Reason and Reasonableness in Review of Agency Decisions

Jeffrey A Pojanowski, University of Virginia - Main Campus
Provisions of federal statutes often incorporate common law terms and concepts. Federal courts interpreting these provisions usually do not look to the law of any particular jurisdiction, but rather apply general rules and principles of the common law. Federal agencies also administer statutes with embedded common law, and it is unclear how much respect, if any, reviewing courts should give to agency interpretations of those incorporated rules and principles. This Article examines this problem with the aim of situating deference doctrine in broader debates about the character of legal reasoning. Drawing on both common law theory and institutional analysis, this Article argues that the quandary of agency interpretations of common law touches on a fault line in the judiciary’s thinking about deference and the nature of law. Courts’ doubts about their ability to resolve difficult questions without issuing legislative-like commands often lead them to accept merely reasonable agency interpretations, while the inherited common law notion of law aspiring to reason preterms courts’ complete retreat from all legal ambiguity. This tension lurks just below the surface of much discussion of administrative law doctrine and scholarship and is a fundamental source of the oft-noted confusion in deference doctrine. Confronting this tension is a crucial first step for shaping a coherent deference regime, or at least recognizing the limits of any such doctrine’s theoretical purity.

* Olin/Smith Fellow in Law, University of Virginia School of Law. Many thanks to Charles Barzun, Ben Beaton, Lillian BeVier, Nita Farahany, John Harrison, Elizabeth Magill, Tom Miles, Caleb Nelson, Mildred Robinson, Fred Schauer, Steve Seem, Matthew Stephenson, George Yin, and the participants at University of Virginia Summer Faculty Workshop and the George Mason D.C. Summer Workshop for reading drafts or talking through the problem. All errors are mine.
INTRODUCTION

A company markets computer software that provides day traders with real-time data and recommendations for buying and selling futures on commodities markets. In a late night infomercial, the firm touts the spectacular “certified” profits that purchasers would have earned had they been using this one-of-a-kind system over the past seven years. What the suntanned host does not tell viewers at home is that these “certified” results are not based on actual trades, but simulations of what the system would have produced based on historical data. A regulator initiates administrative proceedings against the firm, charging that this omission “defrauded” customers under the terms of the statute governing commodities trading. In the proceedings a critical question is whether this omission is significant enough to satisfy the “materiality” element of the law of fraud. The agency concludes that it is and levies a substantial fine. The firm seeks review in a federal court of appeal. If the fraud question is a close one, the court must decide how much respect to give the agency’s legal conclusion. On the one hand, what it means to “defraud” customers here is a statutory question, and *Chevron U.S.A., Inc. v. Natural Resources Defense Council* indicates that courts should defer to an agency’s reading of an ambiguous statute it implements, so long as that interpretation is reasonable. On the other hand, in interpreting the term “defrauded,” the agency simply applied the elements of the common law of fraud—the kind of legal “question courts often encounter,” and an interpretation that would be reviewed de novo if issued by a district court.

To ask whether courts should defer to agency interpretations of judge-made law is to touch on a fault line in thought about judicial review of administrative decisions and the nature of legal reasoning. The common law was understood by its early champions as the “artificial perfection of reason” applied to disagreements, and less ancient theorists of the judicial craft maintained that judicial decisions are “the product of reasoned argument,” and therefore “must be prepared to meet the test of reason.” *Chevron’s* deference doctrine, however, can be seen as the acceptance of

---

1 This example is based on *R&W Technical Services Ltd. v. Commodity Futures Trading Com’n*, 205 F.3d 165 (5th Cir. 2000), and section 4b of the Commodities Exchange Act, 7 U.S.C. § 6b.
3 *R&W*, 205 F.3d at 169.
mere *reasonableness* in resolving legal questions. *Chevron* defers to agencies’ reasonable constructions of ambiguous statutes because it understands such interpretation as a lawmaking act of political and policy choice—a decision that preexisting law can constrain but not dictate. Accordingly, just as *Erie Railroad v. Tompkins* marked the rejection of the traditional conception of a freestanding, discoverable common law, *Chevron* has been dubbed “the *Erie* of the administrative state” for its recognition of the limits of legal reasoning.\(^6\) If interpretation of ambiguity is legislative promulgation to which the judiciary is ill-suited, Judge Calabresi’s lament about the eclipse of the courts by the “statutorification of American law” is truer than he thought.\(^7\)

