interest could fear the legal or political consequences that would follow if it candidly acknowledged on judicial review that pursuit of its own self-interest underlay its conduct. The pressure to advance a facially neutral explanation for its action in such circumstances might be virtually irresistible.⁴⁴⁹

Where a party challenging the agency’s interpretation can show that the interpretation works in the agency’s own self-interest, however, the court has adequate cause to question whether the facially neutral rationale offered by the agency truly supplied the basis upon which the agency acted. Because the analytical framework of *Chevron* tends to

⁴⁴⁷ See, e.g., *MCI Telecomms. Corp. v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993) (“A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious.”) (citing *State Farm*, 463 U.S. at 50); *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 77 (1st Cir. 1993) (“[A]gency decisions must make sense to reviewing courts.”); *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 815 n.35 (D.C. Cir. 1983) (“[A]n agency’s failure to cogently explain why it has exercised its discretion in a given manner renders its decision arbitrary and capricious”) (internal quotations and citation omitted).

⁴⁴⁸ See, e.g., *S. Pac. Transp. Co. v. ICC*, 69 F.3d 583, 588 (D.C. Cir. 1995) (“An agency is barred from advancing in a reviewing court even somewhat differing reasoning from that it expressed at the time it took action.”).

⁴⁴⁹ A review of the previously mentioned cases dealing with self-interested agency interpretations shows a near-universal lack of acknowledgement on the part of the agencies as to the role their own self-interest may have played in the adoption of the challenged interpretation of law, even where the reviewing courts found the agencies’ self-interest to be a determinative factor. See *supra* notes 64-65, 82-96 and accompanying text. Similarly, although the agency in *Brown & Williamson* acknowledged that its expansive interpretation of its authority over tobacco products represented a departure from past practice, nothing in the Court’s opinion suggests that the agency perceived anything improper about the self-interested jurisdictional power grab its interpretation necessarily entailed. See *supra* notes 252-351 and accompanying text.

preclude an inquiry into the genuineness, as distinct from the reasonableness, of the agency's explanation, *Chevron* deference conflicts with the reasoned decisionmaking requirement when an agency's interpretation implicates its self-interest.

3. *Actual and Perceived Fairness*

Judicial deference to self-interested governmental action also carries a particular risk of undermining public confidence in governmental fairness and impartiality.

The courts have recognized that the government, as sovereign, is obliged to comport itself justly. Even if the nation's citizenry consists wholly of Holmesian bad men,⁴⁵⁰ each of them free to walk up to the line of illegality without fear of consequence so long as they do not cross it, still the government itself must lead by example.⁴⁵¹ Thus, the government's own conduct may be rightly condemned not only where it is unlawful, but merely where it is unseemly or gives off the odor of impropriety. Authorities recognizing the special obligations of government counsel in criminal cases constitute a well recognized, but hardly the sole, application of this principle.⁴⁵²

⁴⁵⁰ Justice Holmes described law as a behavioral constraint of last resort, restraining misconduct by those whose individual sense of morality proved inadequate to deter wrongdoing. Such a "bad man" might nevertheless be deterred from wrongful action by the fear that the law would impose unpleasant consequences on such conduct. See O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

⁴⁵¹ For example, the notion that it is not proper for the government itself to commit crimes to catch a criminal because of the corrosive message such conduct sends was well stated by Justice Brandeis three-quarters of a century ago:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see also, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 686 n.33 (1992) (Stevens, J., dissenting).

⁴⁵² The government's unique attributes as an impartial sovereign are said to bar its attorneys from the single-minded pursuit of victory that is the particular ethical duty of private counsel. The principle was stated in perhaps its most celebrated form in *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In both civil and criminal cases, the courts recognize a special obligation of scrupulous propriety on the part of the government. Thus, it is sometimes said that the government is required to “turn square corners” in its dealings with its citizens.⁴⁵³ This rule applies with particular force to actions that the government takes in its proprietary capacity, such as the making and enforcing of contracts.⁴⁵⁴

The courts have recognized that citizens have a justified “interest . . . in some minimum standard of decency, honor, and reliability in

Berger v. United States, 295 U.S. 78, 88 (1935). Today, the same principle finds expression in codes of ethical conduct. See MODEL RULES OF PROF'L CONDUCT R. 3.8 & cmt. 1 (1989); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1982) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict . . .”) (footnote omitted). For a few illustrations of the application of this principle, see, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809–14 (1987) (holding that prosecutorial self-interest in outcome of case *per se* mandates reversal); *Brady v. Maryland*, 373 U.S. 83, 87–88 & n.2 (1963); *United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988); *United States v. Daniels*, 770 F.2d 1111, 1114–15 (D.C. Cir. 1985) (chastising government counsel for advancing a meritless argument merely to sustain a conviction); *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 704–06 (6th Cir. 1985).

