CHEVRON DEFERENCE AND AGENCY SELF-INTEREST

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Abstract

Judicial review of a federal administrative agency's statutory or regulatory interpretation ordinarily proceeds under the highly deferential framework announced in the landmark case of Chevron U.S.A., Inc. v. Natural Resources Defense Council. Withholding an independent judicial interpretation of a statute or regulation in deference to an agency's views, however, poses unique problems when the agency has a self-interested stake in its interpretation—as, for example, when the agency's interpretation affects its regulatory jurisdiction or yields a financial benefit to the agency. A review of several cases in which courts have deferred, or refused to defer, to interpretations of law that implicated the self-interest of the issuing agency shows that the courts have not enunciated a consistent rationale to explain their divergent results. The article concludes that extending the Chevron deference principle to self-interested agency interpretations of law conflicts with settled norms of due process, and proposes an alternative analytical framework for judicial review of such interpretations.

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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 134, 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.

I. INTRODUCTION

When parties aggrieved by a federal government agency's interpretation of a statute or regulation seek judicial review,[1] reviewing courts typically apply the *Chevron* doctrine[2] and defer 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 to an agency's legal

[1] The judicial review chapter of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, 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 but ill-defined constitutional limitations on the legislative power to circumscribe judicial authority. *See* Nicholas Q. 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, 424–45 (1995).

[2] *See* Chevron U.S.A., Inc. v. Natural Resources Def. Council, 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

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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. 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 thoroughgoing 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 generally have failed to enunciate clear and consistent ration-

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'tools of statutory construction,' are ambiguous."). 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) ("courts 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) ("An agency assertion of ambiguity does nothing to establish that the statute is in fact ambiguous") (Henderson, J., dissenting); Cajun Elec. Power Corp. v. FERC, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (holding that agency receives no deference on the question whether the statute is ambiguous); Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 141 (D.C. Cir. 1984); *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) (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 deferentially an agency's interpretation of its own rules. *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); *see also infra* note 11. 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* Christensen v. Harris County, 529 U.S. 576, 587 (2000); United States v. Mead Corp., 533 U.S. 218 (2001). The Court has also suggested, however, that the promulgation of an interpretation through means less formal than full notice-and-comment rulemaking is not, standing alone, a sufficient basis to deny *Chevron* deference to that interpretation. *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 9. *See, e.g.*, Washington Dep't of Social Servs. v. Keffeler, 123 S. Ct. 1017, 1026 (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).

ales 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 under an alternative analytical framework. 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 that implicate 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 decisionmaking.[4]

Second, self-interest on the part of the issuing agency provides a reason to doubt the genuineness of the explanation it offers to justify the interpretation it has adopted—that is to say, it necessarily raises doubt as to whether the enunciated rationale for the agency's action truly supplied the basis on which the agency took that action. The law is clear, however, that agencies are obliged to describe accurately their reasons for adopting any particular position—in part because an accurate statement of the agency's reasoning is necessary for effective judicial review, but more generally because the government ought to speak the truth. It is incompatible with principles of governmental openness and transparency to withhold an independent judicial evaluation of the agency's interpretation where the agency's self-interest casts doubt upon its stated rationale for that interpretation.[5]

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

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[4] *See infra* notes 330–345 and accompanying text.

[5] *See infra* notes 346–394 and accompanying text.

nongovernmental actors cannot. To permit an agency to use its interpretive authority to negate its own duty to perform under a contract,[6] or to radically expand its regulatory sphere in ways it had long disavowed,[7] for example, has corrosive effects on public confidence in the fairness of government that reach far beyond the parties directly affected by the agency's action. For this reason, too, the courts should not accord *Chevron* deference to interpretations of law that implicate the self-interest of the issuing agency.[8]

For these reasons, this article concludes that the courts have correctly refused to defer to agency legal interpretations that implicate the 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 to say, 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 any 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,[9] but should not receive the deferential review provided under the *Chevron* framework.

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[6] *See infra* notes 70–89 and accompanying text (discussing Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996)).

[7] *See infra* notes 227–305 and accompanying text (discussing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

[8] *See infra* notes 395–412 and accompanying text.

[9] 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* Christensen v. Harris County, 529 U.S. 576, 587 (2000); United States v. Mead Corp., 533 U.S. 218, 234–35 (2001). A substantial 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 the statutory text fails to clearly show whether the legislature meant to confer on the agency the authority to promulgate rules with the force of law, see Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original*

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

In most cases, we would not expect an agency's interpretation of a statute it administers,[10] or its own regulation,[11] to implicate the agency's self-interest.[12] Nevertheless, courts and

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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 seems to view *Christensen* and *Mead* as more in the nature of clarifying, rather than revolutionizing, the law on the standards of judicial review of various types of agency action, although he 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).

[10] 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, Inc. v. FLRA, 872 F.2d 1032, 1033 (D.C. Cir. 1988) (recognizing that agency's interpretation of its enabling statute warrants "considerable deference"), *with* IRS, Los Angeles Dist. 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. Department 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*, 325 F.3d 1133, 1136 n.4 (9th Cir. 2003) (en banc) (finding *Chevron* inapplicable in view of unambiguous statutory text). An agency also receives no deference when it advances an interpretation of another agency's statute. *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., Inc. 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* ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 1998–1999, at 45, 46 (2000) ("By explicitly tying deference to the rulemaking powers granted by statute, and not mere linguistic ambiguity, the Court [in United States v. Haggar 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. Retirement Bd., 969 F.2d 1082 (D.C. Cir. 1992); *but cf.* America's Community 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)

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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 has the effect of advantaging the agency's own interests *vis-à-vis* the interests of other agencies, other governmental institutions, or private parties.[13] Such circumstances may raise substantial questions about whether it is appropriate to apply the principle of *Chevron* deference to a self-interested agency interpretation.[14]

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-

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(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* Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997); *see also* Crandon v. United States, 494 U.S. 152, 177 (1990) (arguing against *Chevron* deference for statute "not administered by any agency but by the courts") (Scalia, J., concurring).

[11] *See* United States v. Haggar 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 other agencies); *see generally* Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-*Chevron *Assessment*, 22 MEM. ST. U. L. REV. 411 (1992) (discussing impact of *Chevron* on judicial review of agencies' regulatory interpretations); Coverdale, *supra* note 9, at 58–64 (reviewing different doctrines courts have applied in judicial review of agency regulatory interpretations).

[12] *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").

[13] 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 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.

[14] *See* Sunstein, *supra* note 12, 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).

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.[15] Although it is not impossible that an agency may have self-interested reasons for construing its own jurisdiction narrowly,[16] more commonly, agency self-interest is thought to be at stake when an agency interprets its own jurisdiction expansively,[17]

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[15] 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 a self-interested agency decision "such 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 Jurisdiction*, 61 U. CHI. L. REV. 957 (1994) (arguing in favor of deference in such circumstances).

[16] 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 12, 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 279. 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 12, 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).

[17] *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2127 (2002) ("agencies 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*, REGULATION, vol. 23, no. 3, at 5, 6 (2000) (towards 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?*, NAT. RESOURCES & ENVT., Summer 2002, at 7, 8 (suggesting that "the commonplace aggrandizement of regulatory authority found in agency interpretations" may be vulnerable to constitutional attack under United States v. Morrison, 529 U.S. 598 (2000), and Jones v. United States, 529 U.S. 848 (2000)). 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-

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such as when it claims newfound regulatory authority over a subject matter not previously thought to lie within its jurisdiction.[18]

Second, an agency might adopt a legal interpretation that inures to the agency's own financial interest. This scenario appears to be less frequently discussed in the literature,[19] but has arisen in a number of cases.[20]

The following sections discuss a number of cases in which courts have applied, or declined 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, it seems possible to discern a degree of judicial

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interest"); *but cf. id.* 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 41, 121–124 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 170 and accompanying text. Conversely, Justice Scalia favors deference to agency jurisdictional interpretations (*see infra* notes 175–181 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* notes 227–305 and accompanying text.

[18] *See* Gellhorn & Verkuil, *supra* note 15, 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* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[19] *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).

[20] *See infra* notes 28–125 and accompanying text.

skepticism toward self-aggrandizing agency interpretations that goes beyond what might be expected based solely on examination of the statutory text at issue. Still other cases, however, 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 to 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,[21] and when they do so, the contractual relationship is generally governed by the same neutral principles of contract law that would apply if the government were not involved.[22] Disputes involving the interpretation of government contracts present a fertile area of litigation.[23]

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[21] 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." California Fed. Bank, FSB v. United States, 245 F.3d 1342, 1346 (Fed. Cir. 2001) (internal quotations and citation omitted). In general, however, in the cases discussed in this section, the existence of the government's contractual obligation is clear.

[22] *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).

[23] To take the largest and 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, 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 are have been more than 120 *Winstar*-related cases filed against the government. *See* Southern 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

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One way an agency may advance its own financial self-interest is 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 have illustrated a few ways in which an agency can use its regulatory power to advantage its own contractual interests. First, an agency might claim entitlement to deference with respect to its interpretation of the terms of the contracts themselves. Contracts are not statutes, however, and the courts have taken divergent positions on agencies' self-interested claims of entitlement to deference in this context. Some courts have questioned whether self-interested agency interpretations of contracts to which the agency is a party should command judicial deference,[24] and have reasoned that deference properly extends only to agency interpretations of law, not to interpretations of the agencies' own contracts.[25] Where agency self-interest is not implicated, however, some measure of

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altered the terms of the private financial institutions' bargain with the government. 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; thus, there may be no agency left to make a colorable claim of entitlement to deference. *Cf. supra* notes 10–11 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) (agency's "*post hoc* rationalization[ ]" merits no deference); *see also infra* notes 355–359 and accompanying text (discussing requirement that agency enunciate rationale for its interpretation outside of litigation); *but cf.* Women Involved in Farm Economics 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").

[24] *See* National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir. 1987); *see also infra* note 41 and accompanying text.

[25] *See* Mesa Air Group, Inc. v. Department of Transportation, 87 F.3d 498 (D.C. Cir. 1996). This case is further discussed *infra* notes 49–69 and accompanying text.

deference to agencies' contractual interpretations has been held to be appropriate in some circumstances.[26]

A second way an agency may advance its contractual self-interest is by propounding interpretations not of its contracts themselves, but of various statutory and regulatory provisions that may govern its relations with contracting parties. Here, too, however, 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.[27] Examination of a few cases will illustrate these points.

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[26] 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, the extent of judicial deference to agencies' contractual interpretations is at its nadir. *See infra* notes 28–41 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* Baltimore 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* National 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"); Alabama 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 may stem from an unusually specific statutory grant of authority to the agency over matters of contractual interpretation, however. *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 Financial 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. Washington Metropolitan 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* 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).

[27] *See infra* notes 44–45, 70–89 and accompanying text.

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

In *National Fuel Gas Supply Corp. v. FERC*,[28] a seller of natural gas sought judicial review of FERC's denial of its request for a retroactive rate increase.[29] The rates the seller could charge were limited by agency regulations issued pursuant to the Natural Gas Policy Act of 1978 ("NGPA").[30] When the courts struck down an agency interpretation of the NGPA on which the rate-limiting regulations rested, however, the seller sought to retroactively increase the rates it had charged based on the agency's former view.[31] 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 agreement had been approved by the agency pursuant to statutory authority.[32] The agency interpreted that settlement agreement as failing to reserve to the seller any subsequent right to petition to retroactively increase the rates established therein.[33] On the seller's petition for review of the agency's decision, the correctness of the agency's denial of the rate increase "depend[ed] on the [agency's] reading of the settlement agreement."[34]

Although acknowledging differences of opinion among the courts of appeals,[35] the panel concluded that the case presented a *Chevron* issue and called for judicial deference to the agency's interpretation of the settlement agreement.[36] The court believed deference to be

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[28] 811 F.2d 1563 (D.C. Cir. 1987).