But does *Chevron* really mean all that? Given the Court’s mercurial record in applying deference, *Chevron* has hardly turned out to be a Copernican revolution placing agencies at the center of the interpretive universe. Indeed numerous decisions—and the author of the *Chevron* opinion—maintain that there are ambiguous yet nevertheless purely legal interpretive questions that courts rather than agencies should decide.\(^8\) To be fair, the administrative-*Erie* view can be seen as aspirational, and its proponents are all too aware that the Court has not completed the *Chevron* revolution.\(^9\) So perhaps the better question is, why not? Agency interpretations of common law, the body of law formerly known as the apotheosis of legal reason, provide the ideal problem for testing the administrative-*Erie* thesis and its limits.

This Article explores this problem with the aim of situating deference doctrine in broader debates about the nature of legal reasoning. This analysis indicates that courts’ doubts about their ability to resolve difficult questions without issuing legislative-like commands often lead them to accept merely reasonable agency interpretations, while the inherited common law notion of law aspiring to reason pretermits courts’ complete retreat from all legal ambiguities. This tension, which appears in sharp relief in the common law question, also structures a number of other individual deference problems and the broader question of whether

---


\(^8\) See Parts I and V.B. infra.

\(^9\) See, e.g., Sunstein, *supra* n. __, at 190 (“the simplest interpretations of *Chevron* have unraveled. Like a novel or even a poem, the decision has inspired fresh and occasionally even shocking readings”).
deference doctrine as a whole is rooted in statutory command or common law discernment. Such disagreement about the autonomy of legal reasoning lurks just below the surface of much discussion of administrative law doctrine and scholarship, and confronting this tension is a crucial first step for shaping a coherent deference regime, or at least recognizing the limits of any such doctrine’s theoretical purity.

The discussion proceeds as follows. Part I provides a brief overview of the Supreme Court’s deference doctrine, including its treatment of the threshold question of what kinds of agency interpretations receive *Chevron* deference. Part II describes the problem of deference to agency interpretations of common law and the courts’ mixed responses to the question. Part III highlights the theory of legal change implicit in *Chevron*’s understanding of statutory interpretation and explores whether that approach is compatible with the common law. One theory finds resolution of novel common law problems functionally equivalent to gap-filling in ambiguous statutory schemes, and thus recommends deference. In contrast to this statutory theory of common law reasoning, a traditionalist understanding conceives of the common law as a discipline of practical reasoning distinct from legislative discretion, and thus resists deference. Part IV undertakes a second method of analyzing the problem, looking to the capacities and limits of the legal institutions implementing the common law. Institutional analysis, too, provides plausible arguments for courts and for agencies, though empirical resolution of this intuitive dispute appears daunting.

Part V considers the implications of these two analyses. First, these two inquiries suggest that institutional analysis of the deference question is often inseparable from the more general theoretical debates that institutionalism aspires to avoid, a feature that suggests the methodological debate about the superiority of institutional analysis versus “first-best” approaches to legal theory is overdrawn. Second, the patterns of disagreement over deference to common law surface in other contested *Chevron* questions, and can be seen as structuring the broader disagreement on how to understand *Chevron* deference as a whole. Finally, the uncertainty about deference to common law, and by hypothesis uncertainty about the nature of *Chevron* deference, may reflect not unclear thinking or failure to realize *Chevron*’s full revolutionary potential, but rather basic and perhaps ineradicable tensions in understandings about legal reasoning and adjudication. This conclusion suggests that the relationship between jurisprudence and administrative law may be richer than the legal literature currently appreciates.

I. *Chevron* Deference and Its Scope

This Part provides a brief overview of the *Chevron* deference doctrine
and the “Step Zero” question about when a court should apply the *Chevron* two-step or a less-deferential standard of review. The initiated who have read scores of summaries of *Chevron* and Step Zero can feel free to skip ahead to Part II if they want; the main thing from this Part to keep in mind is the choice between basing deference on a delegation of lawmaking authority from Congress to the agency, or alternatively upon the agency’s comparative expertise and political accountability.

