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Resurrecting Court Deference to the Securities and Exchange Commission: Definition of “Security”

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Resurrecting Court Deference to the Securities and Exchange Commission: Definition of “Security”

Cover Page Footnote

Professor of Law, University of Oklahoma College of Law; J.D., Georgetown University; B.A, University of California, Los Angeles. This Article benefitted from the thoughtful comments of Donald T. Bogan, Brian M. McCall, Emily H. Mezell, Joseph T. Thai, and the participants in a roundtable discussion at the University of Oklahoma. The author is responsible for any errors.

RESURRECTING COURT DEFERENCE TO THE SECURITIES AND EXCHANGE COMMISSION: DEFINITION OF “SECURITY”

Steven J. Cleveland⁺

I. IMPEDIMENTS TO <i>CHEVRON</i> ’S APPLICABILITY	277
A. <i>Chevron’s Applicability to an Agency’s Determination of Its Jurisdiction</i>	277
B. <i>Sufficiency of the Commission’s Political Accountability</i>	285
1. <i>Accountability to the President</i>	285
2. <i>Accountability to Congress</i>	293
C. <i>Public Versus Private Enforcement</i>	297
II. STATUTORY INDICATIONS OF INTERPRETIVE DELEGATION	300
A. <i>The Commission’s Authority to Define Terms</i>	301
B. <i>The Commission’s Exemptive Powers</i>	305
C. <i>Congress’s Context Clause</i>	308
1. <i>Context from Surrounding Sections</i>	308
2. <i>Context from Factual Circumstances</i>	309
D. <i>Congress’s Overlapping and Circular Definition</i>	312
III. NON-DEFERENCE AND ITS IMPACT	313
A. <i>United Housing Foundation, Inc. v. Forman</i>	314
1. <i>Rejecting the Commission’s Position Regarding “Profits”</i>	315
2. <i>Rejecting the Commission’s Position Regarding “From the Efforts of Others”</i>	319
B. <i>Reves v. Ernst & Young</i>	321
IV. CONCLUSION	324

Congress inevitably enacts ambiguous statutes¹ and resolving this statutory uncertainty commonly falls to the courts or the relevant administrative agency.

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1. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 127–29 (1998) (analyzing the various interpretations of the phrase “carries a firearm”); *id.* at 144 n.6 (Ginsburg, J., dissenting)

But, between a court and an agency, which entity should be chiefly responsible for statutory interpretation? In the landmark *Chevron* decision, the Supreme Court crafted a two-step inquiry for a court's review of an agency's statutory interpretation.² The first step considers whether congressional intent is clear and, if it is, the agency and the court must interpret the statute consistent with the intent of Congress.³ If the statute is ambiguous, however, the second step requires the court to defer to the agency's reasonable interpretation of the statute.⁴ The court must defer to the agency's reasonable interpretation of the statute even if the court would have interpreted the ambiguity differently.⁵ Although *Chevron* was groundbreaking in numerous fields, it merely reflected the existent standard operating procedure in the field of securities regulation. Before *Chevron*, courts routinely deferred to the Securities and Exchange Commission ("SEC" or "Commission")—the agency Congress charged with administering federal securities laws.⁶ In particular, before *Chevron*, courts accorded great weight to the SEC's interpretation of whether a financial

("And in the television series M*A*S*H, Hawkeye Pierce (played by Alan Alda) presciently proclaims: 'I will not carry a gun . . . I'll carry your books, I'll carry a torch, I'll carry a tune, I'll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I'll even 'hari-kari' if you show me how, but I will not carry a gun!'" (citation omitted)). Additionally, Congress may intentionally enact ambiguous statutes. See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640 (2002) (suggesting that Congress might rationally choose to use ambiguous terms if intending to allow the courts to resolve disputes with flexible rather than stringent standards).

2. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984).

3. *Id.* at 842–43.

4. *Id.* at 843.

5. See *id.* at 843 n.11 (noting that a court should not apply its own interpretation of a statute, but must defer to an agency interpretation where it is reasonable).

6. See, e.g., *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002) ("[The SEC's] interpretation of the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference if it is reasonable . . ." (citing *United States v. Mead Corp.*, 533 U.S. 218, 229–30 & n.12 (2001))); *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) ("[Section] 14(e)'s rulemaking authorization gives the Commission 'latitude,' even in the context of a term of art . . . [W]e owe the Commission's judgment 'more than mere deference or weight.' . . . [W]e must accord the Commission's assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" (second bracketing in original) (citations omitted)). For examples of the powers that Congress delegated to the Commission, see *infra* Part II.A–B.

instrument constituted a “security,”⁷ a term that Congress defined ambiguously.⁸

Since *Chevron*, the Supreme Court has decided four definition-of-security cases.⁹ However, the Court referenced neither *Chevron* nor an alternative deferential standard in any of those cases.¹⁰ Additionally, none of the four cases discussed the appropriateness of deference to the Commission.

The Court’s failure to accord explicit deference to the SEC in definition-of-security cases does not mean that it ultimately rejects the Commission’s position;¹¹ rather, the SEC’s interpretations generally fare well

7. See, e.g., *Int’l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) (acknowledging that, although an agency’s interpretation is not controlling, “[i]t is a commonplace in our jurisprudence that an administrative agency’s consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight” (citing *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 719 (1975); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626–27 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965))).

8. See 15 U.S.C. § 77b(a)(1) (2006) (defining the term by setting forth more than twenty instruments and including a circular definition: “The term ‘security’ means any . . . instrument commonly known as a ‘security’”); see also 15 U.S.C. § 78c(a)(10) (2006) (same); *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (“Congress . . . enacted a broad definition of ‘security,’ sufficient to ‘encompass virtually any instrument that might be sold as an investment.’” (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990))); *infra* Part II.D.

9. See *Edwards*, 540 U.S. at 393; see also *Reves*, 494 U.S. at 61; *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 (1985); *Gould v. Rufenacht*, 471 U.S. 701, 704 (1985).

10. See *Mead*, 533 U.S. at 234 (“*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.” (citations omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944))).

11. See, e.g., Brief for Petitioner at 33, *Edwards*, 540 U.S. 389 (No. 02-1196), 2003 WL 21498455, at *15–16 & n.11 (seeking deference and referencing *Chevron* and *Mead*); Brief for SEC as Amicus Curiae Supporting Petitioner at 9, *Tcherepnin v. Knight*, 389 U.S. 332 (1967) (No. 104), 1967 WL 113740, at *9 (seeking deference based upon “the Commission’s settled administrative interpretation” and its “repeated[] . . . determination[s] that such [instruments] are covered by the Act”); Brief for Petitioner at 37, *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (No. 843), 1946 WL 50582 at *37 (seeking deference and citing *Skidmore*). For examples of the Commission seeking deference outside of the definition-of-security setting, see Brief for Petitioner at 37–38, *SEC v. Zandford*, 535 U.S. 813 (2002) (No. 01-147), 2001 WL 1663770, at *34–39 (seeking deference and citing *Chevron* and *Mead*); and Brief for Petitioner at 36, *United States v. O’Hagan*, 521 U.S. 642 (1997) (No. 96-842), 1997 WL 86306, at *36 (seeking deference and citing *Chevron*).

Although the Court’s recent silence regarding deference to the Commission differs from its pre-*Chevron* jurisprudence, the silence may be consistent with the Court’s recent unwillingness to apply *Chevron* to *Chevron*-eligible cases. See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.6 (4th ed. 2002) (“The Supreme Court has not shown comparable consistency and conscientiousness in applying *Chevron*. . . . Sometimes it gives *Chevron* powerful effect, sometimes it ignores *Chevron*, and sometimes it characterizes the *Chevron* test in strange and inconsistent ways.”); see also 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, 1090 (2008) (“[W]e found that the Court usually does not apply

before the Court.¹² Recently, without explanation, the Court has seemingly deviated from its precedent favoring deference to the SEC's interpretation of statutory ambiguity.¹³

Some scholars have addressed the issue of court deference to an agency regarding the agency's own jurisdiction, but in so doing, these scholars have made generalized arguments applicable to all agencies, typically failing to closely examine any single agency.¹⁴ This failure is significant because Congress empowered each agency differently and statutory evidence of the powers delegated to a particular agency informs the analysis of whether Congress granted that particular agency the authority to speak to its own jurisdiction.¹⁵ This Article takes a step towards filling this void, addressing an issue that has divided justices, courts, and scholars.¹⁶ The issue of deference to the SEC demands consideration as financial players innovate new financial products because the federal regulation of these products may hinge on the Commission's determination of whether any such product constitutes a "security."

Chevron to cases that are, according to *Mead* and other opinions, *Chevron*-eligible."); *infra* Part I.A.

12. See Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 LAW & CONTEMP. PROBS. 33, 39 (1998) ("From its formation in 1934 until the mid-1970s, the SEC had a stellar record in the Supreme Court and the circuit courts, especially the Second Circuit, not only in cases where the SEC or the United States was the plaintiff, but also in cases where the SEC participated as *amicus curiae*.").

13. See *infra* Part III.A–B. Although this Article suggests the propriety of deference to the Commission regarding the definition of "security," it does not address the degree of deference owed to the SEC, which may vary depending on circumstances. See *Mead*, 533 U.S. at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (footnotes omitted) (citations omitted)); Eskridge & Baer, *supra* note 11, at 1158.

14. See, e.g., Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2673–74 (2003); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 236 (2006).

15. See *infra* Part II.A.

16. See Eskridge & Baer, *supra* note 11, at 1130–32 (discussing the Court's application of various deferential regimes to an agency's interpretation of its own jurisdiction). Compare *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1987) (Scalia, J., concurring) (stating, "the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction" (citations omitted)); and *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("We afford *Chevron* deference to the Commission's assertion of jurisdiction."), and Sunstein, *supra* note 14, at 236 ("In the end, there is no sufficient basis for an exception to *Chevron* when jurisdictional issues are involved."), with *Miss. Power & Light Co.*, 487 U.S. at 387 (Brennan, J., dissenting) ("[A]gencies can claim no special expertise in interpreting a statute confining its jurisdiction."), and *NRDC v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004) (arguing that it is unlikely Congress would allow an agency the authority to decide the bounds of its own jurisdiction), and *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), and Garrett, *supra* note 14, at 2673–74 (asserting that "an independent judicial analysis to determine the scope of the delegation is vital to ensure that a relatively impartial entity determines the boundaries of agency authority").

Part I of this Article discusses potential impediments to *Chevron's* applicability to definition-of-security cases, contemplating the definition of "security" as a jurisdictional issue and discussing the applicability of *Chevron* to an agency's determination of its own jurisdiction. Part I then references *Chevron's* emphasis on the political accountability of an executive agency and then examines the political accountability of the SEC, which is an independent commission. Part I also addresses the applicability of a deferential regime to agency interpretations when private parties seek to enforce the federal securities laws. Looking beyond the Commission's general rule-making authority and its adjudicatory power, Part II examines evidence of congressional delegation of interpretive authority to the Commission regarding the definition of "security." Part II also discusses the SEC's power to exempt "securities" from the reach of the federal securities laws, which amounts to the power to determine whether or not the federal securities laws should apply to a particular instrument. Part III examines two recent definition-of-security cases in which the Supreme Court failed to defer to positions advanced by the Commission, and the negative consequences of the Court's decisions. Finally, Part IV concludes that courts should defer to the Commission regarding its reasonable interpretations of "security."

I. IMPEDIMENTS TO *CHEVRON'S* APPLICABILITY

In the post-*Chevron* decision, *SEC v. Edwards*, the Court upheld unanimously the position of the SEC, based on decades of formal adjudications, that the disputed instrument constituted a "security."¹⁷ In doing so, however, the Court did not reference the landmark *Chevron* decision. Richard Pierce, a scholar of administrative law, termed this omission "curious" and "strange."¹⁸ Although *Chevron* deference may have been appropriate in *Edwards*, a court need not *always* apply *Chevron* deference to the SEC's position regarding the definition of "security." Other cases may require a lesser degree of deference.¹⁹

A. *Chevron's* Applicability to an Agency's Determination of Its Jurisdiction

When the *Chevron* Court introduced its method of judicial inquiry for analyzing an agency's interpretation of statutory ambiguity, it discussed the appropriateness of deference to an agency entrusted by Congress to administer

17. See *SEC v. Edwards*, 540 U.S. 389, 396 (2004) (citing decisions from 1939 to 1982).

18. PIERCE, *supra* note 11, § 3.6, at 175.

19. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting that measure of deference varies with the circumstances); see also, e.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (applying *Chevron* deference because of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); *Mead Corp.*, 533 U.S. at 231 (noting that *Chevron* deference may be appropriate even absent administrative formality).

the statute.²⁰ The classic agency domain is interstitial matters.²¹ According to the Court, the resolution of interstitial matters, which may require relevant expertise and likely involves policy choice, is better suited to a politically accountable expert (an agency) than a politically insulated non-expert (a court).²²

Scholars have noted that, in opinions following *Chevron*, where the facts suggested the appropriateness for *Chevron*'s application, the Court, without explanation, analyzed the issue without employing *Chevron* methodology.²³ The Court has yet to address specifically the applicability of *Chevron* to an agency's interpretation of its own jurisdiction.²⁴ Based on what the Court has said and left unsaid, some scholars have concluded that the Court first

20. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (citing *INS v. Jong Ha Wang*, 450 U.S. 138, 144 (1981); *Train v. NRDC*, 299 U.S. 232, 235–37 (1936))).

21. See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires . . . the making of rules to fill any gap left, implicitly or explicitly, by Congress."). In *Chevron*, the interstitial matters concerned the definition of "stationary source." See *Chevron*, 467 U.S. at 840 (internal quotation marks omitted) (citing 40 C.F.R. § 51.18(j)(1)(i) (1983)).

22. See *Chevron*, 467 U.S. at 865 (arguing that "[j]udges are not experts in the field"); *id.* at 844 ("[T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the . . . reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." (citations omitted) (internal quotation marks omitted)).

23. See PIERCE, *supra* note 11, § 3.6, at 175 (noting that "sometimes [the Supreme Court] ignores *Chevron*"); see also Eskridge & Baer, *supra* note 11, at 1090 ("[W]e found that the Court usually does not apply *Chevron* to cases that are, according to *Mead* and other opinions, *Chevron*-eligible."); Sunstein, *supra* note 14, at 239 (criticizing the Court's after-the-fact reference to *Chevron*: "[a]fter parsing the statute independently, the Court turned to *Chevron* in a brief paragraph, noting (finally!)").

24. See Garrett, *supra* note 14, at 2674; see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 851 (2001). In particular, the Court has not cited *Chevron*, or *Mead* or *Skidmore*, in any of its recent decisions regarding the definition of "security," which definition, in part, defines the Commission's jurisdiction. See, e.g., *SEC v. Edwards*, 540 U.S. 389 (2004); *Reves v. Ernst & Young*, 494 U.S. 56 (1990); *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985); *Gould v. Rufenacht*, 471 U.S. 701 (1985). Only *Edwards* has hinted—without citation to *Chevron*, *Mead*, or *Skidmore*—at the Court's possible deference to the Commission's position. See 540 U.S. at 396 ("[I]t is no surprise that the SEC has consistently taken the opposite position [of that advocated by the petitioner] It has done so in formal adjudications . . . and in enforcement actions"). However, even then, the Court never used the term "deference" or any variation thereof and the hint followed the Court's independent analysis.

The Court has been invited to address an action by the Federal Communications Commission that might be considered jurisdictional, and it may resolve the issue during the 2012 Term. See *City of Arlington, TX v. FCC*, 668 F.3d 229 (5th Cir.), *cert. granted in part*, 133 S. Ct. 524 (2012).

determines whether *Chevron* even applies to the issue to be resolved—the so-called *Chevron* Step Zero.²⁵ Some argue that *Chevron*'s Step Zero analysis is appropriate when an agency's jurisdiction is at issue.²⁶

There are several reasons why a court's interpretation of an agency's jurisdiction may be preferable to the agency's determination of the same issue.²⁷ When one turns from the resolution of an interstitial statutory ambiguity, for which Congress intended the administering agency to be interpreter-in-chief, to the resolution of an ambiguity regarding an agency's jurisdiction, some contend that courts should not defer to the administering agency.²⁸ Congress, it is argued, delegated to the agency the authority to interpret matters within its jurisdiction, but Congress did not, the argument

25. See Merrill & Hickman, *supra* note 24, at 873 (describing Step Zero as “the inquiry that courts should undertake before moving on to [S]tep [O]ne”). Recall that *Chevron* introduced an analysis involving Steps One and Two: (1) Is the statute ambiguous? (2) If so, did the agency reasonably interpret the ambiguity? See *supra* text accompanying note 2.

26. See, e.g., Merrill & Hickman, *supra* note 24, at 912; Sunstein, *supra* note 14, at 234.

27. Although the Administrative Procedure Act (APA) arguably favors a court over an agency as the primary interpreter of an agency's jurisdiction, others have found that the statute provides little resistance to court deference to the agency. Congress emphasized jurisdictional limitations on agencies and also provided for court review under the APA. See 5 U.S.C. § 558(b) (2006) (“A [substantive rule or order] may not be . . . issued except within jurisdiction delegated to the agency and as authorized by law.”); see also 5 U.S.C. § 706 (2006) (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . .”); *id.* § 706(2)(C) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .”); 15 U.S.C. § 78y(b)(4) (2006) (stating that a court shall enforce a rule unless it is “in excess of statutory jurisdiction [or] authority”). *Chevron* itself contained no reference to these provisions nor did those justices who engaged in debate on this particular issue make any reference to them. Compare *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring) (favoring deference to agency), with *id.* at 386–89 (Brennan, J., dissenting) (refusing to defer to the agency). Moreover, “[i]n many statutes, Congress has not only enacted binding law, but has, consistent with the APA, delegated to agencies the authority to create binding ‘law,’ usually through formal adjudications and legislative rules.” Eskridge & Baer, *supra* note 11, at 1161 (citing Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 249–57 (1955)); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199–200 (1998) (“The [EPA’s] rulemaking power reconciles the result in *Chevron* with the APA . . . And the result can be extended to . . . administrative agencies [with] . . . blanket authorizations to promulgate rules . . .”). Congress also empowered the SEC with broad rulemaking authority. See 15 U.S.C. § 77s(a) (2006) (“The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter . . .”); see also 15 U.S.C. § 78w(a)(1) (2006) (“The Commission . . . shall . . . have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which [it is] responsible or for the execution of the functions vested in [it] by this chapter . . .”); Duffy, *supra*, at 202 (noting that a court may “find that the statute confers on the agency a lawmaking power”).

