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### Agencies Obligation to Interpret the Statute

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# Agencies' Obligation to Interpret the Statute

Aaron Saiger\*

*Conventionally, when a statute delegates authority to an agency, courts defer to agency interpretations of that statute. Most agencies and scholars view such deference as a grant of permission to the agency to adopt any reasonable interpretation. That is wrong, jurisprudentially and ethically. An agency that commands deference bears a duty to adopt what it believes to be the best interpretation of the relevant statute. Deference assigns to the agency, rather than to a court, power authoritatively to declare what the law is. That power carries with it a duty to give the statute the best reading the agency can.*

*Notwithstanding substantial jurisprudential disagreement about what it means to give a statute its “best interpretation,” an agency does not abide its role when it seeks to achieve anything less. An agency is legally and ethically obligated to privilege what it views as optimal statutory interpretation over what it considers to be optimal policy. If the two conflict, as they sometimes will, the agency must act consistently with the former to the detriment of the latter. To behave otherwise is to fail to adhere to principles of legislative supremacy and fidelity to law.*

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#### INTRODUCTION: STATING THE QUESTION

Very often, a statute that confers power upon an agency permits multiple interpretations, each reasonable but mutually irreconcilable. How should an agency select among them? In the view of most agency officials and scholars, an agency is entitled, ethically and jurisprudentially, to pick whichever interpretation best advances its policy preferences, subject only to the constraint that its selection should survive judicial review.<sup>1</sup> This view is as wrong as it is ubiquitous. In circumstances where a reviewing court is expected to defer to agency interpretation, the agency bears a legal and ethical duty to select the *best* interpretation of its governing statute. This is a concomitant of the agency's duty, independent of the courts, to uphold the law. *Best*, this Article contends, means "best by the agency's own criteria." But those must be *interpretive* criteria.<sup>2</sup>

This sharply distinguishes an agency that receives judicial deference from a court that extends it. Deference sometimes requires a court *not* to impose what it views as the best interpretation of a statute. The deferential judge sometimes must ratify and enforce statutory

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1. See *infra* Part II.A.

2. See *infra* Parts I.D–E.

interpretations with which she disagrees.<sup>3</sup> Such deference is especially, though not exclusively,<sup>4</sup> associated with the paradigmatic case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>5</sup> Absent “an unambiguously expressed intent of Congress,” *Chevron* instructs,<sup>6</sup> a reviewing court should enforce *any* “permissible construction” that an agency assigns to its statute.<sup>7</sup> The court should not impose the construction that it thinks is best.<sup>8</sup>

A responsible agency must do the opposite. It must reject interpretations that it concludes are interpretively suboptimal, notwithstanding that an ethical, law-abiding reviewing court would acquiesce in those interpretations. This follows directly from the concept of judicial deference itself. A deferential court, by abstaining from finally deciding what a statute means, assigns its law-declaration function to the agency. As Professor Henry Monaghan wrote (before *Chevron*), deference doctrine is the *Marbury v. Madison* of agencies.<sup>9</sup> In

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3. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983). This is the standard sense of the word “deference.” The primary exception is “deference” as used in connection with *Skidmore v. Swift*, 323 U.S. 134 (1944). So-called “*Skidmore* deference” is not deference in the sense of the term used here. See *infra* Part III.B.

4. This Article treats *Chevron* as the paradigmatic deference doctrine, but its argument encompasses any deference rule that instructs courts to uphold or enforce an agency interpretation other than the one that it would adopt absent any agency interpretation. At the federal level, this would include, for example, foreign-affairs deference under *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), and deference to agencies’ interpretations of their own rules under *Auer v. Robbins*, 519 U.S. 452 (1997). For an overview of the range of federal deference regimes, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1097–1136 (2008). At the state level, one finds a range of deference arrangements, some as deferential as *Chevron* and others less so. See Aaron J. Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557–60 (2014). The argument in this Article also extends to proposals to extend or alter the scope of *Chevron* or other deference regimes. See, e.g., William N. Eskridge Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 446–48.

5. 467 U.S. 837 (1984).

6. *Id.* at 843. This caveat is the famous “*Chevron* step one.” The concept of the deference space suggested by Professor Strauss, described immediately *infra*, collapses this requirement into the general rubric of deference: in cases where Congress unambiguously expresses its intent, the set of permissible interpretations is a singleton, a set with only one member. Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1145, 1159 (2012).

7. *Chevron*, 467 U.S. at 843.

8. Monaghan, *supra* note 3, at 5; Cass Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2588 (2006).

9. Monaghan, *supra* note 3, at 25.

the mine run of cases, courts “say what the law is.”<sup>10</sup> When such cases involve statutory interpretation, judicial interpretation is authoritative. But cases where a court defers to an agency’s statutory interpretation are the exception. By extending deference, a court renders it the “province and the duty” of *the agency* “to say what the law is.” An agency subject to deference is doing what the court would otherwise do.

When a court defers, therefore, the agency’s duties parallel those of the judge in a case where no deference is offered. An agency obliged to say what the law is must do so to the best of its ability.<sup>11</sup> Such an agency takes on what would have been the judicial duty to use available interpretive tools to reach the best account it can of what a statute means. An agency, like a judge, has no business assigning a second-best interpretation to a statute in order to achieve a preferred policy in the knowledge that, as a matter of institutional structure, it has the last word. That institutional structure, the assignment of interpretive finality to a particular decisionmaker, is justifiable only in light of the expectation that the final interpreter will interpret faithfully.

Even as deference doctrine is the source of the agency’s duty to interpret, however, in American administrative law deference has obscured both the importance and the existence of that duty. This is true both in the literature and in agency practice. In large part, this is because courts, not agencies, decide which interpretations of a statute rate deference and which do not. In Professor Peter Strauss’s useful conceptualization, courts retain the power to set boundaries: they decide what a given statute “must mean and what it cannot mean,”<sup>12</sup> and defer only to agency interpretations that fall within the “space” between the two.<sup>13</sup> Especially because the power to define a deference space includes the ability to collapse it to a singleton—to declare that a statute has only one permissible interpretation—judicial boundary-setting has come widely to be identified with deference itself. The enormous and enthusiastic literature that surrounds *Chevron* and other deference doctrines undertakes to understand, justify, and

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10. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

11. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120, 2144 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014), and arguing that judges should “determine the ‘best reading’ of a statutory text,” and depart from it only if doing so is justified by substantive canons of interpretation).

12. Strauss, *supra* note 6, at 1145, 1159.

13. *Id.*; accord Monaghan, *supra* note 3, at 5; Sunstein, *supra* note 8, at 2588.

taxonomize judicial boundary-setting, and to analyze when and under what conditions courts are expansive or niggardly in defining those boundaries.

The bright light that shines upon how courts limit deference spaces has largely eclipsed questions of how agencies operate *within* such spaces. Only recently, as administrative-law scholarship has begun generally to turn towards intra-agency deliberation, has a literature begun to develop on how agencies should interpret statutes.<sup>14</sup> This literature explores the argument that practices of statutory interpretation are properly influenced by institutional role.<sup>15</sup> Several scholars have argued that an agency selecting among permissible interpretations should be particularly attentive to statutory purpose, even if, in the same case, a reviewing court might or even should determine the boundaries of the deference space with much greater attention to issues raised by the text.<sup>16</sup> In particular, Professor Kevin Stack has developed the important claim that regulatory statutes are “purposive by statutory design,” and that agencies carrying them out therefore “have a statutory obligation to interpret their statutes in a purposive manner.”<sup>17</sup> Textualist interpretation in the courts,

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14. See, e.g., Eskridge, *supra* note 4; Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 503 (2005) (“[A]dministrative interpretation [is] a legal practice in its own right.”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1190 (2006) (“Statutory interpretation is not the exclusive province of courts; it is a core function of the executive branch as well.”); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871 (2015); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 335 n.36 (1990). The positive analogue to these pieces is Professor Christopher Walker’s recent important survey of agencies. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1062 (2015). Walker assesses agencies’ familiarity with the canons of statutory construction and their openness to the use of legislative history in statutory interpretation not only to aid the Congress and the courts in developing expectations regarding how agencies will work with statutes, but also as a way to shed light upon the interpretive fidelity of agencies as they construe legislation. See *id.*

15. See, e.g., Eskridge, *supra* note 4; Stack, *supra* note 14, at 875 & nn.7–10 (reviewing literature). This claim is an aspect of what Professors Nestor Davidson and Ethan Leib have usefully dubbed “regleprudence”: law adoption and law interpretation in agencies both is and ought to be a particular endeavor with particular rules and standards. See Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259, 264 (2015) (arguing for a category distinct from jurisprudence and legisprudence that addresses the development and interpretation of regulations).

16. See ROBERT A. KATZMANN, *JUDGING STATUTES* 27–28 (2014); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 94–106; Stack, *supra* note 14; Strauss, *supra* note 14.

17. Stack, *supra* note 14, at 876, 878.

concomitantly, need not and should not displace purposivist interpretation in the agencies.

Even that literature, however, elides the prior question of what *ethical* self-understanding an agency should have when it selects an interpretation from within a non-singleton deference space. That understanding is independent of, and prior to, statutory design; ethics precede the particulars of any organic statute. An agency identifies multiple interpretations of its governing statute all of which are reasonable and consistent with the statute, and all of which therefore should survive judicial review. Should an agency therefore be free to adopt *any* interpretation in the deference space of an ambiguous statute in order to advance policies it prefers? Or must a conscientious and ethical agency reject interpretations that it concludes are permissible but interpretively suboptimal, notwithstanding that an ethical, law-abiding reviewing court will accept such interpretations?

On this question, the literature is silent and the cases confusing. *Chevron* in particular offers support to both positions. On the one hand, it repeatedly characterizes an agency choosing within a deference space as “interpreting” or “construing” the statute, thus engaging in the same task as courts would when considering an ambiguous statute *de novo*.<sup>18</sup> At the same time, *Chevron* states that an agency that reasonably construes an ambiguous statute is entitled to deference if it makes a “reasonable policy choice.”<sup>19</sup> The administrative action reviewed in *Chevron* itself was a reading assigned by the Administrator of the Environmental Protection Agency to the ambiguous word “source” in the Clean Air Act.<sup>20</sup> In a famous passage, the *Chevron* Court concludes that reading was “entitled to deference” because “the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests,” and his “decision involve[d] reconciling conflicting policies.”<sup>21</sup>

In many cases, both approaches lead to the same result. But not always. When they do not, only the first position, that agencies must interpret the law as best they can, is consistent with their role as authoritative and final declarants of what the law is. Deference doctrine should be understood to give interpretive power to agencies faced with

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18. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 & n.9 (1984).

19. *Id.* at 845; *accord id.* at 865 (noting that the agency receiving deference is “reconciling conflicting policies” and “rely[ing] upon the incumbent administration’s view of wise policy to inform its judgments”).

20. Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, 1683.

21. *Chevron*, 467 U.S. at 859.

legislative ambiguity. It does not say that ambiguity authorizes agencies to chase any policy agenda they can reasonably square with the statute.

Agency practices in this area cannot be easily policed; indeed, because the nature of agency action makes them difficult even to observe. But this makes it all the more important to be clear about what duties agencies bear when they decide how to read a statute. As with so many other ethical decisions, often only the agency will know if it is doing the right thing.<sup>22</sup> But, also like other such decisions, this makes it only more important that attention be given to what the right thing is.

The Article proceeds as follows. Part I explains the question of interpretive ethics under deference. In particular, it explores the key distinction between interpretation and policymaking, which creates the possibility that an agency can think one interpretation of a statute is “better” while still “preferring” a different, reasonable interpretation. Part II presents three possible understandings of the agency duty to interpret under deference, and argues that agencies expecting deference should hew to what they understand to be the *best* interpretation of the statute. Part III discusses variations in circumstances that might affect the propriety of this course of conduct.

Dean Roscoe Pound defined “discretion” as “an authority conferred by law to act in certain conditions or situations in accordance with an official’s or an official agency’s own considered judgment and conscience.”<sup>23</sup> He rounds out his definition by noting that discretion “is an idea of morals, belonging to the twilight zone between law and morals.”<sup>24</sup> Pound was speaking of judicial discretion, but agencies anticipating judicial deference are the assignees of that discretion; Pound’s definition thus applies to them with full force. If multiple interpretations of a statute are all reasonable but irreconcilable, it is a matter of “considered judgment” to decide between them. It is also a matter of “morals.” This Article is about those “morals.” Legislative supremacy and fidelity to the statute, rather than good policy, should be an agency’s “moral” lodestar.

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22. Cf. Strauss, *supra* note 14, at 321, 335 n.36 (noting the lack of “candor” and “camouflage” associated the ability of an agency to “dres[s] her conclusion up in the language of [legislative] history and what its materials command” in order to justify a pure policy preference).

23. Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 926 (1960).

24. *Id.*

## I. CLARIFYING THE QUESTION

This Article asks: May agencies subject to deferential judicial review adopt *any* interpretation that they reasonably expect to survive such review, or are they obligated to adopt the *best* interpretation? In this Part, I discuss why I have framed this question as I have. The discussion also foreshadows key aspects of the answer I propose.

*A. Defining “Agency” for the Purpose of Statutory Interpretation*

A preliminary but important point is that when this Article argues that agencies have a duty to interpret statutes, this duty obligates individuals, not institutions or entities.

In ordinary speech, even among government people and lawyers, an agency is not a person. It is an *organization*, one more or less complex, with a corporate identity distinct from that of the individuals in its employ. However, there is an important second sense in which an agency *is* the person who leads it. The Administrative Procedure Act defines “agency” as “an authority of the Government of the United States, whether or not it is within or subject to review by another agency.”<sup>25</sup> The “authority” to bind the government does not reside in the organization in the abstract. Rather, it is exercised by the agency head.<sup>26</sup> In the line agencies, this is a single individual: think Cabinet secretary, or the EPA administrator. In the independent regulatory boards, authority is exercised jointly by a small group of commissioners, few in number and voting by majority rule.

That the agency is an organization, in the first sense, is no less important for being obvious. Courts, scholars, government officials, and lawyers are forgivably loose when they use the word “agency” in its

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25. 5 U.S.C. § 551(a) (2012).

26. The APA’s identification of the “agency” with its head is explicit in its provisions for formal agency action. At a formal hearing, the APA offers three disjunctive possibilities regarding who may preside at the “taking of evidence”: “the agency”; “one or more members of the body which comprises the agency”; or an administrative law judge. 5 U.S.C. § 556(b) (2012). Similarly, the general rule that agency personnel involved in adjudicating cases may not communicate with an agency “employee or agent engaged in the performance of investigative or prosecuting function” does not apply “to the agency or a member or members of the body comprising the agency.” 5 U.S.C. § 554(d) (2012); Diana Gillis, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 22 GEO. J. LEGAL ETHICS 863, 869 (2009); see also 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMIN. L. & PRAC. § 4:42 (3d ed. 2015) (“The head of the agency is generally the final rulemaking authority.”).

corporate meaning, notwithstanding the APA.<sup>27</sup> Such usage often makes sense with respect to the ethics of agencies' work as well: one can think profitably about the ethical duties of agencies in their corporate as well as their individual identities.<sup>28</sup>

But organizational ethics and obligations are not my concern here. This Article uses "agency" in its strict APA meaning: to identify the agency head, the person with authority to bind the government. In this Article, an "agency" is the person who decides (or voting members of the board that decides) final agency actions. (I do return briefly *infra* to the question of the ethical duties of individuals who are subordinates of agencies.<sup>29</sup>)

### B. *The Interpretive Duties of Agencies*

An agency bears two broad categories of "ethical" obligation. One is that government officials must advance public rather than private interests when at work. This is the category that comes most easily to mind when one thinks about "government ethics." Various rules and standards seek both to ensure public-regarding behavior and to protect public confidence that official behavior is public-regarding. Therefore, for example, we have rules concerning conflicts of interest: how to prevent them, how to balance the costs and benefits of regulating them, and how their various and mutating forms can be defined and operationalized.<sup>30</sup>

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27. See, e.g., Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011) (analyzing "how administrative law allocates power within agencies and how arguments from expertise, legalism, and politics apply inside agencies rather than across institutions"); Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 320 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("From the perspective of the agency considered as a whole, and of individual agency officials, one of the benefits of investing in learning more about the connection between policy choices and outcomes is the ability to achieve more desirable outcomes.").

28. That this Article does not address how to design organizations to ensure and optimize their ethical performance is not to derogate the complexity and vitality of such undertakings. Indeed, such efforts have pride of place in administrative law, in the form of APA rules that require agencies to separate their adjudicative and prosecutorial functions with a stringency beyond that required by due process. See Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 103, 105 (2007).