At issue in *Chevron* was whether the term “stationary source” of pollution in the Clean Air Act referred to all the “pollution emitting devices” within a single facility as if they were in a single “bubble,” or rather each device within the facility.\(^\text{10}\) The Environmental Protection Agency (EPA), which administers the Act, issued a legislative regulation that adopted the “bubble” concept, thereby reversing the previous administration’s interpretation of “stationary source.”\(^\text{11}\) On review, the Court articulated the two-step rule that now structures review of many agency interpretations. At Step One, the court uses the “ordinary tools of statutory construction” to determine whether Congress has “directly spoken to the precise question at issue.”\(^\text{12}\) If the court discerns a clear answer, that interpretation governs. If the court finds the statute ambiguous, it proceeds to Step Two, asking whether the agency’s interpretation is “based on a permissible construction of the statute.”\(^\text{13}\) If so, the court must uphold the agency’s interpretation even if the court would have chosen a different one. Step Two is functionally similar, if not formally identical, to assessing whether the agency’s interpretation is arbitrary and capricious.\(^\text{14}\)

A host of questions surround the two-step inquiry, such as which tools of statutory construction should be used at Step One or what counts as sufficient ambiguity to proceed to Step Two.\(^\text{15}\) Much of the copious ink spilt over *Chevron*, however, runs toward *Chevron*’s so-called “Step Zero”—the threshold determination about which agency interpretations should be eligible for the two-step inquiry.\(^\text{16}\) When *Chevron* does not

---

\(^{10}\) 467 U.S. at 840.
\(^{11}\) *Id.* at 857-58.
\(^{12}\) *Id.* at 842 & 843 n.9.
\(^{13}\) *Id.* at 843.
\(^{15}\) Some also contend that the *Chevron* inquiry should only be understood as one step; whether the agency’s interpretation is “permissible as a matter of statutory construction.” See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597, 599 (2009).
apply, courts assess the agency interpretation under the less-deferential doctrine of *Skidmore v. Swift & Co.* or, in some cases, under de novo review.\(^{17}\) In contrast to *Chevron’s* forgiving reasonableness review, *Skidmore* considers the “‘specialized experience and broader investigations and information’ available to the agency,” and the “value of uniformity in its administrative and judicial understandings of what a national law requires.”\(^{18}\) The respect due under *Skidmore* “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”\(^{19}\) Evidence suggests that, at least at the court of appeals’ level, application of *Chevron* increases an agency’s chances of prevailing.\(^{20}\)

After *Chevron*, there was uncertainty about the basis for deference, a puzzle that made it difficult for courts and commentators to agree on what kinds of interpretations qualified for the two-step framework.\(^{21}\) *Chevron* gave two clues. First, it emphasized the authority delegated from Congress to the EPA to implement the Clean Air Act, and explained that courts should not reverse agencies’ exercises of lawmaking authority unless the gap-filling interpretation is unreasonable.\(^{22}\) Second, the Court emphasized the EPA’s superior expertise and political accountability in reaching a “reasonable accommodation of manifestly competing interests” at stake.\(^{23}\)

In *Chevron*, both delegation and the need for expertise and accountability weighed in favor of deference, but there are many cases in which an agency has delegated authority but no particular expertise on a

---

17 Mead, 533 U.S. at 234-35 (citing Skidmore, 323 U.S. 134, 139-40 (1944)).
18 Id. at 234 (quoting Skidmore, 323 U.S. at 139).
19 Skidmore, 323 U.S. at 140.
21 See, e.g., Merrill & Hickman, supra n. __, at 863-72 (cataloguing competing rationales for deference).
22 467 U.S. at 443-44 (when “Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute” and at other times “delegation to an agency on a particular question is implicit, rather than explicit”).
question, and vice-versa. This potential tension came to a head in United States v. Mead Corp., where the Court found a lack of delegation dispositive, notwithstanding any considerations of expertise. Mead concerned a tariff classification ruling by the United States Customs Service. The Service’s ruling, issued in an opinion letter, concluded that the petitioning company’s three-ring day planners counted as bound “diaries” under a statutory tariff schedule, and thus were subject to an increased customs duty. On review, the Service sought Chevron deference.

Mead appeared to embrace the delegation model of Chevron. Expertise, the Court indicated, is relevant under Skidmore. An explicit or implicit delegation of lawmaking authority, however, is the “additional reason” that “distinguishes” interpretations subject to Chevron. Mead identified two Chevron-triggering factors signaling “delegation”—“express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed” and “relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”

Notwithstanding any expertise on the part of the Customs Service, its interpretation did not qualify because the letter ruling was neither the product of notice-and-comment rulemaking nor an adjudication that created a binding effect on third parties.