28. See Garrett, *supra* note 14, at 2674 (advising against *Chevron* deference for agency jurisdictional questions).

continues, delegate authority to the agency to interpret its own jurisdiction.²⁹ Rather, jurisdictional matters involve issues familiar to courts, and a court's generalized legal expertise is sufficient.³⁰

The agency's interpretation of its own jurisdiction might be viewed with skepticism. Perhaps for reasons of hubris or self-aggrandizement, an agency may seek to expand its regulatory empire, an attempt that should not benefit from a reviewing court's deference.³¹ Some evidence suggests that the SEC has attempted to expand its regulatory reach.³² For these reasons, among

29. See *Miss. Power & Light Co.*, 487 U.S. at 386 (Brennan, J., dissenting) ("Agencies do not 'administer' statutes confining the scope of their jurisdiction . . ."); see also *NRDC v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004) (noting that a "responsible Congress" would not give an agency the authority to determine its own jurisdiction); *id.* at 200 (applying "a lesser degree of deference than *Chevron*-level" to agency determination of its own jurisdiction when the statute is ambiguous).

30. See *Miss. Power & Light Co.*, 487 U.S. at 387 (Brennan, J., dissenting) ("[A]gencies can claim no special expertise in interpreting a statute confining its jurisdiction."); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1009 (1999) (stating that agencies are no better-equipped than the courts for interpreting statutes).

31. See *Merrill & Hickman*, *supra* note 24, at 867 (noting that *Chevron* opens the potential for "agency aggrandizement . . . without any effective judicial check" (footnote omitted)). Note that, if a court determines that the agency's position should not be accorded deference, the court maintains or expands its own regulatory domain. Nevertheless, the argument favoring regulatory expansionism by judges may be weaker than the argument favoring regulatory expansionism by agencies. See Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 46 (2003) ("The judge writing an opinion will typically be limited in his involvement to the specific case and will not reap any benefits *ex post* from greater regulatory intervention."). But see Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 541-42 & n.71 (2008) (noting the topical specialization by judges, including Judge Frank Easterbrook, who specializes in corporate law and federal securities regulation).

One should also consider the possibility of an agency shirking its responsibility with regard to portions of its congressionally delegated domain, perhaps for reasons of agency capture. See *infra* notes 126-29 and accompanying text. But see Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 252 (2004) ("Few have seriously suggested that the SEC has been a 'captive' of the industries it regulates."). Arguably, an agency will seek to contract its regulatory empire to appease regulated entities, but a reviewing court should not defer to such an interpretation. Even the unconscious bias of an administrator may lead to overreaching by an agency based on a misperception of the agency's core competencies. Some scholars, however, argue that "[n]o sustained evidence justifies the suggestion that when agencies make decisions on major questions, bias and self-interest are the motivating factors." Sunstein, *supra* note 14, at 233. Even if agency leaders suffer cognitive biases, evidence suggests that judges also suffer from such biases. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 45 (2007) (noting that judges may be influenced by cognitive biases despite their awareness of them).

32. See, e.g., 2 LOUIS LOSS ET AL., *SECURITIES REGULATION* 1209 (4th ed. 2007) (suggesting that the SEC "contends for a liberal application of this definition [of 'security']"); Dean Foust, *Is Breeden Too Ambitious for the SEC's Good?*, BUSINESSWEEK, Feb. 10, 1992, at 116 (criticizing the then-Chairman's "aggressive campaigns to expand his agency's power"); see also Karmel, *supra* note 12, at 38 n.27 ("A high ranking SEC enforcement official once told me he had no interest in leaving the Commission despite the financial rewards available in the private sector because 'now, every CEO in America will take my phone call.'"); *Aguilar Calls for*

others, a court may owe no deference to an agency's interpretation of its own jurisdiction.³³

However, the same arguments that support court deference to an agency's interpretation regarding non-jurisdictional matters still support court deference to an agency's interpretation of jurisdictional matters.³⁴

As a preliminary matter, an issue is not always easily categorized as jurisdictional or non-jurisdictional.³⁵ Every interpretation of a statute necessarily concerns that statute's reach; thus, in a sense, every ambiguity presents a jurisdictional question.³⁶ For example, this Article concerns the definition of "security" as a gateway issue to regulation by the SEC. A broad definition of "security" expands the regulatory jurisdiction of the Commission.³⁷ Nevertheless, the Court had at one time accorded the SEC deference on this issue.³⁸ Notwithstanding the Court's history of deference to the Commission regarding the definition of "security," every statutory ambiguity becomes jurisdictional.³⁹ Under section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), Congress prohibited certain behavior "in connection with" the purchase or sale of a security.⁴⁰ If the disputed behavior is "in connection with" a securities transaction, then the SEC may regulate it, but if that behavior is not "in connection with" a securities transaction, then the Commission must find other authority to regulate. Thus, the phrase "in connection with" defines the Commission's jurisdiction under section 10(b). Despite the jurisdictional nature of the phrase "in connection with," and contrary to the Court's recent definition-of-security cases, the Court

Enhanced SEC Enforcement, Including Authority to Bring Criminal Action, 41 Sec. Reg. & L. Rep. (BNA) No. 12, at 492 (March 23, 2009) (setting forth the Commission's position that "Congress . . . expand the commission's enforcement powers, including giving it the 'standby authority' to bring criminal charges in cases in which the Justice Department does not act").

33. See Sunstein, *supra* note 14, at 234–35.

34. See *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 172–74 (D.C. Cir. 2010) (according *Chevron* deference to a Commission rule that narrowly defined a congressional exemption, which arguably expanded the Commission's jurisdiction).

35. Sunstein, *supra* note 14, at 235.

36. See *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 281 (1988) (Scalia, J., concurring) ("[T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."); see also Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2053–54 (2002) (arguing that every question regarding an administrative statute implicates the scope of the administering agency's jurisdiction); Garrett, *supra* note 14, at 2674 (acknowledging the difficulty in defining what constitutes a jurisdictional question).

37. See *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943) (noting that the term "security" "controls the scope of th[e] Act" (footnote omitted)); LOSS ET AL., *supra* note 32, at 856 ("[T]he definition of *security* determines the reach of the federal securities laws.").

38. See *supra* note 7 and accompanying text.

39. See *supra* note 36 and accompanying text.

40. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, § 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. § 78(j) (2006)).

accorded deference to the SEC's interpretation of the ambiguous phrase.⁴¹ Logically, if the Court should defer to the Commission regarding the meaning of "in connection with," which defines the statute's reach, the Court should also defer to the SEC regarding the meaning of "security" as long as the interpretation is reasonable.

Court deference to the Commission may be critical to achieving a *federal* regulatory regime. Under a non-deferential regime, courts would more likely reach different conclusions regarding statutory ambiguity. Consequently, the SEC's regulatory reach could differ from jurisdiction to jurisdiction, potentially giving rise to mischief. For example, courts have differed regarding whether an instrument constitutes an "investment contract," a term that is among the laundry list of instruments that Congress identified as "securities."⁴² The SEC and the Court define "investment contract" as an instrument reflecting certain criteria, including a common enterprise.⁴³ If there is no common enterprise, the instrument is not an "investment contract,"⁴⁴ and thus not a "security" (unless the instrument meets the criteria of another item on Congress's laundry list).⁴⁵ It seems inapt to consider as jurisdictional the issue of common enterprise. Arguably, a reviewing court should highly value the SEC's insights regarding what constitutes a common enterprise. Eschewing the Commission's position, however, courts have become divided, with some circuits favoring "horizontal commonality," which requires more than one investor, and other circuits favoring "vertical commonality," the requirement of which may be met even if there is only one investor.⁴⁶ Thus, the same instrument could qualify as a "security" in one circuit but not in a neighboring circuit, undermining the idea of *federal* regulation.⁴⁷

41. See *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002) (citing *United States v. Mead Corp.*, 533 U.S. 218, 229–30 n.12 (2001)); see also *United States v. Eurodif S.A.*, 555 U.S. 305, 319 (2009) ("This is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the [agency]'s application was reasonable.").

42. See 15 U.S.C. § 77b(a)(1) (2006) ("The term 'security' means any . . . investment contract . . ."); see also 15 U.S.C. § 78c(a)(10) (2006) (same).

43. See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946) (defining "investment contract").

44. See James D. Gordon III, *Interplanetary Intelligence About Promissory Notes as Securities*, 69 TEX. L. REV. 383, 396 (1990) (stating that the *Howey* test requires each prong, including "common enterprise," to be met in order to establish an "investment contract").

45. 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 77c(a)(10).

46. See *LOSS ET AL.*, *supra* note 32, at 929–39 (outlining circuit approaches to "horizontal" and "vertical" commonality).

47. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (arguing that the Supreme Court's "restricted capacity" to "give its own precise renditions of statutory meaning" inhibits uniformity).

Even if jurisdictional issues were always distinct from non-jurisdictional issues, it is not clear that a court should withhold deference to an agency's interpretation of its own jurisdiction. Just as considerations of expertise and political accountability favor court deference to an agency in non-jurisdictional matters, the same considerations favor deference in jurisdictional matters.⁴⁸ An agency's intimate knowledge of the statute and the regulated/unregulated trade-offs provides a valuable background against which to determine the statute's appropriate reach.⁴⁹ As to congressional intent of the statute's reach, the agency has an ongoing relationship with Congress—offering testimony and participating in the budgeting process—regarding the agency's mission. That relationship better enables the agency to determine its jurisdiction compared to the courts, which have fewer contacts with Congress and almost certainly no contacts with respect to the agency's jurisdiction.⁵⁰

Moreover, Congress entrusted the SEC to make regulatory decisions involving policy trade-offs.⁵¹ Determining the appropriate reach of a statute amounts to a policy decision; this is true regarding the definition of "security."⁵² Politically accountable agencies are better suited to make these policy determinations compared to a politically insulated court.⁵³

48. Sunstein, *supra* note 14, at 235–36.

49. See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036, 1059 (2006) ("[S]tatutes that . . . address regulatory problems entailing significant risk-risk . . . tradeoffs may be more effective if their different provisions are interpreted in a way that reflects a coherent, consistent regulatory strategy, as conflicting interpretations create costs beyond those associated with the substantive resolution of each particular issue. These conditions favor agency delegation." (footnotes omitted)); *CFTC's Chilton Calls for Agency to Have Criminal Prosecution Authority*, 77 U.S.L.W. 2491, 2491 (Feb. 17, 2009) (setting forth the commissioner's argument that securities enforcement should be done by experts instead of "DOJ prosecutors who are more likely to be generalists, unfamiliar with the mechanics of derivatives trading and the interstices of the Act and regulations").

50. See Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 602 (2009) ("Unlike courts, agencies have a continuous relationship with Congress and may have a better understanding of the general aims of legislation." (footnote omitted)).

51. 15 U.S.C. § 77b(b) (2006) ("Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.").

52. See LOSS ET AL., *supra* note 32, at 856 ("[T]he definition of *security* determines the reach of the federal securities laws. Thus, there is a policy dimension to how broadly or narrowly the term *security* is defined.").

53. See *Beck v. Dobrowski*, 559 F.3d 680, 685 (7th Cir. 2009) ("It is a matter for the SEC to consider if it wants, because it involves a delicate tradeoff best confided to specialists in the securities markets."); see also *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (*per curiam*) ("It is not as obvious today as it seemed in the 1930s that . . . the decisions of such agencies so clearly involve scientific judgement rather than political choice that it is even theoretically desirable to insulate them from the democratic process."), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); Sunstein, *supra* note 14, at 243 (asserting that agencies are best suited to interpret ambiguous statutes due to their expertise and accountability).

Deference to an agency regarding its own jurisdiction likely would result in overlapping, or increasingly overlapping, regulation by multiple agencies.⁵⁴ Some commentators, including former high-ranking agency officials, typically disfavor having multiple regulators oversee portions of the whole, which is particularly true regarding the financial industry.⁵⁵ Empowering courts with the ultimate authority to determine an agency's jurisdiction, and to accord no particular weight to the agency's position in making that determination, however, is no panacea. Agencies will continue to overreach their statutory authority and battle over jurisdiction.⁵⁶ In a non-deferential regime where agencies have no accountability for the determination of their jurisdiction, the agencies may adopt more aggressive positions. The agencies could deflect jurisdictional criticism either to those who submit to the agency's jurisdiction without challenge or to the courts that uphold or reject the agency's aggressive position.⁵⁷

Generally, Congress will know of an agency's tendency to overreach,⁵⁸ and thus intentionally draft overlapping regulation on occasion.⁵⁹ If overlapping

54. See *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting) (noting that deference should not be given to an agency when the statutory interpretation at issue involves that agency's jurisdiction as well as the jurisdiction of other agencies); *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989). Judge Easterbook stated that, "[i]f each agency's interpretation of its own statute is entitled to some deference, then the [instrument] is both a security and a futures contract. It has some attributes of both, and all attributes of neither, as we have laid out in excessive detail. Neither characterization can be called wrong." *Chi. Mercantile Exch.*, 883 F.2d at 548.

55. See *Current, Former Officials Call for Streamlining of Financial Regulation*, 41 Sec. Reg. & L. Rep. (BNA) No. 13, at 567 (March 30, 2009) (arguing that "an 'uber' regulator responsible for securities, commodities, and insurance products" should take charge of the "piecemeal oversight" currently conducted by various agencies (quoting former SEC Chairman Harvey Pitt)); see also Randall Smith & Kara Scannell, *Regulator Schapiro to Run SEC for Obama*, WALL ST. J., Dec. 18, 2008, at A15 (referencing the consolidation of the National Association of Securities Dealers and certain regulatory and enforcement functions of the New York Stock Exchange).

56. See *Chi. Mercantile Exch.*, 883 F.2d at 544 (discussing the recurrence of jurisdictional disputes).

57. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57 (1999) ("Legislators actually felt little responsibility to consider constitutional questions because they relied on the courts to bail them out [if they overreached].") (internal quotation marks omitted). To a certain extent, political accountability and subject matter expertise are inconsistent constructs because, if one simply does the bidding of the President, Congress, or the majority, then one may not have any incentive to attain the relevant expertise. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 57–58 (2008).

58. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (suggesting that Congress is aware that statutory ambiguity will be resolved by agencies "whose policy biases will ordinarily be known").

59. See *United States v. O'Hagan*, 521 U.S. 642, 648–49 (1997) (discussing investigation by the SEC and eventual prosecution by the DOJ); see also H.R. REP. NO. 106-711, pt. 3, at 46–48 (2000) ("Chairman Levitt of the SEC and Chairman Rainer of the CFTC noted that these products should be subject to joint regulation by both agencies. The Committee agrees."); *Schapiro*

regulation causes friction,⁶⁰ the President may be able to resolve these conflicts even if the concern involves independent agencies rather than executive agencies.⁶¹ Alternatively, the agencies may resolve their own disputes without intervention.⁶² Therefore, deference by a reviewing court to an agency's interpretation of its own jurisdiction may not be a cause for concern.

Significantly, the SEC's participation in a jurisdictional squabble that potentially involves its own overreaching may be less troubling than similar squabbles involving other agencies because of the Commission's broad exemptive powers.⁶³ Consequently, if problems result from jurisdictional overreaching by the Commission, due to either redundant or unnecessary regulation, the SEC could exempt the "security" or "class of securities" from such regulatory provisions while continuing to fill regulatory gaps.

B. *Sufficiency of the Commission's Political Accountability*⁶⁴

1. *Accountability to the President*

Because the Supreme Court has not addressed expressly the appropriate deference, if any, that a court should accord to the views of an independent

Encourages Lawmakers to Seek Legislation for Rating Liability, Proxy Access, 41 Sec. Reg. & L. Rep. (BNA) No. 29, at 1345–46 (July 20, 2009) (discussing a White House legislative proposal that contemplates joint regulation of derivatives by the SEC and CFTC).

60. In certain circumstances, overlapping regulation could prove beneficial. *See, e.g.*, Daniel R. Fischel, *Regulatory Conflict and Entry Regulation of New Futures Contracts*, 59 J. BUS. S85, S101 (1986) (arguing that "[t]he best alternative to no entry regulation would be competition in entry regulation").

61. *See infra* notes 95–99 and accompanying text.

62. *See* Joint Order Excluding Indexes Comprised of Certain Index Options from the Definition of Narrow-Based Security Index Pursuant to Section 1a(25)(b)(vi) of the Commodity Exchange Act and Section 3(a)(55)(c)(vi) of the Security Exchange Act of 1934, Exchange Act Release No. 34-49469, 69 Fed. Reg. 16900, 16900–01 (Mar. 25, 2004); *see also* Chi. Mercantile Exch. v. SEC, 883 F.2d 537, 544 (7th Cir. 1989) (noting that agencies cannot alter their jurisdiction by agreement when the alteration would clearly be contrary to the jurisdiction Congress defined); Joint Order Excluding from the Definition of Narrow-Based Security Index Those Security Indexes that Qualified for the Exclusion from that Definition Under Section 1a(25)(b)(v) of the Commodity Exchange Act and Section 3(a)(55)(c)(v) of the Securities Exchange Act of 1934, Exchange Act Release No. 34-46009, 67 Fed. Reg. 38941, 38941–42 (May 31, 2002).

63. *See* 15 U.S.C. §§ 77z-3; 78mm(a)(1) (2006); *see also infra* Part II.B.