29. See *infra* Part III.C.

30. John D. Feerick, *Ethics, Lawyers, and the Public Sector: A Historical Overview*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR 1, 3–12 (Patricia E. Salkin ed., 2d ed. 2008).

When it comes to the fear of self-dealing, we generally restrict problematic conflicts of interest to financial ones.<sup>31</sup> Because of concern over private gain, we regulate (by disclosure, limitation, or prohibition) things as diverse as gifts, stock ownership, and outside employment by government employees. We likewise restrict campaign contributions and insist upon disclosure of certain kinds of government action, such as the awarding of contracts, in large part (though not entirely) to interfere with efforts to achieve private gain through public means. But conflicts of interest that are “ethnic, cultural, emotional, nostalgic, regional . . . or philosophical” are generally not considered to be the kinds of conflict that give rise to ethical problems.<sup>32</sup> Indeed, in many circumstances these kinds of commitments properly drive the conduct of public officials.<sup>33</sup> Legislators’ voting decisions are a paradigmatic example.

This Article does not address the potential for agencies to seek private gain or the ways in which regulation can reduce that potential. Rather, it is concerned with a second category of government ethics—namely obligations that actors, whom we can assume are entirely public-oriented, have in connection with the execution of their public duties.<sup>34</sup> These are obligations based upon role. They attach to agency heads by virtue of their particular roles in government, not as persons or attorneys. Avoiding self-dealing does not exhaust the ethical duties of an agency official. Rather, to use Professor Jerry Mashaw’s terms, “internal ethics . . . both motivate and restrain [agency] behavior.”<sup>35</sup> And Mashaw argues explicitly that ethical statutory interpretation is part of that internal ethics. Agencies’ interpretive processes, he says, are surely subject to some kind of “internal normative direction.”<sup>36</sup> Mashaw is right, especially when agencies exercise discretion. Interpretive discretion should be cabined by professional and ethical

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31. See, e.g., 18 U.S.C. §§ 202–09 (2012) (criminal prohibitions).

32. NAT’L MUN. LEAGUE, MODEL STATE CONFLICT OF INTEREST AND FINANCIAL DISCLOSURE LAW (1979), quoted in Feerick, *supra* note 30, at 7–8.

33. W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 *FORDHAM L. REV.* 1333, 1337 (2009).

34. Cf. Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 *CORNELL J.L. & PUB. POL’Y* 203 (2004) (considering the arguably intermediate case of agencies who act to advance the self-interest of the agency *qua* institution, but not the personal self-interest of the agency *qua* agency head).

35. Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 *U. TORONTO L.J.* 497, 497 (2005).

36. *Id.* at 499.

constraints, which limit the influence of “ethnic, cultural, emotional, nostalgic, regional . . . or philosophical” factors.<sup>37</sup>

Professor Mashaw does not distinguish between “ethics” and “internal normative direction.” But that distinction has bite when discretionary interpretation is at issue. The normative literature on agency statutory interpretation clusters around the proposition that agencies should take congressional purpose into account when interpreting statutes, and use legislative history materials to do so.<sup>38</sup> Such claims appear to flow primarily from the normative debate, still raging, over the relative legitimacy of textualism and purposivism as modes of statutory interpretation in general.<sup>39</sup> The primary context for that debate is statutory interpretation by judges. But, given today’s burgeoning appreciation for statutory interpretation outside the courts, agency interpretation seems a potentially enlightening addition to the mix.<sup>40</sup> For some, the claim that agencies are and should be purposivists and legislative historians is a way of arguing that purposivism and historicism are legitimate and superior methods of statutory interpretation *in general*, including interpretation by judges. Other treatments of the issue advance the more modest claim that regardless whether purposivism is legitimate or superior to textualism in general, it is surely both legitimate and superior as an approach to interpretation by agencies.<sup>41</sup>

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37. NAT’L MUN. LEAGUE, *supra* note 32, quoted in Feerick, *supra* note 30, at 7–8.

38. See Eskridge, *supra* note 4, at 421, 424, 427; Herz, *supra* note 16, at 94, 121; Mashaw, *supra* note 14, at 513; Stack, *supra* note 14, at 887; Strauss, *supra* note 14, at 329–32. This literature also has a positive analogue, where the assertion is that agencies do in fact prefer to interpret purposively and rely upon legislative history. Professor Christopher Walker’s important survey data suggests that this is so with respect to legislative history. Walker, *supra* note 14, at 1038. Many scholars make the same claim based upon more informal evidence, often combining it with normative arguments. See Mashaw, *supra* note 14, at 529–30 (taking a convenience sample of rules that refer to “statutory interpretation,” and finding more textualism than expected and fewer than expected references to legislative history, though the latter are present); Stack, *supra* note 14, at 896–99; Strauss, *supra* note 14, at 329.

39. Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119 (2009); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 224 (2015) (noting “interpretive wars over the past thirty years”).

40. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

41. *Id.* at 889 (“Compared to courts, agencies are likely to have a good sense of whether a departure from formalism will seriously damage a regulatory scheme; hence it is appropriate to allow agencies a higher degree of interpretive flexibility.”); Strauss, *supra* note 14, at 322 (“The burden of this paper is that the use of legislative history may have an importance in the agency context for maintaining law against politics, however one regards its use at the judicial level.”).

Either way, these are claims that, in the hands of agencies, interpretations that result from a purposivist framework or rely upon legislative history are better, in some sense, than they would be had a textual framework been used or legislative history been eschewed. Those who make this claim do differ over exactly what it means to be *better*. I consider the substance of these differences *infra* Part I.D. Here, I distinguish between the subject of these important debates, which concern what is the best “internal normative frame” for agency interpretation, and claims about agencies’ “internal ethics.” The ethical frame enriches the discussion by adding an important, somewhat different, and underappreciated dimension of what it might mean for an interpretation to be “better.” The ethical frame asks what is required of a person for us to say that he is doing his duty in his job—not that he is doing his job as well as he might, or that he is going about it as sensibly as he should, but merely he has not been derelict in discharging his responsibilities.

Thinking about what is “good” or “better” interpretation as an ethical matter can be both less and more demanding of agencies than general normative claims. It seems wrong to say, if there is a debate between well-meaning and well-informed jurists about the relative desirability of purposivism and textualism as techniques of interpretation, that an agency is *ethically obliged* to pick one or the other. One can believe that a particular jurist is normatively wrong to prefer one method to the other without thinking that either is unethical in her role. The ethical frame is therefore more agnostic as to interpretive method than the broader, normative frame.<sup>42</sup> On the other hand, the ethical frame is more demanding than the normative frame because the ethical frame addresses what agencies ought or must do. An agency that fails to adhere to ethical principles is not doing a proper, professional job.

To be sure, normative arguments often shade into arguments about public ethics. Mashaw, unsurprisingly, offers the clearest example. As he tentatively explores normative agency statutory interpretation, he asks what confers “administrative legitimacy”;<sup>43</sup> he asks “what norms a responsible administrator should observe when

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42. *But see* Richard Elkins, *Interpretive Choice in Statutory Interpretation*, 59 AM. J. JURIS. 1 (2014) (describing but rejecting strong arguments against the claim that there is a single proper interpretive methodology).

43. Mashaw, *supra* note 14, at 503.

engaging in statutory interpretation”;<sup>44</sup> he emphasizes the notion of agency as “faithful agent.”<sup>45</sup> These concerns, about what constitutes the best account of agencies’ role within the “the whole of the legal topography,”<sup>46</sup> can be read as normative or specifically ethical. Mashaw either does not see a bright distinction or does not make it clear.

Other scholars are much more explicit in being interested in the ethical or “moral” dimension of agencies’ work; but this work tends not to focus specifically upon statutory interpretation. Professors Ethan Leib and Stephen Galoob contrast the views of Professor Adrian Vermeule, who takes a consequentialist, cost-benefit approach to agency action, and Professor Evan Criddle, who argues says that administrative agencies are “public fiduciaries,” or “stewards for the people.”<sup>47</sup> Criddle is arguing within an ethical frame in the sense I propose here. His argument is about agencies’ fiduciary *duty*. “Fiduciary relations stand or fall on the fiduciary’s commitment to abandon self-interest and promote her beneficiary’s welfare instead of her own.”<sup>48</sup> Criddle wants agencies to see themselves, like other fiduciaries, “to view their role as a call to service”;<sup>49</sup> to “manifest altruism (or, at very least, honesty)”;<sup>50</sup> “to abandon self-interest and promote her beneficiary’s welfare instead of her own”;<sup>51</sup> and to embrace a “solemn responsibility” to live up to “the extralegal aspirational norms that shape fiduciary behavior.”<sup>52</sup> One might object to Criddle’s fiduciary theory, or to his identification of the principals in agencies’ fiduciary relationships (he includes statutory beneficiaries, for example, as well

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44. *Id.*

45. *Id.* at 505.

46. *Id.* at 509.

47. See Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1855–58 (2016) (comparing Adrian Vermeule, *Rationally Arbitrary Decisions (in Administrative Law)*, 44 J. LEGAL STUD. 475, 482–83 (2015) (developing an instrumentalist theory of administrative governance), with Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 135–36 (2006) (defending a fiduciary political theory of international law)).

48. Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 128 (2006).

49. *Id.* at 133–34.

50. *Id.* at 128.

51. *Id.* (quoting Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV 1735, 1783 (2001)).

52. *Id.* at 133–34.

as the government and the society as a whole);<sup>53</sup> but he is clearly engaged in ethical analysis.

Professor Geoffrey Miller's early and exemplary analysis of the ethical duties of agency lawyers takes the same approach. Agency lawyers are a category distinct from agencies themselves, but Miller insists that agency work is constrained by ethics. The ethical frame applies both to the claim that Miller rejects—that agency lawyers owe a duty to some “transcendental ‘public interest’ ”—and the one he advances—that “an agency attorney acts unethically when she substitutes her individual moral judgment for that of a political process which is generally accepted as legitimate.”<sup>54</sup> Professor W. Bradley Wendel makes the same sort of move with respect to government lawyers in general (rather than agency lawyering in particular). Wendel argues that the primary “theory of government lawyers’ ethics should be the obligation of fidelity to law enacted by tolerably fair procedures.”<sup>55</sup> His averral that this is a “thin conception of the legitimacy of law,” relative to the claims generated by “republican, deliberative, or dialogic notions of law-creation,” elegantly restates the distinction I have offered between the normative and ethical frames in this area.<sup>56</sup>

Finally, there is an unusually well-developed subject in role-determined legal ethics that is closely analogous to agency statutory interpretation. It regards the species of government lawyer that exercises the most unconstrained discretion: prosecutors. Discretion is a primary category in the literature on prosecutorial ethics.<sup>57</sup> Moreover, many of prosecutors’ most consequential decisions, especially those that occur outside of the trial context,<sup>58</sup> are effectively immune from

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53. *See id.* at 121, 138–39, 151.

54. Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987); *see also* Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1173–78 (2002) (contrasting an “agency loyalty” and “public interest” approach to agency lawyers’ ethics); *infra* Part III.D (discussing lawyers’ ethics in the context of agency statutory interpretation).

55. Wendel, *supra* note 33, at 1337.

56. *Id.* at 1338.

57. *See, e.g.*, Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 420–25; Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1513–15 (1999); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523–24 (1981).

58. It is common and reasonable to distinguish ethical obligations prosecutors bear with respect to their conduct at trial, a process governed by ethical rules applicable to all lawyers, and

review.<sup>59</sup> The ethical obligations of the prosecutor in such contexts therefore bear an important family resemblance to those of an agency.<sup>60</sup> It is easy to say that neither prosecutor nor agency should act in a way that is private-regarding; but the interesting ethical questions are about which ways of being public-regarding are appropriate. Both prosecutor and agency, by design, will often feel pulled between various *ways* of being public-regarding when they act on behalf of the public to make a decision that is likely unreviewable. The question is whether and to what extent some of those pulls are more legitimate than others. As Professor Bruce Green puts it, prosecutors' ethics are governed not just by relevant rules. Rather, the profession must establish "the most desirable ways to exercise 'prosecutorial discretion,' when . . . an exercise of discretion [is] unfair or unwise, and when the prosecutor engage[s] in an 'abuse of discretion' (albeit, one that may not be subject to any sanction or remedy)."<sup>61</sup>

The ethical rules governing prosecutors answer this question in ways both large and small. Prosecutors, for example, are supposed to be nonpartisan.<sup>62</sup> This rule may prevent self-dealing, but its primary purpose is to forbid public-regarding pressures that might interfere with impartiality or the appearance of impartiality. Similarly, prosecutors have an enhanced duty to act with candor at trial.<sup>63</sup> Most broadly, prosecutors are required always to "seek justice" in their official roles.<sup>64</sup> This directive prioritizes one sort of public-regarding function, ensuring justice, against other functions that are also

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with respect to non-trial conduct, such as investigations, pleas, and the re-opening of cases. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URBAN L.J.* 607, 636–37, 642 (1999) (the prosecutor is "a representative of, as well as a lawyer for, [the] government").

59. Vorenberg, *supra* note 57, at 1523–27.

60. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869 (2009). Barkow not only notes the considerable scope of prosecutorial discretion, *id.* at 884–86, but also relies on the analogy between prosecutorial and agency discretion, *id.* at 887–94.

61. Green, *supra* note 58, at 619.

62. *Id.* at 611.

63. *Id.* at 631.

64. *Connick v. Thompson*, 563 U.S. 51, 65 (2011); *see also* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 *WIS. L. REV.* 837, 896; K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 *GEO. J. LEGAL ETHICS* 285, 306–08 (2014); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 50–53 (1991).

legitimate and public-regarding, such as maximizing the swiftness and sureness of punishment in order best to deter future misconduct.<sup>65</sup>

The ethical situation in which agencies find themselves is not dissimilar. When judicial deference is available, agencies, like prosecutors, enjoy unreviewable discretion within fairly broad constraints. Both agencies and prosecutors can find the identity of their principal hazy—is it the government, the people, or their own particular agency?<sup>66</sup> Like prosecutors, therefore, agencies' preoccupying ethical dilemma is how to avoid "abuse of discretion." This concern, of course, is a touchstone in administrative law.<sup>67</sup>

This is not to say that the substance of agencies' ethical obligations is the same as prosecutors'. To the contrary, public ethics are determined by role, and the role of each is very different. It would be wrongheaded indeed to imagine that agencies should seek primarily to "do justice." The analogy with prosecutors is meant only to capture the sort of ethical inquiry that this Article undertakes.

### C. *The Relationship of Deference to Duty*

In other contexts, the term "scope of discretion" has been defined to mean "the ability to make decisions . . . without the limits of rules or other constraints on freedom of action, including judicial review."<sup>68</sup> Under that definition, this Article concerns what it means for agencies to act ethically within the scope of discretion that they enjoy with respect to statutory interpretation. Under a standard *Chevron* or other deference framework, courts will set aside agency action outside that scope; the question here therefore applies only within it.

It is useful to consider the polar cases. Agencies' scope of discretion in statutory interpretation is vast in some cases and zero in others. It is vast in cases where there will be no judicial review of any

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65. See PETER A. JOY & KEVIN C. MCMUNIGAL, *DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS* 14 (2009).

66. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009) (describing prosecutors as "agents who imperfectly serve their principals (the public) and other stakeholders (such as victims and defendants)"); Criddle, *supra* note 48, at 164–65 (describing agencies as "agents of the executive branch, Congress, or the people as a whole"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. (c) (AM. LAW INST. 2000) ("No universal definition of the client of a governmental lawyer is possible. For example, it has been asserted that government lawyers represent the public, or the public interest.").

67. See 5 U.S.C. § 706(2)(A) (2012) (requiring reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion").

68. Vorenberg, *supra* note 57, at 1523–24.

kind.<sup>69</sup> Agency action is unreviewable if a statute “preclude[s] judicial review” or commits “agency action . . . [entirely and unreviewably] to agency discretion by law”;<sup>70</sup> if no one will have standing to invoke judicial review;<sup>71</sup> or if no one will be harmed in ways that will motivate them sufficiently to seek judicial review.<sup>72</sup> Agencies may also avoid judicial review by embedding interpretations in non-final actions, in refusals to take action, or in specific kinds of final actions that particular statutes exempt from review.<sup>73</sup> They may also avoid review by timing their actions strategically.<sup>74</sup>

When there is no judicial review, the scope of agency discretion is at its apogee. Absent a judicial check, the agency is the sole and final arbiter of statutory meaning. An agency’s obligations regarding law interpretation in such a situation cannot be less demanding when there is no review as when there is deferential review. An agency that knows it will not face judicial review is not entitled to act *ultra vires*. It therefore must act within its best assessment of its legislatively granted powers. This principle has straightforward analogues for all constitutional and statutory interpretation outside of the courts. Members of Congress and the President, when their actions are unreviewable, must obey the Constitution and conform to the laws.<sup>75</sup> Agencies are no different. The obligations discussed in this Article,

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69. *But see* Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 204 (2007) (arguing that “all agency statutory interpretations are subject to de novo review and potential rejection by a court through application of *Chevron* step one” (emphasis added)).