Mead thus appeared to establish a rule-like presumption that Step Zero is satisfied when “agencies have been given power to use relatively formal procedures” to implement statutes they administer, “and...they have exercised that power.” This presumption, Mead’s “safe harbor,” can be

---

24 See, e.g., Krotoszynski, supra n. _, at 742-43 (discussing the themes of delegation and expertise in Chevron opinion, but concluding that Chevron favored a delegation rationale).
26 Id. at 230. It is important to note that notice-and-comment rulemaking, while described as “informal” under the Administrative Procedure Act, is sufficiently formal to suggest Chevron deference under Mead.
27 Id. at 231-34. One can argue that the first criterion—that an agency has delegated power to make decisions with the force of law—should be sufficient for deference, and that Mead’s focus on procedural formality is beside the point, or suggests an unexplained retreat from the implications of the court’s embrace of a delegation theory of deference. Cf. Thomas W. Merrill, The Mead Doctrine: Rules & Standards, Meta-Rules & Meta-Standards, 54 ADMIN. L. REV. 807 (2002) (arguing for a force-of-law rule delegation rule, rather than a standard that includes the level of agency formality); see also Thomas Merrill and Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 HARV. L. REV. 467 (2002) (arguing that only agencies with powers to issue rules backed by sanctions should be eligible for Chevron deference).
28 Sunstein, supra n. ___, at at 214.
29 Mead, 533 U.S. at 246 (Scalia, J., dissenting).
understood as a rule that sweeps wider than a case-by-case assessment of the need for expertise or political accountability in a given decision, for agencies can use “relatively formal” procedures to expound ambiguous statutes that are not technical. Accordingly, many scholars, including those who think deference should be justified by administrative expertise, concluded after Mead that deference turns on a general congressional delegation of lawmaker power to agencies, not the expertise underpinning Skidmore’s “respectful consideration” of agency interpretations.

Step Zero, however, is more complex than the Mead safe harbor suggests. Mead indicated, and later decisions have reinforced, that less-formal agency interpretations could merit Chevron deference. The Court in Barnhart v. Walton read Mead as generally prescribing a multifactor standard at Step Zero, even when an agency acts with formality. Accordingly, the Court has indicated that certain interpretations otherwise within the Mead safe harbor may be ineligible for deference due to the nature of the question. For example, when the United States sought deference for its conclusion that the Foreign Sovereign Immunity Act does not apply retroactively, the Court explained that “‘pure question[s] of statutory construction . . . well within the province of the Judiciary’” do not fall under Chevron. The Court has also explained that Chevron’s presumption of delegation is unwarranted in “extraordinary cases,” such as “major questions” of national policy, such as whether FDA should be able to regulate tobacco as a drug.

II. THE PROBLEM

Judicial review of agency interpretations of common law is another

30 See Krotoszynski, supra n. __, at 736-37.
31 See Elizabeth Garrett, Legislating Chevron, 101 Mich. L. Rev. 2637, 2637 (2003); Watts, supra n. __ at 1006; Merrill & Hickman, supra n. ___ at 855; but see Criddle, supra n. ___, at 1284-85 (delegation theory is “[a]rguably the leading rationale” for deference, but is inconsistent with the APA and Congress’s more-specific grants of delegation).
33 535 U.S. 212, 222 (2002) (considering “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the 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”).
potential carve-out from Mead’s safe harbor. While many deference questions involve interpretation of technical terms specific to a regulatory regime, statutory terms are often more generally accessible. The Supreme Court presumes that when Congress uses a term with a “settled meaning” at common law, that meaning is incorporated into the statute. Just last Term, for example, the Court assumed that common law tort principles governed the scope of liability for toxic waste cleanup under the Superfund statute. Courts interpreting these pockets of “general law” apply principles of common law jurisprudence, rather than the law of any particular jurisdiction. Agencies also interpret many of these statutes incorporating common law rules and principles in the course of rulemaking and formal adjudication. If the application of the common law in a given case is unclear, the question remains whether a reviewing court should defer to the agency’s reasonable interpretation of the common law under Chevron Step Two or whether the court should apply Skidmore or even de novo review.

The National Labor Relations Act (NLRA) offers a prominent example of common law embedded in an administered statute. Originally, the NLRA did not define the term “employee.” Interpreting the term in NLRB v. Hearst Publications, the Court looked to “the history, terms and purposes of the legislation.” The “standard was one of economic and policy considerations within the labor field.” Congress then amended the NLRA to exclude from the definition of “employee” “any individual having the status of an independent contractor.” The Court concluded in NLRB v. United Insurance Co., that “the obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors.”