[29] *Id.* at 1564.

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

[31] *Id.*

[32] *Id.* at 1566 (citing National Fuel Gas Supply Corp., 15 F.E.R.C. (CCH) ¶ 61,058 (Apr. 21, 1981)).

[33] *Id.*

[34] *Id.* at 1568.

[35] *See id.* (collecting authorities from the Fifth and Sixth Circuits generally rejecting deferential review, and from the Fourth and Seventh Circuits generally supporting it).

[36] *See id.* at 1569–70.

required based on "*Chevron* principles alone,"[37] but also cited the agency's superior technical expertise[38] and the express authority Congress had conferred on the agency to approve settlement agreements[39] as considerations supporting deferential review.

Crucially, however, the court of appeals expressly qualified its recognition of *Chevron* deference by noting that the settlement agreement did not implicate the agency's self-interest. If it had, the court declared, *Chevron* deference would be "inappropriate."[40] Then-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.[41]

As the court observed, the agency itself was not a party to the contract at issue in *National Fuel Gas*.[42] 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, and indeed, the case has more often been cited for the proposition that agencies' contractual interpretations do indeed warrant *Chevron* deference,[43] rather than for the panel's dictum recognizing an exception to that proposition in cases of agency self-interest.

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[37] *Id.* at 1570.

[38] *Id.*

[39] *Id.* at 1571.

[40] *Id.*

[41] *Id.* at 1571–72 (emphasis added; footnote omitted).

[42] *Id.*

[43] *See* Muratore v. United States Office of Personnel Management, 222 F.3d 918, 921–23 (11th Cir. 2000); Reed v. Railroad Retirement Bd., 145 F.3d 373, 375 (D.C. Cir. 1998); Williams Natural Gas Co. v. FERC, 3 F.3d 1544,

(continued…)

The court of appeals expanded upon *National Fuel Gas* in *Transohio Savings Bank v. Director, Office of Thrift Supervision*.[44] There, the court made clear that *National Fuel Gas*'s principle against deference to self-interested agency views was not confined to an agency's attempt to escape from its own contracts, but extended to statutory interpretations that redounded to the agency's financial or contractual advantage. 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 a 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.[45]

Because the court found that the applicable statutory text "clearly conveys Congress' intention,"[46] it found no occasion to evaluate the agency's interpretation under Step Two of *Chevron*.[47]

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 110–111 and accompanying text.

[44] 967 F.2d 598 (D.C. Cir. 1992).

[45] *Id.* at 614 (citations omitted).

[46] *Id.*

[47] 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 23. 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.

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.[48] That precise scenario was at issue in *Mesa Air Group, Inc. v. Department of Transportation*.[49] 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.

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 carriers' actions.[50] 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[.]'"[51] 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.'"[52] The statute gave the agency authority to terminate the subsidy payments when they were found no longer to be necessary to assure that a particular market received "'basic essential air service.'"[53] Private air carriers could terminate their agreements with the agency upon ninety days' notice, subject to the

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[48] *See supra* note 41 and accompanying text.

[49] 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. 923 (1997).

[50] *See Mesa Air Group*, 87 F.3d at 500.

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

[52] *Id.* (quoting 49 U.S.C. § 41737(d)).

[53] *Id.* (quoting 49 U.S.C. § 41733(d)).

agency's right to require the carrier to continue providing service until the agency found a replacement carrier.[54]

The dispute in *Mesa Air Group* arose when Congress appropriated insufficient funds to enable the agency to meet all its contractual subsidy commitments.[55] 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.[56]

The agency seized upon this language to issue an order providing for steep across-the-board reductions in subsidy payments to carriers.[57] The carriers responded by terminating service to some of the communities affected by the subsidy reductions.[58] The carriers relied on a clause in the agency's orders announcing the subsidy reductions 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[.]'"[59]

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."[60] It then recharacterized the carriers' "termination" notices as invoking their right to terminate service upon ninety days' notice, and directed

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[54] *See id.* (citing 49 U.S.C. § 41734).

[55] *See id.* at 500–01.

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

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

[58] *Id.* at 502.

[59] *Id.*

[60] *Id.*

the carriers to continue serving the affected markets until the agency could secure replacement service.[61]

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 review under the neutral principles of contract law, not the deferential principles of regulatory interpretation.[62]

On the merits, the court found that the agency had improperly attempted to unilaterally alter the terms of its bargain with the plaintiffs, and vacated the agency's interpretation.[63]

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*.[64] The above-quoted language from the *Mesa Air Group* court's 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.[65] Yet such a rule would hardly be consistent with

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[61] *Id.* at 503; *see also supra* note 54 and accompanying text.

[62] *Id.* The panel was unanimously of the view that deferential review of an agency's interpretation of its contract was unwarranted, although one judge accepted the agency's arguments that it had not "terminated" the payments (*see supra* note 60 and accompanying text) and, therefore, dissented from the court's holding in favor of the carriers. *Mesa Air Group*, 87 F.3d at 506–08 (Wald, J., dissenting).

[63] *Id.* at 503–06.

[64] *See supra* notes 41, 45 and accompanying text.

[65] *See supra* note 62 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 49; 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

(continued…)

the many cases in which the same court expressly accorded *Chevron* deference to agencies' contractual interpretations.[66] The court should instead have emphasized that it was not merely an agency's contractual interpretation, but a *self-interested* agency 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"[67] into a holding. It did so, however, without expressly drawing the crucial distinction, expressly stated in *National Fuel Gas*, between contractual interpretations that implicate the 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,[68] irrespective of any deference that may be accorded when an agency interprets a contract to which it is not a party.[69]

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contract the rule of agency deference is inapplicable.") (citing Clay Tower Apts. v. Kemp, 978 F.2d 478, 480 (9th Cir. 1992)).

[66] *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. Railroad Retirement Bd., 145 F.3d 373, 375 (D.C. Cir. 1998) ("we apply a *Chevron* analysis when reviewing an agency's interpretation of a contract") (footnote omitted); *see also supra* notes 26, 43 and authorities cited.

[67] *See supra* note 41 and accompanying text.

[68] *See* Independent Petroleum Ass'n v. Armstrong, 91 F. Supp. 2d 117, 124 (D.D.C. 2000) (citing *Mesa Air Group* 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.* Independent Petroleum Ass'n v. DeWitt, 279 F.3d 1036 (D.C. Cir. 2002). This case is further discussed *infra* notes 90–125 and accompanying text.

[69] 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 41, 45 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.*, Southern 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"); New York 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. App.—Austin 2000) (refusing to defer to agency's interpretation of a contract to which it was a party) *with*

(continued…)

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 Michigan Power Co. v. Department of Energy*.[70] In that case, the agency essentially interpreted the statute so as to excuse its own failure to perform under a contract through which it had collected millions of dollars in statutorily imposed fees. The statute at issue was the Nuclear Waste Policy Act of 1982 (NWPA) which, in relevant part, authorized the Secretary of Energy to strike a 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, will dispose of the . . . waste[.]' "[71] 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 generators of the waste to bear primary responsibility for storing the waste until the agency accepted it.[72]

Acting pursuant to the authority the NWPA conferred, the agency entered into contracts with private utility operators. The contractual terms specified that the agency agreed to provide waste disposal services that "shall begin, after the 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.' "[73] The contracts added a phrase—"after the commencement of facility operations"—that was not found in the statutory provision requiring the agency to begin to

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Wisconsin End-User Gas Ass'n v. Public Serv. Comm'n, 581 N.W.2d 556, 558–59 (Wis. App. 1998) (refusing to defer to agency's interpretation of a contract to which it was not a party).

[70] 88 F.3d 1272 (D.C. Cir. 1996).

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

[72] *Id.*

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

"'dispose of'" the waste "'beginning not later than January 31, 1998[.]'"[74] That phrase 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.[75]

In 1995, the agency issued a final interpretation of the statute.[76] 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 or interim storage facility constructed under the NWPA."[77] The affected utilities sought judicial review.

The reviewing court recognized that the agency's interpretation of the statute involved a *Chevron* problem,[78] but found it unnecessary to look beyond Step One.[79] 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[.]'"[80] The court of appeals was unpersuaded; it declared "[t]he phrase 'dispose of'"

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

[75] *Id.* at 1274; *see also* Northern States Power Co. v. Department of Energy, 128 F.3d 754, 757 (D.C. Cir. 1997) (agency "announc[ed] 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, indeed, the contemplated "facility will not be operational until the year 2010").

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

[77] *Id.* at 1274. The agency separately contended that, even if its statutory interpretation was incorrect, the terms of its contracts included a Delay Clause that provided an administrative remedy for its failure to perform. *Id.* The contractual issue need not be considered further, as the court of appeals rested its decision solely on statutory grounds. *See id.* at 1277.

[78] *Id.* at 1274.

[79] *Id.* at 1276.

[80] *Id.* at 1275.

to be "a common term" that Congress intended to be used in its ordinary dictionary sense.[81] The court also found even the term "disposal" not to be consistently used in the statute in the restricted sense for which the agency contended, and 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."[82]

The court next rejected a technical argument the agency advanced. The agency pointed out that a separate provision of the statute contemplated a transfer of legal title to the agency of any radioactive waste transmitted for disposal.[83] According to the agency, this transfer-of-title provision must have meant that Congress intended the agency to "take title to the waste before proceeding with disposal."[84] This was, as best, a stretch, because the cited transfer-of-title provision on its face appeared to have nothing at all to do with the unambiguous statutory mandate directing the agency to begin disposing of the waste by January 31, 1998. The court of appeals spared little effort to knock down the argument. It found the disposal and transfer-of-title provisions to establish "two independent requirements" and noted that they were keyed to entirely different triggering events.[85] It also found that both the terms of DOE's own contracts, and the conduct of other federal agencies such as the Nuclear Regulatory Commission, appeared

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[81] *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 Marketing 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"; 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 likely was not what really troubled the court in that case.

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

[83] *Id.* at 1276 (citing 42 U.S.C. § 10143).

[84] *Id.*

[85] *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 owner and is triggered, at the latest, by the arrival of January 31, 1998.").

to recognize a distinction between ownership of radioactive waste materials and a duty to dispose of that waste, such that the former did not necessarily imply the latter.[86] 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.

The court reserved by far 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. 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 or SNF 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.[87]

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."[88] Because the agency's interpretation acknowledged the

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[86] *Id.*

[87] *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.

[88] *Id.* at 1277.

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.[89]

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 appears to have muddied the waters somewhat. In *Independent Petroleum Association of America v. DeWitt*,[90] 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.

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.[91] The Department of Interior, as lessor, entered into contracts with private natural gas producers to allow exploration and production on federal and Indian lands in exchange for a fractional royalty

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[89] The court of appeals subsequently found it necessary to issue a writ of mandamus to direct the agency to comply with *Indiana Michigan*. The same panel of the court of appeals later 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."

Northern States Power Co. v. United States Dep't of Energy, 128 F.3d 754, 757 (D.C. Cir. 1997). 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, on the grounds that this argument amounted to "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.

[90] 279 F.3d 1036 (D.C. Cir. 2002).