70. 5 U.S.C. § 701(a) (2012). The courts have strongly cabined this category. *See Heckler v. Chaney*, 470 U.S. 821, 826 (1985) (reiterating that the “committed to agency discretion by law” exception applies only when “the substantive statute left the courts with no law to apply” (internal quotation marks omitted)).

71. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 537 n.23 (2006).

72. James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J.L. EDUC. 3, 13–14 (2015) (most “minor” agency actions remain “unreviewed by courts or essentially unreviewable”); Stephenson, *supra* note 71, at 537 n.23; *cf.* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 115 (1993) (same issues arise regarding unreviewable executive interpretation of the Constitution).

73. *See* Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can't) Do to Limit Judicial Review*, 52 B.C. L. REV. 1687, 1689–92 (2011) (giving examples).

74. *See id.*

75. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 219, 239 (2004) (legislature); Morrison, *supra* note 14, at 1223 (executive).

therefore, constitute a floor for agencies acting outside the shadow of judicial review.

The other, more interesting circumstance is when there is judicial review (or a reasonable expectation thereof<sup>76</sup>), but that review proceeds without deference. Here the scope of discretion is effectively zero. Such situations are fairly common. In many states, courts review *de novo*, without deference, some or all categories of final agency action.<sup>77</sup> In the federal system, review is non-deferential when agency action falls within various exceptions to *Chevron*. The statutory interpretation supporting the agency action might have constitutional ramifications<sup>78</sup> or be of such deep “economic and political significance” that *Chevron* is set aside.<sup>79</sup> The interpretation in question might trigger one or the other canon of construction whose application trumps *Chevron* deference.<sup>80</sup> It might involve foreign affairs in a particular way.<sup>81</sup>

Finally, the interpretation might be in the *Mead* twilight of actions insufficiently authoritative to merit *Chevron* deference.<sup>82</sup> Final actions that fall outside of *Chevron* under *Mead* are a special case, because per *Mead* many of them receive *Skidmore* deference.<sup>83</sup> I return to so-called *Skidmore* “deference” in Part III.B below. In this Section,

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76. An ample literature demonstrates that *Chevron* and its analogues are not applied consistently, especially at the Supreme Court level. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–90 (1992); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 359–63 (1994) [hereinafter Merrill, *Textualism*]; Thomas Miles & Cass Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825 (2006); Cass Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2092 (1990) (“If the court has a firm conviction that the agency interpretation violates the statute, that interpretation must fail . . . even if a reasonable person might accept the agency’s view.”).

77. See Saiger, *supra* note 4, at 558.

78. See *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps. of Eng’rs*, 531 U.S. 159, 173 (2001).

79. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). See generally Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN L. REV. 19 (2010) (reviewing doctrine).

80. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (constitutional avoidance); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (canons against retroactivity); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 77 (2008).

81. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 722–25 (2000).

82. *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

83. *Id.* at 234–35.

for clarity of analysis, I assume that a reviewing court that does not defer interprets the statute *de novo*.

When there is non-deferential judicial review, agencies that otherwise might seek the “best” interpretation of a statute will be reviewed by a court doing the same thing. It might be both reasonable and appropriate, therefore, for an agency working in the shadow of non-deferential review to adopt an interpretation it considers to be interpretively suboptimal, on the grounds that this is the interpretation the reviewing court will adopt. An example would be a court whose precedents strongly suggest, but do not demand, an interpretation with which an agency disagrees. An agency might ethically adopt such an interpretation nonetheless. After all, it is the court that will say what the law is; so, under typical circumstances, it is hardly useful for the agency to do anything other than anticipate the courts.<sup>84</sup> On this dimension, the agency is in more or less the same situation as a private lawyer advising a client regarding a legal regime that is uncertain. The lawyer has professional obligations to interpret the law fairly,<sup>85</sup> and may also have opinions about what the law should be understood to mean; but the client primarily relies upon her to determine, as best she can, what the law will be decided to mean. Another apt analogy is a lower court anticipating review by a higher court, whose account of the law is generally the law as it expects the higher court to understand it.<sup>86</sup>

To be sure, agency decisionmaking absent deference has its own ethical dimension. The agency, like any lawyer, might face uncertainties in anticipating the court, and therefore be in a position to choose among multiple predictions.<sup>87</sup> Moreover, the agency is not the

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84. Pierce, *supra* note 69, at 202 (noting that absent deference, an “agency has no practical choice but to attempt to anticipate and replicate the interpretive process a reviewing court will use”).

85. See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1171 (2005) (“[N]o matter how clear a rule appears to be, it will always be ambiguous enough to be manipulated . . . . Professionalism . . . is therefore a principle for regulating the exercise of interpretive judgment.”).

86. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 9–22 (1994) (articulating two models of lower-court decisionmaking, the “precedent” and “proxy” models, both of which direct lower court attention to higher court opinions, and the latter of which understands a lower court directly to anticipate how the higher court would rule in the case before it).

87. An important special case of this concern is uncertainty regarding whether the courts will defer to the agency’s interpretation. See *supra* note 76. It seems straightforward that, so long

same as a private lawyer advising a client in the sense that the agency has its own duties to the public and to uphold the law. So an agency might feel a duty (rather than just a strategy) not merely to predict the outcome but to convince the reviewing, non-deferential court that the agency's own reading is the best. It could do this both by building a strong record and then by litigating it effectively. At the extreme, one can imagine Saturday-Night-Massacre scenarios in which an ethical agency must stand up for her own statutory interpretation notwithstanding likely judicial reversal, just as she ought to stand up for her own legal opinion notwithstanding likely sacking by the President or reversal by a more senior executive.<sup>88</sup> But there must be room for an agency, in more quotidian circumstances, ethically to acknowledge that when it is not the final decisionmaker and cannot reasonably expect to change that decisionmaker's mind, it is reasonable to adopt *ab initio* the view that it best anticipates that final decisionmaker will take rather than its own preferred view.<sup>89</sup>

What distinguishes deferential review is that it renders the agency's decision both final and discretionary. Deference creates room for the exercise of discretion. This is evident in the peculiar administrative-law doctrine that an agency that adopts a permissible construction of an ambiguous statute, but does so in the mistaken belief that the construction it adopts is the *only* permissible construction, receives no deference. In *Arizona v. Thompson*, for example, the Court of Appeals for the District of Columbia Circuit reviewed a Department of Health and Human Services regulation that prohibited states from spending federal block grant monies awarded under the Temporary Assistance to Needy Families ("TANF") program to pay administrative costs common to the TANF program, Medicaid, and Food Stamps.<sup>90</sup> The Department's rule was not entitled to *Chevron* deference, the court

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as there is a reasonable possibility of deference, agencies bear whatever enhanced ethical obligations are associated with deference.

88. See Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 387–88 (1994).

89. Cf. Morrison, *supra* note 14, at 1197 (making the same observation with respect to presidential actions subject to *de novo* judicial review). An intermediate case is an agency that identifies political or policy gains to be had from promulgating an interpretation it expects to be overturned by a nondeferential court, but feels no ethical or moral duty to force a confrontation. The arguments in this Article suggest that such behavior is not obligatory and is normatively appropriate when and only when the agency believes its interpretation to be the best available.

90. 281 F.3d 248, 251 (D.C. Cir. 2002).

held, because the agency “did not purport to exercise discretion.”<sup>91</sup> Rather, the Department believed—erroneously—that its position was required by the statute.<sup>92</sup> Determinations that the agency believes to be compelled by the statute are not entitled to discretion; unless the permissible construction is adopted *as an exercise of discretion*, the agency action is remanded should the court disagree.<sup>93</sup> In the language of an earlier District of Columbia Circuit case, “[w]hile the Secretary ha[d] discretion . . . , that discretion must [have been] exercised through the eyes of one who realizes she possesses it.”<sup>94</sup>

In many respects, the approach in *Arizona v. Thompson* and its sister cases seems perverse. The agency’s decision is remanded because the agency found it to be too obvious; had it made the same decision after protracted agonizing, it would have been upheld. (The *Thompson* doctrine thus encourages agencies, as a matter of practice, always to state formally that a statute is susceptible to multiple interpretations, even if they doubt that alternative interpretations are viable.<sup>95</sup>) But, surface perversity notwithstanding, at its heart the doctrine is defensible. To make an interpretive choice is a fundamentally different thing than to do what is clearly required; courts justifiably treat these two processes differently. The expositors of the doctrine emphasize, quoting *Chevron’s* language, that deference is triggered only because the ambiguity of the statute requires the agency to “bring its experience and expertise to bear in light of competing interests at stake.”<sup>96</sup> If the agency sees only one interpretation, if it sees no “competing interests” or demand for its “expertise,” those triggering conditions are absent.

Discretion, in other words, creates particular ethical issues. The discretionary interpretive choice, which then resists review, involves enhanced ethical demands, like a decision to prosecute or accept a plea.

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91. *Id.* at 253.

92. *Id.* at 253–54.

93. *Id.* at 254; *accord* *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013), as amended (July 9, 2013) (“[B]ecause the agency misapprehended the clarity of the statute . . . deference is not in order.”); *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 314 F.3d 1373, 1378–79 & n.7 (Fed. Cir. 2003) (“It is, of course, impermissible for the Department to adopt regulations in this area on the ground that particular regulations are required under the unambiguous language of the statutes.”).

94. *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000).

95. *Cf. Elizabeth V. Foote, Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 715 (2007) (arguing that *Chevron* itself motivates agencies to seek interpretive ambiguity even when it is not clearly present).

96. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (quoted by *PDK Labs, Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 797–98 (D.C. Cir. 2004)).

*D. What Does It Mean for an Interpretation of a Statute to Be “Good” or the “Best”?*

Can one interpretation of a statute be “better” than another? Than all others? If not, it is incoherent to suggest that agencies might have a duty to adopt the “best” reading of a statute.

Judicial and academic debates regarding what constitutes “good” statutory interpretation are stalemated. Textualists think that many, most, or all interpretations based on analysis of legislative “purpose” and/or legislative “history” are intellectually confused, constitutionally illegitimate, and inappropriately politicized. Purposivists think that textualism is crabbed, misleading, ahistorical—and inappropriately politicized. Purposivists “look over the crowd and pick out their friends.”<sup>97</sup> Textualists are too ingenuous and too ingenious.<sup>98</sup> Purposivists don’t understand the nature of legislation.<sup>99</sup> Textualists don’t understand the nature of language.<sup>100</sup> And so on.

This is of course a caricature of the multifarious, nuanced, and necessary arguments that multiply to fill the appellate reporters, the law reviews, and the university press announcements. These arguments are serious, sophisticated, and important to agencies’ work. But the purposivist/textualist standoff<sup>101</sup> means that, as a matter of ethics in role, it is both difficult and unproductive to suggest that anyone has an obligation to throw their lot in with one side or the other. Justice Breyer and Justice Scalia, who could not agree about interpretation, each upheld their respective positions ethically. This is so even as there is every reason to welcome present and future efforts by any interpretive school to convert another by force of persuasive argument.

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97. This observation, now a chestnut, originates with Judge Harold Leventhal. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 n.143 (1983) (citing a conversation with Judge Leventhal). It is today ubiquitous in the federal reporters and the literature. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment); *Cnty. Care Found. v. Thompson*, 318 F.3d 219, 226 (D.C. Cir. 2003).

98. Merrill, *Textualism*, *supra* note 76, at 354.

99. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 67 (2012).

100. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 623 (1990).

101. Mashaw, *supra* note 14, at 510 (“Textualists are at war with purposivists; plain language advocates joust with those prepared to seek meaning in legislative history.”).

This might be a reasonable position to take with respect to judicial interpretation but not with respect to agency interpretation. The literature has coalesced around the view that agencies not only are but also should be purposivist interpreters of their statutes, even if courts are not.<sup>102</sup> The positive claim is that agencies, in order to understand their governing statute, routinely very heavily depend upon legislative history, communication with the Congress, and other indicators of legislative purpose.<sup>103</sup> Agencies' reliance upon the Congress for their ability to carry out their agendas creates a "profound" and "continuous incentive" for them "to act as faithful agents" of the legislature and "universally to honor" legislative expectations; the "Congress . . . is a constant and immediate presence in their consciousness."<sup>104</sup> These institutional constraints ineluctably lead them when interpreting statutes to serious inquiry into legislative purpose.<sup>105</sup>

Normatively, the argument is that this is as it should be. Professors Cass Sunstein and Adrian Vermeule suggest that even if some form of textualism is the preferable modality of judicial statutory interpretation, purposive interpretation is likely to be superior for agencies that are technically competent, politically accountable, and generally trusted.<sup>106</sup> Some, taking their cue from an early article by Professor Peter Strauss, argue that purposive interpretation allows agencies more accurately to give effect to the substantive intention of the Congress, and thus best to realize the uneasy but genuine place of agencies in the American scheme of separation of powers.<sup>107</sup> Professor Jerry Mashaw recasts Strauss's argument in more strongly normative terms, suggesting that Strauss "persuasively" implies that for an agency to ignore its own "insights into legislative purposes and meaning" would make it less than a "faithful agent."<sup>108</sup> Mashaw himself is less taken with legislative history than Strauss, because he prioritizes agency responsiveness to contemporary political

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102. *See supra* note 38.

103. *See* KATZMANN, *supra* note 16, at 26–27.

104. *See* Peter Strauss, Book Review, 65 J. LEGAL EDUC. 443, 448–49 (2015) (reviewing ROBERT KATZMANN, *JUDGING STATUTES* (2014)).

105. *Id.* at 448.

106. Sunstein & Vermeule, *supra* note 40, at 928–30; *accord* D. Strauss, *supra* note 72, at 113; Sunstein, *supra* note 8, at 2596–97.

107. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 575 (1985); Mashaw, *supra* note 14, at 511; Mashaw, *supra* note 35, at 509; Strauss, *supra* note 14, at 347.

108. Mashaw, *supra* note 14, at 511; *accord* Mashaw, *supra* note 35, at 509.

authority;<sup>109</sup> but he agrees that agencies doing their jobs well will interpret statutes differently from courts.<sup>110</sup>

Professor Kevin Stack's important variation on this approach is to argue that the Congress, by passing regulatory statutes, "impose[s] a duty on agencies to carry out those powers in accordance with the principles or purposes the statutes establish."<sup>111</sup> Agencies should interpret in a purposive fashion, argues Stack, because of a congressional directive.<sup>112</sup>

Other arguments offer versions of normative superiority less grounded in the statutes themselves than Stack's. They argue that purposive agency interpretation is better in the sense that it makes better law, that it is more responsive to circumstances and to nuance, that it is less likely to take off in some undesirable direction that ill-serves the republic and its citizens.<sup>113</sup> The Congress, had it been able to anticipate the circumstances, would of course never have desired bad, unresponsive, or undesirable law, and so again the agency is a "better" agent of the Congress when it interprets purposively.

While the case for agency purposivism is sympathetic and strong, it still falls short of justifying purposivist interpretation as the "best" sort of interpretation in ethical terms. Stack, for example, argues that agencies should be purposivist because "Congress, in its statutory delegations, directs" them to do so.<sup>114</sup> On this view, were Congress to pass a statute that did not contain or that contradicted this directive, then agencies would have no obligation to interpret purposively. Similarly, one can imagine that an administration with a particular philosophy of law and/or attitude to regulation might appoint textualists to agencies, just as it would to courts, in order to achieve narrow readings of the law and of regulatory mandates. This might be foolish politics and bad policy; it also might not succeed on the appointing administration's own terms. But it is hardly unethical. And, of course, purposivism still ties the interpreter to some extent to the text,<sup>115</sup> so any gulf between textualists and purposivists in an agency is

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109. Mashaw, *supra* note 14, at 511–14. Political pressure is discussed *infra* notes 145–152 and accompanying text.

110. Mashaw, *supra* note 14, at 522–23 & tbl.1.

111. Stack, *supra* note 14, at 875–76.

112. *Id.* Stack's approach implies that whether the Congress intends agencies to interpret statutes purposively depends upon the structure of that statute.