64. The APA definition of "agency" includes independent commissions. *See* 15 U.S.C. § 551(1) (2006) (defining "'agency' [as] each authority of the Government of the United States"); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 525 (2009) (plurality opinion) ("The Administrative Procedure Act . . . makes no distinction between independent and other agencies . . . in the standards for reviewing agency action." (citing 5 U.S.C. §§ 701(b)(1), 706 (2006))). Consequently, there may be no reason to treat judicial review of statutory interpretations by executive agencies differently than the statutory interpretations by independent agencies.

agency,⁶⁵ Congress's creation of the SEC as an independent agency, rather than an executive agency, is significant.⁶⁶ For example, the *Chevron* Court deferred to an executive agency and, in crafting its analytical framework, it repeatedly referred to the importance of political accountability.⁶⁷ The Court's emphasis on political accountability, and its express reference to the executive branch, has led some scholars to conclude that, although a reviewing court owes *Chevron* deference to an executive agency, courts need not accord such deference to an independent agency.⁶⁸

65. See Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 446 (2006) (“[I]t is somewhat surprising that the Court in *Chevron* did not then, nor has it since, said anything explicit about *Chevron*'s applicability to independent agencies.”). Nevertheless, the Court has applied precedent involving executive agencies to cases involving independent agencies, and lower courts have applied Supreme Court precedent involving independent agencies to cases involving executive agencies. See, e.g., *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 534 (2002) (applying *Chevron* deference to the FCC); Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 697 & n.83 (2004) (collecting cases that apply “[l]egal principles and tests established in cases involving executive agencies [to] cases involving independent agencies, and vice versa”). The Court may specifically address this gap in its jurisprudence during the 2012 Term. See *City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir.), cert. granted in part, 133 S. Ct. 524 (2012).

66. Some scholars suggest that Congress delegates to independent agencies when the opposing party occupies the White House, or at least when the President's preferences do not align with those controlling Congress. See DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997*, at 27-28 (2003); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 74. But see *id.* at 73 (“The failure of Congress to demonstrate a consistent approach to agency independence is mirrored at the theoretical level by the absence of any noncircular explanation for why independence is needed in a particular case.”). If true, then members of Congress seem short-sighted, because there is relatively rapid turnover in the White House. See Richard A. Posner, Editorial, *The Probability of Catastrophe . . .*, WALL ST. J., Jan. 4, 2005, at A12 (noting that “[p]oliticians [have] limited terms of office and thus foreshortened political horizons”). Nonetheless, the argument seems misplaced with respect to the Securities Act and the Exchange Act, which were passed under President Franklin D. Roosevelt (FDR) and both the House of Representatives and the Senate featuring large Democratic majorities. It merits mention, however, that FDR later sought to bring independent agencies under presidential control. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 466-67 (2008) (discussing FDR's view of independent agencies as the “headless fourth branch of government”).

67. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865 (1984) (referencing the “incumbent administration's views of wise policy” and explaining that, “[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices”).

68. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2377 (2001) (“A *Chevron*-type doctrine attuned to the role of the President would respond to this disparity by giving greater deference to executive than to independent agencies.”); May, *supra* note 65, at 453 (suggesting that “a reading of *Chevron* that accords less deference to independent agencies' decisions than to those of executive branch agencies would be more consistent with our constitutional system and its values”).

Although a single administrator typically heads executive agencies, five commissioners head the SEC, with no more than three coming from a single political party.⁶⁹ The requisite bipartisan representation among SEC commissioners lessens the likelihood that the Commission would implement the President's views.⁷⁰ Even though both executive administrators and commissioners must be nominated by the President and confirmed by the Senate,⁷¹ the President's removal powers differ with respect to each. Generally, the President may remove an executive administrator with or without cause,⁷² but the President's ability to remove a commissioner is limited to removal for cause,⁷³ enhancing the commissioner's independence and lessening accountability to the President. Additionally, executive administrators generally resign at the end of a President's term, increasing the likelihood that the political views of the next President and executive administrators coincide.⁷⁴ In contrast, Congress provided SEC commissioners with staggered, five-year terms so that some commissioners' tenures will extend beyond the President's term.⁷⁵ These staggered terms reduce the likelihood that the views of a newly elected President coincide with each commissioner. Moreover, commissioners—other than the chairperson—exhibit an unwillingness to resign upon the election of a president of a different political party.⁷⁶

Further, the SEC is relatively detached from the executive branch regarding its investigative and enforcement powers. The Commission may commence investigations regarding violations of securities laws without consulting the executive branch.⁷⁷ Upon determining that such violations have occurred or

69. 15 U.S.C. § 78d(a) (2006).

70. See Devins & Lewis, *supra* note 66, at 459 (noting the congressional intent to limit a President's control of independent agencies).

71. See 15 U.S.C. § 78d(a).

72. See *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988) (applying limited president-removal powers to SEC commissioners (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624–26 (1935))).

73. Removal by the President is likely limited to “for cause” situations. See *id.*; see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010) (assuming that a commissioner may be removed only for cause); *Morrison v. Olson*, 487 U.S. 654, 689–93 (1988) (upholding the statutory “good cause” limitation on the Attorney General's power to remove independent counsel); *Humphrey's Ex'r*, 295 U.S. at 624–26 (limiting the President's power to remove an FTC commissioner to those circumstances set forth by statute). Congress, however, may be able to impeach commissioners. See U.S. CONST. art. II, § 4.

74. See Devins & Lewis, *supra* note 66, at 477.

75. Compare U.S. CONST. art. II, § 1 (setting four-year term for the President), with 15 U.S.C. § 78d(a) (2006) (setting five-year, staggered terms for SEC commissioners).

76. See Devins & Lewis, *supra* note 66, at 490; see also *SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCHANGE COMMISSION, <http://sec.gov/about/sechistoricalsummary.htm> (last updated Dec. 17, 2012).

77. See 15 U.S.C. § 78u(a)(1) (2006) (“The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or

are imminent, the SEC may unilaterally seek injunctive relief as well as monetary penalties in federal district court.⁷⁸ Additionally, the Commission may pursue administrative adjudication of securities law violations.⁷⁹ Moreover, the SEC need not consult the executive branch when exercising its rulemaking authority⁸⁰ or when opining on pending or proposed legislation.⁸¹

The differences between an executive agency and an independent agency appear overstated;⁸² the President *may* exert substantial influence over independent agencies.⁸³ For example, although the President's appointment and removal powers limit executive influence over the SEC, those limitations are exaggerated.⁸⁴ Though not required by statute, the Commission's chairperson traditionally resigns upon a change in administrations, allowing

is about to violate any provision of this chapter [or] the rules or regulations thereunder" (emphasis added)).

78. See 15 U.S.C. § 77t(b) (2006) ("Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may *in its discretion*, bring an action in any district court of the United States . . . to enjoin such acts or practices" (emphasis added)); see also *id.* § 77t(d)–(e), (g) (providing for monetary and non-monetary penalties); 15 U.S.C. § 78u(d)(1) (mirroring 15 U.S.C. § 77t(b)); *id.* § 78u(d)(3) (providing for monetary penalties); Aulana L. Peters, *Independent Agencies: Government's Scourge or Salvation?*, 1988 DUKE L.J. 286, 287 (discussing the Commission's independence).

79. See 5 U.S.C. § 557(d) (2006); Peters, *supra* note 78, at 287 (noting the SEC's ability to operate in a quasi-judicial capacity "without the advice or approval of either the executive or legislative branch"); Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 242 ("Adjudications are insulated from influences outside the hearing process by constitutional and statutory norms of due process that bind the President no less than the ordinary citizen.").

80. See Geoffrey P. Miller, *The Debate over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 219 (stating that "[a]s to rulemaking and enforcement, the President has no authority to influence any agency, executive or independent, to act contrary to its statutory mandate"). Congress granted the Commission both targeted and generalized rulemaking authority. See 15 U.S.C. §§ 78i(b), 78j, 78n(a) (2006) (targeted authority); see also 15 U.S.C. §§ 77s(a), 78w(a)(1) (2006) (generalized authority).

81. See 12 U.S.C. § 250 (2006) ("No officer or agency of the United States shall have any authority to require the Securities and Exchange Commission . . . to submit legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the agency submitting them and do not necessarily represent the views of the President.").

82. See Miller, *supra* note 80, at 218 (noting this exaggeration (citing Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 232–33)).

83. See Miller, *supra* note 66, at 43 (noting that some independent agencies are subject to more executive branch control than some executive agencies).

84. See Seligman, *supra* note 31, at 239 (providing, as an example, that President Clinton's SEC appointments were largely based on political rationale rather than one's qualifications).

the newly elected President to influence the Commission's direction.⁸⁵ Even though the chairperson is only one of five commissioners, he or she wields the power to control the agenda,⁸⁶ potentially influencing outcomes.⁸⁷ Moreover, the chairperson controls the SEC's purse, allocates business among the Commission's administrative units, and appoints the heads of those administrative units.⁸⁸ Although the President may not have significant influence over the commissioners regarding the SEC's policies after their confirmation by the Senate, the power of appointment should not be underestimated as an executive means of guiding the Commission's direction.⁸⁹

Cross-party resignations may not occur following a change in administrations, but the SEC's positions, over time, closely align with those of the President.⁹⁰ Furthermore, the difference in independence between an individual administrator and a multi-member commission may be exaggerated because of the significant role played by career-line officers, whose influences

85. See Reorganization Plan No. 10 of 1950, 15 Fed. Reg. 3175, 3175 (May 25, 1950), reprinted in 64 Stat. 1265 (1950) ("The functions of the Commission with respect to choosing a Chairman from among the commissioners composing the Commission are hereby transferred to the President."); see also Peters, *supra* note 78, at 288 n.6 ("Upon a change in administration, the Chairman of the SEC is expected to tender his resignation to the new President."); *SEC Chairman Cox Resigns as SEC Chairman*, HUFFINGTON POST, Jan. 20, 2009, http://www.huffingtonpost.com/2009/01/20/chris-cox-resigns-as-sec_n_159548.html (noting that the chairman's resignation coincides with the inauguration of a President from a different party).

86. See Foust, *supra* note 32, at 115 ("In his two years as chairman of the Securities & Exchange Commission, Breeden has broadened the agency's enforcement agenda and pushed a flurry of tough new regulations."); see also Miller, *supra* note 66, at 80 & n.146 ("[T]he chairman of an independent agency is in theory only first among equals. . . . Agency chairmen, however, do often enjoy considerably greater powers because of their prestige in Congress, their access to the press, and their control over internal housekeeping matters such as staffing or budget."); Peters, *supra* note 78, at 288 (noting that the chairperson has "general control of the Commission's calendar"). *But see* Karmel, *supra* note 11, at 41 (identifying a period at the SEC during which "the Enforcement Division dominated the Commission and to a significant extent set its agenda").

87. See Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 564-65 (1977) (arguing that agenda influences outcomes); see also Christopher Long & Susan Rose-Ackerman, *Winning the Contest by Agenda Manipulation*, 2 J. POL'Y ANALYSIS & MGMT. 123, 124-25 (1982) (same). For example, former SEC Chairman Breeden was accused of refusing to process a matter on which a retiring commissioner had provided the swing vote, so as to nullify that critical vote in hopes of achieving a different outcome with a newly confirmed commissioner. See Foust, *supra* note 32, at 116.

88. See Reorganization Plan No. 10 of 1950, 15 Fed. Reg. at 3175.

89. See Peters, *supra* note 78, at 288 (discussing President Reagan's implementation of a deregulatory scheme by his appointment of like-minded commissioners); see also Robinson, *supra* note 79, at 245 (asserting that "implicit in the selection itself is the choice of persons who will continue to be responsive to future presidential preferences").

90. See Devins & Lewis, *supra* note 66, at 492.

have shaped the SEC's policies.⁹¹ The far-reaching knowledge base, the practical experience, and the intimate familiarity of the relevant facts of career line-officers frequently enable them to successfully advocate positions that are accepted by the ultimate authority—whether an administrator or a multi-member commission—commonly without modification.⁹²

The independence of the SEC from the executive branch may also be overstated with respect to its investigative and enforcement powers. Although the SEC is not required to consult with the executive branch before or regarding an investigation, the Commission may voluntarily consult with executive branch representatives to preserve limited resources or coordinate across agencies.⁹³ Because the Commission lacks criminal authority, it refers particularly egregious violations of the federal securities laws to the Attorney

91. See Karmel, *supra* note 12, at 38 (emphasizing the enforcement staffs' role in shaping the Commission's policies); see also Miller, *supra* note 66, at 80 ("The expertise that makes a difference in particular cases will be concentrated in the career staff of an agency . . .").

92. See Karmel, *supra* note 12, at 41 ("[T]he staff controls the factual record which is presented to the Commission." (footnote omitted)); see also Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Misdemean Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 121 (1997) (arguing that "[t]he employees with the most immediate access to basic information are almost always line personnel"); James G. March & Martha S. Feldman, *Information in Organizations as Signal and Symbol*, 26 ADMIN. SCI. Q. 171, 176 (1981) (stating that "[o]ften, information is produced in order to persuade someone"); Miller, *supra* note 66, at 80 ("[T]he recommendations of the career officer will be reviewed by 'policy-making' officials higher up in the chain of authority. And in the vast majority of cases, in both independent and executive agencies, the staff recommendations are accepted by the agency heads without change."); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1188 (1997) ("Often people make probability judgments on the basis of an initial value, or 'anchor,' from which they make insufficient adjustments. The initial value may have an arbitrary or irrational source." (footnote omitted)).

93. See Exec. Order No. 13,271, 3 C.F.R. 245 (2003) (creating an inter-agency working group composed of executive and independent agencies); see also OFFICE OF CHIEF COUNSEL, SEC. & EXCH. COMM'N DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL 108 (2008) (discussing the Commission's "[c]ooperation and coordination with other law enforcement agencies"); *id.* at 110 ("[The Commission] staff is encouraged to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate."); Andre Hruska, *The President's Corporate Fraud Task Force*, U.S. ATT'YS' BULL., May 2003, at 1, 2 ("[M]embers of the interagency group communicate frequently outside of the Task Force meetings on policy and, where appropriate, operational matters as they arise.").

General for prosecution.⁹⁴ After doing so, the SEC occasionally details members of its staff to assist in the prosecution of the referred cases.⁹⁵

Despite the independence of litigation in the lower courts, the Commission loses independence and influence when a matter reaches the Supreme Court, where the executive branch has the final say as to the government's position.⁹⁶ Commonly, the SEC and the executive branch agree regarding the appropriate resolution of the issue presented,⁹⁷ but, on those occasions of disagreement, the executive branch presents the government's position to the Court.⁹⁸ Additionally, the influence of the executive branch is not limited to silencing the Commission. For purposes of briefing and argument before the Court, the executive branch, on at least one occasion, required the SEC to reverse its own previously articulated position before the lower courts.⁹⁹

94. See 15 U.S.C. § 77t(b) (2006) ("The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter."); see also 15 U.S.C. § 78u(d)(1) (2006) (virtually identical); Press Release, U.S. Dep't of Justice, U.S. Charges Ex-Worldcom CEO Bernard Ebbers; Former Worldcom CFO Scott Sullivan Pleads Guilty (Mar. 24, 2004) (announcing the indictment and guilty plea of corporate fraudsters and thanking the Commission for its assistance in the investigation), available at <https://www2.fbi.gov/dojpressrel/pressrel04/world030204.htm>.

95. See 28 U.S.C. § 543 (2006) (empowering the U.S. Attorney to appoint attorneys to assist AUSAs); see also, e.g., *United States v. Wencke*, 604 F.2d 607, 610 (9th Cir. 1979) (per curiam); *Wall v. United States*, 384 F.2d 758, 763 (10th Cir. 1967).

96. Securities and Exchange Commission Historical Society Fireside Chat—Courts and the SEC (Apr. 17, 2007) (statement of Paul Gonson, former Solicitor, U.S. Sec. & Exch. Comm'n) [hereinafter Fireside Chat], transcript available at http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/programs/Transcrip_2007_0417_FC.pdf.

97. *Id.* ("Generally, the Solicitor General will defer to the SEC with regard to the position and the Solicitor General's staff will do some editing of the brief [originally drafted by the SEC]."). As evidence of an agreement, the DOJ and SEC generally file a joint merits brief with the Supreme Court. See, e.g., Brief for United States as Amicus Curiae Supporting Petitioners at 1, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (06-484), 2007 WL 460606; Brief for United States as Amicus Curiae Supporting Petitioner at 1, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006) (No. 04-1371), 2005 WL 3048038; Brief for United States as Amicus Curiae Supporting Petitioners at 1, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) (No. 03-932), 2004 WL 2069564; Brief of Petitioner at 1, *SEC v. Edwards*, 540 U.S. 389 (2004) (No. 02-1196), 2003 WL 21498455; Brief of Petitioner at 1, *SEC v. Zandford*, 535 U.S. 813 (2002) (No. 01-147), 2001 WL 1663770.

98. See Linda Greenhouse, *Skeptically, Court Hears Fraud Case*, N.Y. TIMES, Oct. 10, 2007, at C1, C11 ("While the S.E.C. is an independent agency, it needs authorization from the solicitor general to file a Supreme Court brief."). Greenhouse refers to the *Stoneridge* case, in which the Commission supported a position advocated by plaintiffs, but the Bush Administration advocated a position favoring defendants before the Court. See *id.*

99. See Fireside Chat, *supra* note 96 ("PAUL GONSON: . . . In the lower courts, the courts of appeals, the SEC and the FDIC had taken opposite positions on [whether the instrument was a 'security']. One of these cases, the *Marine Bank* case, came to the Supreme Court. The Solicitor General then invited the general counsels of the SEC and the three banking regulators to a suite in his office, locked the door, and said you guys aren't coming out until you agree on a common position that you'll all sign in the Supreme Court."). Little consolation flows from the

Congressional enactments may provide statutory cover, but the Commission does not insulate itself from the influence of the executive branch with respect to its rulemaking authority.¹⁰⁰ In fact, the SEC has worked repeatedly with executive agencies in this regard.¹⁰¹ After the enactment of the Sarbanes-Oxley Act of 2002, the Commission worked with the Treasury Department in crafting new rules.¹⁰² Following Black Monday—the stock market break of October 1987—as the SEC prepared to propose legislation, President Ronald Reagan issued an executive order that created a working group composed of executive administrators and independent commissioners, which effectively prevented the Commission from taking action independently until the group had issued a report to him.¹⁰³

Finally, the President proposes the budget for agencies, including the SEC's allocation thereof. Thus, the Commission must, to a certain extent, appease the President in its actions lest it risk being short-changed.¹⁰⁴ Even if an executive administrator is more responsive than a commission to the President, it need not be the case that courts can avoid *Chevron* deference to the views of an independent agency. Even those who oppose a court's application of *Chevron* to independent agencies concede that some lesser deference may be appropriate.¹⁰⁵

fact that the Commission extracted from the DOJ footnotes that limited the arguments presented. *See id.*

100. *See* Peters, *supra* note 78, at 287 (“[A]s a matter of prudence and courtesy the Commission does consult with other agencies of government in formulating major legislative positions.”); *see also* Foust, *supra* note 32, at 116 (describing Chairman Breeden’s “efforts to ingratiate himself with the White House” by “shift[ing] course, or at least his emphasis, on several key policy issues to promote the Bush Administration agenda during an election year”); Colleen M. Kelley, Letter to the Editor, *Don’t Blame the SEC’s Employees*, WALL ST. J., Feb. 13, 2009, at A12 (“[F]ront-line employees . . . have been hampered from fulfilling the [SEC’s] mission[] by leaders under the previous administration who were, at best, ambivalent about agency missions.”).