[91] *Id.* at 1037–38.

of production revenues.[92] The terms of the leases specifically made the parties' agreement subject to existing *or future* regulations of the Department.[93] The lessees agreed to pay the government royalties computed based on gross production proceeds less certain allowed deductions.[94] The dispute in *DeWitt* arose when the Interior Department amended its regulations in 1997 to forbid parties from deducting certain costs from gross proceeds when computing the royalties due.[95]

The natural gas producers and their representatives sued to challenge the Department's new royalty regulations. The district court agreed with the producers that the Department's financial self-interest in increasing its own royalty revenues disentitled it to *Chevron* deference.[96] Indeed, the district court's opinion reads as a fair summary of Circuit precedent as it then existed. Citing *Mesa Air Group*,[97] the district court declared that "no deference is due an agency's

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

[93] *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 23; *cf. also* 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*, *e.g.*, Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994, 999–1000 (11th Cir. 1991) (interpreting contractual provision requiring party's compliance with current regulations "and 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, 337 (2002) (interpreting identical language as not imposing on private party the risk of regulatory change).

[94] *See DeWitt*, 279 F.3d at 1037.

[95] *Id.* at 1038 (citing Final Rule, *Amendments to Transportation Allowance Regulations for Federal and Indian Leases to Specify Allowable Costs and Related Amendments to Gas Valuation Regulations*, 62 Fed. Reg. 65,753/3–65,754/1 (1997)). Obviously, by reducing allowable deductions, the regulations would increase the gross proceeds upon which the lessee's royalty payment would be calculated, and thus increase the royalties paid to the government.

[96] *See* Independent Petroleum Ass'n v. Armstrong, 91 F. Supp. 2d 117, 124 (D.D.C. 2000).

[97] Mesa Air Group Inc. v. Department of Transportation, 87 F.3d 498 (D.C. Cir. 1996). *See generally supra* notes 49–69 and accompanying text.

interpretation of contracts in which it has a proprietary interest."[98] The court continued, citing *Transohio*,[99] that "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."[100] Reviewing the Department's regulations outside the deferential *Chevron* framework of review, the district court 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.

The court of appeals, however, reversed in pertinent part.[101] Specifically disagreeing with the district court, a two-judge majority held that the Department's regulations were entitled to *Chevron* deference.[102] Concurring separately, Judge Sentelle disagreed with the majority's interpretation of *Chevron*, finding it "confusing, and indeed troubling,"[103] but nevertheless voted to reverse the district court on other grounds.[104]

The panel 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."[105] As discussed above, *Mesa Air Group* seemed literally to

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[98] *Armstrong*, 91 F. Supp. 2d at 124; *see also id.* at 127 (although "[i]n certain circumstances, 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 the contract."). As stated *supra* note 69, this seems to me to be the correct reading of *Mesa Air Group*.

[99] Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598 (D.C. Cir. 1992). *See generally supra* notes 44–45 and accompanying text.

[100] *Armstrong*, 91 F. Supp. 2d at 124; *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."), 130.

[101] Independent Petroleum Ass'n v. DeWitt, 279 F.3d 1036 (D.C. Cir. 2002).

[102] *Id.* at 1039–40.

[103] *Id.* at 1043 (Sentelle, J., concurring).

[104] *Id.* (Sentelle, J., concurring).

[105] *Id.* at 1039.

say that judicial deference to agencies' interpretations of contracts was *per se* inappropriate,[106] even though the specific interpretation at issue in that case was objectionable principally because it implicated the self-interest of the agency.[107] 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 themselves lead us back to the agency,"[108] which it followed with a rather opaque and probably unnecessary digression on the notion of retroactivity.[109] The majority did approvingly cite *National Fuel Gas*[110] as "applying a *Chevron* framework to agency interpretation of contracts,"[111] and to that extent, *DeWitt* is

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[106] *See supra* note 62 and accompanying text.

[107] *See supra* notes 66–69 and accompanying text. The district court in *DeWitt* clearly understood *Mesa Air Group* as forbidding deference only to agencies' *self-interested* contractual interpretations. *See supra* note 98 and accompanying text.

[108] *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 rightly 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 69. 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 9.

[109] *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 93 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.

[110] National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir. 1987). *See generally supra* notes 28–43 and accompanying text.

[111] *DeWitt*, 279 F.3d at 1039.

consistent with Circuit precedent recognizing that some agency contractual interpretations may be eligible for *Chevron* deference.[112]

The panel majority faltered at its next step, however, which asked whether the application of *Chevron* deference was "inappropriate for regulations that affect contracts in which Interior has financial interests."[113] 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[.]"[114] If the majority intended this statement to suggest that the issue was an open one, its assertion is difficult to credit. Indeed, as the decision under review had expressly recognized,[115] the very same court had ruled on precisely this question in *Mesa Air Group*.[116] The *Indiana Michigan* cases,[117] which *DeWitt* ignored entirely, were also openly hostile to the notion that financially self-interested agency interpretations commanded judicial deference. All but ignoring Circuit precedent on the question, however, the panel 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 Interior Department had the authority to promulgate regulations governing leases and that when it did so, those regulations could be entitled to deferential review.[118] Unlike *Mesa Air Group*, *Indiana Michigan*, *National Fuel Gas*, *Transo-*

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[112] *See supra* notes 43, 66 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.

[113] *DeWitt*, 279 F.3d at 1039.

[114] *Id.* at 1040.

[115] *See supra* note 98 and accompanying text.

[116] Mesa Air Group, Inc. v. Department of Transportation, 87 F.3d 498 (D.C. Cir. 1996). *See generally supra* notes 49–69 and accompanying text.

[117] Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996); Northern States Power Co. v. United States Dep't of Energy, 128 F.3d 754, 757 (D.C. Cir. 1997). *See generally supra* notes 70–89 and accompanying text.

[118] *See DeWitt*, 279 F.3d at 1040.

hio,[119] and the other D.C. Circuit cases the panel majority failed to apply, however, the cases it collected said nothing about the question whether the ordinary rule of deference should continue to apply in the face of a demonstration that the agency's financial self-interest was 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, *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283–84 (D.C. Cir. 1994), 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, see generally Dennis C. Mueller, Public Choice 156–70 (1979); William A. Niskanen, J., Bureaucracy and Representative Government (1971), 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.[120]

Judge Sentelle found "confusing, and indeed troubling" the panel majority's interpretation of *Chevron* as permitting in all cases "deference to the interpretation of statutes governing contracts in which the agency has a financial interest."[121] Judge Sentelle did not dispute that deference was the general rule and that nothing in the statute showed any specific intent to withhold from the agency the measure of deference that would ordinarily attach to its interpretations.[122] He disagreed with the majority that cases concerning deference to agencies' interpretations of the extent of their own jurisdiction necessarily implied judicial acceptance of interpreta-

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[119] Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598 (D.C. Cir. 1992). *See generally supra* notes 44–45. 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 ("we ultimately found that Congress's intent was clear and thus had no occasion to grant (or withhold) deference"). Yet this hardly answers the question 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.

[120] *DeWitt*, 279 F.3d at 1040.

[121] *Id.* at 1043 (Sentelle, J., concurring).

[122] *Id.* (Sentelle, J., concurring).

tions implicating agencies' *financial* self-interest.[123] 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."[124] 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.[125]

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," thus assuming away the very question to be decided. Second, it is hardly settled that *Chevron* deference attaches to all "agency interpretations of their jurisdictional limits,"[126] and indeed, the Supreme Court had recently declined to defer to an agency jurisdictional interpretation in *FDA v. Brown & Williamson Tobacco Corp.*[127] Third, even if one believes that "self-interest alone gives rise to no automatic rebuttal of deference"—a debatable, but certainly defensible, proposition—it does not follow, as the

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

[124] *Id.* (Sentelle, J., concurring).

[125] *Id.* (Sentelle, J., concurring). Judge Sentelle's characterization of the majority's pro-deference language 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 repeatedly rely expressly upon the reasonableness of the Interior Department's interpretation (*see supra* note 128), 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 96–100 and accompanying text.

[126] *See, e.g.*, Business Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990) ("The Supreme Court cannot be said to have resolved the issue definitively"); *infra* notes 140, 184–185 (noting divergence of opinion on this issue).

[127] 529 U.S. 120 (2000). *See generally infra* notes 227–305 and accompanying text.

majority apparently believed, that agency self-interest was *entirely irrelevant* to a determination of the extent of deference owed, particularly at the *Chevron* Step Two reasonableness inquiry where the *DeWitt* majority ultimately resolved the case.[128] Fourth, the general reference to the purported "ubiquity of some form of agency self-interest" 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.[129] Finally, virtually no court or commentator to date has believed that agency interpretations implicating the agency's self-interest are so common as to represent the rule, rather than the vanishingly rare exception.[130] 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*."

It is too soon to say whether *DeWitt* represents an enduring shift in the way the D.C. Circuit evaluates a contention 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

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[128] *See DeWitt*, 279 F.3d at 1040 ("[w]e find nothing unreasonable in Interior's refusal to allow deductions for so-called 'downstream' marketing costs."), 1042 ("it 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 321–326 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.

[129] *See supra* notes 28–89 and accompanying text. 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").

[130] *See supra* note 12. Only by defining the notion of "self-interest" with essentially all-encompassing breadth, which the panel did without citing a single precedent, 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.

one, rather than analyzing or distinguishing its own prior decisions on the subject, the panel 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 of appeals. The trend of decisions in the D.C. Circuit before *DeWitt* was generally against judicial deference to agencies' financially self-interested interpretations of law. Although *DeWitt* reaches a contrary result, it does 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,[131] the government nevertheless competes with private parties to provide several types of economic goods. Government agencies as diverse as the Federal Reserve Board,[132] NASA,[133]

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[131] 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). 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).

[132] In the Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C.), 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) (listing services covered by the Act). The statute required the Federal Reserve to promulgate a schedule of the fees 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. Federal Reserve Bank, 713 F.2d 1221, 1222 (6th Cir. 1983). In an early case brought under the Act, the agency described this

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and the Department of Education[134] all offer services in direct economic competition with private sellers of substantively identical services.[135]

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provision as showing Congress's "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, Inc. v. Board of Governors of the Federal 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 cases 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*, *supra*, at 1236–37 (holding that printers of checks lacked standing to complain that statute would increase proportion of paperless transactions); *Jet Courier Servs.*, *supra*, at 1226–27 (holding that private air couriers lacked standing to complain that 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). 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 "made 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. Conf. Rep. No. 96-842, 96th Cong., 2d Sess. 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.

[133] 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* (Nov. 26, 2001), *at* http://www.wired.com/news/politics/0,1283,48455,00.html; Declan McCullagh & Ben Polen, *NASA: Smelling the Coffee* (Nov. 28, 2001), *at* http://www.wired.com/news/politics/0,1283,48643,00.html ("*Smelling the Coffee*"); Ben Polen, *NASA Mulls Shuttle Shuttling* (Dec. 3, 2001), *at* http://www.wired.com/news/politics/0,1283,48743,00.html ("*Shuttle Shuttling*"); Ben Polen, *NASA: Taking Privatization Public* (Dec. 4, 2001), *at* http://www.wired.com/news/politics/0,1283,48814,00.html. 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 launching services since after the 1986 *Challenger* disaster. *See Shuttle Shuttling*, *supra*.

[134] Under the Federal Family Education Loan Program ("FFELP"), 20 U.S.C. §§ 1071–1087-4, 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 School of Wash., 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 352 (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). Additionally, if the loan holder's rate of return falls below a

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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 (D.D.C. 1996), *aff'd mem.*, 132 F.3d 1480 (D.C. Cir. 1997); Tipton v. Secretary 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. 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* (visited Sept. 13, 2000), *at* http://www.ed.gov/offices/OSFAP/CSTF/virginpart3.19.html ("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).

[135] *See also* Jim Suber, *Crop Insurance Program is a Real Disaster: The View from Rural Route 8* (Jan. 13, 1999), *at* http://thekansan.com/stories/011399/vie_0113990015.shtml ("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 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. § 40101). 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 "though 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 Air Transportation Stabilization Board Conditionally Approves Application By America West*, *at* http://www.ustreas.gov/press/releases/po890.htm. *See also* Daniel Gross, *The Government's Cram-Down Artists: Tough Love for Troubled Airlines*, *at* http://slate.msn.com/?id=2074534 ("within 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.").