113. See Herz, *supra* note 16, at 96.

114. Stack, *supra* note 14, at 875.

115. See *infra* note 119.

a matter of degree, not of kind. Therefore: if an agency that interprets like Breyer would interpret a statute in one way, and one that interprets like Scalia in another, no *ethical* principle is available that could reasonably call one interpretation superior. Again, that is not to say that there are no jurisprudential (better, “regleprudential”) principles that could do so—but, at this writing and for the foreseeable future, these principles are, or at least can be, contested.

In a different sense of the question of whether one interpretation can be better than another, and whether there might often be a “best” interpretation, the answer is obviously “yes.” “Yes” is the right answer from within a given sense of interpretive principles.<sup>116</sup> No lawyer or academic advocates complete indeterminacy with regard to statutory interpretation. Given any plausible interpretive framework, some interpretations are better than others—at least in most cases. The goal of interpretation, under whatever theory, is in part to avoid interpretive “error.”<sup>117</sup>

This is obvious for a Scalia-style textualist: not only are textualist arguments superior, for example, to those based illegitimately upon legislative history, but there are good textualist arguments and bad ones. Scalia’s most vociferous, anti-textualist interlocutors think similarly about their own interpretive principles. A purposivist interpretation can be good or not as good; one might be clearly better than other, probably better than a third, and in close contention with a fourth.

This internal perspective is the one this Article adopts. Agencies can interpret statutes in good faith using a variety of methodologies. And the diversity of available methodologies will frequently yield diverse results. Agencies have no obligation to adopt the interpretation that Justice Breyer, Justice Scalia, or you the reader would consider the “best.” I argue here only for the claim that an agency must hew to the interpretation that the agency itself determines, in good faith, to be the best interpretation.

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116. See Stephenson, *supra* note 71, at 538 (arguing and offering an example for the claim that any judge’s internal perspective determines a continuum of interpretations from best to worst, in the view of that judge, regardless of interpretive method). This appears to be the use of the word “best” adopted by the Office of Legal Counsel when it purports to provide “advice based on its best understanding of what the law requires.” Memorandum from David J. Barron, Acting Assistant Att’y Gen., Re: Best Practices for OLC Legal Advice and Written Opinions, at 1 (July 16, 2010), available at <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>. The practice of OLC is discussed additionally *infra* notes 154–155 and accompanying text.

117. Mashaw, *supra* note 14, at 517.

*E. Conflicts Between Interpretation and Policy Preference*

To ask whether the reading of a statute an agency considers “best” from its internal interpretive perspective (call it **A**) must be adopted over the reading it prefers from its internal policy perspective (call it **B**) implies that the two will be different, at least some of the time. This is surely the case if an agency is textualist in its approach to statutory interpretation; there is no reason to expect textual interpretation to track policy preferences. But the assumption might not hold if an agency interprets its statutes purposively, as nearly all scholars believe that nearly all agencies do and most scholars believe that agencies should.<sup>118</sup> For such an agency, it might be that, as among potential reasonable interpretations of the statute, the “best” interpretation, by definition, is always precisely the one that furthers the policy the agency prefers. That is, it might be that **A** and **B** are always the same.

Consider what it means for an agency that interprets its statute purposively to identify **A** and **B**. Such an agency, having limited itself to interpretations that are reasonable, identifies from among them whichever one, in its own estimation, is the best policy (**B**). To choose **B** is to choose the policy that will yield the best effects: it is the one that best fulfills the agency’s mandate and advances its goals. But in determining what is goal-advancing or mandate-maximizing, the agency, assuming that all its reasons are public-regarding, is perhaps doing no more and no less than interpreting the statute in light of its purposes. It is, after all, the statute that sets agency goals, operationalizes its mandate, defines the mission, and determines what is best. Therefore, what the agency regards as the best policy (**B**) will be, invariably, the same as what it understands to be the best interpretation of the statute (**A**). Both are the approach to the statute that best effectuates its purpose(s), from the agency’s internal perspective.

It is no objection that an agency might sometimes prefer to do something that the statute fairly clearly does not allow. By hypothesis, our agency restricts itself only to *reasonable* interpretations. The reasonableness assumption assures that, in Professor William Eskridge’s important formulation, the agency will not promulgate any interpretation that “impose[s] on words a meaning they will not

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118. See *supra* notes 102–113 and accompanying text.

bear.”<sup>119</sup> Both **A** and **B** are reasonable. The reasonableness assumption also excludes cases of what Eskridge calls “rule-of-law shirking” or “democratic shirking” by agencies, both of which involve deforming the meaning of the statute.<sup>120</sup> Such deformations are by definition *unreasonable*, and therefore outside the deference space.

Nor can an agency engage in what Eskridge calls “policy shirking,” whereby the agency “fail[s] to pursue the congressional goals effectively, perhaps because of interest group capture or simply because of lethargy and inertia.”<sup>121</sup> Again by hypothesis, the agency determines its preferred policy based upon purely public-regarding criteria. Therefore its preference cannot depart from its internal understanding of its mission.

*Chevron* itself can be read to anticipate precisely this kind of policy-driven interpretation.<sup>122</sup> *Chevron* involved a decision by the Environmental Protection Agency (“EPA”) regarding the meaning of the Clean Air Act’s category of pollutants emitted by a “major stationary source.” EPA chose to read the word “source” so that it could include multiple smokestacks within a single industrial site; the EPA postulated an imaginary “bubble” over the site that could merge all emissions from that site into one “source.” The *Chevron* Court says that the reason EPA’s reading “is entitled to deference” is that the agency’s view that the statutory phrase “major stationary source” was consistent with the bubble “represents a reasonable accommodation of manifestly competing interests.”<sup>123</sup> The Court refers to EPA’s conclusion as a “wise

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119. Eskridge uses this formulation repeatedly in his work. See, e.g., Eskridge, *supra* note 4, at 445; William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)). Eskridge credits the formulation to Professors Hart and Sacks. See 2 HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1200 (tent. ed. 1958) (cited in, e.g., William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 333 n.43 (1990); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1038 n.119 (1989)).

120. Eskridge, *supra* note 4, at 433.

121. *Id.*

122. As is well-known, *Chevron* assumed that purpose-oriented interpretation, uncontroversial in 1984, would be standard throughout the legal system. Cf. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (interpretation under step one proceeds “employing traditional tools of statutory construction”).

123. *Id.* at 865.

policy.”<sup>124</sup> The Court takes up the issue of wisdom particularly in the peroration of the case:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.<sup>125</sup>

These statements sound as if, once an interpretation is within the *Chevron* space of all possible reasonable interpretations, what the agency is doing when it chooses is simply making policy. If what *Chevron* itself is doing in step two is deferring to EPA policy, then it is hard to see in what way there is light between the agency’s preferred policy and its preferred interpretation.

This account—that agencies are merely instantiating policy preferences when they pick a policy within the *Chevron* space—has been picked up by some courts and commentators. In the courts of appeal, the most striking instance is the position of the District of Columbia Circuit that agency interpretations rate deference *only if* that interpretation results from a policy judgment.<sup>126</sup> This rule emerged from a case, *PDK Labs*, in which the Administrator of the Drug Enforcement Agency interpreted a statute in a particular way because he thought it was clear. The court disagreed and thought the statute was ambiguous, although it thought the Agency’s interpretation was a possible, reasonable interpretation. Nevertheless the court declined to defer to the agency, on the ground that the agency had “reached [its] conclusion without mentioning any policy considerations or other matters within the agency’s expertise.”<sup>127</sup> *Chevron* deference, held the court, does not apply whenever an agency “choose[s] between competing meanings.” It is available only when an agency “bring[s] its experience and expertise to bear in light of competing interests at stake.”<sup>128</sup> In other words, a court defers only if the agency chooses its most-preferred *policy* from among the alternatives that are reasonable as a matter of interpretation.

Several academic commentators have taken upon an even stronger version of this view, arguing that agencies choosing among

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124. *Id.*

125. *Id.* at 866.

126. *PDK Labs, Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 794 (D.C. Cir. 2004).

127. *Id.*

128. *Id.* at 797–98 (citing *Chevron*, 467 U.S. at 843–45).

policy approaches within a *Chevron* space are *only* making policy, and are not *interpreting* the statute in any meaningful sense of that word. Responding to analyses by Professors Jerry Mashaw and Peter Strauss who understood (the latter especially) statutory interpretation to be the ubiquitous and quotidian business of agencies, their daily bread and butter,<sup>129</sup> Professor Richard Pierce insisted that this was a fundamental category error. Agencies, once within the *Chevron* space, are not interpreting—not “explain[ing] or tell[ing] the meaning of”—statutes at all.<sup>130</sup> Rather, they are making policy, an activity distinct and fundamentally different from interpretation.<sup>131</sup>

Professor Elizabeth Foote extends and elaborates Pierce’s claims. She argues that statutory construction on the one hand and “carrying out” or “implementing” statutory commands on the other are distinct and discrete activities, and that agencies are not engaged in the former when they determine policy preferences.<sup>132</sup> It is a “misnomer” to label policymaking as statutory construction.<sup>133</sup>

Professors Pierce and Foote would likely approve of *PDK*. They also are aficionados of the view that *Chevron* step two, in which courts evaluate the agency’s decision for reasonableness, is coextensive with the judicial analysis, commonly identified with *Motor Vehicles Manufacturers v. State Farm*, whether an agency decision must be set aside because it is “arbitrary [or] capricious.”<sup>134</sup> To Pierce, “[i]t seems

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129. Mashaw, *supra* note 14, at 513 (noting that each agency “control[s] . . . what might be called its ‘interpretative agenda’ . . . the *Chevron* doctrine recognizes a convergence of interpretation and policymaking”); Strauss, *supra* note 14, at 329 (“The organic nature of agency relationships with their statutes, that agencies essentially *live* the process of statutory interpretation, makes it of special importance to see how that occurs. . . . Legislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government and are accustomed to considering its relevance only to actual or prospective judicial resolution of discrete disputes.”); accord Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 2 (1990) (“Agencies continually interpret the statutes they administer.”); D. Strauss, *supra* note 72, at 113; Sunstein, *supra* note 8, at 2588 (“interpretation was the central part of [the agency’s] job”).

130. Pierce, *supra* note 69, at 199.

131. *Id.* at 200, 205 (stating that when agencies make policy, “they are not involved in the process of statutory interpretation”).

132. Foote, *supra* note 95, at 675.

133. *Id.* at 695.

134. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983) (quoting 5 U.S.C. § 706(2)(A)). The question whether *Chevron* step two and *State Farm* are coextensive is a persistent puzzle in administrative law. *Cf.* *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (“[I]n this case,” *Chevron* step-two analysis would be “the same” as a *State Farm* analysis, “because under *Chevron* step two, we ask whether an agency interpretation is

apparent that step two of *Chevron* is *State Farm*.<sup>135</sup> This is a “pragmatic approach,” because “[a]s applied, the two tests are functionally indistinguishable.”<sup>136</sup> They are indistinguishable in the sense that the selection of one reasonable interpretation from a set of potential reasonable interpretations—which is what the Court purports to assure under *Chevron* step two—is the same as determining that a policy is reasonable and therefore not “arbitrary”—which is what the Court purports to assure in applying *State Farm*.<sup>137</sup> At the point where an agency reaches step two, policy and what the courts call “interpretation” are identical. Therefore, an agency’s internally “best” purposive interpretation and “best” policy are always the same.

These arguments and authorities for the identity of best purposive interpretation and most preferred policy ultimately fail to convince. As a matter of authority, the *PDK* rule that agencies must weigh competing policy considerations in order to receive deference<sup>138</sup> (a rule not established in all circuits) might be read to demand some kind of comparative policy analysis as part of the interpretive process. But this does not make the two processes coextensive. An agency could weigh policy goals in the context of purposive interpretation and still emerge with an interpretation that demanded a policy different from the one that simply maximized its policy preferences. And *Chevron*’s own emphasis upon policy determinations must be understood in light of its repeated characterization of an agency’s choice of approach from among reasonable alternatives—such as the EPA’s choice to read “stationary source” to embrace the bubble—as “construction” or “interpretation.”<sup>139</sup>

More broadly, the reasons that Strauss and Mashaw give for characterizing the process by which an agency gives meaning to its statute as “interpretation” are good ones. They easily survive the objections of Pierce and Foote. Consider *Chevron* itself. It takes whether the statutory term “stationary source” can include a “bubble” over an

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‘arbitrary or capricious in substance.’”) (Kagan, J., for a unanimous Court) (internal citations omitted).

135. RICHARD PIERCE, 1 ADMINISTRATIVE LAW TREATISE § 3.6, at 172 (4th ed. 2002).

136. *Id.* § 3.3 at 173–74.

137. *State Farm*, 463 U.S. at 46.

138. *See supra* notes 126–128 and accompanying text.

139. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837, 844 (1984) (two uses); *id.* at 857, 860, 862, 863 (several uses).

entire facility to be a question of statutory construction.<sup>140</sup> If the answer is yes, there follows a policy question whether the agency wants to read “source” in that way. EPA did not ever claim that “source” *had* to be read to embrace a whole facility. But the interpretive question is jurisprudentially prior. Before EPA could choose whether to treat multiple smokestacks as a single source, it had to determine whether the best meaning of “source” was broad enough to allow it to do so.

Professor Strauss in particular emphasizes that the prior analysis, of what the statute means, can sometimes be restrictive. In particular, legislative history materials can lead to interpretations that might prevent an agency from going where it otherwise might wish to go.<sup>141</sup> Strauss evokes an agency attorney at work in a library of legislative history materials. If that attorney is “responsible,” Strauss says, she will “pore through those materials . . . seeking help in understanding and/or justification.”<sup>142</sup> In doing so, Strauss’s conscientious lawyer “acquires a sense of political history and possibility that will both suggest and constrain.”<sup>143</sup> Sometimes historical materials compel interpretive positions that an agency cannot then ignore if it “do[es] not wish to destroy morale or an internal sense of the agency’s legitimacy.”<sup>144</sup> Legislative history has pride of place in the purposive toolbox, and Strauss has no doubt that its use, and therefore purposivist interpretation itself, can constrain as well as expand statutory meaning.

Certainly, the possibility that *Chevron* step two and *State Farm* demand the same *judicial* inquiry in no way implies that an agency, having determined that multiple statutory readings are legitimate, can ignore interpretive considerations and confine itself strictly to policy analysis. Even if *Pierce* is correct that it is the same for a court to determine that an agency’s resolution of a statutory ambiguity is reasonable *qua* interpretation and reasonable *qua* policy, an agency choosing the best interpretation from a set of reasonable interpretations

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140. *Id.* at 840; accord John Willis, *The McRuer Report: Lawyers’ Values and Civil Servants’ Values*, 18 U. TORONTO L.J. 351, 360 (1968):

When the Labour Relations Board is applying a standard laid down by its governing act, for example “appropriate unit,” it is, though in form interpreting the Act and deciding a “question of law,” in truth devising its “unit” policy through the eyes of people who are familiar with labour conditions and labour understandings.

141. Strauss, *supra* note 14, at 330–31.

142. *Id.* at 330.

143. *Id.*

144. *Id.* at 331.

could be doing something distinct from choosing the most desirable policy from a set of reasonable policies.

In particular, we know of one very important set of considerations that affect agencies' policy preferences but, very likely, not their interpretations. These are what are often called "political" factors. Mashaw tentatively describes (but is careful to say that he does not endorse) purposive agency interpretation by urging his reader to "imagine agency statutes as works-in-progress, to be shaped and molded by continuous interaction among the implementing agency, the political branches and affected interests" in an "ongoing process of agency implementation."<sup>145</sup> And *Chevron* itself endorses the view that the politics of a sitting administration can and should influence a statutory interpretation: "[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."<sup>146</sup>

That famous statement from *Chevron* uses the phrase "wise policy," which is not quite the same as politics. Nevertheless, most modern scholars agree that agencies can indeed consider "political" factors.<sup>147</sup> However, the agency's nonpolitical reasons must be sufficient on their own to justify its decision, without regard to political factors.<sup>148</sup> And an administrative record cannot explicitly advert to goals unless those goals are among those in fact embraced by the statute.<sup>149</sup> Agencies

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145. Mashaw, *supra* note 14, at 523.

146. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

147. See Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144 (2012) ("[T]he understanding of the administrative state that prompted courts to develop hard-look review accepts that agency decisions are political and properly so."); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35–39 (2009) (documenting "widespread acceptance" of the view "that many policymaking decisions made by agencies cannot be resolved through a myopic technocratic lens but rather are highly political decisions that should be made by politically accountable institutions"). *But see* Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573, 575 (2010); *cf.* Marcia E. Mulkey, *A Crisis of Conscience and the Government Lawyer*, 14 TEMP. POL. & CIV. RTS. L. REV. 649, 650 (2005) ("government lawyers are often defensive about offering policy advice," as distinguished from legal advice).