---

39 I use the term “formal adjudication” to refer to proceedings conducted pursuant to the trial-like procedures outlined in sections 554 and 556-57 of the Administrative Procedure Act. See ASIMOW, ET AL., A GUIDE TO FEDERAL AGENCY ADJUDICATION 203 (2003).
40 This question is distinct from the unsettled question of whether an agency receives deference its conclusion that the presumption of common law meaning was rebutted. In Commissioner v. Duberstein, for example, the government persuaded the Court to not adopt the common law meaning of “gift” under the tax code. 363 U.S. 278, 285-86 (1960). The Court neither deferred nor considered the deference question.
41 322 U.S. 111, 124 (1944)
43 Ibid.
Subsequently, courts and the National Labor Relations Board refer to general principles of the common law of agency to determine a worker’s status. The employee/independent contractor distinction is often decisive in labor disputes. For example, in *Aurora Packing v. NLRB*, the Board and the D.C. Circuit addressed the question of whether a union could represent four rabbis who performed kosher slaughtering services at a meat packing plant. Because the NLRA does not impose a duty to bargain with independent contractors, the decision turned on whether the rabbis were “employees” under the multifactor common law test. The D.C. Circuit observed that because “the line between independent contractors and employees was not an easy one for common law judges to draw,” there will often be room for reasonable disagreement about a given worker’s status under the Act.

The problem of deference on common law also arises when agencies interpret contracts in course of adjudication. For example, in *Natural Fuel Gas Supply Co. v. FERC*, a utility claimed that it was entitled to a retroactive rate increase due to artificially low rates it charged under a government order later invalidated by the courts. The agency denied the request because a settlement agreement between the utility and its customers forfeited the right to seek recoupment. On review before the court, the validity of the agency’s action turned on whether it properly interpreted the contract. When “the issue simply involves the proper construction of language” in a contract for services, the agency’s decision is similar to that of a common law court. In nearly identical circumstances, pre-*Chevron* doctrine applied de novo review when the agency “professed to dispose of the case solely upon its view of the result called for by the application of canons of [contractual] construction employed by the courts.” Contracts and the common law rules and principles for interpreting them can be ambiguous, and the question remains whether after *Chevron* an agency’s “reasonable” interpretation should prevail when the

---

44 904 F.2d 73, 74-75 (D.C. Cir. 1990).
45 Id. at 75. Some contend that because NLRB decisions are not self-executing, they lack the “force of law” and thus are ineligible for *Chevron* deference. See Merrill, supra n. __ at 832-33. The D.C. Circuit in *Aurora Packing* assumed *Chevron* would otherwise apply and, like the Supreme Court, has deferred to the NLRB under *Chevron*. See, e.g., *San Miguel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315-16 (D.C. Cir. 2008); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001).
46 Courts have also imposed common law requirements for business reorganizations to qualify as tax-exempt transactions. See, e.g., *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (requiring transaction to have “business or corporate purpose”). The Internal Revenue Service regularly applies these judge-made doctrines and has incorporated them, with some modifications, into Treasury regulations. See 26 C.F.R. § 1.368-1 (2008)
47 811 F.2d 1563, 1565-69 (D.C. Cir. 1987).
The courts do not provide clear answers to these questions. When interpreting statutorily embedded common law, the Supreme Court has pointedly noted that the government has either not argued for *Chevron* deference or has not offered its interpretation in a format that would otherwise have the force of law.49 The courts of appeals are mixed, though it appears they are less likely to defer. The D.C. Circuit has deferred to the FCC’s conclusion that a party is a “common carrier,” and the Third Circuit applied *Chevron* to a ruling that a party “willfully” violated a licensing regime, even though the agencies’ reasoning turned largely on application of common law rules and principles.50 By contrast, the D.C. Circuit reads the common law definition of “employee” in the NLRA as reflecting Congress’s choice to give decisionmaking authority to courts, rather than policymaking agencies.51 Other courts of appeals have refused deference to agencies’ interpretations of statutes (or their own regulations) raising similar questions, such as: whether a party’s litigation success before the agency displaced the American rule on attorney’s fees;52 presumption of death for purposes of survivors’ benefits;53 whether an election of in-kind royalties counted as a “purchase” of natural gas under property law;54 or if violations of statutes were “material”55 or immunized by “reasonable diligence.”56