(continued…)

Although this scenario is less frequently discussed in the case law, it is not difficult to see that a federal agency could advantage 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 to advance the agency's own financial self-interest at others' expense. Logically, one would expect the same skepticism courts have generally shown when reviewing agencies' self-interested interpretations that affect their own contractual rights[136] to accompany judicial review of agencies' interpretations that advance the agency's 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 had the effect of expanding or restricting the

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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. 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.

[136] *See supra* notes 21–89 and accompanying text.

scope of the agency's statute.[137] 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."[138]

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.[139] The Supreme Court has declined opportunities to resolve the issue,[140] and the question was described as a "long-standing unsettled issue" as recently as early 2000.[141] 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,[142] the Court again dodged the question:

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

[138] Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 616 (1944); *see also* FMC 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"); Social Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function.") (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.").

[139] *See, e.g.*, Crawford, *supra* note 15 (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).

[140] *See* California 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* Business 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) (collecting authorities); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 157 (2002) ("while the Court has never explicitly held that *Chevron* applies to jurisdictional disputes, it has often applied *Chevron* to such disputes.").

[141] Herz, *supra* note 10, at 48.

[142] *See id.* at 50–51. *But cf.* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common 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).

because it concluded that the FDA's interpretation was contrary to the policies established in the applicable statute and related statutes, it had no occasion to consider whether the FDA might have been entitled to deference had the analysis proceeded to Step Two of *Chevron*.[143]

The arguments for and against deference to agencies' jurisdictional interpretations were well ventilated in the concurring and dissenting opinions in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.[144] The case essentially concerned the question whether an order of the Federal Energy Regulatory Commission (FERC) ordering 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. 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.[145] The construction project suffered huge cost overruns, however, and in consequence, wholesale rates for power from the completed plant were far higher than had been expected at the time the construction was undertaken.[146] 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.[147]

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.[148] FERC Administrative Law Judges found, and

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[143] *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*").

[144] 487 U.S. 354 (1988).

[145] *Id.* at 357–58.

[146] *See id.* at 359–60 & n.5.

[147] *Id.* at 360.

[148] *See id.* (citing 16 U.S.C. §§ 824d(a), 824e(a)).

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.[149] 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 being allocated to MP&L.[150] FERC's cost allocation was upheld on judicial review.[151]

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.[152] Thus, 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.[153] The MPSC was, at that very moment, challenging the 33% cost allocation to MP&L in the ongoing FERC proceeding.[154] Nevertheless, in response to MP&L's application, the MPSC concluded, with obvious reluctance, that it must allow the requested rate increase or risk MP&L's insolvency.[155]

Joined by consumer representatives, the Mississippi Attorney General challenged the MPSC's grant of MP&L's requested rate increase.[156] In the state-court proceedings, the challengers advanced a new argument that had not been raised before FERC or the MPSC: they

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[149] *See id.* at 361–63.

[150] *Id.* at 363.

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

[152] *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).

[153] *Id.* at 365.

[154] *See id.* at 366.

[155] *See id.* at 365–66.

[156] *Id.* at 366.

contended that the huge costs involved in the construction of the nuclear plant had been imprudently incurred. 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.'"[157] Thus, the plaintiffs argued, the MPSC's failure to perform a "prudence review" of the costs sought to be recouped in MP&L's rate increase meant that the MPSC's granting of the requested increase was improper as a matter of state law.[158] The Mississippi Supreme Court agreed.[159] That court rejected the argument that the U.S. Constitution's Supremacy Clause prohibited the MPSC from reviewing the prudence of costs incurred by FERC mandate.[160]

The Supreme Court reversed and held that Mississippi was obliged under the Supremacy Clause to accept FERC's cost allocation to MP&L.[161] The majority opinion held that the Supremacy Clause required Mississippi to accept FERC's cost allocation to MP&L as fair and reasonable, and forbade the MPSC to conduct its own "prudence review" of the costs FERC had ordered MP&L to bear.[162] Because such "prudence" issues could have been, but were not, raised before FERC in the cost allocation proceedings, the Court reasoned, they could not be back-doored in through the state retail rate-setting procedure.[163]

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

[158] *See id.* The 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 366, 375 ("[t]he question of prudence was not discussed, however, because no party raised the issue").

[159] *Id.* (citing Mississippi *ex rel.* Pittman v. Mississippi Pub. Serv. Comm'n, 506 So. 2d 978 (Miss. 1987)).

[160] *See id.* at 366–67.

[161] *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.

[162] *See id.* (principally citing Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986)).

[163] *See id.* at 375 ("appellees failed to raise the matter of the prudence of the investment in Grand Gulf before FERC though it was a matter FERC easily could have considered in . . . allocating Grand Gulf power"), 376 ("[t]he MPSC

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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 grounds 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, conduct a "prudence review" of MP&L's antecedent decision to participate in the construction project.[164] The dissenting justices perceived a jurisdictional limitation on FERC's authority to conduct the "prudence review" the majority said it could have performed. Although the dissent agreed with the majority that "FERC has jurisdiction to determine whether a whole-saling utility has incurred costs imprudently,"[165] 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."[166] 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."[167]

FERC, of course, contended (and the majority agreed) that it did indeed have the power to direct MP&L to purchase power from the nuclear plant rather than from other sources. The

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cannot evaluate either the prudence of MSU's decision to invest in Grand Gulf and bring it on line or the prudence of MP&L's decision to be a party to agreements to construct and operate Grand Gulf 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 FMC 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 it must accept the administrative tribunal's resolution even of issues never submitted to it.

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

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

166 *Id.* (Brennan, J., dissenting).

167 *Id.* (Brennan, J., dissenting).

dissenters acknowledged that the agency's view of that question would be entitled to deference under the rubric of *Chevron* if it applied, but argued that *Chevron* did not apply because the issue concerned the agency's jurisdiction.[168]

The dissenters considered three rationales for *Chevron* deference and found each inapplicable in the context of agency jurisdictional interpretations. First, they contended, *Chevron* deference had been recognized as appropriate when an agency resolved "conflicts between policies that have been committed to the agency's care."[169] 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."[170] Second, the dissenters argued, *Chevron* deference had been held appropriate when an agency resolved matters within its specialized expertise, but no agency could claim to have "special expertise in interpreting a statute confining its jurisdiction."[171] Finally, the dissenters noted, *Chevron* presumed that Congress meant to delegate to the agency the authority to fill in gaps in the statute the agency administered. There could be no presumption, however, that Congress meant for the agency to fill in "gaps" in its jurisdiction, since the mere act of statutorily delimiting the jurisdiction of an agency "manifests an unwillingness to give the agency the freedom to define the scope of its own power."[172] For such reasons, the dissenters declared, "this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its

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[168] *See id.* at 386 (Brennan, J., dissenting).

[169] *Id.* at 387 (Brennan, J., dissenting) (citations omitted).

[170] *Id.* (Brennan, J., dissenting).

[171] *Id.* (Brennan, J., dissenting).

[172] *Id.* (Brennan, J., dissenting).

jurisdiction."[173] 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."[174]

Justice Scalia wrote a separate concurring opinion to respond to the dissent's reading of *Chevron*.[175] 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."[176] Justice Scalia wrote that the Court had previously rejected the very arguments 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[.]"[177]

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[173] *Id.* (Brennan, J., dissenting). To bolster this assertion, the dissenters did find it necessary to distinguish some authorities that could, indeed, be read as involving deference to agency jurisdictional interpretations. They distinguished Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986), on the grounds that the statute at issue did, indeed, expressly grant the agency the authority to resolve the jurisdictional issue there presented. *Mississippi 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 grounds that it did not involve a question of the agency's own jurisdiction. *See Mississippi Power*, 487 U.S. at 387 (Brennan, J., dissenting).

[174] *Id.* at 391 (Brennan, J., dissenting).

[175] *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 there presented.

[176] *Id.* at 381 (Scalia, J., concurring).

[177] *Id.* (Scalia, J., concurring). 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 here. First, many of the cases Justice Scalia cited as treating agency jurisdictional interpretations deferentially themselves antedated *Chevron*, and were thus 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 Broadcasting Co. v. FCC, 395 U.S. 367 (1969); FTC v. Bunte Brothers, Inc., 312 U.S. 349 (1941) (all cited in *Mississippi 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 suggested.

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Justice Scalia then defended the deference principle on practical grounds. In what has become the most frequently invoked rationale for treating jurisdictional issues the same as all other statutory interpretation issues 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."[178]

Justice Scalia 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."[179] Congress would not, Justice Scalia believed, intend "that

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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 173. 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 only to 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 171 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 169–170 and accompanying text), which Justice Scalia found to be inconsistent with City of New York v. FCC, 486 U.S. 57 (1988). *See Mississippi 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 a the kind of delegation of interpretive authority to the agency that *Chevron* presumes. *See supra* note 172. Although Justice Scalia made an argument that deference to agency jurisdictional interpretations would still be "appropriate" and "consistent with the general rationale for deference" (*see infra* note 179 and accompanying text), he neither contended nor showed that the dissent's third argument was foreclosed by precedent.

[178] *Mississippi Power*, 487 U.S. at 381 (Scalia, J., concurring).

[179] *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 agency

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every ambiguity in statutory authority would be addressed, *de novo*, by the courts."[180] For those reasons, the concurrence concluded that FERC could permissibly construe its jurisdiction to include evaluating the prudence of MP&L's participation in the plant construction project.[181]

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,[182] but other courts have written that an agency is entitled to deference even when constru-

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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.

[180] *Id.* at 382 (Scalia, J., concurring).

[181] *See id.* at 382–83 (Scalia, J., concurring).

[182] *See, e.g.*, Manley v. Department of Air Force, 91 F.3d 117, 119 (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. MSPB, 47 F.3d 409, 410 (Fed. Cir. 1995); Borlem S.A./Empreedimentos 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 69. 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.*, Harmon v. Ogden City Civil Serv. Comm'n, 917 P.2d 1082, 1084 (Utah 1996); Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n, 904 P.2d 28, 32 (N.M. 1995); Iversen v. Wall Board of Educ., 522 N.W.2d 188, 193 (S.D. 1994) ("Questions involving authority require no deference to the decision maker"); *In re* Electric Lightwave, Inc., 869 P.2d 1045, 1051 (Wash. 1994); Wisconsin Power & Light Co. v. Public Serv. Comm'n, 511 N.W. 2d 291, 293 (Wis. 1994); Office of the Lake County State's Attorney v. Illinois Human Rights Comm'n, 558 N.E.2d 668, 671 (Ill. App. 1990); Vann v. Employment Security Bd. of Review, 756 P.2d 1107, 1109 (Kan. App. 1988); *cf. also* Christesson Reporting Serv. v. Oklahoma Employment Security Comm'n, 903 P.2d 336, 337 (Okla. App. 1995) (explaining that, in reviewing 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"); Moderate Income Housing, Inc. v. Board 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.").

ing its statutory authority.[183] In the academic literature, the views expressed can, without undue oversimplification, be divided between those who believe that jurisdictional questions are no different from any other legal questions to which courts owe deference to agency interpretations under the *Chevron* doctrine,[184] and those who believe that, whether because of the risk of agency aggrandizement or otherwise, agency jurisdictional issues are different and should receive some more searching form of review.[185]

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

[184] *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 15.