148. See Watts, *supra* note 147, at 35–39 (noting the "widespread acceptance" of the view "that many policymaking decisions made by agencies cannot be resolved through a myopic technocratic lens but rather are highly political decisions that should be made by politically accountable institutions").

149. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987) (stating that an agency is free to consider non-statutory factors, but cannot "substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority

therefore have every incentive not to document or discuss whatever political considerations they do take into account, and to craft records that plausibly defend their conclusions without reference to such factors.<sup>150</sup> There is debate about whether this incentive is pernicious, and whether agencies should be permitted explicitly to consider and discuss political factors leading to their decisions.<sup>151</sup>

Most scholars participating in this debate understand “political” to mean not only “non-technocratic” but “external,” coming from the President or the Congress. This is a somewhat narrower category than the notion I am defending in this Section of public-regarding policy preferences independent of the statute. But such reasons are surely an instance of such independent preferences. So, if the President urges an agency to adopt one interpretation rather than another because he hopes to benefit a particular state or region in economic distress,<sup>152</sup> or if the chairman of the relevant oversight committee does so in order to protect an industry important to his constituency, these are reasons that are public-regarding but not anticipated by the statute or fairly embraced by any reasonable interpretation, even a purposive one, of that statute. If, then, Professor Kathryn Watts and others are correct that there is a legitimate place for politics in agency decisionmaking, then there are some cases where **A** (the agency’s “best” interpretation from its internal perspective) and **B** (the interpretation that best advances the agency’s policy preference) are not the same even for the purposively interpreting agency.<sup>153</sup>

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under the statute”; agency action must be “squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area”).

150. Watts, *supra* note 147, at 43 (“[P]olitical factors influencing agency decisions are kept out of the public’s eye and are not subject to open public scrutiny.”); *accord* Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1129 (2010).

151. Watts, *supra* note 147, at 7–8.

152. Hard questions, not considered here, are whether it should count as a public-regarding reason if the President’s motive is not to ameliorate economic distress but to carry the hard-pressed region in his reelection bid, or if the committee chair is concerned with the important industry not because of her constituents’ jobs but in order to stay in the good graces of its lobbyists. President or chair would often not communicate these true motives to the agency, but agencies would just as often nevertheless be equipped to identify them with confidence. See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1831 & nn.111–113 (2011) (citing other scholars); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f (2000) (“Courts have stressed that a lawyer representing a governmental client must seek to advance the public interest in the representation and not merely the *partisan* or personal interests of the government entity or officer involved . . . .” (emphasis added)).

153. The caveat should be noted that for the camp of administrative-law theorists known as “unitarians,” who believe that agencies are truly mere agents of the president, presidential

This conclusion is consistent with the position of the Office of Legal Counsel (“OLC”), an executive-branch entity which itself often reviews agencies’ statutory interpretations. The Office felt no need to take a stand regarding the relative merits of textualism, purposivism, or any other interpretative method in order to declare that the “OLC must provide advice based on its best understanding of what the law requires— . . . even if that appraisal will constrain the Administration’s or an agency’s pursuit of desired practices or policy objectives.”<sup>154</sup> The role of the OLC is to provide “dispassionate legal analysis”—notwithstanding that, as Dean Trevor Morrison points out, “as an office within the Executive Branch, OLC views the law through a particular lens, and thus . . . its best view of the law might legitimately differ on some issues from that of a differently situated actor.”<sup>155</sup> Even as role inflects interpretation, interpretation remains distinct from policy preference.

None of this implies, of course, that the agency’s preferred policy, determined exclusively with regard to public-seeking criteria, *must* diverge from its preferred interpretation, arrived at in a purposive fashion. In many cases, we should expect the two to be the same. This will be particularly true for regulatory statutes that have a Progressive-era generality to them, directing agencies to act “in the public interest,” to set criteria in the best judgment of the agency, or some similarly vague mandate. It will also frequently be true for a category of statutes that Professor Kevin Stack identifies, those that explicitly direct agencies to “carry out” the statute’s purpose.<sup>156</sup> Nor do these define the universe of such cases. *Chevron* itself is a case where **A** and **B** were likely the same; so is *Judulang*, the case in which the Court said (“in this case”) that *Chevron*’s step two and *State Farm* were coextensive inquiries.<sup>157</sup>

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preferences are not properly understood to be external to agency deliberation. See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1083 (1986); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2325 n.314 (2001) (reviewing literature); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 957 (1980). A president’s policy preferences could, in unitarian terms, help to establish his purposive interpretation of the statute. Even for unitarians, however, some legitimate presidential preferences—for example, the desire to carry a particular state in an upcoming election—are distinct from any possible purposive analysis of statutory meaning.

154. Barron, *supra* note 116, at 1.

155. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1456, 1467 (2010).

156. Stack, *supra* note 14, at 889 & n.73 (also giving examples of such statutes).

157. See *supra* note 134.

But there will be cases in which **A** and **B** will diverge. There is no reason to think such cases will be rare, especially in light of Strauss's analysis. It is these cases that confront agencies with an ethical dilemma: How to choose?

## II. THREE THEORIES (TWO OF THEM WRONG) OF ETHICAL AGENCY INTERPRETATION

This Part argues that when an agency finds itself in a situation with the following features—

- (1) It identifies reasonable interpretations **A** and **B**.
- (2) For legitimate reasons unconnected to interpretation, it would prefer to act based upon **B** rather than **A**.
- (3) It concludes that **A** is superior to **B** as a matter of interpretation.
- (4) Because **B** is nevertheless a reasonable interpretation, a reviewing court would enforce an action predicated upon either **A** or **B**.

—the agency has an ethical duty to adopt interpretation **A**. The obligation to do so follows from the agency's role as final, authoritative interpreter of the statute. The role itself follows from the practice of judicial deference.

This argument therefore rejects two other views: that deference constitutes permission given to the agency to adopt any interpretation it likes within the deference space, and that deference is not relevant to agency obligation at all. This Part first describes these two views and then rejects them in favor of the argument that the paramount duty of an agency anticipating deference is to interpret the statute.

### *A. Deference as Permission*

Many agencies and commentators appear to understand deference as judicial permission for an agency to adopt at its pleasure *any* interpretation that the agency plausibly expects to survive deferential review.

I think this view is broadly held. However, there are very few contexts in which it is in agencies' interest to articulate such an understanding. Evidence for its prevalence (or lack thereof) is therefore hard to come by. There is some. In Professor Christopher Walker's survey of agency rule-drafters, an enormous majority (ninety percent of

respondents) report “using” the *Chevron* doctrine in their work.<sup>158</sup> Walker’s survey questions, although rich on many dimensions, do not make clear in what sense that doctrine might be “used.”<sup>159</sup> Nevertheless, Walker strongly suggests the view of *Chevron*-as-permission is dominant when he quotes a respondent’s comment as an exemplar of the “minority view”:

I generally try to make a rule conform with a statute as much as possible. If the statute has gaps, I rely on my agency’s technical expertise for the best, most reasonable way to fill them. . . . I think of it in terms of what is practicable and honest, not what the court cases specifically say.<sup>160</sup>

This respondent, who feels an independent duty to “conform” his rule to the statute, represents the approach of a small minority.

There is also some positive anecdotal evidence for the prevalence of the deference-as-permission view. Important and often cited is Professor E. Donald Elliott’s on-the-scenes account of the impact of *Chevron* at the Environmental Protection Agency.<sup>161</sup> Elliott reports that prior to *Chevron*, the EPA Office of General Counsel supplied statutory interpretations that embraced a “ ‘single-meaning’ conception of statutes.”<sup>162</sup> The Office conceived of the statute as a “prescriptive text having a single meaning, discoverable by specialized legal training and tools.”<sup>163</sup> After *Chevron*, the Counsel’s Office switched gears, no longer claiming that the statute “possess[ed] a single prescriptive meaning on many questions.”<sup>164</sup> Rather, Office of General Counsel (“OGC”) opinions began to describe

a “policy space,” a range of permissible interpretive discretion, within which a variety of decisions that the agency might make would be legally defensible to varying degrees. So the task of OGC today is to define the boundaries of legal defensibility, and thereby to recognize that often there is more than one possible interpretation of the meaning of key statutory terms and concepts. *The agency’s policy-makers, not its lawyers, should decide which of several different but legally defensible interpretations to adopt.*<sup>165</sup>

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158. Walker, *supra* note 14, at 1062.

159. *Id.* at 1073–75. This is no fault of Walker’s, whose research questions focused upon different issues.

160. *Id.* at 1062.

161. E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 3 (2005).

162. *Id.* at 11.

163. *Id.*

164. *Id.* at 12.

165. *Id.* (emphasis added); accord Mashaw, *supra* note 14, at 532–33 & nn.71, 73.

*Chevron*, Elliott concludes, “opened up and validated a policy-making dialogue within agencies about what interpretation the agency *should* adopt for policy reasons, rather than what interpretation the agency *must* adopt for legal reasons.”<sup>166</sup> As a result of *Chevron*, “EPA and other agencies are now more adventurous when interpreting and elaborating statutory law.”<sup>167</sup> There is “every reason” to imagine that *Chevron* had similar impacts in other agencies, even though neither Elliott nor the broader literature documents such.<sup>168</sup>

The “policy space” that Elliott describes is identical to Professor Strauss’s *Chevron* space, the range of reasonable-and-therefore-permissible interpretations of an ambiguous statute.<sup>169</sup> A statute, says Strauss, “empower[s]” agencies with “authority” to select any interpretation within its *Chevron* space.<sup>170</sup> Elliott is saying that EPA felt constrained *only* by policy when choosing among options in the *Chevron* spaces defined by its statutes. This is exactly the approach advocated by Professors Pierce and Foote, whose views are described above.<sup>171</sup> Pierce and Foote claim that agencies should be described primarily as engaged in policymaking rather than statutory interpretation, and in particular that agency decisions that would be reviewed under *Chevron* step two (in Strauss’s terms, a choice within a multivocal *Chevron* space) are *policy* choices. The characterization of these moves as policy decisions suggests that policy preferences are their sole driver.

Professor John Willis, making a somewhat different argument about Canada in the late 1960s, similarly implies that agency lawyers should and do identify more strongly with the “social policy” of their particular agency and less with the “legal policy” concerns of the Canadian Attorney General.<sup>172</sup>

More recently, the theory of deference as permission has been a barely concealed subtext of expansive approaches to executive action adopted by an Obama Administration frustrated by congressional opposition and inaction. This practice has been both justified and debated primarily in terms of the reach of the president’s core

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166. Elliott, *supra* note 161, at 12.

167. *Id.* at 3.

168. Sunstein, *supra* note 8, at 2599–2600.

169. Strauss, *supra* note 6, at 1143, 1160.

170. *Id.* at 1145.

171. *See supra* Part I.E.

172. Willis, *supra* note 140, at 354.

constitutional “executive power” and the limits of his “prosecutorial discretion.”<sup>173</sup> But executive action also often involves aggressive statutory interpretation. In the gun control context, for example, the President’s frustration with congressional unwillingness to constrict the easy the availability of firearms led him to instruct subordinates to, in the words of a spokesman, “scrub existing legal authorities to see if there’s any additional action we can take administratively.”<sup>174</sup> Law professor and blogger David Bernstein, acknowledging that Obama’s man probably meant to say “scour” rather than “scrub,” notes the statement as intended assumes a particular version of how to advise the President regarding executive power: not to “first decide what’s lawful, and then give the president his options, [but] first seeing what the president wants to do, and then scour[ing] legal authorities to find some implausible but not crazy legal hook for his actions.”<sup>175</sup> “Implausible but not crazy” is an imperfect but serviceable restatement of this version of the *Chevron* step-two standard.

Finally, there is a formal literature on the practice of agency interpretation. The models that this literature specifies consistently assume that agencies maximize their preference in a policy space, subject only to the external constraints of judicial review.<sup>176</sup> Professor Matthew Stephenson’s model of tradeoffs between formality of agency procedure and interpretive flexibility, for example, proceeds on the assumption that agencies are “interpretive instrumentalists, attaching no intrinsic importance to textual fidelity or analogous concerns.”<sup>177</sup> A

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173. See U.S. CONST. art. 2, § 1; *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

174. Jennifer Fermino & Larry McShane, *Gun Control Regulations Likely a Part of President Obama’s New Year’s Resolutions*, N.Y. DAILY NEWS (Dec. 31, 2015, 8:23 PM), <http://www.nydailynews.com/news/politics/obama-plans-announce-gun-control-regulations-2016-article-1.2481810> [<https://perma.cc/PL5Q-GHTQ>] (quoting presidential spokesman Eric Shultz).

175. David Bernstein, *Obama: “Scrub Existing Legal Authorities” to Take Executive Action on Guns?*, VOLOKH CONSPIRACY (Jan. 1, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/01/obama-scrub-existing-legal-authorities-to-take-executive-action-on-guns/> [<https://perma.cc/2F3E-A5FD>]. Bernstein’s post credits earlier coverage by blogger and professor Josh Blackman.

176. See, e.g., Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95, 96 (2010) (“In the model, the agency, which maximizes some objective function, adopts a rule that interprets a statute . . .”); John R. Wright, *Ambiguous Statutes and Judicial Deference to Federal Agencies*, 22 J. THEORETICAL POL. 217 (2010). Wright also models judicial behavior as maximizing an objective function defined over a policy space, Wright, *supra*, at 226.

177. See Stephenson, *supra* note 71, at 536, 544.

given agency simply wants to “secure whatever interpretation would best advance its substantive policy agenda.”<sup>178</sup>

So too, in a model developed by Professor Yehonatan Givati, agencies are motivated by a desire to maximize some output: an environmental agency looks for the interpretation that will maximize environmental protection, a tax agency for the interpretation that will maximize government revenue, and a prosecutors' office for the one that will maximize the number of cases.<sup>179</sup> Professor John Wright similarly models agency decisions regarding the implementation of certain statutes as ones where “the agency can essentially choose any rule and corresponding policy outcome.”<sup>180</sup> Stephenson's model rests upon a tension between a court's desire to secure its “own view of the best reading of the statute” and its desire “to maximize the agency's ability to advance its policy agenda.”<sup>181</sup> He calls the former the “textual plausibility” of the statute, and says that when it is high relative to the latter, this indicates a “more aggressively textualist” court.<sup>182</sup> On the other hand, Stephenson calls a court relatively more inclined to help an agency secure its policy goals one that shows greater “intrinsic deference” to the agency.<sup>183</sup> (In other words, Stephenson models nontextualism as a willingness to accept less good interpretations in order to facilitate better policy.) It is courts that the modeling literature generally casts in the role of caring about legal fidelity, or the “best” meaning of the statute in a noninstrumental way,<sup>184</sup> as against policy-driven agencies.

It is natural for modelers to think of players who maximize utility subject to constraint. This is their basic professional instinct. And of course they make no formal claim that actual institutions behave as abstract ones do. Policy-maximization is an assumption.<sup>185</sup> Stephenson even concedes that “[i]t is of course possible that some agency personnel, particularly agency lawyers, may feel some intrinsic obligation to respect the statutory text.”<sup>186</sup> But there is an unspoken

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178. *Id.* at 535.

179. Givati, *supra* note 176, at 102 & n.5.

180. Wright, *supra* note 176, at 222.

181. *See* Stephenson, *supra* note 71, at 541.

182. *See id.* at 542.

183. *See id.*

184. Givati, *supra* note 176, at 96 (modeling courts as “nonstrategic” actors); Stephenson, *supra* note 71, at 535.

185. Stephenson, *supra* note 71, at 535.

186. *Id.* at 535 n.22.

claim that the modeling assumptions are at least plausible, that, in Givati's words, the models can help explain "[h]ow administrative agencies choose their statutory interpretation."<sup>187</sup> The reason that these models are of interest (and they are) is that their assumptions enjoy some level of plausibility.

That models in which agencies feel free to maximize policy preferences within their deference space are interesting and useful does not imply that agencies do not have or are not thought to have ethical constraints when they make their decisions. This is obvious when one considers models of judicial behavior that treat *courts* as maximizing their policy preferences subject to constraints.<sup>188</sup> This in no way implies that judges have no ethical constraints.<sup>189</sup> Rather, the models are helpful because they shed light upon a limiting case: they describe what judges have the power to do, and what might happen were they to exercise that power. That is different from saying what judges should or even will do. The same is true for agencies.

To be sure, such models of judicial behavior do respond to a suspicion that some judges, some of the time, *do* maximize policy preferences.<sup>190</sup> The agency models I describe here, I think, even more strongly reflect a parallel suspicion. The models participate in an assumption in our legal culture about agency freedom of action within the deference space.