⁴⁵³ See, e.g., *United States v. Jimenez Recio*, 537 U.S. 270, 278 (2003) (Stevens, J., concurring in part and dissenting in part) (“The prosecutor, like the defendant, should be required to turn square corners.”); *Commissioner v. Lester*, 366 U.S. 299, 306 (1961) (“The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners.”) (Douglas, J., concurring); *McPhaul v. United States*, 364 U.S. 372, 387 (1960) (“[W]hen it comes to criminal prosecutions, the Government must turn square corners.”) (Douglas, J., dissenting); *United States v. Hodge*, 150 F.3d 1148, 1151 (9th Cir. 1998) (“[T]he government must turn square corners when it employs the heavy engine of the criminal law.”); *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) (“[T]he government should meticulously follow its own guidelines in dealing with its constituents.”); *Black v. United States*, 25 Cl. Ct. 268, 274 & n.14 (1992). See generally *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 61 & n.13 (1984).

⁴⁵⁴ The “square corners” formulation derives from Justice Holmes’s opinion in a tax case. See *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (“Men must turn square corners when they deal with the Government.”). In government contract cases, the Supreme Court has characterized the principle as partly aimed at protecting the public fisc. See *Heckler*, 467 U.S. at 63. The obligation to “turn square corners,” however, is equally incumbent upon the government itself. See *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting) (“It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government.”); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387–88 (1947) (Jackson, J., dissenting) (“It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.”); *Texas Instruments, Inc. v. United States*, 922 F.2d 810, 816 (Fed. Cir. 1990) (“To paraphrase Justice Holmes, the Government as well must turn square corners in its contractual dealings.”); *de Rochemont v. United States*, 23 Cl. Ct. 80, 84 (1991) (“[J]ust as men must turn square corners when they deal with the government, . . . so must government officials walk around the same block when acting on the government’s behalf.”) (internal quotations and citations omitted). Cf. *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting) (arguing that to extend the principle that “those who contract with the Government must turn square corners” too far in the government’s favor risks “mak[ing] a tyrant out of every contracting officer”).

their dealings with their Government.”⁴⁵⁵ Failing to hold the government to this standard risks eroding the public’s trust in the government.⁴⁵⁶ Thus, courts have correctly condemned government agencies whose conduct falls below the “minimum standard of decency” to which citizens are entitled.

For example, in *Massachusetts Bay Transportation Authority v. United States*,⁴⁵⁷ the federal government contracted with a state transportation agency to help renovate and redesign Boston’s South Station rail terminal.⁴⁵⁸ Among the commitments the government made was to secure professional liability insurance endorsements from the various architects, engineers, and other subcontractors on the project for the benefit of the state agency, to protect the agency against liability arising out of those parties’ design errors.⁴⁵⁹ The state agency’s foresight in securing such a commitment proved essential, for a number of design errors delayed the project for almost three years at a cost exceeding \$20 million.⁴⁶⁰ However, the federal government neither obtained the promised insurance nor informed the state agency of its failure to do so.⁴⁶¹ The court condemned this failure not only as a breach of contract, which it certainly was, but also as a failure on the federal government’s part to live up to the obligation of scrupulous propriety incumbent upon a sovereign:

This court is also disturbed by evidence suggesting that even as late as three years after the parties entered the Construction Agreement, and more than two years after FRA first became aware of the impossibility, FRA still did not notify MBTA that it had failed to secure any endorsements. Regardless of whether the endorsements were impossible to obtain, it certainly was possible for

⁴⁵⁵ *Heckler*, 467 U.S. at 61 (footnote omitted); see also *United States v. Wharton*, 514 F.2d 406, 413 (9th Cir. 1975) (“[T]he public has an interest in seeing its government deal carefully, honestly and fairly with its citizens.”) (footnote omitted).