[185] *See* Miller & Hickman, *supra* note 143, 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, 1522 (2000) ("[i]t 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) ("deference 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."); 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 "defin[e]" "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.*, Rosenkranz, *supra* note 1, at 2131 ("*Chevron* may well be wrongly decided as a matter of constitutional law"); Thomas W. Merrill, *Judicial Deference to Executive*

(continued…)

Professor Pierce's treatise, the successor to Professor Davis's, stakes out the pro-deference position.[186] He notes that the Supreme Court's "pattern of decisions" show that "*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers."[187] Most of the decisions of the courts of appeals, he continues, do so as well, although generally without discussing the issue directly.[188] The only court of appeals decision Professor Pierce cites as squarely confronting the issue, however, reached the opposite result.[189] Professor Pierce criticizes this case on two grounds. First, he essentially contends that the court should have seen the handwriting on the wall. The Supreme Court's tacit endorsement of *Chevron* deference to agency jurisdictional interpretations, Professor Pierce believes, should have been enough to bring the lower court into line.[190] Second, Professor Pierce adopts a version of Justice Scalia's argument from *Mississippi Power*,[191] arguing that courts, in the face

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Precedent, 101 YALE L.J. 969, 993–98 (1992) (criticizing *Chevron*'s resolution of the "*Marbury* problem" without directly arguing that *Chevron* is unconstitutional). 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 judicial role"). *See generally* Thomas W. 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).

186 PIERCE, *supra* note 140, § 3.5, at 157–58.

187 *Id.* at 157.

188 *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 People of New York v. FCC, 267 F.3d 91 (2d Cir. 2001).

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

190 *See id.*

191 *See supra* note 178 and accompanying text.

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.[192]

Professor Schwartz's treatise argues the opposite view. 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.[193]

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 dance around an issue that could well be thought determinative of the appropriate scope of deference, namely, agency aggrandizement or self-interest. It would be perfectly reasonable

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[192] PIERCE, *supra* note 140, § 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 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 17, at 2153–54 ("*[E]very* statutory interpretation implicates the scope 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, this contention seems to be one on which neither side advances much in the nature of an actual reasoned argument. It appears that either one believes that all statutory interpretation disputes are essentially jurisdictional, or one does not; advocates of each side seem to simply make their respective assertions and leave it at that.

[193] BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.36, at 707 (3d ed. 1991). The *Mississippi Power* dissenters made substantially the same point. *See supra* note 172 and accompanying text. *See also* Bernard Schwartz, *A Decade of Administrative Law: 1987–1996*, 32 TULSA L.J. 493, 573–75 (1997).

to believe 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,[194] and their self-interested interpretations, which may not.[195] 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.[196] On the other hand, if every statutory question can truly be reasonably thought to implicate the agency's jurisdiction,[197] and if agency self-interest is truly at issue in every run-of-the-mill *Chevron* case,[198] 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 the routine sort of *Chevron* case,[199] as the following discussion should make plain.

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[194] *See supra* note 43 and accompanying text.

[195] *See supra* note 68 and accompanying text.

[196] *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 "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 15, 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 238–301 and accompanying text.

[197] *See supra* note 178 and accompanying text.

[198] *See supra* note 120 and accompanying text.

[199] 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 120, 178, 192 and accompanying text. Although the issue arises infrequently, the available evidence does not seem to suggest that courts have found it

(continued…)

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. First, an agency might stake a jurisdictional claim to a regulatory sphere that arguably falls within the jurisdiction of another agency.[200] 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.[201] Second, an agency might assert regulatory jurisdiction over a subject matter 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.

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.[202] Assuming that both agencies have adopted

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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").

[200] *See, e.g.*, Crawford, *supra* note 15, 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).

[201] In this case, courts should engage in an independent construction of the statute or statutes at issue. *See infra* note 204 and accompanying text. As suggested below, the outcome ought not depend on which agency first adopted its interpretation of the relevant statutory provision, nor upon which agency's interpretation is first tested on judicial review.

[202] 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).

their respective interpretations with the requisite formality,[203] and assuming that neither recedes to the other's superior claim of regulatory authority, then *Chevron* analysis, standing alone, may not suffice to resolve the dispute, for deference to either agency's view offends the principle of deference to the other's.

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 be based on legislative intent, not the happenstance of timing. Accordingly, courts should in such circumstances decline to accord deference to either agency's jurisdictional claim and instead reason through the applicable statutes to ascertain what Congress most likely intended.[204]

The Supreme Court resolved such an apparent jurisdictional conflict between two agencies in *ETSI Pipeline Project v. Missouri*,[205] although it did so without finding it necessary to consider whether the statute called for deference to either agency's view. In that case, the Secretary of the Interior entered 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.[206] Several

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[203] *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 9.

[204] *See* United Parcel Serv. v. NLRB, 92 F.3d 1221 (D.C. Cir. 1996); Department of the Navy, Military Sealift Command 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. also* Ackley-Bell v. Seattle Sch. Dist. No. 1, 940 P.2d 685, 688 (Wash. App. 1997) (courts should "consider the expertise of both agencies" when they advance "conflicting legal interpretations").

[205] 484 U.S. 495 (1988).

[206] *See id.* at 497–98.

state governments 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.[207] They alleged that, under the applicable statute, authority to approve any such withdrawal of water from the reservoir lay instead with the Secretary of the Army.[208] It was apparently undisputed that the reservoir had been constructed, and was operated, by the Army Corps of Engineers.[209]

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.[210] The statute also required consultations and information-sharing between the agencies on any other projects within the affected area.[211] Finally, and most important, the statute conferred authority on both Departments to take specified other actions in connection with the operation of the reservoir.[212] 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.' "[213]

This express grant of authority to the Secretary of War, the Court reasoned, left no room for the argument that the various powers granted to the Secretary of the Interior could authorize

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[207] *Id.* at 498.

[208] *Id.*

[209] 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"), 499 (court of appeals affirmed decision for plaintiffs "primarily because the Army built the reservoir and controls its operation").

[210] *See id.* at 502.

[211] *See id.* at 503.

[212] *Id.* at 504–05.

[213] *Id.* at 504.

the contracts that department had concluded with the private parties. Any such contracts, the Court reasoned, expressly required the concurrence of the Secretary of the Army, to whom the statutory text and structure committed the authority to make such agreements.[214]

The Court rejected the Interior Secretary's claim of entitlement to deference for its statutory interpretation under the *Chevron* doctrine.[215] The Interior Secretary's 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."[216] Thus, although the statute plainly delegated to the Interior Department *some* authority over the ongoing administration of the project, and was silent on the question whether the Interior 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 Interior Department lacked the authority to contract.

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. This was the circumstance presented in *Air Courier Conference of America/International Committee v. U.S. Postal Service*.[217] 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 charged for certain international express mail.[218] The

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[214] *Id.* at 505 ("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.").

[215] *See id.* at 515–17.

[216] *Id.* at 517.

[217] 959 F.2d 1213 (3d Cir. 1992).

[218] *See id.* at 1214–15.

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.[219] The court of appeals essentially resolved the issue at *Chevron* Step One,[220] holding that the plain meaning of the statutory text gave the Postal Service, not the Postal Rate Commission, sole and unilateral authority over international rates.[221] Nevertheless, the court buttressed its conclusion with a *Chevron* Step Two reasonableness analysis.[222] In this latter connection, 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.[223]

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

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[219] *Id.* at 1214. To be more specific, the applicable statute set up 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. The Commission then reviewed the proposed rate change and submitted a recommendation to the Postal Service Board of Governors. 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.* at 1216 (describing this process). The plaintiffs contended that this same process had to be followed when changes in international, rather than domestic, postage rates were proposed. *Id.*

[220] At least, this is the effect of the court's decision, which ruled in the agency's favor because it found the statutory text to support the agency's position. Nevertheless, some of the court's language seemed to downplay the relevance of *Chevron* to the issue presented. *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"), *id.* (noting that, in addition to its arguments about the plain meaning of the statutory text, "[t]he Postal Service . . . also argues that we should defer to its interpretation of the statute so long as that interpretation is reasonable"). The court also rebuffed, as incompatible with *Chevron*, however, the plaintiffs' suggestion that "a court needs no help from an agency in deciding a purely legal question of statutory construction[.]" *Id.* at 1225. Thus, although the court's own statement of the standard of review seems in many ways to echo the very position for which it chastised the plaintiff, a review of its reasoning as a whole places the decision squarely in the *Chevron* Step One camp.

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

[222] *See id.* at 1223–25.

[223] *See id.* at 1215 ("our conclusion 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"), 1223 ("[o]ur holding . . . is strengthened by the long-standing interpretation both the Postal Service and the Commission have given the statute"), 1225 n.10 ("Here, we have one statute consistently construed by both the Postal Service and the Commission").

self-interest runs counter to *Chevron*."[224] The quoted sentence represents the court of appeals' entire reasoning on the subject of deference to self-interested agency jurisdictional interpretations, and as such, 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 a 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 irrespective of the agency's entitlement to deference at Step Two.[225] Second, contrary to the quotation's implication, *Chevron* itself is hardly authority 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. 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,"[226] 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 of appeals' own view. In any event, however, 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* deference, 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 disavowed any authority over international rates. All 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.

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[224] *Id.* at 1225 (footnote omitted).

[225] *See supra* note 221 and accompanying text.

[226] *Air Courier Conference*, 959 F.2d at 1225.

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.*[227] Although the decision may be best known for its narrow holding that the FDA lacked regulatory authority over cigarettes and tobacco products,[228] the means by which the Court reached that conclusion also bear scrutiny.[229]

The statute at issue gave the FDA regulatory jurisdiction over "drugs," defined in relevant part as any "'article[ ] (other than food) intended to affect the structure or any function of the body,'";[230] and "devices," defined in relevant part as "'an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, including any component, part, or accessory, which is . . . intended to affect the structure or any function of the body.'"[231] From the agency's inception until 1995, the FDA consistently disavowed that it had any jurisdiction to regulate tobacco products under the statute.[232] In 1995, however, the agency reversed course. It thereafter declared nicotine to be a "drug" and found cigarettes and smokeless tobacco to be

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[227] 529 U.S. 120 (2000).

[228] *See id.* at 126 ("Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products").

[229] 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.

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

[231] *Id.* (quoting 21 U.S.C. § 321(h)) (ellipses in *Brown & Williamson*).

[232] *See id.* at 144 (referring to "the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer"), 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").

"devices" for the delivery of that drug, as the statute defined those terms.[233] 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.[234]

Makers and sellers of tobacco products sought judicial review. The district court upheld the agency's assertion of jurisdiction,[235] but the court of appeals reversed,[236] and the Supreme Court granted the agency's petition for certiorari.[237]

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.[238] 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.[239]

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[233] *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 (1996)). The Supreme Court did not actually dispute either of these findings in its decision.

[234] *See id.* at 128–29.

[235] Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374 (M.D.N.C. 1997) (cited in *Brown & Williamson*, 529 U.S. at 129).

[236] Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998) (cited in *Brown & Williamson*, 529 U.S. at 130). 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 229.

[237] FDA v. Brown & Williamson Tobacco Corp., 526 U.S. 1086 (1999).

[238] *See infra* notes 241–275 and accompanying text.

[239] *See infra* notes 276–298 and accompanying text.

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 what Congress authorized. Most telling, however, was the Court's third argument, which spoke directly to the question whether the agency's action amounted to a jurisdictional power grab, and rejected the agency's interpretation as an exercise in self-aggrandizement.[240]

First, the Court contrasted the agency's interpretation with the statutory text. The Court recognized that, because the case presented an instance of an agency's interpretation of a statute it administered, *Chevron* and its progeny supplied the relevant analytical framework.[241] The agency's interpretation failed at Step One of *Chevron*, however, because as the Court saw it, "Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products."[242]

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'"[243] rather than "examining [the] particular statutory provision in isolation."[244] 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. These 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 com-

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[240] *See infra* notes 299–301 and accompanying text.