To know what an agency truly thinks about the ethics of deference, much less what agencies in general think, is often not possible. As I note in the Introduction, ethics are invisible. But it does appear that many agencies often think that it is appropriate for them to range freely across the deference space in order to achieve legitimate policy goals.

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187. See, e.g., Givati, *supra* note 176, at 95.

188. See, e.g., Mathew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law*, in OXFORD HANDBOOK OF POLITICAL ECONOMY 273, 274–77 (Barry R. Weingast & Donald A. Wittman eds., 2006); McNollGast, *The Political Economy of Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1651, § 7.1 at 1716–18 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“Scholars of law and politics typically regard judicial decisions as subsequent to legislation. From this perspective courts are omnipotent actors, imposing any outcome they wish.”).

189. See McNollGast, *supra* note 188, § 7.1, at 1716 (noting judicial preferences may flow from “normative principles of law, moral philosophy, policy preferences or ideology”). In Stephenson’s model of policy-driven agency interpretation, by contrast, he assumes that a reviewing “court, all else equal, prefers interpretations that correspond as closely as possible to its own view of the ‘best’ reading of the statute.” Stephenson, *supra* note 71, at 537. Judge Brett Kavanaugh similarly asserts that “judges should strive to find the best reading of the statute.” See Kavanaugh, *supra* note 11, at 2144.

190. Stephenson, *supra* note 27, at 307–08.

### *B. Deference as Abstention*

A better understanding of deference is that it simply does not speak to how agencies should select alternative readings of a statute from within a deference space. It surely does not imply that all alternatives within the space are equally valid. Rather, all that deference does is assign the choice of alternatives to the agency, and require judges not to second-guess that choice.

This is vivid from the language and structure of the major deference cases. Part II of *Chevron* itself, in which the Court states the famous two-step rule in general terms, begins straightforwardly: “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions.”<sup>191</sup> These questions confront the court, not the agency. *Chevron* describes its deferential “step two” in this way: “A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>192</sup> This limits the court, not the agency. *Mead*, similarly, frames its holding as defining the circumstances in which a “reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise.”<sup>193</sup> This should not be read as an invitation to agencies actually to be “unwise.” To tolerate failure is not to equate failure with success.

This view is also essential to the arguments of scholars who advocate agency attention to statutory purpose even when courts do not and even perhaps should not engage in purposivist interpretation themselves.<sup>194</sup> Such arguments assume that the process of interpretation in an agency can and ought to be distinct from whatever interpretive processes might be anticipated in a reviewing court.

Deference holdings are directed to the courts. They treat methods of agency decisionmaking as exogenous.

There is some positive law about agency interpretation in *Chevron*. *Chevron* and its sister deference cases of course rest upon the APA idea that reviewing courts must set aside unreasonable agency action.<sup>195</sup> This imposes (really, reiterates) a reasonableness

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191. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

192. *Id.* at 844.

193. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

194. *See supra* notes 103–113 and accompanying text.

195. 5 U.S.C. § 706(2) (2012).

requirement upon the agency. *Chevron* also says that “an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”<sup>196</sup> This tells agencies that they may permit at least some kind of policy-inflected preferences to influence their decisions.

But to inform judgment is not the same as to direct judgment. There is plenty of room to read this latter passage as approving of purposive interpretation that is in line with the administration’s sense of congressional purpose. And, obviously, the rule that no agency interpretation may be unreasonable does not imply that agencies may promulgate any reasonable interpretation. There are neither formal nor prudential reasons to imply from the propositions either that unreasonable constructions will be set aside or that reasonable ones will be upheld that the agency is itself *entitled* to promulgate any reasonable interpretation.

### *C. The Paramount Duty of Fidelity to the Statute*

The best understanding of deference is not just that it is agnostic with respect to interpretation, but that it assumes that agencies have a duty, independent of the courts, to interpret the statute as best they can. A court must uphold the law, at least with respect to any matter that it resolves.<sup>197</sup> Therefore, it seems that a minimal prerequisite for a court to defer to an interpretation promulgated by a non-judicial authority is that the thing being deferred to itself be an interpretation.

The guiding intuition that underlies this view is that legal grants of power, and legal restrictions upon that power, must be understood as prior to the exercise of the power they delineate. This intuition is at the root of Professor Bernstein’s claim that “[o]ne would hope . . . that [Obama’s] legal team would first decide what’s lawful, and then give the president his options, rather than first seeing what the president wants to do, and then scour legal authorities to find some implausible but not crazy legal hook for his actions.”<sup>198</sup> This same intuition undergirds arguments, which proceed from politics very

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196. *Chevron*, 467 U.S. at 866.

197. Unlike the political question doctrine, for example, deference does not suggest that challenges to agency interpretations are situations in which courts have no prerogative to say what the law is.

198. Bernstein, *supra* note 175.

different from Bernstein's, that agency statutory interpretation is and should be self-consciously purposivist.<sup>199</sup> These accounts emphasize that agencies believe consideration of purpose to be the best way for agencies to understand the intent of Congress. Such accounts emphasize the agency of agencies. They subordinate agency preferences to the effort to identify the meaning of legislation.

Professor Bernstein is wrong to insist that interpretation of the law must be first in time, *temporally* prior to any view about what an ideal policy outcome should be.<sup>200</sup> But interpretation should be *intellectually* prior. Interpretation that is faithful to law must be a process distinct from an effort simply to justify, however possible, an already-determined desired legal outcome. To be sure, this is no easy task; agencies are no different than the rest of us in their ability to convince themselves that what they already want to do is, indeed, the right thing to do. But they must be on guard against such self-deception. Return to the image suggested by Professor Strauss, of the agency lawyer with a policy agenda hard at work in a library of legislative materials, seeking to understand whether her agenda accords with the purpose of the statute as those materials define it.<sup>201</sup> To interpret a statute in good faith cannot be a process where one fires at a blank wall and then draws a target around the point of impact.

This understanding does not view *Chevron* as merely a "*magna carta* of deference, mandating greater respect for *administrative* interpretations than had theretofore been the case."<sup>202</sup> It denies that *Chevron*, properly read, "equivocates whether the agency's action was 'interpretation' strictu sensu or the implementation of a policy judgment permitted by the statutory language."<sup>203</sup> It privileges instead the more particular and apt analogy that *Chevron* is a counter-*Marbury*.<sup>204</sup> *Chevron* holds, in Professor Sunstein's words, that "[i]n the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is."<sup>205</sup>

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199. See *supra* notes 103–113 and accompanying text.

200. Bernstein, *supra* note 175.

201. Strauss, *supra* note 14, at 330–31.

202. Merrill, *Textualism*, *supra* note 76, at 358.

203. Strauss, *supra* note 6, at 1163.

204. Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637 (2003) ("*Chevron* . . . is routinely referred to as the 'counter-*Marbury*.'"); Foote, *supra* note 95, at 724.

205. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006) (citing, for example, Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 301–03 (1988); Kenneth W. Starr, *Judicial Review in*

The view that the agency is saying what the law is necessarily implies that the EPA, in the run-up to *Chevron*, was interpreting the Clean Air Act and *not* merely “implement[ing] a policy judgment permitted by the statutory language.”<sup>206</sup> The point of *Chevron* is not to free the EPA and its sister agency from overweening judicial second-guessing, as the barons were freed from the tyranny of King John. Rather, it is to assign to the agency final responsibility to declare that a contemporary Marbury has or lacks a particular legal entitlement. The agency is therefore duty-bound to do so as best it can. Like a court interpreting a statute nondeferentially (or without the benefit of any agency interpretation), an agency is subject to legislative supremacy: its mandate is to “say what the law is, not what the law should be.”<sup>207</sup> It must give force to the meaning it understands the statute to have.

This is only true, however, in situations where Sunstein’s “in the face of ambiguity” caveat applies.<sup>208</sup> Only when the courts defer does the agency say what the law is.

The understanding is justified even more strongly from the agency side. Statutes are the *sine qua non*—that without which there is nothing—for agencies. Agencies exist as pure creatures of their statutes.<sup>209</sup> As Professor Miller argued in 1987, one cannot ethically even assist an agency in acting if it cannot claim statutory authority, “since without statutory authority there is . . . no bona fide claim of constitutional power to act.”<sup>210</sup> Statutes are what create agencies’ duties.<sup>211</sup> When agencies interpret a statute with finality, therefore, fidelity to statutory meaning must override policy, adherence to a political agenda, or considerations of the public good. Without fidelity to the statute, agency power is *ultra vires* and illegitimate.

This approach is broadly consistent with the view of other scholars who have considered agencies’ duties with respect to their statutes in our system of agency law. Professor Stack, for example, also emphasizes that the “most basic feature of a regulatory statute is the

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*the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283–84 (1986)); see also Monaghan, *supra* note 3, at 5 (anticipating this issue before *Chevron*); Sunstein, *supra* note 8, at 2580, 2583–84, 2588.

206. Strauss, *supra* note 6, at 1163.

207. Kavanaugh, *supra* note 11, at 2119, 2120. As Kavanaugh notes repeatedly, this is “not always easy.” *Id.* at 2121, 2145.

208. Sunstein, *supra* note 205, at 189.

209. Jeffrey Rosenthal, *Who is the Client of the Government Lawyer?*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR, *supra* note 30, at 17, 18.

210. Miller, *supra* note 54, at 1297.

211. Stack, *supra* note 14, at 888.

vesting of lawmaking and other powers in the agency. An agency 'literally [has] no power to act . . . unless and until Congress confers power upon it.'<sup>212</sup> As noted, Stack goes further and claims that agencies under many regulatory statutes bear duties with respect to the particular method of interpretation.<sup>213</sup> For reasons described above, I am unready to call this additional duty a matter of agency ethics in role.<sup>214</sup> But Stack is right that the analysis of duty begins with the source of agency power.

Professor Criddle similarly begins from the position that agencies' duties flow from their authorizing statutes. "At its heart," he writes, "administrative law governs the exercise of entrusted authority by institutions that serve as stewards for the people. The terms of an administrative agency's enabling statute reflect the type and degree of trust that the people, through their elected representatives, have chosen to repose in the agency."<sup>215</sup> This is exactly right. But I reason more narrowly from this proposition than Criddle. Criddle thinks that this proposition creates a general duty, by which "administrative agencies' fiduciary obligations do not run solely to the chief executive or the legislature *per se*, but rather to the agencies' statutory beneficiaries, who are often, but not always, the sovereign people as a whole."<sup>216</sup> Such duties, in my view, must be limited by the meaning of the "terms of the enabling statute." Some statutes surely permit consideration of a generalized public interest; but that is a particular interpretive conclusion about a particular statute. Such a conclusion must be logically and ethically prior to the acceptance of any such duty.

When agencies are extended deference, therefore, they do not gain *carte blanche* to use interpretation as a tool to achieve desired ends. They must instead interpret in good faith. This is unlike the responsibilities, say, of a private citizen, who is entitled to pick the interpretation of an unclear legal requirement that she likes the best and act accordingly, aware that eventually some authoritative decisionmaker may determine the proper interpretation for itself in a way that then would become binding upon her and upon others.

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212. *Id.* (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

213. *Id.* at 888–89.

214. *See supra* Part I.B.

215. Criddle, *supra* note 48, at 136.

216. *Id.* at 139.

It is also very unlike the ethical directive to federal prosecutors to “do justice” when enforcing the law.<sup>217</sup> This is because agencies are diametrically different than prosecutors. They have different institutional roles. Prosecution is an inherent and foundational part of the executive function, separate by its nature from the business of lawmaking.<sup>218</sup> Agencies, by contrast, are entirely animated by their statutes.<sup>219</sup> They should understand their duty not as seeking the generalized public good but as maintaining fidelity to their statutes.

Dean John Feerick, speaking generally about public-sector ethics, cites the “Athenian Oath.”<sup>220</sup> The text of this oath as it has come down to us refers to a duty to “revere and obey the city’s laws and do our best to incite to a like respect and reverence those who are prone to annul or set them at naught.” Feerick asserts that this “captures all the ideals of public office as a public trust.”<sup>221</sup> With respect to agencies, at least, he is right. Respect for the law is their first duty. Policy comes second.

### III. IMPLICATIONS AND EXTENSIONS

#### *A. Consistency and Precedent*

When an agency construes a statute, it says what the law is. Agencies therefore must respect the jurisprudential (better, “regleprudential”) values that accompany law declaration, although this respect can take a different form that it does in courts.<sup>222</sup> Among the most important such values are consistency, predictability, and respect for precedent.

Citizens might expect two kinds of consistency from agencies with respect to statutory interpretation. One is *intra-agency* consistency: an agency (within a particular agency head’s term or, in the case of independent regulatory bodies, between each incident of member turnover) should perhaps use a consistent interpretive methodology for all of its decisions. The other is *inter-agency*

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217. See *supra* Part I.B.

218. *Morrison v. Olson*, 487 U.S. 654, 689 (1988); see also *id.* at 706 (Scalia, J., dissenting) (stating that prosecution “[is] conducted never by the legislature, never by the courts, and always by the executive”).

219. Whether agencies share criminal prosecutors’ ethical duty to do justice when they exercise their own investigative and prosecutorial functions is discussed *infra* Part III.D.

220. Feerick, *supra* note 30, at 2–3.

221. *Id.*

222. See Davidson & Leib, *supra* note 15, at 270–71; Morrison, *supra* note 155, at 1493–97.

consistency: perhaps the President should attempt to harmonize methods of statutory interpretation across the agencies, or at least all line agencies within his administration, rather than leave the jurisprudential theories of interpretation to the preferences of each individual agency. Can the same President have a textualist EPA but a purposivist OSHA? Or should voters be asked to decide whether they prefer a textualist administration or a purposivist one? (One should not pretend that either a shorthand label or a lengthy exposition of interpretive principles would find universal acquiescence throughout the government, resolve all questions, or induce uniformity among agencies.)

These questions, especially the latter one, have important theoretical implications relating to lines of authority in the administrative state. In practice, however, they are moot. An agency or a president who wants to vary methods of interpretation, and has public-regarding reasons for doing so, is saying that she thinks that one method fits a given statutory problem or policy situation or regulatory field better than another. But this is not really switching methods. Rather, such an agency is consistently implementing the method of interpretive pragmatism. As Judge Wald has written:

For most of our history, American judges have been pragmatists when it comes to interpreting statutes. They have drawn on various conventions—the plain meaning rule, legislative history, considerations of statutory purpose, canons of construction—“much as a golfer selects the proper club when he gauges the distance to the pin and the contours of the course.”<sup>223</sup>

One can therefore hardly object to interpretive pragmatism, within or among agencies, as inconsistent.

This does not imply that an agency could not declare a consistent commitment to a particular interpretive method. Similarly, a president might commit to a particular method of reading statutes, say so publicly, and seek to induce agencies to adopt that method.<sup>224</sup> It is particularly easy to imagine in our current political climate a stated commitment to textualism by an agency or an entire administration. But departures from a preferred interpretive method in a given case, whether a single action or a particular agency, are not problematic

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223. Wald, *supra* note 97, at 215–16 (1983) (quoting a conversation with Judge Leventhal); see also Merrill, *Textualism*, *supra* note 76, at 351.

224. Whether a President could require agencies to be textualist depends on whether he enjoys direct authority over agency decisions; this is the subject of substantial debate. See *supra* note 153. It is clear that many scholars would argue strenuously that a President *should* not, for reasons of policy, seek such a requirement. See *supra* notes 111–113 and accompanying text.

because they are *inconsistent*. If such departures are problematic at all, it is because the relevant interpreter opposes pragmatic interpretation. Presidents and agencies are ethically entitled to be as pragmatic or dogmatic as they choose.

Respect for precedent is a related value, especially when agency decisions, like courts', are adjudicatory in nature. How are agencies' duties to assign a statute its best reading affected if there is a prior, authoritative statement of what the statute means?

Two situations must be distinguished. The first: An agency in the past interpreted the statute one way; today's agency, were it deciding *de novo*, would not agree that this is the best interpretation. Should the agency discard the prior interpretation, or may it properly accept what it now views as second-best interpretation in order to conform to its own precedent?