101. *See* Peters, *supra* note 78, at 287 (noting that the SEC works with other agencies).

102. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1807–08 (2007).

103. *See* Exec. Order No. 12,631, 3 C.F.R. 559 (1989); *see also* Jerry W. Markham & Rita McCloy Stephanz, *The Stock Market Crash of 1987—The United States Looks at New Recommendations*, 76 GEO. L.J. 1993, 2028 n.227 (1988) (“The agencies did not introduce proposals partly because they were awaiting the formation of the Presidential Working Group.”); Peters, *supra* note 78, at 293 (stating that Executive Order 12,631 temporarily “enjoyed” the Commission).

104. Seligman, *supra* note 31, at 253 (“The SEC . . . submits its budget to the White House Office of Management and Budget, which consolidates several agency budgets into a single request.”).

105. *See* Kagan, *supra* note 68, at 2377 n.506 (arguing that the “adoption of the proposal offered here need not entail the elimination of all deference to independent agencies”).

2. Accountability to Congress

In *Chevron*, the Court partially justified ceding interpretive authority to an administrative agency because such agencies have greater political accountability than federal courts.¹⁰⁶ Although the *Chevron* Court specifically referenced executive agencies, which are accountable to the President, who, in turn, is accountable to the country,¹⁰⁷ the *Chevron* Court did not discuss whether the requisite political accountability might come from congressional—rather than presidential—oversight.¹⁰⁸ Even if they are independent of the executive, independent agencies nevertheless may be sufficiently politically accountable to Congress so as to warrant deference from reviewing courts regarding interpretations of the ambiguous statutes that they administer.¹⁰⁹ Accountability may arise through Congress’s confirmation power, power of the purse, and power to compel testimony, as well as through Congress’s ultimate legislative authority.¹¹⁰

Through its confirmation power, Congress plays an influential role in the SEC’s composition because the Senate offers advice to the President regarding

106. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865–66 (1984).

107. See *id.* at 865 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

108. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality opinion) (“The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.” (citations omitted)); see also *id.* at 525 (“The Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency, nor in the standards for reviewing agency action.” (citations omitted)).

109. See WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 4 (1967) (“Government regulatory commissions are often referred to as ‘independent’ agencies, but this cannot be taken at face value by anyone who has ever had any experience in Washington. In fact, government regulatory agencies are stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one.”); see also Bressman, *supra* note 102, at 1806 (“[T]he Court may ensure that Congress can use administrative procedures to control independent agencies.”); Karmel, *supra* note 12, at 43 (“At least while I was a Commissioner, the SEC did not consider itself as independent of congress as it did of the White House.”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 100 (1994) (“It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely ‘independent’ regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable”); Miller, *supra* note 80, at 218 (noting that “studies . . . suggest that independent agencies may be somewhat more responsive to Congress”).

110. See *Fox*, 556 U.S. at 525 n.5 (noting the “extrastatutory influence Congress exerts over agencies . . . which is exerted by the congressional committees responsible for oversight and appropriations with respect to the relevant agency”); see also Scalia, *supra* note 58, at 518 (“Under *Chevron*, . . . [a statutory ambiguity] can mean a range of things, and it is up to the agency, in light of . . . political pressures that it feels from Congress . . . to specify the correct meaning.”).

nominees, and no nominee can become a commissioner without the Senate's consent.¹¹¹ Recent Presidents have given surprising import to the "advice" of Senate leaders of the rival party in nominating minority positions on the Commission.¹¹² During the confirmation process, the Senate may "exact promises from nominee[s],"¹¹³ increasing the likelihood that a nominee's regulatory vision adequately aligns with that of a majority of senators. Although Congress empowered the chairperson to appoint directors of the Commission's various divisions,¹¹⁴ Congress may lean on the chairperson to influence those appointments.¹¹⁵

The SEC responds to congressional influence because Congress controls the purse.¹¹⁶ The Commission is one of the few agencies whose revenues historically have exceeded its expenses, but it does not retain the revenue that it collects.¹¹⁷ The revenue goes to the federal fisc, and the SEC must convince Congress to allocate to it enough money to cover its expenses.¹¹⁸

111. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, § 4(a), 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78a (2006)).

112. See Seligman, *supra* note 31, at 257 (stating that recently "Senate leaders of the leading other political party have proposed the minority of the commissioners representing the rival political party").

113. Peters, *supra* note 78, at 288.

114. See Reorganization Plan No. 10 of 1950, 15 Fed. Reg. 3175, 3175 (May 25, 1950), reprinted in 64 Stat. 1265 (1950).

115. See *Enforcement Chief Thomsen Leaving SEC; Deutsche Bank Lawyer Seen as Successor*, 41 Sec. Reg. & L. Rep. (BNA) No. 7, at 246 (Feb. 16, 2009) ("[G]iven the anger of many in Congress at the enforcement program, and criticisms, however unfair, from many quarters including the Commission's own inspector general, [Chairperson] Mary Schapiro has to make a visible change in the leadership and direction of the division or lose her own credibility with Congress." (quoting an unnamed securities attorney)); see also Gretchen Morgenson, *Top Enforcer at the S.E.C. Steps Down*, N.Y. TIMES, Feb. 10, 2009, at B1 (discussing the new Chairperson's acceptance of the Director of Enforcement's resignation "amid blistering criticism that the commission had failed to protect investors in recent years").

116. See U.S. CONST. art. I, § 8, cl. 1; see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 525 n.5 (2009) (plurality opinion) (noting the "extrastatutory influence Congress exerts over agencies . . . which is exerted by the congressional committees responsible for . . . appropriations with respect to the relevant agency"); Seligman, *supra* note 31, at 234 ("Congress generally prefers control of budgetary purse strings as a technique to control how the independent regulatory agencies function").

117. See 15 U.S.C. §§ 77f(b), 78ee (2006); see also *Financial Services and General Government Appropriations for Fiscal Year 1997: Hearing on H.R. 3814 Before a Subcomm. of the H. Comm. on Appropriations*, 104th Cong. 704, 713 (1996) (statement of Arthur Levitt, Chairman, U.S. Sec. & Exch. Comm'n) ("[T]he SEC has been a net contributor to the U.S. Treasury, collecting more in fees than was necessary to cover its budget in every year since 1983."); Peters, *supra* note 78, at 294; Seligman, *supra* note 31, at 239 (reporting that the fees collected by the Commission in 1993 were twice the funds allocated by Congress and that in 2001 its fee collections were more than five times the amount appropriated to it).

118. See U.S. CONST., art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); see also *Fiscal 2009 Appropriations: Hearing Before the Subcomm. on Financial Services and General Government of the S. Comm.*

Consequently, Congress employs the budgetary process to ensure that the Commission is fulfilling its congressional mission.¹¹⁹ By shortening the period during which Congress budgets funds to the SEC, Congress has enhanced the effectiveness of this monitoring mechanism and increased the Commission's accountability.¹²⁰

In addition to addressing budgetary matters, representatives of the SEC—typically the chairperson and division directors—testify frequently before Congress regarding regulatory shortcomings and potential remedies thereof.¹²¹ Congress continually monitors the Commission, even if such monitoring varies in intensity over time—arguably less intense during market booms and more intense during market busts.¹²²

As is typical following a market drop, previously undiscovered frauds are illuminated. For example, following the precipitous market drop in late 2008, Congress convened several hearings during which representatives of the SEC appeared, with members of Congress lambasting the Commission for shortcomings in its enforcement.¹²³ Of particular note was the \$50 billion fraud perpetrated by Bernard Madoff that ensnared the likes of Elie Wiesel,

on Appropriations, 110th Cong. 349–52 (2008) (statement of Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n).

As a caveat, recently Congress authorized the use of disgorgement funds, such that certain fines previously collected by the Commission (and paid to the federal fisc) may be paid to disgorgement funds to remedy harms suffered by investors. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 308, 116 Stat. 745, 784–85 (codified as amended at 15 U.S.C. § 7201 (2006)).

119. See Karmel, *supra* note 12, at 43 (“Members of Congress who head up oversight committees can cause an agency like the SEC a great deal of aggravation or can benefit the agency through budgetary largess”); see also Peters, *supra* note 78, at 294 (“It is neither unusual nor inappropriate for Congress to use the budget process to ensure that an agency is fulfilling its statutory mandate.”).

120. Compare S. REP. NO. 100-105, at 2 (1987), reprinted in 1987 U.S.C.C.A.N. 2087, 2090 (describing the necessity of legislation and stating that “the expanding responsibilities and workload of the Commission as well as recurring revelations of improprieties in the financial markets cast doubt on the wisdom of making a 3 year appropriation in today’s environment. The Subcommittee believes that it should have greater involvement in overseeing the SEC’s operations Accordingly, the Subcommittee believes a 2 year authorization is appropriate.”), with *supra* note 118 (noting the chairman’s annual appearances before congressional appropriations subcommittees).

121. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 523–24 & n.4; see also *SEC Congressional Testimony*, U.S. SEC. & EXCH. COMM’N, <http://sec.gov/news/testimony.shtml> (last modified Dec. 12, 2012) (archiving prepared testimony before Congress by representatives of the Commission from 1995 to present).

122. See Karmel, *supra* note 12, at 43 (noting Congress’s use of appropriations as a means of oversight that fluctuates over time).

123. See *More Effective SEC Changes Recommended by Commerce*, 24 CORP. COUNS. WKLY. 52, 53 (2009) (“The SEC’s belated discovery of Bernard Madoff’s alleged Ponzi scheme has prompted lawmakers, in three hearings since January, to focus on the Division of Enforcement’s handling of complaints and sharing of information among themselves, with the commission, and with other regulators.”).

Steven Spielberg, and John Malkovich.¹²⁴ After a hearing in which “[s]ecurities regulators could not cool the white-hot Congressional fury” regarding the Commission’s “failure to act on tips that might have exposed the Madoff scandal,” Chairwoman Mary L. Schapiro requested a meeting with the House Financial Services subcommittee to “work out ‘a course forward’ that would provide accountability and maintain the integrity of continuing investigations.”¹²⁵ Two days later, Shapiro convened meetings with commissioners and senior SEC staff to “reinvigorate the SEC’s enforcement program, including improving the handling of tips and whistleblower complaints”¹²⁶ Less than two weeks after Congress excoriated the Commission for its decades-long failure to pursue allegations of the Madoff fraud, the Commission followed up on another case with a history of fraud allegations by charging R. Allen Stanford and affiliates with financial fraud.¹²⁷

Congress’s influence over the Commission is not limited to enforcement matters. Because Congress can revise, supplement, or reverse any administrative rule,¹²⁸ the Commission remains accountable to Congress when it acts in a quasi-legislative capacity.¹²⁹ Congress monitors the SEC¹³⁰ and may either impede the Commission’s rulemaking or induce the Commission to

124. See *id.*; see also Richard Hill & Yin Wilczek, *Enforcement Chief Thomsen Leaving SEC: Beutsche Bank Lawyer Seen as Successor*, in 41 SECURITIES REGULATION & LAW 245, 245 (BNA, Feb. 16, 2009) (reporting Madoff’s confession to senior Commission staffers that his investment business was actually a Ponzi scheme); Lynnley Browning, *Madoff Victims Will Get a Tax Break*, N.Y. TIMES, Mar. 18, 2009, at B3 (identifying some of Madoff’s victims).

125. Diana B. Henriques, *At Madoff Hearing, Lawmakers Lay into S.E.C.*, N.Y. TIMES, Feb. 5, 2009, at B1, B10.

126. Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm’n, Address to Practising Law Institute’s “SEC Speaks in 2009” Program (Feb. 6, 2009), available at <http://www.sec.gov/news/speech/2009/spch020609mls.htm>.

127. See Glenn R. Simpson et al., *Madoff Case Led SEC to Intensify Stanford Probe*, WALL ST. J., Feb. 19, 2009, at A14; see also Karmel, *supra* note 12, at 43 (“While the Enforcement Division probably would not quash an investigation because of congressional pressure, the staff can and does begin and pursue investigations because of it.”).

128. See U.S. CONST., art. VI, cl. 2.

129. Even though Congress has authority to revise, supplement, or reverse an administrative rule, it may choose not to invoke that authority. Congress’s legislative attention is focused on many matters outside the realm of the securities laws. See U.S. CONST., art. I, § 8. Additionally, Congress has impediments to enacting legislation. See, e.g., McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992) (noting that “to succeed, a bill must survive a gauntlet of veto gates”). Congress only periodically passes new securities legislation, see Seligman, *supra* note 31, at 251, but periodically does not mean never. See LOSS ET AL., *supra* note 32, at 1103 (discussing congressional amendment to definition of “security”).

130. See Bressman, *supra* note 50, at 603 (“Congress maintain[s] active interest in agency decision making as it unfolds.” (citing Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1804–13 (2007))).

promulgate rules.¹³¹ The SEC is sufficiently accountable to Congress to merit court deference.¹³² Albeit infrequently and without explication, the Court has relied on the *Chevron* framework when deciding cases involving an independent agency.¹³³

C. Public Versus Private Enforcement

The Supreme Court commonly favors SEC interpretations when the agency is enforcing federal securities laws,¹³⁴ but the Commission's positions in private securities litigation do not fare as well before the Court.¹³⁵ Some scholars suggest that, when private parties litigate, the Commission is neither acting in its enforcement nor its rulemaking capacity and, thus, its position commands no deference from a reviewing court,¹³⁶ whereas the SEC's

131. See SEC Regulatory Accountability Act, H.R. 2308, 112th Cong. § 2 (2011) (requiring clear identification of the problem to be addressed by the Commission's regulation as well as clear articulation of the costs and benefits of that regulation); see also Peters, *supra* note 78, at 294 (criticizing Congress's attempts to impede the SEC's Electronic Data Gathering Analysis and Retrieval (EDGAR) initiative by "impos[ing] significant restrictions on the Commission's ability to finance the system . . . [and also] impos[ing] time-consuming reporting and certification requirements"); Seligman, *supra* note 31, at 242–43 (describing Congress's deregulatory bent and stating that the "Commission would have to backpedal by administrative action to reduce the likelihood of more deregulatory legislation").

132. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (plurality opinion) (stating that "independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction" and also noting that "[t]he Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency, nor in the standards for reviewing agency action." (citations omitted)).

133. See, e.g., *id.* at 525; *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 501–02 (2002).

134. See *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002) ("[The Commission's] interpretation of the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference if it is reasonable" (citing *United States v. Mead Corp.*, 533 U.S. 218, 229–30 & n.12 (2001))); see also *United States v. O'Hagan*, 521 U.S. 642, 673 (1997) ("Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment 'more than mere deference or weight.' . . . [W]e must accord the Commission's assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to statute.'" (second alteration in original) (citations omitted) (quoting *Batterton v. Francis*, 432 U.S. 416, 424–26 (1977); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984))).

135. See *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) (collecting cases in which the Supreme Court has refused to apply the SEC's statutory interpretations of some of the provisions of the Securities Acts).

136. See *Chevron*, 467 U.S. at 842 (discussing deference in a public, not private, enforcement action); see also Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors*, 53 CATH. U. L. REV. 667, 695 (2004) ("Congress delegated authority to the SEC to prohibit certain conduct—it did not delegate authority to create private rights of action. The question of how far to extend the private action is in essence a question of federal common law."). Additionally, following the enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA), the Court has accorded the Commission's positions little weight with respect to ambiguities in that

positions in public enforcement actions should command such deference. Certainly, there are some issues of federal securities regulation that are distinctly public and some issues that are distinctly private.¹³⁷ Emphasis on the public/private distinction, however, is misplaced. A court's deference to an agency's interpretation depends on the issue at hand, not necessarily

statute. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); see also Bressman, *supra* note 50, at 579 ("Congress likely intended courts to interpret the PSLRA or at least knew that they would. The explanation is straightforward: courts have been the primary interpreters of securities law in the context of private class actions." (footnote omitted)).

137. For example, consider Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, which serves as the workhorse for both public and private securities litigation. See REPORT OF THE SECURITIES AND EXCHANGE COMMISSION: SECTION 703 OF THE SARBANES-OXLEY ACT OF 2002: STUDY AND REPORT ON VIOLATIONS BY SECURITIES PROFESSIONALS 9 (2003), available at <http://www.sec.gov/news/studies/sox703report.pdf> (listing Section 10(b) and Rule 10b-5 as the two most frequently enforced provisions of the federal securities laws); see also Nat Stern, *The Constitutionalization of Rule 10b-5*, 27 RUTGERS L.J. 1, 1 (1995) (asserting that "Rule 10b-5 is probably the most familiar and most frequently invoked securities regulation [which was] [p]romulgated by the Securities and Exchange Commission (SEC) under § 10(b) of the Securities and Exchange Act of 1934" (footnotes omitted)). Aiding-and-abetting liability is a distinctly public action, meaning private litigants cannot successfully charge defendants with having aided and abetted securities violations of Section 10(b) and Rule 10b-5. See 15 U.S.C. § 78j(b) (2006); see also 17 C.F.R. § 240.10b-5 (2007); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994) ("[W]e hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)."). Only the government may pursue aiding-and-abetting charges against those defendants. See 15 U.S.C. § 78t(e) (2006).