[241] *Brown & Williamson*, 529 U.S. at 132.

[242] *Id.* at 133.

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

[244] *Id.* at 132.

merce.[245] 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.

The Court first considered the statutory provision forbidding the introduction into interstate commerce of any "misbranded" drug or device.[246] 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.[247] Because the FDA's own findings "make clear that tobacco products are 'dangerous to health' when used in the manner prescribed" in their packaging,[248] such products would necessarily satisfy the statutory definition of "misbranded" if found to be "devices" under the statute.[249] Second, the Court explained, the statute deems a device to be "misbranded" if its labeling does not contain directions for safe use.[250] 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."[251] Thus, for this reason, too, a finding that tobacco products were "devices" as defined in the statute

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

[246] *Id.* (citing 21 U.S.C. § 331(a)).

[247] *Id.* (citing 21 U.S.C. § 352(j)).

[248] *Id.*

[249] *See id.*

[250] *See id.* (citing 21 U.S.C. § 352(f)(1)).

[251] *Id.*

would necessarily imply that they were "misbranded" and therefore "could not be introduced into interstate commerce."[252]

The Court next turned to another provision of the statute that also suggested that tobacco products would have to be banned from commerce if found to be "devices." 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.[253] 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.'"[254] 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 on the labeling thereof.'"[255] 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."[256]

Thus, both the "misbranding" and classification provisions of the statute suggested that tobacco products must be banned from commerce if found to be "devices." The agency itself,

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[252] *Id.* at 135–36.

[253] *Id.* at 136 (citing 21 U.S.C. § 360c(b)(1)).

[254] *Id.* (citing 21 U.S.C. § 360c(a)(1)(C)).

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

[256] *Id.*

the Court noted, had previously so recognized in congressional testimony.[257] 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.[258]

The Court then examined the entire 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.[259] 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."[260] The legislature's tinkering with cigarette labeling and marketing requirements "reveal[ed] its intent that tobacco products remain on the market."[261] 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."[262]

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[257] *Id.* at 137 (citing congressional testimony of prior 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).

[258] 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.

[259] *See Brown & Williamson*, 529 U.S. at 137 ("Congress, however, has foreclosed the removal of tobacco products from the market.").

[260] *Id.* at 139.

[261] *Id.*

[262] *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

(continued…)

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.[263] Intuitively, the statutory term "safe" might reasonably be thought susceptible of more than one identifiable meaning, and the agency's interpretation of the ambiguous term would appear to present 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 thought to be "safe" within the meaning of the statute. 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.

As the Court described it, the FDA's position was essentially that a device was "safe" if the health consequences of banning it exceeded those of leaving it on the market. 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

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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. Haggar 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. American 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, *Administrative Law:* Food & Drug Administration v. Brown & Williamson Tobacco Corp., 28 ECOLOGY 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. *See* Molot, *supra* note 185, at 1325 ("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."); *see also id.* at 1326–27.

[263] *Brown & Williamson*, 529 U.S. at 139.

available.[264] Thus, banning cigarettes would be more "unsafe" than allowing them to continue to be sold. 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.

Although this is certainly not the only meaning one could ascribe to the statutory term "safe," it hardly seems outlandish or facially implausible.[265] 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."[266] The Court cited two examples of statutory provisions that established a different meaning of the term "safe" from that the agency advanced. 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."[267] 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."[268] 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. Rather, the agency's approach balanced the risk of injury against the risk of *continued tobacco use*, which, the record established, was itself harmful. "In

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[264] *Id.*

[265] 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, this case [*Brown & Williamson*] would appear easy: . . . . [s]urely 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).

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

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

[268] *Id.* at 141.

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."[269]

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.[270] 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.'"[271] This was a "different inquir[y]"[272] from the one the agency proposed, to wit, whether it would be would be worse to ban the product than to leave it on the market.[273] 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."[274] 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.

Thus, the Court concluded, the statute would require the FDA to ban tobacco products as misbranded and dangerous if interpreted to confer on the agency the regulatory authority it claimed.[275] In the second major portion of its analysis, however, the Court found, in other legislation, evidence that Congress did not intend tobacco products to be banned.[276] The other statutes the Court cited were not statutes administered by the FDA, but the Court nevertheless

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[269] *Id.*

[270] *Id.*; *see also supra* notes 246–252 and accompanying text.

[271] *Id.* (quoting 21 U.S.C. § 352(j)).

[272] *Id.*

[273] *See id.*

[274] *Id.*

[275] *Id.* at 143.

[276] *See id.* at 143–55.

found them relevant in determining whether the agency's interpretation of its own statute could withstand scrutiny at Step One of *Chevron*.

The Court noted that Congress had repeatedly addressed the question of tobacco regulation over the preceding 35 years.[277] 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[.]"[278] In 1964, FDA officials testified before Congress that existing statutory law gave the agency no authority to regulate tobacco products.[279] 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.[280] 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.[281] In 1980, the D.C. Circuit upheld the agency's restrictive jurisdictional interpretation on judicial review.[282] In 1983, the agency again reaffirmed in congressional testimony its view that Congress had reserved regulatory authority over tobacco for itself and that the agency neither possessed, nor sought, regulatory authority over tobacco.[283] FDA officials repeated this point in testimony in 1988.[284]

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[277] *Id.* at 143.

[278] *Id.* at 144.

[279] *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 banning cigarettes. *Id.* at 145–46.

[280] *Id.* at 151–52.

[281] *Id.* at 152–53.

[282] *Id.* (citing Action on Smoking and Health v. Harris, 655 F.2d 236, 243 (D.C. Cir. 1980)).

[283] *Id.* at 153.

[284] *Id.* at 154–55.

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.[285] Yet this hardly seems like a complete answer, for as even the Court recognized, agencies to whom Congress has delegated authority to administer an ambiguous statute remain free to change their interpretations of that statute as circumstances warrant.[286] Before *Brown & Williamson*, it does not appear to have been 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.[287] 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. To the contrary, for the Court to step in in such circumstances displays an almost paternalistic attitude towards 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.

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[285] *Id.* at 156.

[286] *See id.* at 156–57 (citing Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996)).

[287] *See, e.g.*, NLRB v. Local Union No. 103, Int'l Ass'n 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") (cited in NLRB v. Viola Indus.-Elevator Div., Inc., 979 F.2d 1384, 1391 (10th Cir. 1992) (en banc)); Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950, 955–56 (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 Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 776–77 (3d Cir. 1988) ("our 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) ("[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, and so long as the most recent interpretation is reasonable its antiquity should make no difference") (Scalia, J., concurring).

Reviewing Congress's other enactments on the subject of tobacco, the Court found that Congress had both rejected legislation that would have expressly conferred on the FDA the regulatory authority it now claimed to posses, and had enacted other legislation that effectively occupied the field, leaving no room for the FDA. In the 1960s, Congress three times considered and rejected legislation to extend the FDA's regulatory jurisdiction to cover "smoking products."[288] It rejected three similar measures between 1987 and 1989.[289] In 1965, Congress enacted a statute to govern " 'cigarette labeling and advertising[.]' "[290] Significantly, in the Court's view, this legislation "explicitly pre-empted any other regulation of cigarette labeling[.]"[291] Because the FDA's statute 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.[292] 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.[293] In the 1980s, Congress enacted other statutes governing cigarette warning labels and smoking education programs.[294] Again, as the Court saw it, these efforts showed a legislative unwillingness to delegate regulatory

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288 *Brown & Williamson*, 529 U.S. at 147–48.

289 *Id.* at 155.

290 *Id.* at 148.

291 *Id.*

292 *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.

293 *Id.* at 151.

294 *Id.* at 153–54.

authority over tobacco products to any agency, but rather evidenced Congress's intent to reserve such matters for itself.[295]

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 seemingly 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.[296] Moreover, none of the statutes the Court cited concerned the regulatory jurisdiction of the FDA or even related to programs administered by the FDA, and consequently, it is difficult to imagine that Congress actually had an intent concerning the FDA's regulatory jurisdiction at the time it enacted the statutes on which the Court relied.[297]

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[295] *Id.*

[296] To be sure, certain of the regulatory restrictions the FDA adopted concerned marketing of tobacco products, not merely health and safety issues. 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 298), however, would require a close, careful parsing of the respective provisions at issue—just the opposite of the Court's broad-brush approach.

[297] *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). *Cf. supra* note 86 and accompanying text (showing court's reliance on other agencies' interpretations of similar statutory terms).

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 288–289 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 are probably why courts seldom base definitive conclusions on the legislature's *failure* to act.

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. Separately, Congress established a different regulatory regime for the labeling of cigarettes, which was expressly declared to preempt all other federal regulations on the subject. 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*. Yet this is hardly the only, or the most natural, inference that could be drawn 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 regulation, 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.[298]

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 something far less than the decisive support it declared it

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[298] *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) ("harmonizing 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 quotations and citation omitted); FMC v. Pacific Maritime Ass'n, 435 U.S. 40, 56 (1978) ("the 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) ("statutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis, and validity given to each").

had found there. The last section of the majority's opinion, however, provides a source of insight that likely does much to explain why the majority decided the case as it did.

In the last section, the Court suggested that *Chevron* analysis may not be 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. *Chevron*, the Court wrote, is premised on the notion of legislative delegation to the agency to resolve matters the legislature left ambiguous. Where the issue involves an "important" or "major" question of law, however, the Court reasoned, it is less likely that Congress would have wanted the agency itself to resolve it.[299] 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.[300] 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."[301] 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.

It may yet be too early to say whether *Brown & Williamson* will carry much force outside the unique legal context of federal tobacco regulation.[302] 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

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[299] *Brown & Williamson*, 529 U.S. at 159.

[300] *Id.* at 159–60.

[301] *Id.* at 160; *see also id.* at 133 ("we 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").

[302] *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).

own delegated powers? Or should *Brown & Williamson*, like *Bush v. Gore*,[303] instead be considered a "ticket good for this train only,"[304] 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 generally to be integrating the decision into the broader body of *Chevron* jurisprudence.[305] *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.

III. 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 so suggest—then at what stage of the analysis should courts evaluate whether the agency interpretation at issue represents 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

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[303] 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.").

[304] *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 J. 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).

[305] *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. Resources for Human Development, 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).

agency, *de novo* review would apply.[306] Thus, where *Chevron* governs, we would expect courts to uphold agency actions more often than if courts apply a more searching standard of review.[307]

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.[308] Nevertheless, some studies have suggested that application of the *Chevron* doctrine will tend to increase the likelihood that the agency's interpretation will be upheld on judicial review. 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.[309] Schuck and Elliott found that

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[306] 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 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).

[307] *But see* Elhauge, *supra* note 17, at 2157 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").

[308] 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).

[309] 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.

"*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,"[310] 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 in construing a statute."[311] 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.[312]

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.[313] As one might expect, agencies fared far better in cases re-

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[310] *Id.* at 1032.

[311] *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 (2000).

[312] *See Chevron*, 467 U.S. at 843 n.11 ("[t]he 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) ("courts are bound to uphold an agency interpretation as long as it is reasonable—regardless of whether there may be other reasonable, or even more reasonable, views"); General 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) ("[i]n determining whether the Secretary's construction is permissible, a court need not find that it would have interpreted the statute in the same manner").

[313] 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 (1998).

solved at the deferential Step Two of *Chevron* than in the independent judicial inquiry of Step One. 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.[314]

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

Analytically, a court considering a claim that an agency's statutory interpretation is infected by 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 infected by self-interest at the initial step of determining whether to apply the *Chevron* doctrine at all in reviewing the agency's interpretation of law.[315] Assuming that the court finds *Chevron* applicable, 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 included 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

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[314] *Id.*; *see also* Avila, *supra* note 311, at 427 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 185, *with* Cohen & Spitzer, *supra* note 308, 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 Perspective 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.