This scenario imagines facts similar to those presented by a 2009 case decided by the Supreme Court, *Federal Communications Commission v. Fox Television*.<sup>225</sup> In a series of successive decisions spanning decades, the Federal Communications Commission ("FCC") had repeatedly changed its mind regarding whether evanescent utterances of vulgar terms on television violated the statutory requirement that holders of broadcast licenses not "utter[] any obscene, indecent, or profane language by means of radio communication . . . ."<sup>226</sup> In its most recent flip-flop, the Commission had imposed liability on several networks for broadcasting such "fleeting expletives."<sup>227</sup> Those penalized asked the Supreme Court to impose a more stringent variety of arbitrary and capricious review when an agency had reversed its own precedent than would have been imposed had the agency reached the same decision as a matter of first impression.<sup>228</sup> But the Supreme Court declined to do so. The Administrative Procedure Act and the Court's precedents, it said, "mak[e] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."<sup>229</sup>

*Fox TV* is not our case. It concerns judicial review rather than agency deliberation, and was framed entirely as a question of arbitrary and capricious review, never even mentioning *Chevron* deference. But the *Fox TV* scenario allows us to ask whether the FCC in 2004, if it in fact believed that the statutory phrase "obscene, indecent, or profane

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225. 556 U.S. 502 (2009).

226. 18 U.S.C. § 1464 (2006); discussed in *Fox Television*, 556 U.S. at 506.

227. *Fox Television*, 556 U.S. at 510–12.

228. *Id.* at 514.

229. *Id.* at 515.

language” was best understood to embrace fleeting expletives, would nevertheless have been ethically entitled, had it wished to do so, to adjudicate the case using prior precedent. More plausibly, perhaps, one might ask whether an Obama-era FCC could have left the more stringent fleeting expletive prohibition in place even if, had it been writing on a clean slate, it would have thought that the statute did not reach offhand, momentary profanity.

This is a hard question because respect for precedent is a category of reason that is neither about statutory interpretation nor about policy. Rather, it is a process value. It is unhelpful, I think, to resolve it simply by insisting upon the formulation that statutory fidelity is a primary, even paramount value for agencies, and so precedent should fall before it. Statutory fidelity is also such a value for courts, yet the courts give special weight to *stare decisis* in statutory interpretation cases.<sup>230</sup>

On the other hand, it is unsatisfying simply to import the judicial principle of strong statutory *stare decisis* into the agency context. There are good normative reasons to challenge the principle,<sup>231</sup> and good data suggesting that the principle itself is sometimes honored in the breach.<sup>232</sup> Moreover, one justification for strong statutory *stare decisis* in the courts is the separation of powers: it serves to limit judicial policymaking in the guise of ever-shifting interpretation.<sup>233</sup> In this respect, agencies are situated differently from courts. Their institutions are explicitly intended to make policy and to shift in their policy views with evolving circumstances and the political winds.<sup>234</sup>

Ultimately, I think, agency respect for precedent must be a matter of degree. A precedent today's agency thinks entirely wrongheaded should be rejected, but one that is just a bit off could, even should, ethically be tolerated. Today's agency is also entitled to consider what it knows about whether yesterday's agency behaved ethically, that

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230. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

231. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1385 (1988).

232. *Id.* at 1368–69; Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 182 & n.36 (1989) (collecting cases).

233. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 323–27 (2005); Marshall, *supra* note 232, at 208–11.

234. Marshall, *supra* note 232, at 224–25. The literature on this topic would benefit from a more thorough appreciation that statutory interpretation does not involve only the Congress and the courts, but also involves agencies, both as authoritative interpreters of statutes and as institutions with quasi-legislative powers.

is, whether it had selected what it genuinely and public-regardingly thought was the best interpretation.

The other species of potentially relevant precedent is judicial. In the companion cases of *National Cable & Telecommunications Ass'n v. Brand X*<sup>235</sup> and *United States v. Home Concrete & Supply*,<sup>236</sup> the Supreme Court considered whether agencies may promulgate interpretations inconsistent with constructions already blessed by an authoritative court. In *Brand X*, the Court held that agencies could do so, if the court had merely deferred to a reasonable agency interpretation under *Chevron*.<sup>237</sup> But, *Home Concrete* reiterated explicitly, agencies are bound by judicial interpretations issued with the understanding that there was no interpretive gap that the agency had been delegated to fill.<sup>238</sup>

These are *Chevron* issues. For our purposes, the *Home Concrete* decision is trivial: courts limn the boundaries of the *Chevron* space, and even an agency that disagrees can and should accept the judicial map, prospectively and certainly retrospectively.<sup>239</sup> But the *Brand X* scenario is a puzzler: the agency thinks that the best interpretation is **B**, but the court has already deferred to a prior interpretation **C**. *Brand X* holds that the agency *may* promulgate **B** notwithstanding; but the ethical question is whether the agency *must* as an ethical matter in this circumstance promulgate **B**, or whether it has ethical warrant to stick with **C** even though it judges it to be interpretively inferior.

The *Brand X* problem shares with its *Fox TV* analogue its jurisprudential (better, “regleprudential”) value of respect for precedent and its concomitant benefits: order, reliance, and respect for the law. Those benefits can be as compelling in the former situation as the latter. But the *Brand X* scenario differs from that of *Fox TV* in two relevant ways. First, there is a confusion of institutions. In the *Fox TV* scenario, an agency gives up what it views as the best interpretation of a statute in favor of an interpretation that a prior incarnation of the agency itself once viewed as the best. In the *Brand X* scenario, no agency has ever necessarily offered a best reading of the statute. For the agency to accept the judicial reading is therefore to cede agency authority to say what the law is to the courts. Moreover, on the *Brand X* facts, the court never says that the interpretation it confirmed was in fact the *best*

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235. 545 U.S. 967 (2005).

236. 132 S. Ct. 1836 (2012).

237. *Brand X*, 545 U.S. at 982.

238. *Home Concrete*, 132 S. Ct. at 1843.

239. *Accord* Miller, *supra* note 54, at 1298.

interpretation; it said only that it was a permissible interpretation of an ambiguous statute. Therefore, no authoritative decisionmaker has ever identified the best interpretation. Both of these differences, it seems to me, make the *Brand X* situation less unclear than the *Fox TV* situation, and counsel in favor of an agency indeed having a duty to promulgate **B**—the interpretation that it thinks best.

### *B. When Agencies Face Skidmore Deference*

In *Skidmore v. Swift*, a pre-*Chevron* case, the Supreme Court said that agency interpretations of a statutory term that were “not controlling upon the courts by reason of their authority” could “still constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>240</sup> “The weight of such a judgment in a particular case,” *Skidmore* continued, “will depend upon 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.”<sup>241</sup>

In recent times, the Supreme Court revitalized *Skidmore* by declaring, in *Mead*, that *Skidmore* is the relevant standard for reviewing many agency interpretations promulgated with procedures more informal than the notice-and-comment procedures defined by the Administrative Procedure Act.<sup>242</sup>

Given that I have argued for a duty borne by agencies only when they are subject to judicial deference, does that duty apply to agencies that will receive deference under *Skidmore* or its analogues? That depends on whether *Skidmore* is really *deference*. If it is, then agencies retain their duty. If not, as I argue in Part I.C, they are entitled to ignore their own best judgment and instead anticipate the courts.

*Skidmore* is certainly not deference in the way *Chevron* is. Under *Chevron*, agency interpretations receive deference because they are made by the agency. They are “controlling upon the courts by reason of their authority.”<sup>243</sup> At the same time, there are other senses of the term “deference” under which *Skidmore* clearly qualifies.<sup>244</sup> *Skidmore*

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240. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

241. *Id.*

242. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

243. *Skidmore*, 323 U.S. at 140.

244. Monaghan, *supra* note 3, at 5.

does involve deference, for example, in the view of Professors Jonathan Masur and Lisa Ouellette, who recently defined deference “to include any situation in which a second decisionmaker is influenced by the judgment of some initial decisionmaker rather than examining an issue entirely de novo.”<sup>245</sup>

For the purposes of the agency obligation to interpret, the question is whether *Skidmore* is the sort of deference that requires a court, in some situations, to endorse a statutory construction that it does not view as the best available.<sup>246</sup> This is the sense of deference that makes the agency into an authoritative interpreter of its statute, which in turn is what triggers its ethical obligation to adopt the best interpretation it thinks will survive review.<sup>247</sup> Absent final interpretive authority, the agency is entitled simply to anticipate the construction that it expects the reviewing court to adopt.

But it is doubtful that *Skidmore* in fact involves deference in this sense. *Mead* settles only that the Court *describes* *Skidmore* review as “deference,”<sup>248</sup> not whether it is deference of this sort. Given that *Skidmore* says that agencies are due its deference only to the extent that the agency’s views have the “power to persuade,” some, Justice Scalia chief among them, would insist that it is not “deference” in the relevant way.<sup>249</sup> But many judges and commentators understand *Skidmore* to involve, in some cases, a court agreeing with the agency without having been convinced. Professors Thomas Merrill and Kristin Hickman call it “an intermediate option” that “rescues courts from a stark choice between *Chevron* deference or no deference at all.”<sup>250</sup>

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245. Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 652 (2015).

246. See *supra* notes 6–8 and accompanying text; Monaghan, *supra* note 3, at 5 (“Deference, to be meaningful, imports agency displacement of what might have been the judicial view *res nova*—in short, administrative displacement of judicial judgment.”).

247. Monaghan, *supra* note 3, at 6 (“A statement that judicial deference is mandated to an administrative ‘interpretation’ of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency.”).

248. *United States v. Mead Corp.*, 533 U.S. 218, 234 (“*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form.”).

249. *Id.* at 239 (Scalia, J., dissenting) (referring to “so-called *Skidmore* deference”); see Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1252–55 (2007) (describing the “independent judgment model of *Skidmore* review”).

250. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001); accord Hickman & Krueger, *supra* note 249, at 1241 & n.22 (2007); Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 568–69 (2006) (describing *Skidmore* deference as a “weaker and more contingent type of deference” than that associated with *Chevron*).

Professor Eskridge and his collaborator call it “mildly deferential,” “a judicial willingness to go along.”<sup>251</sup> Professor Strauss, who advocates the term “*Skidmore* weight,” says that under *Skidmore* courts retain their independent judgment but give weight to agency opinions because they are often more informed, more uniform, more predictable, more experienced, and generally more savvy than courts’ own.<sup>252</sup>

Resolving this question is beyond the scope of this Article. Which view is right determines the ethics of interpretation in the shadow of *Skidmore* deference. If courts defer under *Skidmore* to agency interpretations they think are interpretively suboptimal, then agencies are saying what the law is and must promulgate the interpretation they think is interpretively the best. If courts will not accept interpretations with which they do not agree, agencies are both entitled and usually wise to privilege the courts’ anticipated interpretation over their own best interpretation of the statute.

### C. Agencies Interpreting Their Own Regulations

Another genus of deference is that accorded to agencies when they resolve ambiguities in their own regulations. In the classic case of *Bowles v. Seminole Rock & Sand Co.*,<sup>253</sup> and then again in *Auer v. Robbins*,<sup>254</sup> the Supreme Court instructed courts to defer to agency interpretations of agencies’ own regulations whenever those interpretations are not “plainly erroneous or inconsistent with the regulation.”<sup>255</sup> The Court limits such “*Auer* deference” to situations where there is no reason to suspect that the agency’s interpretation “does not reflect the agency’s fair and considered judgment on the matter in question.”<sup>256</sup> But if the agency is acting in good faith, *Auer* is to ambiguous regulations as *Chevron* is to ambiguous statutes,<sup>257</sup> except

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251. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1737, 1744 (2010).

252. Strauss, *supra* note 6, at 1146.

253. 325 U.S. 410 (1945).

254. 519 U.S. 452 (1997).

255. *Id.* at 461.

256. *Id.* at 462.

257. See *Coeur Alaska v. Se. Alaska Conservation Council*, 557 U.S. 261, 277–78 (2009); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996) (“The *Chevron* and *Seminole Rock* principles . . . are functionally similar.”).

that its “plainly erroneous” standard is even more deferential—in the hands of the Court, much more deferential—than *Chevron*’s reasonableness standard.<sup>258</sup>

Three sitting justices of the Supreme Court, along with the late Justice Scalia, have recently indicated—some of them repeatedly—that they are open to overruling *Auer*.<sup>259</sup> They express two primary concerns. The first, based upon separation of powers, is that legally binding text should not be promulgated and interpreted by the same agency.<sup>260</sup> *Chevron* deference respects this principle because the Congress legislates and the agencies interpret. But *Auer* does not, because agencies first promulgate rules and then, by the operation of deference, function as authoritative interpreters of those same rules.<sup>261</sup>

A second problem is more practical. *Auer* encourages, rather than discourages, ambiguity in rulemaking. If agencies know that courts will defer to any interpretation of a regulation not “plainly erroneous,” they will draft regulations in ways that maximize ambiguity, in order to be able to operate in as expansive a deference space as possible.<sup>262</sup>

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258. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516 & n.8 (2011) (finding the Court is “extraordinarily deferential” to agency interpretations of their own rules, and the courts of appeals somewhat less so (citing Eskridge & Baer, *supra* note 4, at 1142 & tbl.15)).

259. See *United Student Aid Funds, Inc. v. Bryana Bible*, 136 S. Ct. 1607, slip op. at 2 (2016) (Thomas, J., dissenting from the denial of certiorari); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., dissenting); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part); *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring) (Chief Justice Roberts, joined by Justice Alito, expressing general agreement with Justice Scalia’s disapproval of *Auer* but disagreeing that *Decker* was an appropriate vehicle through which to overrule the case). Professor Manning points out that other justices can also be understood to have endorsed some or all of these concerns. See Manning, *supra* note 257, at 615 (discussing Justice Thomas’s dissent, joined by Justices Ginsburg, Stevens, and O’Connor, in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 518 (1994) (Thomas, J., dissenting)).

The Congress also occasionally seeks explicitly specifically to overrule *Auer*. At this writing, the most recent attempt is H.R. 4768, 114th Cong. § 2(c) (2016) (proposing to amend the Administrative Procedure Act to provide that courts should “decide de novo all relevant questions of law, including the interpretation of . . . rules made by agencies”). Enactment is highly unlikely.

260. *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part); Manning, *supra* note 257, at 654 (“Given the reality that agencies engage in ‘lawmaking’ when they exercise rulemaking authority, *Seminole Rock* contradicts the constitutional premise that lawmaking and law-exposition must be distinct.”).

261. Manning, *supra* note 257, at 654.

262. *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part); *United Student Aid Funds*, 136 S. Ct. 1607, slip op. at 2 (Thomas, J., dissenting from the denial of certiorari); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1460–62 (2010).

Both of these concerns are rooted in the recognition that an agency to whose interpretations courts defer is authoritatively declaring what the law means. Justice Scalia's objections to *Auer* lead to one of the most direct acknowledgements in the United States Reports of Professor Monaghan's and Professor Sunstein's deference-as-*Marbury* claim:<sup>263</sup>

Making regulatory programs effective is the purpose of rulemaking, in which the agency uses its "special expertise" to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to "say what the law is," *Marbury v. Madison*, 1 Cranch 137 [ ] (1803). Not to make policy, but to determine what policy has been made and promulgated by the agency, to which the public owes obedience.<sup>264</sup>

Justice Scalia is clear here not only that agencies say what the law is, but that doing so involves a duty to interpret and "[n]ot to make policy."<sup>265</sup>

Were agencies to acknowledge a duty, when interpreting their own regulations, "*not* to make policy" but only to *interpret*, the concerns about the *Auer* doctrine that the Justices have expressed would be ameliorated, though not rectified. Agencies that scrupulously hewed to what they viewed as the best interpretation of an agency rule, regardless of their policy preferences, would have relatively little incentive to promulgate ambiguous rules that were purposely ambiguous. Even faithful purposivist interpretation would not allow agencies the free rein that Justice Scalia and his colleagues fear.

This does not solve the *Auer* problem; the separation of powers claim that interpretation and promulgation must be separate remains. But, as even Justice Scalia recognizes, deference is a compromise.<sup>266</sup> If there were a broad consensus that deference to agencies interpreting their own rules was not permission for agencies to act however they thought best, but demanded agency interpretation, that compromise might be more palatable.

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263. Monaghan, *supra* note 3, at 25.

264. *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part).

265. *Id.*

266. *See id.* at 1341 ("*Auer* deference has the same beneficial pragmatic effect as *Chevron* deference: The country need not endure the uncertainty produced by divergent views of numerous district courts and courts of appeals as to what is the fairest reading of the regulation, until a definitive answer is finally provided, years later, by this Court."); Pierce & Weiss, *supra* note 258, at 519; Stephenson & Pogoriler, *supra* note 262, at 1459.

*D. Agencies Exercising Their  
Investigative and Prosecutorial Functions*

Agencies routinely monitor the conduct of regulated entities, investigate alleged misconduct, and prosecute violations internally before agency tribunals. These activities perforce involve statutory interpretation. To investigate or prosecute the violation of a statute or regulation requires a judgment about what the statute or regulation means.