However, some issues that may arise in private securities litigation will not arise in the Commission's enforcement actions. For instance, although a private plaintiff must establish that he or she relied on the defendant's misstatement or omission in an action under Section 10(b), the Commission need not establish such reliance. See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 156 (2008) (noting the elements a private plaintiff must establish for a cause of action under Section 10(b)); STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: CASES AND ANALYSIS* 315 (2005). Additionally, private plaintiffs must have purchased or sold securities to have standing to pursue their Section 10(b) claims, but the Commission is not similarly encumbered. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754-55 (1975) (imposing a standing requirement for private actions); see also *O'Hagan*, 521 U.S. at 664 (limiting the standing requirement to private actions); *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 467 n.9 (1969) (same). Further, private plaintiffs must have pursued such claims within a limitations period, but this period does not apply to actions by the SEC. See 28 U.S.C. § 1658(b) (2006); see also *Lampf v. Gilbertson*, 501 U.S. 350, 356-58 (1991) (interpreting a predecessor statute); *SEC v. Rind*, 991 F.2d 1486, 1488-90 (9th Cir. 1993). When resolving the foregoing issues in private enforcement cases, the Court rejected the Commission's positions without reference to *Skidmore* or *Chevron* deference. See *Lampf*, 501 U.S. at 361 (rejecting, without any reference to *Chevron*, the Commission's proposed five-year limitations period for a private action under Section 10(b)); see also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197-98 (1975) (rejecting, without any reference to *Skidmore*, the Commission's interpretation of what constitutes a "manipulative or deceptive device or contrivance"); *Blue Chip Stamps*, 421 U.S. at 738, 746 n.10 (1975) (rejecting, without any reference to *Skidmore*, the Commission's interpretation of Section 10(b) and Rule 10b-5).

whether that issue arises in private or public litigation.¹³⁸ In fact, the Court has deferred to an agency's interpretation of a statutory ambiguity when that ambiguity has arisen in private litigation.¹³⁹

Even if there were merit to the public/private distinction, the distinction seems irrelevant in definition-of-security cases. Though some issues may be distinctly private or public, many issues apply to causes of action whether those actions are private or public.¹⁴⁰ For example, under Section 10(b) of the Exchange Act and Rule 10b-5, the defendant's deception must have been "in connection with" a securities transaction whether a private litigant or the government pursued that defendant.¹⁴¹ Most pertinent to this Article, the requirement that the instrument offered or sold must have been a "security" straddles both private and public realms. A court's holding regarding the definition of "security" affects public enforcement, whether the issue arises in private litigation or not.¹⁴² A holding in a private action that is overly cramped unduly limits the Commission and prevents its own enforcement efforts.¹⁴³ According deference to the SEC in a public enforcement action

138. See Bressman, *supra* note 50, at 579 (arguing that "courts [sh]ould focus on legislative reasons for interpretive delegation by examining the nature of the issue").

139. See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 12–18 (2004) (according *Skidmore* deference to an agency's interpretation of statutory ambiguity); see also Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444–49 (2003) (same); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (expressing willingness to accord *Skidmore* deference to an agency's opinion letter, but ultimately finding the agency's interpretation unpersuasive); Mead Corp. v. Tilley, 490 U.S. 714, 722–25 (1989) (according *Chevron* deference to an agency's interpretation of statutory ambiguity).

140. See *infra* note 141 and accompanying text.

141. See 15 U.S.C. § 78j(b) (2006); see also 17 C.F.R. § 240.10b-5 (2007); *Stoneridge*, 552 U.S. at 156; SEC v. Zandford, 535 U.S. 813, 819–25 (2002); *O'Hagan*, 521 U.S. at 651–59.

142. See Brief for the SEC as Amicus Curiae Supporting Petitioner at 3, *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985) (No. 83-1961), 1984 WL 565898, at *3 ("The resolution of [the 'security' issue] will not only affect private litigation but could also significantly affect enforcement actions brought by the Commission."); see also Brief for the SEC as Amicus Curiae Supporting Petitioner at 3–4, *Tcherepnin v. Knight*, 389 U.S. 332 (1967) (No. 104), 1967 WL 113740, at *3–4 ("The decision of the court of appeals that [the instrument] is not a 'security' as defined in that Act . . . would seem to preclude the Commission from acting for [investors'] protection.").

143. See Brief for the SEC as Amicus Curiae Supporting Petitioner at 4–5, *Tcherepnin*, 389 U.S. 332 (No. 104), 1967 WL 113740, at *4–5 ("[T]he restrictive meaning the court of appeals has given to the statutory definition of the term 'security,' if allowed to stand, would seriously hamper the Commission's efforts to deal with novel types of financial instruments as they appear."); see also Brief for United States as Amicus Curiae Supporting Respondent at 2, *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975) (No. 74-157) ("The construction of the term 'security' in these acts necessarily determines their applicability in Commission enforcement actions. . . . The Commission opposes restrictive constructions of the securities laws and of the Commission's rules that would weaken the protections they afford investors and narrowly restrict the range of circumstances to which they apply.").

In resolving a private suit under Rule 10b-5, which proscribes the making of "any untrue statement", the Supreme Court recently determined that one must have "ultimate authority" for a

regarding a particular issue,¹⁴⁴ but failing to accord any deference to the Commission for the same issue that arises in a private action is troublingly inconsistent because both speak to the Commission's reach. Finally, emphasis on public-versus-private *enforcement* fails to capture the entirety of the *Chevron* Court's discussion of administering the statute,¹⁴⁵ which contemplates both agency adjudication and rulemaking.¹⁴⁶

That an issue arises in private litigation should not determine whether a court accords deference to the SEC. If the issue arises in private litigation, a court should accord deference to the Commission's interpretation based upon familiar considerations such as whether the Commission promulgated a rule that addresses the issue following the appropriate notice-and-comment procedures or whether the SEC previously resolved the issue in a formal adjudication.¹⁴⁷

II. STATUTORY INDICATIONS OF INTERPRETIVE DELEGATION

Congress envisioned some malleability in securities laws, intending that the SEC mold regulation in certain circumstances.¹⁴⁸ However, with respect to the definition of "security," statutory interpretation arguments cut both ways. Some scholars argue that Congress delegated interpretive authority to the Commission, but others argue that Congress delegated this authority to the courts.¹⁴⁹ Given each argument's persuasiveness, the Court should

statement in order to be held accountable. *See* 17 C.F.R. § 240.10b-5; *see also* *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). Thus, one corporate entity that crafted a statement would not be accountable if a second affiliated entity made the statement with the approval of its managing board. *See id.* The Court's interpretation of the phrase "make any untrue statement," may inhibit the SEC's pursuit of those involved in securities fraud. *See* Alert Memorandum from Cleary Gottlieb Steen & Hamilton LLP, Supreme Court Limits Liability for False Statements Under Rule 10b-5 to Those with "Ultimate Authority" for Them, at 3 (June 20, 2011) (discussing *Janus Capital's* effect on Commission enforcement).

144. *See, e.g., Zandford*, 535 U.S. at 819–20 (accorded deference to the SEC in its enforcement action).

145. The *Chevron* Court spoke of "an agency's construction of the statute which it administers," and also of "an agency to which Congress has delegated policymaking responsibilities." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842, 865 (1984).

146. *See* 15 U.S.C. §§ 77s(a), 78w(a)(1) (2006); *see also O'Hagan*, 521 U.S. at 673; *supra* note 134.

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

148. *See, e.g.,* 15 U.S.C. § 77s(a) ("The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter"); *id.* § 78w(a)(1) ("The Commission . . . shall . . . have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which [it is] responsible or for the execution of the functions vested in [it] by this chapter . . ."); S. REP. NO. 73-792, at 5 (1934) (noting that administrative flexibility is essential in regulating the "modern stock exchange," but the limits of the entrusted agency's authority should be clear).

149. *Compare* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 216 ("Judges can put into effect congressional decisions about the scope of

hold—and, according to at least one Justice, the Court has held—that, when there is ambiguity, “*Chevron’s* rule of deference applies to an agency’s . . . interpretation of its own statutory authority or jurisdiction.”¹⁵⁰ Further, Congress has provided additional indications that it intended to give the SEC interpretive authority to define its own jurisdiction, including: the Commission’s power to define terms, its exemptive power, the context clause preceding the definition of “security,” and the significance of Congress’s overlapping, circular definition of “security.”

A. *The Commission’s Authority to Define Terms*

In determining whether Congress intended for the Commission to serve as the primary interpreter of uncertainties regarding the definition of “security,” it is essential to examine the responsibilities with which Congress charged the SEC. Congress delegated the authority to define terms in both the Securities Act of 1933 (Securities Act) and the Exchange Act to the SEC.¹⁵¹ Specifically, Congress empowered the Commission to define “technical and trade terms” used in the Securities Act and “technical, trade, . . . and other terms” used in the Exchange Act.¹⁵² Although Congress itself defined

the *Chevron* doctrine only if Congress, as an initial matter, makes these decisions.”), with Bressman, *supra* note 50, at 551 (stating that “when courts find no ‘clear’ meaning for the statutory text . . . they infer a delegation of interpretive authority to the agency”).

150. *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–81 (1988) (Scalia, J., concurring) (citations omitted); *see also* Scalia, *supra* note 58, at 517 (“Congress now knows that the ambiguities it creates, *whether intentionally or unintentionally*, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.” (emphasis added)). Other Justices agree with Justice Scalia. *United States v. Eurodif S.A.*, 555 U.S. 305, 319 (2009) (stating that the Court should look to an agency for interpretation of a statute’s scope and accept that application if it is reasonable).

151. *See infra* note 152 and accompanying text.

152. 15 U.S.C. § 77s (“The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations . . . defining accounting, technical, and trade terms used in this title.”); 15 U.S.C. § 78c(b) (2006) (“The Commission . . . as to matters within [its] jurisdiction[], shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter.”).

Congress did not empower the Commission to define only trade terms and technical terms, but also accounting terms. *See* 15 U.S.C. § 77s (“The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations . . . defining accounting, technical, and trade terms used in this subchapter.”); *see also* 15 U.S.C. § 78c(b) (2006) (substantially similar). The inclusion of accounting terms should neither cabin the SEC’s power to define terms in order to provide indirect guidance about the meaning of “security” nor prevent courts from according deference to that guidance. Although accounting is a field that includes technical and trade terms, an interpretation that limits those terms to the field of accounting would render their inclusion as surplusage. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825,

“security,” in so doing, it created a laundry list of more than twenty different financial instruments that comprise the definition.¹⁵³ Thus, the definitional dilemma is not as simple as determining what constitutes a “security,” because

837 (1988) (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” (footnote omitted)); *see also* *Gustafson v. Alloyd Co.*, 513 U.S. 561, 586 (1995) (Thomas, J., dissenting) (stating that the canon *noscitur a sociis*, meaning “a word is known by the company it keeps,” is not an obligation on the Court “to construe every term in a series narrowly because of the meaning given to just one of the terms” (citations omitted)). Admittedly, an argument favoring such a narrow construction finds some support in the Securities Act. As originally enacted, the Securities Act delegated the power to define only “accounting and trade terms.” Pub. L. No. 73-22, § 19, 48 Stat. 74, 85 (1933). Immediately thereafter, Congress delegated to the Commission the authority to detail disclosures regarding accounting matters. Congress empowered the Commission to determine the items to be included in the balance sheets and earnings statements generally described by Congress and, among other things, the appropriate methods of valuation and depreciation. *See id.* At first look, the grant of the power to define is immediately followed by detailed powers limited to matters of accounting, suggesting a narrow reading of the power to define.

Upon closer inspection, however, the Court should not construe the power to define so narrowly as to limit it to the accounting field. Context matters and the Court has repeatedly instructed that statutes should not be interpreted in a vacuum. *See, e.g., Gustafson*, 513 U.S. at 568 (noting that the Court must “construe statutes, not isolated provisions”).

First, in section 19, Congress delegated the power to define terms for the entire title, even though it did not include any accounting terms other than those that appeared in section 19 and schedules A and B. *See* Pub. L. No. 73-22, 48 Stat. 74, 88–91 (1933). Congress’s grant of authority to define terms extended to the entire Securities Act and was not limited to section 19 or schedules A and B, suggesting that “technical and trade terms” should not be interpreted so narrowly so as to apply only to matters of accounting.

Second, Congress granted the SEC the power to define terms in the Exchange Act using similar language as found in the Securities Act. More importantly, in the Exchange Act, Congress placed the power to define terms in section 3(b), which immediately follows the definitional section, suggesting that the power to define was relatively broad. Finally, in 1934, Congress amended the Securities Act by adding “technical” terms to the Commission’s power to define, suggesting that Congress intended greater conformity between the two sections. *See* Pub. L. No. 73-290, § 209(a), 48 Stat. 881, 908 (1934); *see also* *Reves v. Ernst & Young*, 494 U.S. 56, 76 (1990) (Stevens, J., concurring) (suggesting a uniform reading of the Securities and Exchange Acts); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n.1 (1985) (“We have repeatedly ruled that the definitions of ‘security’ in § 3(a)(10) of the 1934 Act and § 2(1) of the 1933 Act are virtually identical and will be treated as such in our decisions dealing with the scope of the term.” (citations omitted)).

153. *See* 15 U.S.C. § 77b(a)(1) (“The term ‘security’ means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a ‘security,’ or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.”); *see also* 15 U.S.C. § 78c(a)(10) (2006) (substantially similar).

each of the twenty-plus congressionally enumerated instruments generates its own definitional dilemma.¹⁵⁴ Congress used numerous ambiguous terms in compiling its list of securities, including technical and trade terms for which the SEC's interpretive guidance would be beneficial to the public.¹⁵⁵ The Commission's authority to define terms, including any technical or trade terms included in Congress's own definition of "security," suggests that Congress intended for the SEC to have the primary role in interpreting the Commission's own regulatory realm.¹⁵⁶

Congress specified rulemaking as the means by which the SEC could define terms.¹⁵⁷ Accordingly, if the Commission promulgated a rule defining a technical or trade term that Congress included in its own definition of "security," then courts should defer to the SEC's definition if it is reasonable.¹⁵⁸ However, if the Commission speaks to an interpretation of a term outside of the notice-and-comment rulemaking process, a court should not dismiss the SEC's position. By empowering the Commission to define terms, Congress indicated its preference that the Commission, rather than the courts, define technical and trade terms used in the the Securities Acts.¹⁵⁹ Therefore, even when the SEC acts through methods other than rulemaking, courts should still accord substantial weight to its interpretation because of Congress's preference that the Commission define such terms.¹⁶⁰

154. LOSS ET AL., *supra* note 32, at 859 n.6 (stating that each instrument may have its own definitional problems).

155. See *Landreth*, 471 U.S. at 686 (stating that this definition "includes both instruments whose names alone carry well-settled meaning, as well as instruments of 'more variable character [that] were necessarily designated by more descriptive terms,' such as 'investment contract' and 'instrument commonly known as a security'" (citation omitted) (alteration in original)); see also *Gustafson*, 513 U.S. at 584 (acknowledging the word "prospectus" as a "term of art").

156. *United States v. Eurodif S.A.*, 555 U.S. 305, 319 (2009) ("This is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the Department's application was reasonable."); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984) ("[T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." (citations omitted) (internal quotation marks omitted)).

157. See *supra* note 152.

158. *Compare* *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 172–74 (D.C. Cir. 2010) (according *Chevron* deference to a Commission rule that narrowly defined a congressional exemption, which arguably expanded the Commission's jurisdiction).

159. See H.R. REP. NO. 73-1838, at 30 (1934) (Conf. Rep.).

160. See *id.* ("The substitute retains the House provisions except that it is not provided that the definitions 'shall have the force of law.' This phrase was omitted as unnecessary, since courts commonly give the force of law to administrative interpretations of statutory terms, unless clearly inconsistent with the legislative intent."); see also Bressman, *supra* note 50, at 587–88

Counter-arguments exist, but prove unconvincing. For example, one might point to the phrase in the Exchange Act regarding the Commission's power to define terms "as to matters within [its] . . . jurisdiction."¹⁶¹ Although the definition of "security" may be considered jurisdictional,¹⁶² the SEC would be acting within its delegated powers and within its jurisdictional reach when defining a technical or trade term that Congress used in its definition of "security."¹⁶³

A more general argument against the Commission's definitional authority regarding "security" involves negative implications. For example, in the Exchange Act, immediately after defining "security," Congress defined "equity security," and, in so doing, it expressly empowered the SEC to expand the definition of "equity security."¹⁶⁴ Because Congress empowered the Commission to expand one congressionally provided definition ("equity security"), one arguably should give force to the absence of such empowerment in a closely related definitional section ("security"). Even accepting this negative-implication argument, the Commission does not expand Congress's definition of "security." Instead, the Commission is acting within its delegated power to define any technical or trade terms (or, for the Exchange Act, "any other terms") that appear in Congress's definition of "security."¹⁶⁵ Although the practical effect of exercising the power to define technical or trade terms may be to expand the class of securities, the Commission's action would remain consistent with its congressionally delegated powers.

Another statutory provision suggests that the courts—not the SEC—should define what constitutes a "security." In the Gramm-Leach-Bliley Act (GLB Act), which amended the Exchange Act, Congress empowered the

(suggesting that an agency's considered position commands substantial weight even if not the product of formal rulemaking).

161. See 15 U.S.C. 78c(b) (2006).

162. See *supra* Part I.A.

163. See Brief for Respondent at 35–36, *Am. Equity Inv. Life Ins. Co.*, 613 F.3d 166 (No. 09-1021), available at <http://sec.gov/litigation/briefs/2009/americanequitybrief0409.pdf> (arguing that the Commission is not expanding its jurisdiction by promulgating a rule that narrowly defines an ambiguous statutory exemption).

164. See 15 U.S.C. § 78c(a)(11) ("The term 'equity security' means any stock . . . or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security."). Section 3(a)(11) is not the only definitional section that Congress empowered the Commission to adjust. See, e.g., *id.* § 78c(a)(12)(A)(vii) ("The term 'exempted security' or 'exempted securities' includes . . . such other securities . . . as the Commission may . . . exempt from the operation of any one or more provisions of this chapter which do not apply to an 'exempted security' or to 'exempted securities'"); *id.* § 78c(a)(23)(B)(iii) (empowering the Commission to expand the definition by ruling against a congressionally created exclusion); *id.* § 78c(a)(35)(C) (empowering the Commission to expand upon the definition of "investment discretion").

165. *Id.* § 78c(b); H.R. REP. NO. 73-1838, at 4 (1934) (Conf. Rep.).