[315] To extend the popular *Chevron* nomenclature, we might call this "Step Zero" of the analysis. *Cf.* Merrill & Hickman, *supra* note 143, at 912–13.

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 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 might deem permissible at each step, and 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.[316] Alternatively, 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.[317] 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.[318] Applying a similar analysis, a court might question generally whether Congress would likely have delegated to the agency the authority to adopt a legal interpretation that served to advance

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316 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 15, 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").

317 *See* Sunstein, *supra* note 12, at 2112 ("When constitutionally based norms conflict with an agency's interpretation, it is highly probable that the agency's view will not prevail"), 2113–14, 2115–16; *see also infra* notes 327–410 and accompanying text.

318 *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 301 and accompanying text.

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." 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. 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 *Chevron* Step One inquiry, which focuses on the statutory language.[319] To base a decision on a supposition about likely legislative intent may be problematic where the legislature's presumed 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 delegated authority.[320] Such courts may well be unmoved by the suggestion that the agency's advancement of its own self-interest weighs against

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[319] Indeed, this criticism has been applied to *Brown & Williamson* itself. *See supra* notes 262, 265 and accompanying text.

[320] *See supra* note 302; *but cf.* William S. Jordan, III, *et al.*, *Judicial Review*, *in* ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 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).

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).[321] 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."[322] 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 Step Two 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.*,[323] which expressly incorporated a list of factors courts should consider when assessing the persuasiveness of the agency's views.[324] The lack of any comparable language in *Chevron* and its progeny might be thought to preclude judicial inquiry into the pre-*Chevron*

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[321] *See* Gellhorn & Verkuil, *supra* note 15, 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 185, at 1024).

[322] *Cf. infra* notes 350–391 and accompanying text (discussing requirement that agencies provide reasoned explanation for actions taken).

[323] 323 U.S. 134 (1944).

[324] *See supra* note 9 (quoting *Skidmore*); *see also, e.g.*, 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.").

factors as part of the Step Two reasonableness analysis.[325] On this view, an agency 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,[326] 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 more searching standard of review. Thus, pretermitting consideration of the agency's self-interest until Step Two of *Chevron* makes it more likely that an agency's interpretation infected by bias will be upheld.

The question which stage of the analysis is the correct one to undertake an evaluation of the agency's self-interest may thus be answered in a variety of ways. To clarify the issue, it is pertinent to consider the potential constitutional concerns that would accompany any rule that would permit *Chevron* deference to attach to a self-interested agency interpretation of law. Consideration of these 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 inherent effect of advancing the agency's self-interest stands in tension with a number of settled norms associated with due process. First, because the practical effect of *Chevron* is to shift the locus of interpretive deci-

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[325] *See* Merrill, *supra* note 185, at 977–78 ("The question whether an interpretation is reasonable in light of . . . traditional norms of judicial interpretation likewise provides no place 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).

[326] *See supra* notes 312–314 and accompanying text.

sionmaking from a court to the agency, judicial deference in cases of agency self-interest effectively makes the agency the judge in its own cause.[327] 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 the rationale that actually motivated the agency's conduct. Where the agency's self-interest gives reason to doubt that the asserted reasons for its statutory or regulatory interpretation are those actually justifying the interpretation it adopted, however, one of the foundational assumptions underlying judicial deference to the agency's interpretation may be weakened or, indeed, absent.[328] 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 authorities recognizing the government's obligation of scrupulous impartiality and fair dealing.[329] These issues will be considered in turn.

1. Disinterestedness and Impartiality

The ancient axiom that no one should be a judge in his own cause[330] is a long-settled part of our common-law tradition, inherited from England[331] and recognized as an elemental princi-

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[327] *See infra* notes 330–345 and accompanying text.

[328] *See infra* notes 346–394 and accompanying text.

[329] *See infra* notes 395–410 and accompanying text.

[330] *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*, book III, ch. 9 (322 B.C.), *in* 2 COMPLETE WORKS OF ARISTOTLE 1986, 2031 (B. Jowett trans., Jonathan Barnes, ed., 1984) ("most people are bad judges in their own case").

[331] *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. II, para. 13 (1690) (Thomas P. Peardon, ed., 1952). Sir Edward Coke's reference to a Latin maxim that translates as "one should not be judge in his own cause,

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ple from the time of the Revolution[332] to the present.[333] The principle requires, at a constitutional minimum, recusal or disqualification of an adjudicative officer who has a "direct, personal, substantial pecuniary interest"[334] in the matter *sub judice*.[335]

The rule against judging one's own cause extends to administrative proceedings.[336] For example, it has been held to violate an accused's due process rights where a government official

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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 Co. 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, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM ch. 3 (1992); CATHERINE D. BOWEN, THE LION AND THE THRONE 315–16 (1956). Although less celebrated, Lord Coke's application of the principle against judging one's own cause seems no less worthy.

[332] "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).

[333] *See, e.g.*, 2 CHESTER J. ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 35.09 (2d ed. 1997); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.8, at 656–58 (2d ed. 1992 & Supp. 1999); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-16 (2d ed. 1988).

[334] Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("it 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, 821–28 (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).

[335] 28 U.S.C. § 455(b)(4) 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.* § 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), (c) (requiring judge to keep informed about personal, familial, and fiduciary financial interests), (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 304, at 268–69, 277–78.

[336] *See* Withrow v. Larkin, 421 U.S. 35, 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).

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or agency stands to receive a direct financial benefit from rendering an adverse decision.[337] Although the rationale extends to forbid some types of indirect or non-personal financial interests,[338] the principle is not implicated where the adjudicator's interest in the outcome is deemed to be too remote or contingent,[339] or where the allegation of bias is overbroad.[340] The courts

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The Administrative Procedure Act includes a statutory provision for disqualification of an administrative adjudicator for bias. *See* 5 U.S.C. § 556(b). 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.

337 *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. Medical 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 state body that appointed them).

338 *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 potentially to benefit financially from loss of competition from respondent optometrists); Ward v. Village of Monroeville, Ohio, 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. Feb. 13, 1997) (remanding for further consideration in light of new state statute altering motor vehicle commission's procedures).

339 *See* Dugan v. Ohio, 277 U.S. 61, 64–65 (1928) (rule of *Tumey v. Ohio* inapplicable where adjudicator received the same salary irrespective of whether accused party was held liable or not); 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); *see also* New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n, 198 F.3d 1, 14–15 (1st Cir. 1999) (holding "highly attenuated" financial interest of administrative adjudicators did not disqualify them from case); Northern Mariana Islands v. Kaipat, 94 F.3d 574 (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 Veh. 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

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also have been less receptive to allegations that financial interest resulted in unconstitutional governmental bias where the challenged governmental conduct was nonjudicial in nature.[341]

It is hardly difficult to perceive the tension between the principle of *Chevron* deference on the one hand, and the rule against judging one's own cause on the other, where the agency itself has a stake in the statutory or regulatory interpretation it has propounded. *Chevron* stands for the proposition that, so long as it does not contravene the statutory text or legislative pur-

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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 Securities, 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); Secretary, Agency of Nat. Rsrcs. v. Upper Valley Regional 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); Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., 848 P.2d 848, 853–54 (Ariz. 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); Serian v. West Virginia *ex rel.* West Virginia Board of Optometry, 297 S.E.2d 889, 894–96 (W. Va. 1982) (labeling "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).

[340] *See* Doolin Security Sav. Bank, F.S.B. v. FDIC, 53 F.3d 1395, 1405–07 (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"); Standard Alaska Production Co. v. Schaible, 874 F.2d 624, 627–30 (9th Cir. 1989) (rejecting allegation that every state judge in Alaska had a pecuniary stake in the outcome of ancillary proceedings); Hammond v. Baldwin, 866 F.2d 172, 177 (6th Cir. 1989) ("the 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").

[341] *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); *Northeast Dairy*, 198 F.3d at 13–14 (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).

pose,[342] an agency is free to adopt whatever reasonable statutory or regulatory interpretation it wishes. Apart from scrutinizing the agency's interpretation to make certain it does not contradict the statute, *Chevron* restricts the judicial role to merely determining whether the agency's interpretation is reasonable, requiring affirmance of the agency even if the reviewing 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.[343] 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 agency's favor poses special risks. Were the agency's self-interested interpretation 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 decisionmaker, can hardly be presumed to have made an impartial decision where its own self-interest is at stake.[344] To withhold an independent judicial interpretation of the statute or regulation at issue, as *Chevron* commands, is necessarily to remove a check on potential agency 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.[345]

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[342] *See supra* note 262 and accompanying text.

[343] *See supra* note 312 and accompanying text.

[344] *See* Sunstein, *supra* note 12, 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").

[345] 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 338–340. Where it is the agency's own, rather than any individual's, interest 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.

2. Openness and Transparency

Governmental transparency is a recognized characteristic of a well-functioning democracy.[346] The principle finds expression in settings so numerous and varied as to virtually defy summation. A number of constitutional provisions work to undermine attempts to shroud in secrecy the inner workings of government.[347] Statutes provide an additional layer of protection for the right of public information about governmental operations,[348] and the courts generally have put agencies wishing to deviate from the general rule of governmental openness to a stringent burden.[349]

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[346] 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).

Nor can transparency be described as a uniquely American concern. *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).

[347] The constitutional guarantee of a free press, of course, is foremost among these. U.S. CONST. amd. 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, all 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; Amds. 5, 6. 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.

[348] *See* Freedom of Information Act (FOIA), 5 U.S.C. § 552. 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* John Doe Agency v. John Doe Corp., 493 U.S. 146, 151–53 (1989); *see also, e.g.*, 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 5 and 39 U.S.C., including, *e.g.*, 5 U.S.C. § 552b note ("It is hereby declared to be the public policy of the United States that the public is entitled to the fullest practicable information regarding the decision making processes of the Federal Government.")); and the Presidential Records Act, 44 U.S.C. §§ 2201–2207.

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

In the administrative law context, the Supreme Court's two decisions in *SEC v. Chenery Corp.*[350] 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.[351] The stated rationale for the Commission's original adoption of this rule was that it believed the result to be required by a number of equity cases concerning the fiduciary obligations of corporate management.[352] Before the Supreme Court, however, the agency changed its argument. Rather than contending that principles of equity compelled the rule it adopted, it instead adverted to the special strategic position occupied by management during a corporate reorganization, and to the Commission's own experience in the field.[353] The Commission also relied on its general statutory powers to protect the investing public against market manipulations by corporate insiders.[354]

The Supreme Court, although not disagreeing with the agency's arguments, 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. The agency's interpretation must stand or fall, the Court reasoned, on the soundness of the rationale upon which the agency actually based it.[355] The Court held that the validity of the agency's rationale "must be measured by what the Commission did, not by what it

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[350] SEC v. Chenery Corp., 318 U.S. 80 (1943) (*"Chenery I"*); SEC v. Chenery Corp., 332 U.S. 194 (1947) (*"Chenery II"*). For a general discussion of the *Chenery* doctrine, see, *e.g.*, PIERCE, *supra* note 140, § 8.5; SCHWARTZ, supra note 193, § 10.4.

[351] *See Chenery I*, 318 U.S. at 81–85.

[352] *See id.* at 87.

[353] *See id.* at 90.

[354] *See id.* at 90–92.