⁴⁵⁶ The Supreme Court has warned that such an erosion would work to the detriment of all citizens by, among other things, increasing the transaction costs incurred by the government in the making of contracts. See *United States v. Winstar Corp.*, 518 U.S. 839, 885 & n.29 (1996) (citing *Lynch v. United States*, 292 U.S. 571, 580 (1934); Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1146 (1996)).

⁴⁵⁷ 254 F.3d 1367 (Fed. Cir. 2001).

⁴⁵⁸ *Id.* at 1369–70.

⁴⁵⁹ *Id.* at 1370.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 1372 (“FRA [the federal agency] failed to get the endorsements despite its clear contract obligation. Moreover, FRA failed to advise MBTA [the state agency] that the endorsements had not been obtained after the contract was entered, and failed to notify MBTA when it unilaterally decided not to purchase, as an alternative, ‘special project’ insurance . . .”).

FRA to notify MBTA of the unavailability of the endorsements as soon as FRA became aware of it. By failing to at least inform MBTA of the problem, FRA placed MBTA in the precarious position of both being uninsured and being unaware that it was uninsured, and FRA did so without excuse or explanation. Both omissions . . . were clearly breaches of [the contract].

. . . [I]t certainly was possible for FRA, at the time it actually became aware of the impossibility, to “furnish the MBTA evidence” that it would be unable to obtain those endorsements. *That it did not do so is not only an unfortunate breach of the contract, but an unseemly act for a government agency.*⁴⁶²

According *Chevron* deference to an agency interpretation that advances the agency’s self-interest—for example, by freeing the agency from its own duty to perform under a contract—effectively eliminates the government’s obligation to “turn square corners” in dealings with its citizens and authorizes the sort of “unseemly act[s]”⁴⁶³ that the *Massachusetts Bay* court condemned. Although a basic axiom of contract law holds that the government is to be treated in its contractual dealings the same as any other party,⁴⁶⁴ *Chevron* potentially allows a contracting agency to do something no private contractor can: to use its regulatory power to alter the terms of its bargain,⁴⁶⁵ or even to excuse its own performance entirely.⁴⁶⁶ Conversely, withholding *Chevron* deference from such agency interpretations avoids unseemly results and preserves public confidence in the integrity of government, to the mutual long-term advantage of both the government and its citizens.

CONCLUSION

Although many courts have on various occasions refused to extend *Chevron* deference to an agency interpretation of law that advanced the agency’s self-interest, they have enunciated no single cogent rationale for doing so. Such a rationale may, however, be derived from a set of higher-order principles of governmental impartiality, transparency, and propriety. It is consistent with the extant case law to suggest that, where

⁴⁶² *Id.* at 1374–75 (emphasis added; internal citations omitted); *see also* United States v. Nordic Vill., Inc., 503 U.S. 30, 44–45 (1992) (Stevens, J., dissenting) (crediting views of legislative commission declaring it “unseemly” for government to award its own claim for back taxes priority over all other creditors’ claims against bankrupt debtor).

⁴⁶³ *Mass. Bay*, 254 F.3d at 1375.

⁴⁶⁴ *See supra* note 23 and accompanying text.

⁴⁶⁵ *See supra* Part I.A.1.b.

⁴⁶⁶ *See supra* Part I.A.1.c.

application of the *Chevron* principle of judicial deference to governmental action would produce a result incompatible with these higher-order principles, *Chevron* must yield.

Where a challenged agency interpretation advances the agency's financial self-interest, withholding an independent judicial interpretation of the statute or rule at issue offends the higher-order principles discussed above. Thus, as in *Mesa Air Group* and *Indiana Michigan*, courts should properly evaluate such agency interpretations outside the *Chevron* framework of review.⁴⁶⁷ As the court of appeals recognized in *Transohio*, it makes no difference to the analysis whether the challenged agency interpretation is of a statute or a contract.⁴⁶⁸ In either case, removing an independent judicial check on financially self-interested agency action contravenes settled principles more deeply rooted in our jurisprudence than *Chevron*.⁴⁶⁹