Commission to regulate products that it determines to be “hybrid” products.¹⁶⁶ The GLB Act, however, also provided that the “court shall determine to affirm and enforce or set aside a regulation of the Commission . . . , based on the determination of the court as to whether . . . the subject product is a security”¹⁶⁷ The GLB Act’s empowerment of the judiciary to review the Commission’s definition of “security” may suggest that Congress intended for the courts—not the SEC—to be the primary interpretive authority. The weakness in this argument is that, although the courts may make the final determination,¹⁶⁸ they could do so and still accord great deference to the Commission’s conclusions.¹⁶⁹ As an alternative response, the negative-implication argument now favors deference to the SEC rather than the courts. That is, by expressly empowering courts to make the final determination of whether an instrument constitutes a “hybrid security,” but not expressly empowering the courts to make the final determination of whether an instrument constitutes a “security,” the negative-implication argument suggests that Congress intended the Commission to be interpreter-in-chief of what instruments constitute “securities.”¹⁷⁰

B. *The Commission’s Exemptive Powers*

Congress delegated broad powers to the SEC to exempt any security or class of securities from any provision of the Securities Acts or from any rules and regulations promulgated thereunder.¹⁷¹ In permitting the Commission to

166. See Pub. L. No. 106-102, § 205, 113 Stat. 1338, 1391 (1999) (codified at 15 U.S.C. § 78o(i)(3) (2006)) (“Criteria for Rulemaking.—The Commission shall not impose a requirement under paragraph (2) of this subsection with respect to any new hybrid product unless the Commission determines that—(A) the new hybrid product is a security; and (B) imposing such requirement is necessary and appropriate in the public interest and for the protection of investors.”).

167. Pub. L. No. 106-102, § 205, 113 Stat. 1338, 1393 (1999) (codified at 15 U.S.C. § 78o(i)(5)(D) (2006)).

168. Note that a court may not actually make the “final determination” because an agency’s subsequent interpretation may control. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (upholding an agency’s new interpretation of statutory ambiguity as reasonable, despite a lower court holding setting forth a different meaning of the ambiguity when it deemed the agency’s prior interpretation of the ambiguity unreasonable).

169. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984) (deferring to the agency’s definition despite the requirement of 5 U.S.C. § 706 that courts decide all questions of law); see also Bressman, *supra* note 50, at 587–88 (“[Even] if the statute delegates interpretive authority to courts, they could rely less on traditional tools of statutory construction and more on the agency’s practical experience with the regulatory regime.”); Duffy, *supra* note 27, at 202 (arguing that although the courts resolve all questions of law, some statutes confer lawmaking authority on agencies).

170. See Pub. L. No. 106-102, § 205, 113 Stat. 1338, 1391–92 (1999) (codified at 15 U.S.C. § 78o(i)(5)(D) (2006)) (conferring on the courts the authority to determine if a product is a hybrid security).

171. See 15 U.S.C. § 77z-3 (2006) (“The Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or

exempt any security or class of securities, Congress required it to consider the public interest,¹⁷² which, in turn, requires consideration of the interests of investors as well as those seeking financing.¹⁷³

Investing parties and those who are seeking financing sit on opposite sides of the table before the money changes hands, but their post-investment interests frequently align. Therefore, Congress entrusted the Commission to balance each party's competing interests in determining what federal securities laws, if any, should apply to their negotiations and any resulting instrument.¹⁷⁴ That Congress delegated the authority to the SEC to determine whether the securities laws should apply to a particular instrument—for purposes of exemption—is instructive. It suggests that the Commission, as opposed to the courts, should wield greater influence when determining whether the securities laws should apply to a particular instrument for purposes of defining “security.”¹⁷⁵

The balancing of interests of various groups of the public is a complex undertaking and not readily appreciated by those lacking expertise.¹⁷⁶ The

classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation issued under this subchapter, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”); *see also* 15 U.S.C. § 78mm(a)(1) (“[T]he Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”). Notably, the Exchange Act includes a limitation on the Commission's exemptive authority with respect to a narrowly specified class of securities. *See id.* § 78mm(b). The narrowness of the limitation suggests the broadness of the SEC's exemptive authority.

172. *See* 15 U.S.C. § 78z-3 (“[T]o the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”); *see also* 15 U.S.C. § 77mm(a)(1) (same).

173. *See* 15 U.S.C. § 77b(b) (2006) (“Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”). Although there is no parallel provision in the Exchange Act, its absence does not preclude the SEC's consideration of whether the action will “promote efficiency, competition, and capital formation,” which impacts the public and its interest, considerations set forth in the Exchange Act. *See id.* § 78mm(a)(1).

174. *See infra* notes 175–76.

175. *See* Brief for Petitioner at 16, *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (No. 843), 1946 WL 50582 (“[I]t [is] apparent from the scheme of the [1933] Act as a whole that Congress relied primarily upon the exemption provisions, and the exercise of administrative discretion thereunder, to avoid impractical application of the full regulatory provisions to situations in which the burdens upon the promoter [issuer of the securities] might be thought to be disproportionate to the need for protection of investors.”).

176. *See* H.R. REP. NO. 73-1383, at 4 (1934) (“With such concentration of national wealth in the form of liquid corporate securities the economic machinery of the whole country is now affected by, and is organized primarily to serve, security markets which are as sensitive as a hair

Chevron Court indicated that deference to the administering agency is appropriate when the agency can act as the expert.¹⁷⁷ In discussing the importance of expertise when determining a statute's reach, the *Chevron* Court suggested the appropriateness of deference to an agency regarding jurisdictional matters.¹⁷⁸

However, some scholars may argue that the power to exclude, or exempt an instrument, neither encompasses nor necessitates the power to include, or treat an instrument as a "security." Arguably, courts need not accord any deference to the Commission's determination that an instrument is a "security,"¹⁷⁹ particularly because the SEC is more generous than parsimonious in making this determination.¹⁸⁰ Perhaps Congress trusts the Commission when the Commission determines that the balance tips in one direction (exemption), but does not trust the Commission's determination that the balance tips in the opposite direction (inclusion).

In response, Congress did not limit the SEC's broad exemptive powers to securities or classes of securities.¹⁸¹ The Commission can couple its treatment of an instrument as a "security" with exemptive relief from provisions of the federal securities laws if such laws are redundant or otherwise unnecessary. For example, after defining an instrument as a "security," the SEC could exempt that security from burdensome obligations such as disclosure requirements or liability provisions.¹⁸² Congressional delegation of such broad exemptive powers suggests that court deference to the SEC is appropriate whether the Commission favors an instrument's treatment as a "security" or not.¹⁸³

trigger."); see also Karmel, *supra* note 12, at 35 ("The articulation of new standards is a difficult business, especially in a dynamic and fast paced area like securities regulation.").

177. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

178. *Id.* at 844 ("[T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever the decision as to the reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." (citations omitted) (internal quotation marks omitted)).

179. See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 693–94 (1985).

180. See *LOSS ET AL.*, *supra* note 32, at 1209 (suggesting that the Commission "contends for a liberal application of this definition [of 'security']").

181. See 15 U.S.C. §§ 77z-3, 78mm(a)(1) (2006); see also S. REP. NO. 73-792, at 14 (1934) ("Thus the Commission is able to remove from the operation of any one or more of these provisions any securities as to which it deems such provisions inappropriate. It may attach such conditions to such exemptions as it deems desirable.").

182. See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1582–84 (2006) (proposing that the Commission exempt non-trading corporations from class action liability under Rule 10b-5).

183. See Bressman, *supra* note 50, at 584 (stating that a court should rarely conclude that an agency overstepped its authority).

C. Congress's Context Clause

In the Securities Acts, Congress provided that, “*unless the context otherwise requires . . . the term ‘security’ means any note, stock, treasury stock . . .*”¹⁸⁴ By including this “context clause,” Congress clearly delegated an interpretive power with respect to its definition of “security.” Congress did not, however, indicate clearly whether the power should be exercised by the courts, the SEC, or both. Two theories have emerged as to the meaning of the context clause. According to the first theory, “context” means the appearance of the term “security” elsewhere in the federal securities laws.¹⁸⁵ According to the second theory, “context” means the factual circumstances of the transaction being scrutinized.¹⁸⁶ Statutory clues and Court precedent lend support to both theories.

1. Context from Surrounding Sections

Congress could have intended “context” to refer to other portions of the federal securities laws. Such usage would reflect the common definition of “context” as “the parts of a discourse that surround a word or passage and can throw light on its meaning.”¹⁸⁷ The Court has endorsed the interpretation that the context clause is Congress’s way of cautioning that the same word may take on different meanings within different provisions of the federal securities laws.¹⁸⁸

The context clause does not just modify the definition of “security;” it modifies every term Congress set forth in its definitional section. In the Securities Act, the context clause precedes more than fifteen terms; and in the Exchange Act, the context clause precedes more than sixty terms.¹⁸⁹ Because there are numerous terms that could take on different definitions depending on the provisions in which they appear, the statute’s construction favors the

184. 15 U.S.C. § 77b(a)(1) (2006) (emphasis added); 15 U.S.C. § 78c(a)(10) (2006) (emphasis added).

185. See *infra* notes 188–91 and accompanying text.

186. See *infra* notes 192–206 and accompanying text.

187. WEBSTER’S COLLEGIATE DICTIONARY 250 (10th ed. 2002) [hereinafter WEBSTER’S].

188. See *SEC v. Nat’l Sec., Inc.*, 393 U.S. 453, 466 (1969) (“Congress itself has cautioned that the same words may take on a different coloration in different sections of the securities laws; both the 1933 and the 1934 Acts preface their lists of general definitions with the phrase ‘unless the context otherwise requires.’” (citations omitted)); see also *Gustafson v. Alloyd Co.*, 513 U.S. 561, 588–89 (1995) (Thomas, J., dissenting) (“Despite the majority’s protestations, it is absolutely clear that the 1933 Act uses ‘prospectus’ in two different ways. . . . [T]his understanding is reinforced by § 2’s preface that its definitions apply ‘unless the context otherwise requires.’ This phrase indicates that Congress intended simply to provide a ‘default’ meaning for ‘prospectus.’” (citing 15 U.S.C. § 77b)); *id.* at 598 (Ginsburg, J., dissenting) (“According ‘prospectus’ discrete meanings in § 10 and § 12(2) is consistent with Congress’ specific instruction in § 2 that definitions apply ‘unless the context otherwise requires.’” (citing 15 U.S.C. § 77b)).

189. See, e.g., 15 U.S.C. §§ 77b(a)(16), 78c(a)(64).

argument that Congress intended an expert to interpret those terms.¹⁹⁰ In this regard, the context clause could represent congressional delegation to the Commission, empowering it to adjust Congress's definition to capture or exclude a particular instrument as a "security." Moreover, the context clause was unnecessary to empower the courts to deviate from statutory language,¹⁹¹ so its inclusion may have been intended to empower the SEC.

2. Context from Factual Circumstances

Alternatively, Congress could have intended the context clause to mean the factual circumstances surrounding the particular transaction under scrutiny. "Context" also means: "[T]he interrelated conditions in which something exists or occurs: ENVIRONMENT, SETTING."¹⁹² The legislative history of the context clause supports this meaning as well.¹⁹³ An early draft of the Securities Act preceded the definitional section with the language "unless the *text* otherwise indicates."¹⁹⁴ By rejecting the proposed *text* clause and enacting the *context* clause, Congress seemingly favored considerations of factual circumstances beyond just the text of the statute.

This interpretation of the context clause finds support in several of the Court's decisions regarding the existence of a "security." In *Marine Bank v. Weaver*, the Court specifically referenced the transactional nature of the inquiry and the importance of "the factual setting."¹⁹⁵ The Court emphasized the factual context of the transaction in question by highlighting its uniqueness

190. See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 688 (1985) ("[T]he reach of the Act does not stop with the obvious and commonplace." (internal quotation marks omitted) (quoting *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943))); see also *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 856 (1984) (discussing the EPA's usage of two definitions for a single term and arguing for "a flexible rather than a rigid definition of the term 'source' to implement various policies and programs").

191. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application.").

192. WEBSTER'S, *supra* note 187, at 250; see also *Marine Bank v. Weaver*, 455 U.S. 551, 558–59 (1982).

193. Reliance on legislative history can be fraught with peril. See WILLIAM E. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 948–49 (3d ed. 2002) ("Lobbyists and lawyers maneuver endlessly to persuade staff members (who write the committee reports) or their legislative bosses to throw in helpful language in the reports when insertion of similar language would be inappropriate or infeasible for the statute itself."); see also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (describing citations to legislative history as "looking over a crowd and picking out your friends" (internal quotation marks omitted) (quoting the Honorable Harold Leventhal)).

194. S. 875, 73d Cong. § 2 (1933); H.R. 4314, 73d Cong. § 2 (1933) (emphasis added); LOSS ET AL., *supra* note 32, at 862 & n.15.

195. *Weaver*, 455 U.S. at 560 n.11.

in determining that the instrument was not a “security.”¹⁹⁶ Additionally, the Court noted that, given the surrounding circumstances, the transaction would be subject to federal regulation even if the federal securities laws were inapplicable.¹⁹⁷ In *Reves v. Ernst & Young*, the Court similarly emphasized the factual context of the transaction by contrasting a corporate *note* to finance an enterprise, which would be a “security,” with an individual’s home mortgage *note*, which would not be a “security,” concluding that, when Congress wrote “any note,” it did not literally mean “any note.”¹⁹⁸

If the context clause refers to the factual circumstances of the transaction under scrutiny, then Congress may have intended for the courts to determine whether *the context otherwise requires* that the definition of “security” be altered to include or exclude the instrument. Arguably, the Commission should adopt broadly applicable rules instead of formulating policy via individual enforcement actions and their unique factual circumstances.¹⁹⁹

196. *Id.* at 560 (finding that “[t]he provision that the Weavers could use the barn and pastures of the slaughterhouse at the discretion of the Piccirillos underscores the unique character of the transaction. . . . Accordingly, we hold that this unique agreement, negotiated one-on-one by the parties, is not a security.” (footnote omitted)). The court emphasized that “[e]ach transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.” *Id.* at 560 n.11.

197. *See id.* at 558–59 (“The definition of ‘security’ in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires. It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws.”). The Court’s emphasis on alternative regulatory schemes has been criticized. First, the protections provided by the federal securities laws generally are cumulative of other legal protections. *See, e.g.*, 15 U.S.C. § 77p (2006) (“Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.”); 15 U.S.C. § 78bb(a) (2006) (virtually identical). Second, the Court first referred to an alternative regulatory scheme as additional support for a conclusion already reached. *See Int’l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 569 (1978) (“If any further evidence were needed . . . the enactment of ERISA in 1974 . . . would put the matter to rest.”); *see also* Marc I. Steinberg & William E. Kaulbach, *The Supreme Court and the Definition of “Security”: The “Context” Clause, “Investment Contract” Analysis, and Their Ramifications*, 40 VAND. L. REV. 489, 505–06 (1987) (criticizing the Court’s analysis that considers an alternative regulatory scheme sufficient to render the federal securities laws inapplicable). In *Weaver*, an alternative regulatory scheme grew in importance for the Court’s analysis. *See Weaver*, 455 U.S. at 502.

198. *See* 494 U.S. 56, 63 (1990) (stating that “the phrase ‘any note’ should not be interpreted literally as ‘any note’”); *see also* *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694 (1985) (“[N]ote’ may now be viewed as a relatively broad term that encompasses instruments with widely varying characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context.”).

199. *See* Karmel, *supra* note 12, at 41 (“As a Commissioner, I was . . . opposed to both substantive and procedural jurisdictional expansionism through enforcement prosecutions.”); *see also* Stephenson, *supra* note 49, at 1060 (“[F]or statutes that require application of general standards to the facts of particular cases on a more individualized basis—for example, antifraud

Because courts speak only to individual cases, a court necessarily focuses on the factual circumstances in which those cases arise.²⁰⁰ Thus, a court would defer to the content of the agency's rules, but would not defer to an agency's unadorned application of rules to those facts.²⁰¹

The question arises, if the context clause was an implicit delegation of interpretive power by Congress to the SEC, then why did Congress—within certain defined terms preceded by the context clause—expressly empower the Commission to alter those definitions?²⁰² Some scholars argue that the inclusion of implicit and explicit power is mere redundancy. In contrast,

laws . . . —legislators would tend to favor delegation to courts because such statutes implicate a larger number of discrete interpretive issues of roughly comparable importance.”)

200. See *United Hous. Found. Inc. v. Forman*, 421 U.S. 837, 848 (1975) (“The task has fallen to the Securities and Exchange Commission (SEC), the body charged with administering the Securities Acts, and *ultimately to the federal courts to decide* which of the myriad financial transactions in our society come within the coverage of these statutes.” (emphasis added)). That a court decides only one case at a time may be an oversimplification. Because of *stare decisis*, individual court decisions commonly serve as long-lasting rules. A court may be hesitant to reverse its interpretation of a statute because it may expect the legislature to fix any interpretive error. See *ESKRIDGE ET AL.*, *supra* note 193, app. B, at 20 (“CONTINUITY IN LAW: . . . Super-strong presumption of correctness for statutory precedents.”); see also *Scalia*, *supra* note 58, at 517 (“One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change.”). However, a strength of the argument for delegation to courts is the courts’ temporal consistency (*stare decisis*), which enhances third parties’ understanding and compliance. Arguably, this may hinder the development of the law necessary to capture new instruments designed to evade existing regulation. See *Peters*, *supra* note 78, at 292 (“[I]t is virtually axiomatic that the market will try to overcome *any* cabining regulation.”). Thus, regulatory flexibility is required.

201. See *United States v. O’Hagan*, 521 U.S. 642, 679 (1997) (Scalia, J., concurring). When an agency’s own rule is ambiguous, courts routinely defer to the agency’s interpretation of that ambiguity. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

202. See, e.g., 15 U.S.C. § 78c(a)(11) (2006) (“When used in this chapter, unless the context otherwise requires—The term ‘equity security’ means any stock . . . or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.”); *id.* § 78c(a)(12)(A)(vii) (“When used in this chapter, unless the context otherwise requires—The term ‘exempted security’ or ‘exempted securities’ includes . . . such other securities . . . as the Commission may . . . exempt from the operation of any one or more provisions of this chapter which do not apply to an ‘exempted security’ or to ‘exempted securities’”).