[355] *See id.* at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based"), 92 ("the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based").

might have done"[356] 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."[357] Because the agency's actual rationale, which relied on general equitable principles, was unsupported by the case law, the Court held that the case must be remanded to the agency for further consideration notwithstanding the alternative rationales it articulated during judicial review.[358] The Court suggested that this rule—requiring that the agency's action be sustainable upon the grounds it actually employed—served an important instrumental function of promoting clarity and orderliness in judicial review.[359]

On remand, the agency adopted what was in substance the same rule, this time grounding its view on two provisions of the Holding Company Act, rather than on the equity cases the Court had found to provide it no support.[360] On this revised rationale, the agency's rule was affirmed.[361] *Chenery II* usefully emphasized a different aspect of agency transparency: the requirement that the agency's rationale be clearly stated. In the Court's words:

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[356] *Id.* at 93–94.

[357] *Id.* at 95.

[358] *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"), 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 it is found that the specific transactions under scrutiny showed misuse by respondents of their position as organization managers . . . . The record is utterly barren of any such showing.").

[359] *See id.* at 94 ("the 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).

[360] *See Chenery II*, 332 U.S. at 199.

[361] *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 ("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.'") (Jackson, J., dissenting). 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."[362]

Principles of administrative transparency also underlay the Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[363] 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.[364] The rescission undid a long series of agency steps, taken over the course of more than a decade, that had incrementally tightened automobile safety requirements.[365] In 1977, the Carter Administration had promulgated a rule mandating the installation

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

[363] 463 U.S. 29 (1983).

[364] *See id.* at 34–40.

[365] 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.*

There followed 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. In 1972, 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. *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.

of air bags or automatic seatbelts in all large cars by September 1981, and in all cars by model year 1984.[366]

The incoming Reagan Administration reversed the Carter-era rule, citing the difficult economic circumstances in the automobile industry and the likelihood that overwhelming public noncompliance would vitiate the safety benefits that the passive restraint rule had been meant to foster.[367] The agency found that, instead of a near-even split between airbags and automatic seatbelts, it now appeared that virtually all manufacturers intended to comply with the regulatory mandate solely through the installation of automatic seatbelts that could be detached and disabled permanently by drivers.[368] 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.[369] Rather than promulgate an amended rule tailored to address these perceived weaknesses, however, the agency rescinded the passive restraint requirement in its entirety.[370]

Assessing the agency's stated rationale under the arbitrary and capricious standard,[371] the Court identified a fundamental disconnect between the agency's premises and its conclusion.

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366 *Id.* at 37.

367 *See id.* at 38–39.

368 *Id.*

369 *Id.* at 39.

370 *Id.* at 38.

371 Arbitrary and capricious review of agency rulemaking precludes a court from substituting its own judgment for the agency's. *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 differences between *Chevron* and arbitrary-and-capricious review); National Mining Ass'n v. Slater, 167 F. Supp. 2d 265, 280 (D.D.C. 2001) (same). The courts remain free, however, to scrutinize the rationale enunciated by the agency to justify its result. As the Court put it: "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

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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*. The Court identified two alternatives that the agency logically should have considered, but did not. First, the agency offered no rationale for refusing to require all automobile manufacturers to install airbags rather than automatic seatbelts.[372] 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.[373] Its reasoning, accordingly, could not justify wholesale abandonment of the passive restraint rule, which had rested upon findings that airbags would be effective means of achieving the statutory purpose of improved safety.[374] "[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."[375]

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, in requiring an agency to seek additional evidence to illuminate the issue, imposed too stringent a burden on the agency,[376] the Court nevertheless found the agency's

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World Wide, Inc., 535 U.S. 81, 90 (2002) (criticizing agency for adopting presumption lacking any "empirical or logical basis").

372 *See id.* at 46.

373 *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.").

374 *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.

375 *Id.* at 51.

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

interpretation of the statistical evidence on seatbelt usage unconvincing. The agency's own data, based on field studies, suggested usage rates of automatic seatbelts of more than double the rates of manual belts.[377] 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.[378] The Court reasoned that, although the agency was within its rights to find that the conclusions of these field studies could not necessarily be generalized to predict that the passive restraint rule would produce a real-world increase in safety,[379] the agency's reasoning was nevertheless insufficient to support rescission of the passive restraint rule because it failed to account for the differences between automatic and manual seatbelts.[380] The agency's survey data had shown user inertia or inaction to be a powerful factor in explaining patterns of seatbelt usage.[381] The effects of user inaction, however, pointed in opposite directions when automatic and manual seatbelts were considered. A user who neglected to fasten a manual seatbelt might just as readily neglect to disable an automatic one. The effect of inertia, therefore, provided "grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts."[382] The agency's rationale for rescinding the passive restraint rule failed to address this necessary consequence of the data on which it purported to rely.[383]

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[377] *Id.* at 53.

[378] *See id.*

[379] The Court based this conclusion on the substantive expertise of the agency. *See id.* ("it 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.").

[380] *See id.* at 54.

[381] *Id.* at 54 & n.18.

[382] *Id.* at 54.

[383] *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.").

Just as the agency had failed to explain its failure to even consider the alternative of mandating airbags,[384] the Court noted, it also failed, without explanation, to consider mandating the alternative of nondetachable automatic seatbelts.[385] This alternative would have avoided the risk that drivers would simply disable the automatic seatbelts and thereby vitiate the hoped-for safety benefits of the regulation. The agency's failure even to recognize the alternative, however, much less to consider it on its merits, led the Court to conclude that the reasons given for the agency's action failed the test of rationality.[386] 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."[387]

Chenery and *State Farm* illuminate the requirement of reasoned decisionmaking by administrative agencies.[388] Although judicial application of the reasoned decisionmaking requirement has sometimes proved controversial at the margins,[389] there is at least some reason to

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[384] *See supra* notes 372–375 and accompanying text.

[385] *State Farm*, 463 U.S. at 55.

[386] *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.' ").

[387] *Id.* at 52.

[388] *See also* Allentown Mack Sales and Service, 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, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce."); 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).

[389] Commentators have suggested, for example, that the reasoned decisionmaking 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

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believe that the requirement both improves the thoughtfulness and rigor of agency action[390] and facilitates judicial review.[391]

If there is an irreducible principle to be derived from the "reasoned decisionmaking" requirement of authorities 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,[392] and *Chenery*

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reasoned decisionmaking requirement of *State Farm*). Even Judge Wald, while disputing the criticism's validity, "acknowledged [that 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 decision-making; 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).

[390] *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").

[391] *See* Bagdonas v. Department of Treasury, 93 F.3d 422, 426 (7th Cir. 1996) (finding inadequate 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."); National 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 359 and accompanying text.

[392] *See, e.g.*, MCI Telecommunications 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"); Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 77 (1st Cir. 1993) ("agency decisions must make sense to reviewing courts"); International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 95, 815 n.35 (D.C. Cir. 1983) ("an 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).

establishes that the proffered explanation must be the "real" one; that is, it must be the contemporaneous rationale actually employed by the agency when it acted.[393]

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 an agency's rationale that makes no logical sense 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 that advantages its own self-interest may rightly fear the legal or political consequences that would follow were it to candidly acknowledge 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 may be virtually irresistible.[394]

Where a party challenging the agency's interpretation can show that the interpretation works in the agency's own self-interest, however, there is 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 preclude an inquiry into the genuineness (rather than merely the reasonableness) of the agency's explanation, *Chevron*

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[393] *See, e.g.*, Southern 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.").

[394] 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 60–61, 76–87 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 227–305 and accompanying text.

deference stands in tension with the reasoned decisionmaking requirement in circumstances where the agency's interpretation implicates the agency's 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 in a variety of contexts that the government, as sovereign, is obliged to comport itself justly. Even if the nation's citizenry consists wholly of Holmesian bad men,[395] 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 instead lead by example,[396] and its 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.[397]

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[395] 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* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[396] 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).

[397] 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*:

(continued…)

In civil cases as well as criminal cases, the courts similarly 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.[398] This rule applies with particular force to actions taken in the government's proprietary capacity such as the making and enforcement of contracts.[399]

> 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.

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."). 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).

[398] *See, e.g.*, United States v. Jimenez Recio, 123 S. Ct. 819, 824 (2003) ("The prosecutor, like the defendant, should be required to turn square corners") (Stevens, J., concurring in part and dissenting in part); Washington v. United States, 402 U.S. 978, 978 (1971) ("The Government should turn square corners, not taxpayers alone.") (Douglas, J., dissenting from denial of certiorari); Minor v. United States, 396 U.S. 87, 99 (1969) (Douglas, J., dissenting); CIR 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) ("But, when 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) ("the 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) ("the 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. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 61 & n.13 (1984).

[399] 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) ("[i]t 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") (Black, J., dissenting); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387–88 (1947) ("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.") (Jackson, J., dissenting); Texas Instruments, Inc. v. United States, 922 F.2d 810, 816 (Fed. Cir. 1990) ("[t]o 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) ("just 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")

(continued…)

The courts have recognized that citizens have a justified "interest . . . in some minimum standard of decency, honor, and reliability in their dealings with their Government."[400] Failing to hold the government to this standard risks eroding the public's trust in the government.[401] Thus, courts have rightly condemned the government in strong terms where its conduct falls below the "minimum standard of decency" to which citizens are entitled.

For example, in *Massachusetts Bay Transportation Authority v. United States*,[402] the federal government contracted with a state transportation agency to help renovate and redesign Boston's South Station rail terminal.[403] Among the commitments the government made was that it would 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.[404] 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.[405] Nevertheless, however, the federal government neither obtained the promised insurance nor informed the state agency that it

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(internal quotations and citations omitted); *cf. also* 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").

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

401 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); Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1146 (1996)).

402 254 F.3d 1367 (Fed. Cir. 2001).

403 *Id.* at 1369–70.

404 *Id.* at 1370.

405 *Id.*

had failed to do so.[406] The court condemned this failure not only as a breach of contract, which it certainly was, but also as a failure on the government's part to live up to the obligation of scrupulous propriety incumbent upon it as 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 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.*[407]

According *Chevron* deference to an agency's interpretation that has the effect of advantaging 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. 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,[408] *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,[409] or even to excuse its own performance

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[406] *Id.* at 1372 ("FRA failed to get the endorsements despite its clear contract obligation. Moreover, FRA failed to advise MBTA 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.").

[407] *Id.* at 1374–75 (emphasis added; internal citations omitted); *see also* United States v. Nordic Village, 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).

[408] *See supra* note 22 and accompanying text.

[409] *See supra* notes 48–69 and accompanying text.

entirely.[410] 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.

IV. CONCLUSION

Although many courts have, on a variety of occasions, refused to extend *Chevron* deference to an agency interpretation of law that advantaged 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 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 properly should evaluate such agency interpretations outside the *Chevron* framework of review.[411] 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.[412] In either case, removing an independent judicial check on financially self-interested agency action contravenes settled principles more deeply rooted in our jurisprudence than is *Chevron*.[413]

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410 *See supra* notes 70–89 and accompanying text.

411 *See supra* notes 49–89 and accompanying text.

412 *See supra* note 45 and accompanying text.

413 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* notes 131–136 and accompanying text, should not receive deferential judicial review under the *Chevron* doctrine.

To say that courts must independently scrutinize agencies' self-interested interpretations of law, however, is not to say 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 merely incidentally or inconsequentially benefits the agency in some fashion. What is important in either case is merely 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 is one that 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 it 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 ultimately is found to be the more persuasive, notwithstanding the agency's financial self-interest in its interpretation, then the agency should prevail.[414]

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* certainly 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 generally be afforded the same latitude in construing their jurisdic-

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[414] The decision of the court of appeals in *DeWitt* 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 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 viewed simply as an isolated misstep along the court's otherwise uniform path.

tional 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 merely to differentiate interpretations that expand an agency's regulatory sphere from those that do not.[415] This sort of line-drawing should prove challenging only at the margins.[416] 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.

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[415] 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 12, at 2100 (footnote omitted).

[416] 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.