Consider, then, a statute that prohibits a range of behaviors and authorizes the agency to enforce that prohibition; but the scope of the statutory prohibition is ambiguous. We have established that a conscientious agency is obliged to conform its deference-worthy rulemakings and adjudicative decisions to what it regards as the best interpretation of that statute. But must it similarly conform its monitoring, investigative, and prosecutorial functions to that same, best interpretation? Or, could the agency investigate and prosecute activity not prohibited by the statute as the agency best understands it, but that would be prohibited under a competing, reasonable, but suboptimal interpretation of the statute? An agency might want to do this, if it were permissible. Investigation and prosecution could deter conduct that the agency wants to prevent as a policy matter—notwithstanding that, were the matter to come to a final adjudicative decision, the agency could not hold that it was forbidden.

The converse case, with somewhat different implications, would involve an agency whose best interpretation of a statute prohibits a wide range of conduct, but which had a policy preference for a narrower interpretation that is both reasonable and, from the agency point of view, interpretively suboptimal. Could such an agency direct its investigators and prosecutors to exercise discretion and ignore conduct that, under what it views as the best *interpretation* of a statute, is prohibited?

Assessing this problem demands a comparison between the adjudicative and rulemaking functions on the one hand, and monitoring, investigation, and prosecution on the other. The most obvious difference between the two sets of roles, of course, is that the latter group does not involve “final” agency action.<sup>267</sup> Monitoring, investigation, and prosecution are generally not subject to judicial

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267. 5 U.S.C. § 551(6) (2012).

review at all.<sup>268</sup> They are certainly not candidates for judicial deference, even of the *Skidmore* variety. If a final agency action that will not receive judicial deference need not conform to the best interpretation of the statute—as I have argued<sup>269</sup>—then it seems that a fortiori an agency need not conform its non-final activities, which receive no deference whatsoever, to that interpretation.

At the same time, monitoring, investigation, and prosecution involve interpretive discretion much like that associated with rulemaking and adjudication. Moreover, these functions are part of a single process that culminates in adjudication. The modal (though not universal) practice is for a single agency simultaneously to monitor, investigate, prosecute, and adjudicate.<sup>270</sup> An agency interpretation that leads it to investigate or prosecute some kinds of activity but not others has enormous consequences for the regulated public. Investigation and prosecution are the engines of adjudication. They determine what questions are heard and what interpretations are considered. And prosecutors themselves, in an important sense, are adjudicators; in particular, a case never prosecuted will never be adjudicated.<sup>271</sup> Investigation and prosecution are thus central parts of an agency's law declaration function.

To be sure, the Administrative Procedure Act, concerned about the combination of prosecutorial and adjudicative functions, imposes upon agencies an internal “separation of functions” that prohibits collusion and most communication between agency officials involved in the two sets of activities.<sup>272</sup> This separation, however, is imperfect. It does not apply before adjudicative proceedings begin. It applies only to formal adjudication, with no parallel provisions for rulemaking or

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268. 5 U.S.C. § 704 (2012); David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1159 (2016) (“Agencies have always enjoyed unfettered discretion to choose their enforcement targets”).

269. See *supra* Part I.C.

270. See Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 157–58 (2000).

271. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

272. See 5 U.S.C. § 554(d) (2012); Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2398 (2011). This design is sometimes referred to as the “internal separation of powers” within agencies. It is conceptually clearer, however, to distinguish the two terms, treating the latter as a broader category. Stack, *supra*, at 2395 n.10 (citing Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429–34, 453–57 (2009)).

informal adjudication.<sup>273</sup> The separation of functions also breaks down, of necessity, when the head of an agency, by definition the supervisor of investigators and prosecutors in her agency's employ, conducts adjudications herself.<sup>274</sup> In that circumstance, the same individual is perforce involved in investigation, prosecution, and monitoring. Can that single individual, ethically obliged when adjudicating to conform to what she determines to be the best interpretation of the statute, simultaneously direct prosecutors and investigators to hew to a different, though still reasonable, interpretation?

The matter is further complicated by the nature and processes of investigation and prosecution, which are focused on the development of factual records and, in their nature, are often adversarial. An agency might arrive at its view of a best interpretation because its opinions are sharpened by an adversarial, intra-agency prosecution; indeed, it might come to *change* its view of what is the best interpretation because of such a prosecution. To require investigators and prosecutors to hew to the existing agency interpretation might be to ossify agency interpretation and prevent access to facts and opinions that should inform it.

An important additional set of concerns is raised by the ethical duty of prosecutors, in particular, to "seek justice."<sup>275</sup> There are strong reasons to think that intra-agency prosecutors, just as criminal prosecutors, bear such duties. Professor Bruce Green has been the preeminent proponent of the claim that civil lawyers representing the government—a somewhat broader category than agency litigators—must seek justice.<sup>276</sup> Green understands this to be a consequence of their "dual role as lawyer for the government and government official."<sup>277</sup> Supporting Green's normative claims is the practical reality

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273. See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 760 (1981). Asimow notes that some agencies separate functions even when such separation is not statutorily required. See *id.*

274. See 5 U.S.C. § 554(d)(C); Asimow, *supra* note 273, at 765–68. This rule is the same for agencies headed by single persons and by bodies of several commissioners.

275. See *supra* notes 57–65 and accompanying text.

276. Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 239 (2000).

277. *Id.* at 265–66. But see Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1013–17 (1991) (stating civil government lawyers have no special justice-seeking duties beyond those that apply to all attorneys). It should be noted that the line between criminal and civil proceedings is permeable. To be sure, agency prosecutions rarely involve criminal penalties, but when they do, these cases require the involvement of non-agency prosecutors, who bear independent duties to

that agency prosecutors, like their criminal counterparts, wield unusually vast powers as representatives of the sovereign.<sup>278</sup> Both sorts of prosecutors also adopt an adversarial posture with respect to their opposing parties;<sup>279</sup> both enjoy very substantial discretion; and both can use that discretion to disrupt, upend, and even destroy lives and livelihoods.<sup>280</sup>

These considerations push one to want agency prosecutors, like their criminal counterparts, to seek justice. But if justice-seeking is a duty that agency prosecutors bear, in some circumstances it will come into conflict with the view that agency prosecution must hew to the *best* interpretation of a statute. The best reading from an interpretive perspective might not be the reading that best advances justice.

One easy solution to this conflict is to exercise prosecutorial discretion, but to do so only within the constraints of the agency's best interpretation. So, in the case where an agency thinks the statute, assigned its best reading, prohibits a range of behaviors, it would be entirely legitimate to direct investigators and prosecutors to give attention only to a subset of those behaviors. This is garden-variety investigative and prosecutorial discretion. It need not be conceptualized as giving the statute a suboptimal reading at all. An agency might have a range of motives for proceeding in this way, including justice-seeking. Discretion can of course be abused, and at the margins there will be gray areas.<sup>281</sup>

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seek justice, and eventual determination by a court. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 5–6 (2005) (noting that the “modern federal regulatory state [is] founded on civil penalties, punitive damages, and delegations of prosecutorial authority to administrative agencies and private parties”); Laura J. Kerrigan et al., *Project: The Decriminalization of Administrative Law Penalties, Civil Remedies, Alternatives, Policy, and Constitutional Implications*, 45 ADMIN. L. REV. 367, 369, 419, 426 & nn.473–80 (1993) (documenting trend away from criminal sanctions for regulatory offenses, but noting the “commingling of administrative and criminal law power” in agency Offices of Inspector General and giving examples of “federal legislation authorizing parallel administrative and criminal proceedings”). Agency and criminal prosecutors also cooperate and, even absent active cooperation, assist one another in developing facts and evidence. See generally Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 U. DAYTON L. REV. 77 (2013).

278. Green, *supra* note 58, at 632–33.

279. Zacharias, *supra* note 64, at 53 (suggesting a connection between this adversarial posture and prosecutors' duty to seek justice).

280. See KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 520–21 (4th ed. 2004).

281. See, e.g., *United States v. Texas* 136 S. Ct. 2271 (2016) (mem.); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

This does not resolve, however, the difficult question: If an agency preference conflicts with what it understands to be the best interpretation of a statute, may it direct its prosecutors and investigators to pursue suboptimal, but still reasonable, interpretations for policy reasons? With respect to prosecutors, *must* the agency do so if it believes those interpretively suboptimal readings to be justice-seeking? It would, of course, then be obligated to impose the interpretively optimal reading were it required to make an adjudicative decision that would induce judicial deference. But this outcome is not a certainty: many cases never get that far.

Ultimately, in such circumstances, an agency must investigate and prosecute only in ways consistent with its best interpretation of the statute. In the context of adjudication and rulemaking, this duty is triggered by judicial deference, which gives the agency discretion that, within a range of reasonableness, is not subject to further review. When they investigate and prosecute, agencies exercise discretion that is similarly unreviewable. This duty, therefore, should apply even in circumstances where the ultimate agency decision is reviewable and does not receive deference—because investigative and prosecutorial discretion is not itself reviewable. It should also apply to cases unlikely to be resolved through final agency action of any kind. Although it is true that investigations and prosecutions might generate change in agencies' opinions about what the best interpretation is, once such an interpretation is determined, change must come through a process of intra-agency consultation and argument, not through adversarial proceedings.

This view is consistent with Green's suggestion that the duty of the civil government lawyer to seek justice is a manifestation of her "constitutional duty to faithfully carry out the law" and to avoid "seeking outcomes or employing methods that, in the lawyer's independent professional judgment, are contrary to the law."<sup>282</sup> Unlike criminal prosecutors, who are separately elected or selected with an independent mandate to seek justice, agencies—including prosecutors within those agencies—are creatures of their statutes. When they exercise discretionary functions not subject to outside review, they should do so only in ways consistent with their best understanding of what the law requires. Policy preferences, and any justice-seeking duty borne by agency prosecutors, must be subordinate to agency duty to interpret the statute as best it can. Agency prosecutors may collaborate

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282. Green, *supra* note 276, at 276.

with outside prosecutors, who have their own, different duties; but their own responsibility to the statute is paramount.

### *E. Interpretation and the Law Governing Lawyers*

The ethical obligations of a lawyer who works for an agency are the subject of a small but interesting literature. The most persuasive position in that literature is that such a lawyer represents her own particular agency, not the government writ large or the public in general. As Professors Jonathan Macey and Geoffrey Miller explain:

[T]he scope of a government attorney's ethical duties must be understood in the context of the attorney's role in a system of separation of powers. It is not the responsibility of an agency attorney to represent the "public interest" nor the government as a whole. Rather, the constitutional system of checks and balances depends upon the institutional loyalty of its attorneys. Although this argument runs counter to the common intuition that the government attorney should act to further the common good, we argue that this common view is ultimately insupportable, in large part because there is simply no consensus in our pluralistic society as to what constitutes the common good.<sup>283</sup>

An agency lawyer owes her agency duties to provide sound advice and zealous representation when requested, although she may not assist it in clearly unlawful activity.

There is no reason to alter this conclusion in the context of statutory interpretation. So, to take an example offered by Miller, an agency lawyer should not assist her agency in promulgating a rule or adjudication that interprets a statute in a manner contrary to that announced in a court decision in which the agency was a party.<sup>284</sup> (Even then, she should first work within the agency to forestall such

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283. Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1116 (1995); accord RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97(2) cmt. c (2000); Green, *supra* note 58, at 636–37, 627 n.84 (“Lawyers representing the government in civil proceedings typically (although perhaps wrongly) view the agencies they represent as their client for purposes of allocating decision-making. As a result, they have a tendency to view their ethical responsibilities as essentially the same as those held by lawyers for private clients. This view finds support in the professional literature.”); Miller, *supra* note 54, at 1296 (“In a system of checks and balances it is not the responsibility of an agency attorney to represent the interests of Congress or the Court . . . . [T]he constitutional system presumes—indeed, depends upon—the institutional loyalty of its [agency] lawyers [to their agencies].”); Rosenthal, *supra* note 209, at 17 (rejecting the view that “the role of the lawyer is to interpret the statute and provide legal advice that best fulfills the public interest as expressed in such statute,” arguing that it is “implausible to characterize the enabling statute as the expression of some collective, universally agreed-upon public interest”). *But see* Note, *supra* note 54, at 1185–90 (rejecting an “agency loyalty approach to government lawyering” in favor of a “critical approach”).

284. Miller, *supra* note 54, at 1297.

behavior.<sup>285</sup>) But she not only may but should assist an agency in promulgating (and then litigating) actions based on an interpretation that she, in the exercise of her professional judgment, thinks are mistaken and/or expects eventually to be overturned, but which the well-advised agency nevertheless has the institutional prerogative to issue.<sup>286</sup>

A different question arises about agencies themselves. Given that an agency is the person or body of persons who have the authority to commit the government of the United States,<sup>287</sup> it is possible that the ethical duties of those persons may depend on their professional status. Nothing requires that an agency be a lawyer; often they are not.<sup>288</sup> But sometimes they are. Does an agency that is also a lawyer bear different ethical responsibilities with respect to statutory interpretation?

The answer is no. It is impossible to see how an agency who is a lawyer would have a more stringent obligation than a non-lawyer agency. The latter already has the obligation to say what the law is according to her best, public-minded judgment. This should apply regardless of professional status. Similarly, a federal judge who is not herself a lawyer has the same duties as her attorney colleagues with respect to saying what the law is.<sup>289</sup>

It is only slightly more challenging to reject the converse possibility, that agencies who are attorneys should have the duties I describe here, but that non-lawyer agencies should be entitled to more freedom of action. In the context of *stare decisis*, for example, Professors Nestor Davidson and Ethan Leib assert that “it would be reasonable to ask whether nonlawyers who do not usually reason by case and precedent do or should feel themselves bound by prior institutional decisions.”<sup>290</sup> While the question may be reasonable with respect to a transsubstantive issue like *stare decisis*, there is no reason systematically to allow non-lawyer agencies more latitude with respect to substantive legal interpretation than agencies who are lawyers. The obligation to interpret the law flows from the role of the interpreter in the governmental scheme, not her professional status.

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285. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, §§ 96(2–3), 97(2) (2000).

286. Miller, *supra* note 54, at 1294, 1296–97.

287. *See supra* Part I.A.

288. *See* Rosenthal, *supra* note 209, at 18.

289. MODEL CODE OF JUDICIAL CONDUCT § 2.2 (“A judge shall uphold and apply the law.”).

290. Davidson & Leib, *supra* note 15, at 273.

## CONCLUSION: REJECTING CYNICISM IN AGENCY PRACTICE

Any reader who has persevered this far might well wonder whether so many pages are justified to argue for a principle that cannot be policed or, in many cases, even observed. Well and good, my reader might agree: The fact of judicial deference indeed does not invite agencies to choose any interpretation that will merit such deference. By making the agency the final authoritative interpreter, deference indeed heightens the duty agencies bear to interpret statutes as best they can. But nevertheless, in the real world, deference absolutely does invite agencies to pick whatever interpretation, from among those that will survive judicial review, that they like the best. By doing so, they get what they want. Who would reject such an invitation—especially when any gap that might exist between their stated preference and their genuine view of the best interpretation will be invisible to all? To imagine that agencies might feel themselves bound not to have what they want betrays a hopeless romantic, and unrealistic, view of agency practice.<sup>291</sup>

I do not deny that the entire argument I have presented is predicated upon agencies being honest, at least with themselves if not with the public, regarding what they think the “best” interpretation is. Especially when choosing from among reasonable interpretations, it is trivially easy to disguise such an opinion. One can allow one’s statutory judgment to be clouded by policy judgment, obfuscate, or just plain conceal one’s own real opinion about the best result.

Nevertheless: We do not and should not assume that those authorized to say what the law is in the United States are dishonest or even that they are obfuscatory. We should not even assume that they allow themselves routinely to fall prey to self-deception. All of these things are sometimes true, but they are not generally true. Exhibit A is the judiciary. For all the evidence that judges are sometimes swayed by policy, for all the suspicions that in this or that case a judicial opinion describes reasons different from the true motivation for the result, for all of the literature that suggests that courts deploy doctrines (like *Chevron*) inconsistently, strategically, even arbitrarily—our legal system operates in genuine faith that judges are impartial and committed to the rule of law. We know that departures from this norm are hard to detect, but we are not lying to ourselves when we doubt that they are the norm. This may be romantic, but it is hardly unrealistic.

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291. See Leib & Galoob, *supra* note 47, at 1820 & n.209.

The project of this Article is to bring agencies entitled to judicial deference under this umbrella. They, no less than courts, say what the law is every day. They therefore, like courts, bear duties to interpret the law as best they can. The courts and the public are entitled to expect, and to behave as if, agencies can, will, and do rise to their responsibilities.