A response to this belief is that Congress routinely has employed a belts-and-suspenders approach to the federal securities laws. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (“[I]t is hardly a novel proposition that the [1933 and 1934 Acts] prohibit some of the same conduct.” (internal quotation marks omitted)); see also *SEC v. Nat’l Secs., Inc.* 393 U.S. 453, 468 (1969) (“The fact that there may well be some overlap is neither unusual nor unfortunate.”). Compare 15 U.S.C. § 78mm (2006) (providing the Commission with general exemptive authority), with 15 U.S.C. § 78c(a)(12)(A)(vii) (2006) (providing the Commission with particularized exemptive authority), and 15 U.S.C. § 78o(a)(2) (2006) (also providing the Commission with particularized exemptive authority). Consequently, arguments of negative implication may lack their typical force.

some justices have interpreted the context clause as a delegation to the courts.²⁰³

Perhaps this theory asks the context clause to bear more weight than it can withstand. If there was no context clause, courts would look to the factual context.²⁰⁴ Therefore, according such a meaning to the context clause may be amiss, particularly when courts decide only one case at a time and necessarily focus on its factual setting or context. Moreover, if the context clause serves as a delegation to the courts, the courts “could rely less on traditional tools of statutory construction and more on the agency’s practical experience with the regulatory regime.”²⁰⁵ Given that policy considerations play a significant role in defining “security,” greater reliance by a court on the administering agency seems particularly appropriate.²⁰⁶

D. Congress’s Overlapping and Circular Definition

In section 2(a)(1) of the Securities Act and section 3(a)(10) of the Exchange Act, Congress defined “security” broadly, setting forth a number of financial instruments.²⁰⁷ In deciding whether an instrument constitutes a “security,” the Court has determined that those congressionally enumerated instruments

203. See *Reves*, 494 U.S. at 75–76 (Stevens, J., concurring) (“[T]he exclusion for short-term notes must be read in light of the prefatory language in § 2 of the 1933 Act and § 3 of the 1934 Act. . . . The context clause thus permits a *judicial construction* of the statute which harmonizes the facially rigid terms of the 9-month exclusion with the evident intent of Congress.” (emphasis added)); see also *id.* at 81 (Rehnquist, C.J., dissenting) (“leaves it to the judiciary to flesh out additional ‘context clause’ exceptions”); *Exch. Nat’l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1138 (2d Cir. 1976) (“So long as the statutes remain as they have been for over forty years, courts had better not depart from their words without strong support for the conviction that, *under the authority vested in them by the ‘context’ clause*, they are doing what Congress wanted when they refuse to do what is said.” (emphasis added)).

204. See *LOSS ET AL.*, *supra* note 32, at 860 (describing the context clause as an “explicit reminder of a doctrine of statutory construction that should be implicit in any event”).

205. Bressman, *supra* note 50, at 587–88.

206. See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694 n.7 (1985) (“[I]t is proper for a court to consider—as we do today—policy considerations in construing terms in these Acts.”); see also *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (“Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.” (citations omitted)); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975) (weighing policy considerations in reaching its conclusion); *Tcherepnin v. Knight*, 389 U.S. 332, 345 (1967) (“Policy considerations lead us to conclude that the petitioners are entitled to the investor protections afforded by the Securities Exchange Act.”).

207. 15 U.S.C. §§ 77b(a)(1), 78c(a)(10) (2006); see also *Reves*, 494 U.S. at 61 (“Congress therefore did not attempt precisely to cabin the scope of the Securities Acts.” (footnote omitted)); *Tcherepnin*, 389 U.S. at 338 (“Even a casual reading of § 3(a)(10) of the 1934 Act reveals that Congress did not intend to adopt a narrow or restrictive concept of security in defining that term.”); H.R. REP. NO. 73-85, at 11 (1933); *LOSS ET AL.*, *supra* note 32, at 858–59 n.6.

substantially overlap.²⁰⁸ In *Tcherepnin v. Knight*, the Court determined that the instruments in question constituted securities because they were “investment contract[s],” “certificate[s] of interest or participation in any profit-sharing agreement,” “stock,” and “transferable share[s].”²⁰⁹ In *SEC v. C.M. Joiner Leasing Corp.*, the Court indicated that the instruments constituted both “investment contract[s]” and “instrument[s] commonly known as securit[ies].”²¹⁰ Congress’s overlapping of definitional terms invites and enhances an agency’s discretion to regulate.²¹¹ Further, Congress defined “security” by using the term “security,”²¹² a circular logic that amounts to a delegation of interpretive authority, prompting the Court to defer to the agency’s interpretation.²¹³

III. NON-DEFERENCE AND ITS IMPACT

In cases of statutory ambiguity,²¹⁴ either a court or the relevant agency will provide clarity. Between the two, the agency possesses greater subject matter expertise, better appreciates the conflicting policies implicated by the ambiguity, and better understands the consequences that follow alternative

208. See *Tcherepnin*, 389 U.S. at 339 (“But we need not rest our decision on that conclusion [that the instrument constitutes an ‘investment contract’] alone. . . . The petitioners’ shares fit well within several other descriptive terms contained in § 3(a)(10).”); see also *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943) (“Instruments may be included within any of these definitions, as matter of law, if on their face they answer to the name or description.”). Although the Court later disclaimed the argument that the *Howey* test for “investment contracts” was the lone test for determining the existence of a “security,” the *Forman* Court stated that the *Howey* test “embodies the essential attributes that run through all of the Court’s decisions defining a security.” *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975); see also Gordon, *supra* note 44, at 403 (charting the similarities between the Court’s “investment contract” inquiry and its “note” inquiry). Additionally, the *Forman* Court “perceive[d] no distinction . . . between an ‘investment contract’ and an ‘instrument commonly known as a ‘security.’” *Forman*, 421 U.S. at 852; see also LOSS ET AL., *supra* note 32, at 863 n.19 (“There has been surprisingly little judicial or administrative construction of the phrase [‘any interest or instrument commonly known as a “security”], perhaps because other phrases, especially *investment contract*, normally satisfy any reasonable plaintiff.”).

209. See *Tcherepnin*, 389 U.S. at 339.

210. See *Joiner*, 320 U.S. at 351.

211. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 862 (1984) (“[I]t would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency’s power to regulate particular sources in order to effectuate the policies of the Act.”).

212. 15 U.S.C. §§ 77b(a)(1), 78c(a)(10) (2006) (“The term ‘security’ means . . . any interest or instrument commonly known as a ‘security’ . . .”).

213. See *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 12–18 (2004) (according *Skidmore* deference to an agency’s interpretation of Congress’s circular definition); see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444–49 (2003) (same).

214. To reiterate, if a statute is unambiguous, Congress left no interpretive gap for the agency to fill so Congress’s clear intent must be enforced. See *supra* note 3 and accompanying text.

resolutions of the ambiguity.²¹⁵ Consequently, when a court deviates from the agency's interpretation, an inferior outcome is more likely to result than if the court had deferred to the agency's interpretation.²¹⁶ In some cases, by failing to defer to the SEC's expertise, the Supreme Court has unnecessarily addressed issues and then resolved them incorrectly. Such judicial action has generated confusion among the lower courts and has required, or will require, redressing by the Supreme Court.

A. *United Housing Foundation, Inc. v. Forman*

When *United Housing Foundation, Inc. v. Forman* was decided, the Court acknowledged that deference to agency interpretations was the norm.²¹⁷ Nevertheless, the *Forman* Court did not defer to the SEC's position.²¹⁸ In *Forman*, the Court addressed whether the instruments acquired by tenants of the issuer constituted "investment contracts" and were thus considered securities.²¹⁹ As set forth by the Court, the test was "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."²²⁰ Under this test, the Court must consider the definition of "profits" and whose "efforts" generated those profits.

215. See *Chevron*, 467 U.S. at 844 ("[T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever . . . a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." (citations omitted) (internal quotation marks omitted)). The Court also emphasized that "[j]udges are not experts in the field" *Id.* at 865; see also *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference . . . , given the specialized experience and broader investigations and information available to the agency" (citations omitted) (internal quotation marks omitted)).

216. See Brief for Petitioner at 30, 37–38, *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (No. 843), 1946 WL 50582 (criticizing the lower court's inquiry as "administratively impractical," and arguing that "the consequence is to afford loopholes for those who may desire to evade the Act" and the inquiry "invite[s] extended litigation in those cases where the form of the security is novel and differs from more orthodox types in general use"); see also Steinberg & Kaulbach, *supra* note 197, at 492, 529 (arguing that "*Weaver* serves as a compelling focus for an even more serious problem: The Supreme Court's apparent inability to comprehend thoroughly and to address analytically, consistently with the language, legislative history, and underlying policies of the securities acts, the important issues of federal securities regulation" and further asserting that *Weaver* "is an example of judicial activism at its worst").

217. See *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 855 n.25 (1975) ("Traditionally the views of an agency charged with administering the governing statute would be entitled to considerable weight." (citations omitted)).

218. See *id.* at 849–58.

219. 15 U.S.C. §§ 77b(a)(1), 78c(a)(10) (2006) ("The term 'security' means any . . . investment contract . . ."); see also *Forman*, 421 U.S. at 840.

220. *Forman*, 421 U.S. at 852 (quoting *Howey*, 328 U.S. 301) (internal quotation marks omitted).

1. Rejecting the Commission's Position Regarding "Profits"

The Court determined that consumption does not constitute an investment, which would prohibit treatment of the instrument as an "investment contract."²²¹ The Court concluded that, in this case, "there can be no doubt that investors were attracted *solely* by the prospect of acquiring a place to live, and not by financial returns on their investment."²²² Therefore, according to the Court, the individuals were consuming, not investing for profit.²²³ Next, the Court launched into a discussion regarding the concept of "profits," according no deference to the Commission's longstanding position.²²⁴ The Court narrowly construed "profits" as "either capital appreciation . . . or a participation in earnings . . ."²²⁵ By contrast, the SEC had recognized that a financial opportunity may involve both aspects of consumption and investment for profit.²²⁶ To conclude that the transaction constituted an "investment contract," the Commission required only that the investment aspect predominate, not that the consumptive aspect be absent.²²⁷ By not deferring to the Commission's interpretation and instead favoring an overly cramped definition of profits, the Court easily emphasized the exclusivity of consumption and the total absence of investment.²²⁸

The facts of *Forman* indicate that the individuals had to purchase the instruments in question in order to gain access to housing.²²⁹ The purchasers of the instruments, who were of modest means,²³⁰ would not tie up their limited resources to acquire access to just any apartment, particularly when apartments could be obtained without purchasing such instruments.²³¹

221. *Id.* at 852–53 (reasoning that purchasers who consume are not seeking a profit from their financial contribution); *see also* Gordon, *supra* note 44, at 396.

222. *Forman*, 421 U.S. at 853 (emphasis added).

223. Nevertheless, interestingly and confusingly, the Court continually referred to the tenants as "investors." *See generally Forman*, 421 U.S. 387.

224. *See id.* at 851–53.

225. *Id.* at 852.

226. *See In re Natural Res. Corp.*, 8 SEC 635 (1941); *see also* Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 5347, 38 Fed. Reg. 1735, 1735–36 (Jan. 4, 1973).

227. *See* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 28 (5th ed. 2006) ("Investment Versus Consumption"); *see also* LOSS ET AL., *supra* note 32, at 942 ("weighing of the purposes of an investment").

228. *Forman*, 421 U.S. at 853 & n.17 ("In some transactions the investor is offered both a commodity or real estate for use and an expectation of profits. . . . The application of the federal securities laws to these transactions may raise difficult questions that are not present in this case.").

229. *Id.* at 842 (describing the requirement of share purchases to obtain housing).

230. *Id.* at 841 ("wage earners and other persons of low or moderate income").

231. *See id.* at 842–43, 856 (highlighting the difficulty for the tenant to "sell [the instrument] for more than the initial purchase price" and noting that "income—if indeed there is any—is far too speculative and insubstantial").

Instead, the individuals purchased the instruments to obtain housing at a deep discount relative to market rates for comparable housing²³²—essentially to obtain an economic profit. The Court’s cramped conception of “profits,” including only capital appreciation and dividends that were impossible and unlikely, accorded no deference to the SEC’s conception of “profits.”²³³ The Court faulted the Commission’s position that the individuals had an expectation of profits attributable, in part, to “savings based on the fact that apartments [offered by the seller of the instruments] . . . cost substantially less than comparable unsubsidized housing.”²³⁴ The Court stated, “this [was] an inappropriate theory of ‘profits’ that [it] could not accept.”²³⁵ The Court’s interpretation runs contrary not only to its overarching instruction to “examine . . . the economic realities of the transaction,”²³⁶ but also to the longstanding position of the Commission to focus on substance over form.²³⁷ When focusing on substance, one should not distinguish between a dollar earned and a dollar saved. Attempting that distinction offends not only economics, but also common sense.²³⁸ For one to have “zero profit” would indicate that one rents the same quality apartment at the same rate as others.²³⁹ In *Forman*, the

232. See *Forman v. Cmty. Servs., Inc.*, 366 F. Supp. 1117, 1124 n.27 (S.D.N.Y. 1973) (“Relatively speaking, Co-op City still offers one of the lowest rent structures of any Mitchell-Lama housing in New York City.”). Perhaps unlike other comparably priced housing, the offered housing presented a “favorable environment for family . . . community atmosphere . . . [and] very little turnover.” *Forman*, 421 U.S. at 854 (quoting the Information Bulletin in App. 162a, 166a of the District Court’s record).

233. See *Forman*, 421 U.S. at 858–59 n.25.

234. *Id.* at 846.

235. *Id.* at 855.

236. *Id.* at 851; see also *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) (“Form was disregarded for substance and emphasis was placed upon economic reality.”).

237. See Brief of Petitioner at 12, *Howey*, 328 U.S. 293 (No. 843), 1946 WL 50582 (“[T]he substance controls the form . . .”); see also Brief for United States as Amicus Curiae Supporting Respondent at 16 n.20, *Forman*, 421 U.S. 837 (No. 74-157) (“Thus, *Howey* cannot be read to require a literal monetary ‘profit’ . . .”).

238. See *Forman*, 421 U.S. at 863–64 (Brennan, J., dissenting) (arguing that “the Court must surprise knowledgeable economists with its proposition . . . that profits cannot assume forms other than appreciation of capital or participation in earnings,” adding that “[n]ot only would simple common sense teach that [money saved and money earned] are the same, but a more sophisticated economic analysis also compels the conclusion that in a practical world there is no difference between the two forms of income.”); see also Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1503 (1998) (“There is also a large body of work that suggests that whether decisions are ‘framed’ in terms of potential gains or losses affects decisions even though the framing may be completely arbitrary and manipulable.”).

239. See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1218 (2008) (“‘Economic profits’ measures how profitable a company is relative to other ways of investing one’s money. Thus, ‘zero economic profits’ does not mean that firms are not making money, but rather that all firms are doing as well as the rest of the market.”); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (6th ed. 2003) (“A profit opportunity is a magnet drawing resources into an activity.”).

purchasers of the instruments fared better than their peers who sought housing without purchasing the instruments in question; those who purchased the instruments profited.²⁴⁰ In formal adjudications and other interpretive guidance, the SEC construed “profits” more broadly than the *Forman* Court; the Commission’s construction should have commanded the Court’s deference.²⁴¹

The Court attempted to respond to this line of thought, stating: “There is no doubt that purchasers in this housing cooperative sought to obtain a decent home at an attractive price. But that type of economic interest characterizes every form of commercial dealing.”²⁴² The Court was correct but presented a non sequitur. The regularity with which people seek profit in a transaction does not speak to the presence or absence of a “security;” misplaced is any concern that every transaction will result in the creation of a “security.” The quest for profit does not mean that one’s expectation of profit is reasonable.²⁴³

This Article refers to “economic profit” to suggest that the Court’s definition of profits was overly narrow, not to suggest its adoption by the Court. “Economic profit” may be an overly narrow term in and of itself. See, e.g., *Forman v. Cmty. Servs., Inc.*, 366 F. Supp. 1117, 1131 (S.D.N.Y. 1973) (objecting to a definition of “profit” confined to “economic profit,” which could yield an inquiry into an “uncharted and unchartable realm of intangible, elusive personal values”).

240. See, e.g., 15 U.S.C. § 78p (2006) (requiring the disgorgement of profits whether in the form of gains or losses avoided); see also *Forman*, 421 U.S. at 863–64 (Brennan, J., dissenting); *Forman*, 366 F. Supp. at 1129 n.36 (“[I]t avoids the problems of private apartment dwelling where the landlord’s interest was financial gain” (first alteration in original) (quoting Offering Bulletin)).

241. See *In re Abbott, Sommer & Co., Inc.*, 44 SEC 104, 109 (1969) (“We do not consider it significant that in the ‘investment contract’ cases previously cited the services were designed to create a profit, whereas in the present case the services were directed essentially toward minimizing the risk involved in the investment.”); see also Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 5347, 38 Fed. Reg. 1735 (Jan. 18, 1973) (“The ‘profits’ that the purchaser is led to expect may consist of revenues received from rental of the unit . . . and any tax benefits resulting from rental of the unit”); Brief for United States as Amicus Curiae Supporting Respondent at 15, 16 n.20, *Forman*, 421 U.S. 837 (No. 74-157) (arguing that “[c]ontrary to petitioners’ contention that ‘profit’ in some narrow accounting sense is required” and concluding, “[t]hus, *Howey* cannot be read to require a literal monetary ‘profit’”).

242. *Forman*, 421 U.S. at 858. The Court also referenced welfare benefits and food stamps. See *id.* at 855. Although welfare benefits and food stamps may yield profit, consumption dominates investment. The Court also tried to liken the instruments’ purchase price to a recoverable deposit. See *id.* at 842 (stating that “[t]he sole purpose of acquiring these shares is to enable the purchaser to occupy an apartment in Co-op City; in effect, their purchase is a recoverable deposit on an apartment” and emphasizing the non-profit character of the endeavor). The Court, however, gave no indication that, upon a tenant’s departure, the instruments’ sales price would be reduced for nonpayment of rent or damage to the apartment; and neither did the lower courts. The Court’s characterization of the purchase as a deposit does not reflect the economic realities of the transaction.