To say that courts must independently scrutinize agencies' self-interested interpretations of law, however, does not imply that such interpretations should be presumed unlawful. The courts should have little difficulty distinguishing an agency's abuse of its interpretive authority—such as when an agency adopts an interpretation that purports to excuse the agency's own performance under a preexisting contract—and an interpretation that incidentally or inconsequentially benefits the agency in some fashion. What is important in either case is that the agency's decision, whether upheld or overturned, be subject to a truly independent judicial review. *Chevron* effectively places the agency's thumb on the judicial scales, which should not be tolerated when the interpretation before the court advances the agency's own self-interest. The agency's interpretation should still be taken into account under the rubric of *Skidmore*, and given whatever weight the court believes appropriate to assign to the views of a party with a financial stake in the interpretation for which it contends. If the agency's view is ultimately found to be the more persuasive, notwithstanding its financial self-interest in its interpretation, then the agency should prevail.⁴⁷⁰

⁴⁶⁷ See *supra* Parts I.A.1.b; I.A.1.c.

⁴⁶⁸ See *supra* note 48 and accompanying text.

⁴⁶⁹ The same principle suggests that interpretations that work to advance the interpreting agency's financial interest *vis-à-vis* its economic competitors, as discussed *supra* Part I.A.2, should not receive deferential judicial review under the *Chevron* doctrine.

⁴⁷⁰ The decision of the court of appeals in *DeWitt*, as discussed *supra* Part II.A.1.d, is troubling less for its outcome than for its cavalier treatment of the substantial question whether *Chevron* deference was appropriate, and for breaking with a long line of circuit precedent without reasoned explanation. To rehabilitate the panel majority's decision is a task beyond the scope of this article; nevertheless, it is not difficult to envision circumstances in which the agency's view might properly have been upheld even under a *de novo* review informed by *Skidmore*—as, for example, if it were shown that the agency's change in the royalty calculation formula was expected to yield only a *de minimis* financial advantage to the agency. Until

A similar analysis should apply where an agency's interpretation serves in some identifiable way to aggrandize regulatory power in the agency. Although *Brown & Williamson* makes clear that not *all* agency interpretations regarding the scope of their regulatory jurisdiction command deferential review, ultimately the debate over whether agency jurisdictional interpretations in general qualify for *Chevron* deference is somewhat beside the point. Even if one assumes that agencies should be afforded the same latitude in construing their jurisdictional statutes as they generally receive when interpreting substantive laws delegated for their enforcement, a court cannot withhold an independent evaluation of an agency's *self-interested* assertion of authority without running afoul of the higher-order principles previously discussed. As Professor Sunstein has suggested, the task for the courts in such circumstances would not be to separate jurisdictional from non-jurisdictional interpretations, but rather to differentiate interpretations that expand an agency's regulatory sphere from those that do not.⁴⁷¹ This sort of line-drawing should prove challenging only at the margins.⁴⁷² Such a framework of review would give *Chevron* the fullest sweep compatible with settled principles of governmental impartiality, transparency, and fairness, the preservation of which has long been the most identifiable hallmark of an independent judiciary.

such time as another panel, or the court of appeals sitting *en banc*, undertakes to rationalize *DeWitt's sub silentio* departure from prior circuit precedent, however, the case should probably be viewed simply as an isolated misstep along the court's otherwise uniform path.

⁴⁷¹ In Professor Sunstein's words:

Probably the best reconciliation of the competing considerations of expertise, accountability, and partiality is to say that no deference will be accorded to the agency when the issue is whether the agency's authority extends to a broad area of regulation, or to a large category of cases, except to the extent that the answer to that question calls for determinations of fact and policy. On this approach, there is no magic in the word "jurisdiction." Instead, the question is whether the agency is seeking to extend its legal power to an entire category of cases, rather than disposing of certain cases in a certain way or acting in one or a few cases.

Sunstein, *supra* note 13, at 2100 (footnote omitted).

⁴⁷² There would appear to be little rational basis for contending that the point-source pollution definition at issue in *Chevron*, for example, served to aggrandize power in the EPA. Conversely, it can hardly be gainsaid that the agency interpretation in *Brown & Williamson* served in large measure to give the agency new regulatory power over a sphere long previously acknowledged to be beyond its control.