243. See *id.* at 852 (“reasonable expectations of profits” (emphasis added)).

Moreover, as in *Forman*, in any mixed-motives transaction, consumption frequently dominates investment.²⁴⁴

The *Forman* Court overstated its position and need not have charted such an extreme course. Having failed to defer to the Commission,²⁴⁵ the Court issued an opinion that gave rise to confusion and required clarification. In subsequent cases, the Court refined, if not repudiated, its limited definition of “profits” set forth in *Forman*.²⁴⁶ Today, the Court’s position more closely resembles that of the SEC. Had the *Forman* Court deferred to the Commission in that case, it would have alleviated the need for further clarification. Given the Commission’s power to define “investment contract,”²⁴⁷ the Commission’s guidance regarding an element thereof should have commanded deference.²⁴⁸ Giving force to long-held positions of the Commission enhances continuity of the law and allows private actors to plan

244. See *id.* at 864–65 (Brennan, J., dissenting).

245. See Brief for United States as Amicus Curiae Supporting Respondent at 16, *Forman*, 421 U.S. 837 (No. 74-157) (“Nor does the fact that investors directly enjoy the housing to which their stock entitles them diminish the investment character of the transaction.”); see also *id.* at 15 (“Contrary to petitioners’ contention that ‘profit’ in some narrow accounting sense is required . . .”).

Moreover, the Supreme Court deviated from its own precedent. In *SEC v. W.J. Howey Co.*, the purchasers of the disputed instruments were consumers, having acquired title to land. 328 U.S. 293, 295 (1946) (“Upon full payment of the purchase price the land is conveyed to the purchaser by warranty deed.”). The *Howey* Court, however, made clear that, although an individual could be both an investor and a consumer, one may dominate the other and in this instance, the investor dominated the consumer. See *id.* at 299 (stating that “[t]he respondent companies are offering something more than fee simple interests in land”).

246. See *SEC v. Edwards*, 540 U.S. 389, 396 (2004) (“Concededly, *Forman*’s illustrative description of prior decisions on ‘profits’ appears to have been mistaken for an exclusive list . . . [W]e will not bind ourselves unnecessarily to passing dictum . . .”); see also *Reves v. Ernst & Young*, 494 U.S. 56, 58 n.4 (1990) (“We have, of course, defined ‘profit’ . . . restrictively To apply this restrictive definition to the determination whether an instrument is a ‘note’ would be to suggest that notes paying a rate of interest not keyed to the earnings of the enterprise are not ‘notes’ with the meaning of the Securities Acts.” (citing *Forman*, 421 U.S. at 852)).

247. See *supra* Part II.A.

248. Although courts should defer generally to such definitional positions advocated by the Commission, such deference should not be equated with blind deference. The Commission supported treatment of the instruments in *Forman* as “securities;” and the Court was correct to reject the Commission’s ultimate conclusion. Contrary to its position in *Forman*, the Commission generally treated the acquisition of a principal residence as consumption and thus not an “investment contract.” See Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 5347, 38 Fed. Reg. 1735, 1735 (Jan. 18, 1973) (distinguishing the acquisition of real estate as such from condominium units coupled with rental pool arrangements). Under the *Howey* test, if one element is not met, then the instrument is not an “investment contract.” See Gordon, *supra* note 44, at 396. The Court could have deferred to the Commission’s guidance regarding “profits” and accorded weight to the Commission’s consistent long-standing positions, and still rejected any position adopted for the first time during the litigation of the case. See Bressman, *supra* note 50, at 581.

their transactions in accordance with law.²⁴⁹ Moreover, if the SEC maintains its positions for long periods of time, and neither the President nor Congress act to countermand those positions, then the Commission's positions command respect as having withstood the scrutiny of the most politically accountable actors.²⁵⁰

2. *Rejecting the Commission's Position Regarding "From the Efforts of Others"*

The *Forman* Court need not have continued its analysis once it concluded that individual purchasers were consuming, not investing, and that there could not be an "investment contract," but the Court unfortunately continued its flawed analysis. The Court reiterated that, in an investment contract, profit must flow "solely from the efforts of others,"²⁵¹ despite reticence by the Commission and the lower courts to strictly apply the "solely" requirement,²⁵² and despite the fact that the "solely" requirement was dictum.²⁵³ Moreover, the "solely" requirement emphasized form over substance because of the ease with which one could circumvent the requirement. Such emphasis on form over substance is inconsistent with the Court's instruction to focus on the economic realities of the transaction.²⁵⁴ To its credit, the Court included a footnote and referenced the SEC's reticence, perhaps suggesting that, in the future, it too would relax its position regarding the "solely" requirement.²⁵⁵ Nevertheless, "*Forman's* mixed signals on 'solely' confused rather than clarified the issue"²⁵⁶

Accordingly, the Court revisited the matter in *Landreth Timber Co. v. Landreth*. Although the *Landreth* Court addressed a congressionally enumerated instrument ("stock") rather than the "investment contract" addressed by the *Forman* Court, the Court relaxed its earlier view on the

249. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1489 (2005).

250. See *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 383 (1987) (Scalia, J., concurring) ("What goes along with the jurisdiction is the responsibility"); see also Bressman, *supra* note 50, at 555 ("Congress also likely delegates under conditions that minimize princip[al]-agent concerns. . . . [Congress] can rely on a position that the agency has long maintained in the past").

251. *Forman*, 421 U.S. at 852 (emphasis added) (citation omitted) (citing *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)).

252. See Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, 38 Fed. Reg. at 1735 ("Recent interpretations have indicated that the expected return need not be solely from the efforts of others, as the holding in *Howey* appears to indicate. For this reason, an investment contract may be present in situations where an investor is not wholly inactive, but even participates to a limited degree in the operations of the business." (footnote omitted)).

253. See LOSS ET AL., *supra* note 32, at 998 (discussing the *Howey* decision).

254. See *id.* at 950.

255. See *Forman*, 421 U.S. at 852 n.16.

256. COX ET AL., *supra* note 227, at 41.

“solely” requirement.²⁵⁷ In so doing, the Court’s position now resembles the SEC’s longstanding position.²⁵⁸

Because the *Forman* Court was unwilling to reconsider its articulation of the “solely” requirement, it was determined to conclude that any economic gain enjoyed by the purchasers was not attributable to the efforts of others.²⁵⁹ The reduced rent, which the Commission believed amounted to “profit” and to which the Court did not defer, was directly attributable to the subsidies obtained through the efforts of those working for the issuer.²⁶⁰ The individuals who purchased the instruments did nothing to obtain the subsidies and, based upon the Commission’s long-standing position, it is the purchaser’s own efforts that defeat classifying an instrument as an “investment contract,” and thus a “security.”²⁶¹

257. See *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 692 (1985) (“We cannot agree . . . that the Acts were intended to cover only ‘passive investors’ . . .”); see also *LOSS ET AL.*, *supra* note 32, at 956–57.

258. See Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 5347, 38 Fed. Reg. 1735, 1735 (Jan. 18, 1973) (“[S]ubstance should not be disregarded for form Recent interpretations have indicated that the expected return need not be solely from the efforts of others, as the holding in *Howey* appears to indicate.”); see also *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 481–82 (9th Cir. 1973); Multi-Level Distributorships and Pyramid Sales Plans, Securities Act Release No. 5211, 36 Fed. Reg. 23,289, 23,290 (Dec. 8, 1971) (“[I]n the Commission’s view a failure to consider the kind and degree of efforts required of the investors ignores the equally significant teachings of *Howey* that form is to be disregarded for substance The ‘efforts of others’ referred to in *Howey* are limited, therefore, to those types of essential managerial efforts but for which the anticipated return could not be produced.”).

259. *Forman*, 421 U.S. at 855 (“The low rent . . . does [not] result from the managerial efforts of others.”).

260. See Brief for United States as Amicus Curiae Supporting Respondent at 4 n.5, *Forman*, 421 U.S. 837 (No. 74-157) (“[A] limited profit housing company . . . is entitled to borrow up to 95 percent of the cost of a housing project at low interest from the state or a municipality.”). Interestingly, then Solicitor General Robert Bork, Associate General Counsel for the SEC Paul Gonson, and Assistant to the Solicitor General Robert Reich contributed to the government’s brief. See *id.* at 24.

261. See *Glenn W. Turner Enters., Inc.*, 474 F.2d at 482 (accepting the Commission’s position and holding that the instrument constituted a “security” even though the investor must exert some effort to realize a return on the investment, because the efforts made other than by the investor were undeniably the essential managerial efforts); see also Multi-Level Distributorships and Pyramid Sales Plans, 36 Fed. Reg. at 23,390 (“[I]n the Commission’s view a security is offered or sold where the franchisee is not required to make significant efforts in the operation of the franchise in order to obtain the promised return.”); *LOSS ET AL.*, *supra* note 32, at 950 (“A more appropriate standard would require proof only that the efforts made by those other than the investor are the undeniably significant ones” (internal quotation marks omitted)).

Although not addressed by the *Forman* Court, the timing of the promoter’s entrepreneurial efforts relative to the time of the purchase of the instruments may be critical. See *COX ET AL.*, *supra* note 227, at 43–45. If the efforts that lead to profits were expended in advance of the purchase of the instruments, then the instrument may not be a “security.” See *SEC v. Life Partners, Inc.*, 87 F.3d 536, 545–48 (D.C. Cir. 1996) (distinguishing between pre- and

Further, in interpreting the phrase “solely the efforts of others,” the SEC advocated a position vastly different than the Court’s conclusion.²⁶² Giving force to long-held positions of the Commission enhances continuity of the law and the political accountability with respect to those positions.²⁶³

B. *Reves v. Ernst & Young*

In *Reves v. Ernst & Young*, the Court, without mentioning *Chevron*, set forth the inquiry for whether an instrument constitutes a “note,” thus qualifying as a “security.”²⁶⁴ In *Forman*, the Court had suggested that its test for “investment contracts” “embodies the essential attributes that run through all of the Court’s decisions defining a security.”²⁶⁵ The *Reves* Court, however, admitted to overstating its position. In *Reves*, the Court indicated that, to interpret the test for “investment contracts” as the ultimate test for “security,” would render as surplusage the other twenty-plus congressionally enumerated terms in the statutory definition of “security.”²⁶⁶ The Court concluded that a different test was appropriate to determine whether an instrument was a “note.”²⁶⁷

At the time *Reves* was decided, different tests were percolating in the lower courts. The *Reves* Court discussed those tests and anointed its preference, the

post-purchase entrepreneurial efforts by the promoter). In *Forman*, the entrepreneurial efforts that yielded the profits sought by the purchasers were seemingly expended in advance of the purchase of the instruments, which could prevent treatment of the instruments as “investment contracts.” The *Forman* Court, however, did not discuss or foreshadow this issue and, contrary to the conclusions of the *Forman* Court, the benefits enjoyed by the purchasers of the instruments were attributable to the efforts of others.

262. See Brief for United States as Amicus Curiae Supporting Respondent at 4 n.5, *Forman*, 421 U.S. 837 (No. 74-157) (“[A] limited profit housing company . . . is entitled to borrow up to 95 percent of the cost of a housing project at low interest from the state or a municipality.”); see also *id.* at 10 (captioning the issue, without reference to “solely,” as whether the individuals “entrusted their capital to the management of others”).

263. See Bressman, *supra* note 50, at 555 (“[Congress] can rely on a position that the agency has long maintained in the past”); see also Bressman, *supra* note 249, at 1489.

264. See 15 U.S.C. §§ 77b(a)(1), 78c(a)(10) (2006) (“The term ‘security’ means any note”). This Article does not address the Court’s analysis of the proviso to section 3(a)(10). 15 U.S.C. § 78c(a)(10) (“The term ‘security’ . . . shall not include . . . any note . . . which has a maturity at the time of issuance of not exceeding nine months”). Though one may be sympathetic to the arguments of Justice Stevens, arguably, if the Court had applied *Chevron*, the clear language of the proviso might yield a disposition of the case at *Chevron*’s Step One, rendering the SEC’s interpretation of the proviso as irrelevant. See *Reves v. Ernst & Young*, 494 U.S. 56, 73–76 (1990) (Stevens, J., concurring).

265. *Forman*, 421 U.S. at 852 (“This [*Howey*] test, in shorthand form, embodies the essential attributes that run through all of the Court’s decisions defining a security.”).

266. See *Reves*, 494 U.S. at 64; see also *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691 (1985) (“[W]e would note that the *Howey* economic reality test was designed to determine whether a particular instrument is an ‘investment contract,’ not whether it fits within *any* of the examples listed in the statutory definition of ‘security.’”).

267. See *Reves*, 494 U.S. at 64.

so-called “family resemblance test.”²⁶⁸ The Court rejected the SEC’s suggestion that no one test should be adopted because the disputed instrument satisfied the various tests under discussion.²⁶⁹ Instead of following the SEC’s guidance,²⁷⁰ the Court unnecessarily addressed the issue before it was ripe. Additional percolation of the various tests in the lower courts would have been advantageous.²⁷¹

The Court’s handling of the matter worsened. Finding that the anointed test provided inadequate guidance—hence the benefit of additional percolation—the Court took it upon itself to provide that guidance.²⁷² After rejecting the test for “investment contracts” as applicable to “notes,” the Court set forth criteria for determining whether an instrument is a “note” that virtually mirror the criteria for determining whether an instrument is an “investment contract.”

268. See *id.* at 64–65 (“Because we think the ‘family resemblance’ test provides a more promising framework for analysis, . . . we adopt it.”); see also Gordon, *supra* note 44, at 391 (“That’s merely a conclusion. That statement is the equivalent of saying that the Court likes the test better. Moreover, the family resemblance test is not an analytical test at all. It’s a ‘smell’ test.”).

269. See Brief for the United States et al. as Amici Curiae Supporting Petition for a Writ of Certiorari at 8, *Reves*, 494 U.S. 56 (No. 88-1480), 1988 WL 1025770 (“[T]his case may not be an ideal vehicle for this Court’s review, since in our view the Co-Op’s notes qualify as securities under any of the several tests used for determining whether a note qualifies as a security.”). Compare Brief for the United States et al. as Amici Curiae Supporting Petitioner, *supra* at 15 (“The different approaches developed by the courts of appeals for determining whether an instrument is a ‘note’ obviously overlap to a significant degree. We do no doubt that those approaches would produce similar results in many cases.”), and *id.* at 24 n.26 (“Should the Court be disinclined to adopt the Second Circuit’s family resemblance test, the Court should nonetheless hold that the Co-Op’s notes qualify as securities under either the commercial-investment approach or the risk capital test used by the other courts of appeals.”); and *id.* at 16 n.15 (referencing that the issue of the appropriate test was not squarely presented in the lower courts), with *id.* at 16 (“Yet even though the approaches reflect a ‘common core,’ we believe that the Second Circuit’s family resemblance approach is . . . superior to [the other tests]. We consequently urge [its adoption].”). Although the Commission ultimately favored adoption of the Second Circuit’s family resemblance test over the alternatives and although the Court should defer to the Commission’s position as to which test to adopt, the Court need not have decided the issue, and the Court need not have deferred to the Commission’s preference that the Court decide the issue. The Commission was free to craft its own definition of “note.” Given the facts, the Court should not have filled the void left by the Commission.

270. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 778 (1996) (Souter, J., concurring) (“[W]e know too little to risk the finality of precision”); see also Cass R. Sunstein, Foreword, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 7–8 (1996) (highlighting “constructive uses of silence[.] . . . democracy-forcing” and minimalism “when the Court is dealing with an issue of high complexity”).

271. See *LOSS ET AL.*, *supra* note 32, at 871–72 (“While the courts showed considerable facility in adumbrating the criteria to be considered in distinguishing *commercial* from *investment* notes, they were considerably less successful in theorizing how these criteria might be ordered or weighted.”).

272. *Reves*, 494 U.S. at 65, 67.

<i>HOWEY</i>	<i>REVES</i> ²⁷³
1. An investment of money	1. The motives are investment, not commercial or consumer.
2. In a common enterprise (under the multiple-investor test)	2. The notes are offered and sold to a broad segment of the public.
3. With an expectation of profits	3. The public reasonably expects the notes to be investments.
4. Solely from the efforts of others.	4. [This is inherent in notes.]
5. The absence of an alternative regulatory scheme.	5. The absence of an alternative regulatory scheme or other risk-reducing factor.

Additionally, in identifying the criteria that suggest the existence of a “note,” the Court repeatedly and confusingly cited “investment contract” precedent instead of precedent that addressed the existence of a “note.”²⁷⁴

Recently, in *SEC v. Edwards*, the Court determined whether an instrument constituted an “investment contract,”²⁷⁵ and the Court’s analysis has since been labeled “casual.”²⁷⁶

273. Gordon, *supra* note 44, at 403.

274. See, e.g., *Reves*, 494 U.S. at 66–67 (citing *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 851 (1975)) (addressing the existence of an “investment contract,” not a “note”); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 687, 693 (1985) (same); *Marine Bank v. Weaver*, 455 U.S. 551, 557–59 (1982) (same); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943) (same); see also Gordon, *supra* note 44, at 403–04.

275. See *SEC v. Edwards*, 540 U.S. 389, 393–97 (2004) (holding “that an investment scheme promising a fixed rate of return can be an ‘investment contract’ and thus a ‘security’ subject to the federal securities laws”).

276. LOSS ET AL., *supra* note 32, at 947.

[T]he Court could have avoided potential confusion by explaining how the investment contract in *Edwards* can be distinguished from a note. Presumably, the casualness of the analysis will invite new applications of the . . . investment contract test to precisely the type of cases to which *Reves* said such test should not apply.²⁷⁷

A future Court undoubtedly will have to resolve the confusion stemming from the *Reves* decision, which could have been avoided altogether by exhibiting deference to the SEC.

IV. CONCLUSION

Despite its best efforts, Congress inevitably enacts ambiguous statutes. In resolving those ambiguities, courts routinely accord deference to an administering agency when its position is well reasoned, consistently applied, and longstanding. Courts should similarly accord deference to such positions advocated by the SEC, even if the ambiguity concerns the definition of “security.” Generalized arguments against such court deference prove unavailing, and statutory clues counsel in favor of such deference to the Commission. Deference to the SEC regarding the definition of “security” would enhance continuity of the law and political accountability.

277. *Id.* at 949.