The appellate courts sharply disagree on agency interpretation of contracts. The D.C. Circuit deemed obsolete the pre-*Chevron* Supreme Court precedent that withheld deference from an agency’s application of “canons of [contract] construction applied by courts.”57 The court explained that after *Chevron* the delegation of gap-filling power to agencies is “a grant of power [that] embodies congressional recognition of the agency’s ‘special competence’ to handle those matters”—a holding that the

50 See Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 544 F.3d 509 (3d Cir. 2008); USTA v. FCC, 295 F.3d 1326 (D.C. Cir. 2002).
51 See, e.g., Int’l Longshoremen’s Ass’n, AFL-CIO v. NLRB, 56 F.3d 205 (D.C. Cir. 1995).
53 Green v. Shalala, 51 F.3d 96 (7th Cir. 1995).
54 Jicarilla Apache Tribe v. FERC, 578 F.2d 289, 292-93 (10th Cir. 1978) (pre-*Chevron*, but relied on by cases like Burgin, infra).
55 R&W Technical Servs. Ltd. v. CFTC, 205 F.3d 165, 169 (5th Cir. 2000).
57 Natural Fuel Gas Supply, 811 F.2d at 1570.
First, Tenth, and Eleventh Circuit have followed. The Fourth, Fifth, Sixth, and Seventh Circuits do not apply *Chevron* in these circumstances, maintaining that decisions “based on general common law principles” are “clearly within the competence of courts,” and do not implicate the “agency’s unique expertise and policymaking prerogatives.”

The literature lacks a full examination of such deference questions. Professors Merrill and Hickman touch briefly on the question of deference to agency interpretation of contracts. Rather than focusing on features unique to common law, they allow for deference if the contract has the force of law through the filed-rate doctrine, and is thus like legislative regulations that agencies authoritatively interpret. Another commentator has similarly argued for deference to agency constructions of contracts because such questions often require interpretation of agency-administered statutes. Professor Kahan’s case for deference to government interpretations of criminal statutes depended on his claim that much of federal criminal law is interstitial common law, and that allowing prosecutors to resolve ambiguity will lead to superior doctrine. Kahan, however, focused on the benefits of deference without considering whether interpretation of embedded common law presents unique problems. This paper addresses this broader question.

### III. Deference and Common Law Theory

Under *Mead*, an agency receives *Chevron* deference if Congress has “delegated” the agency the power to authoritatively resolve the ambiguity at hand. The question here is whether an agency has delegated power to apply common law rules and principles that fall within its administrative bailiwick. Answering that question is not straightforward. *Mead* appeared to presume an exercise of delegated authority, and thus deference, when the agency offered its interpretation in a rulemaking or formal adjudication. The picture is more muddled, however, with *Barnhart* suggesting a general multifactor test for deference, and other decisions excluding certain

---

58 *Id. See Boston Edison Co. v. FERC*, 441 F.3d 10 (1st Cir. 2006); *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479 (10th Cir. 1995); *Muratore v. OPM*, 222 F.3d 918 (11th Cir. 2000).

59 *Burgin v. OPM*, 120 F.3d 494, 498 (4th Cir. 1997). *See also Melton v. Pasqua*, 339 F.3d 222, 225 (4th Cir. 2003); *City of Kaukauna v. FERC*, 214 F.3d 888, 895 (7th Cir. 2000); *Davidson v. Glickman*, 169 F.3d 996, 1000 (5th Cir. 1999); *Dayton Power & Light Co. v. FERC*, 843 F.2d 947, 953 & n. 12 (6th Cir. 1988).

60 *Supra n. __*, at 898-99.


63 *See id.* at 489.
interpretations from *Mead’s* safe harbor based on the character of the question. At this point, it may be fair to say that “delegation” tracks what the court thinks it is reasonable for Congress to have delegated, which is basically what the court thinks is reasonable.

One approach to determining whether it is “reasonable” to infer delegated agency authority over embedded common law is thinking about the nature of the common law and common law adjudication. *Chevron*, after all, suggests a thesis about the nature of statutory interpretation—that resolution of ambiguity frequently involves policy-laden lawmaking—and we can ask whether a similar thesis pertains when the application of common law rules and principles is unclear. One approach to common law answers that question in the affirmative, holding that common law reasoning in novel cases requires judges to engage in lawmaking activity that is not meaningfully different than legislation. An alternative theory, which understands common law reasoning as an autonomous tradition of practical reasoning distinct from legislation, resists deference to agency interpretations. While the two theories sketched below do not exhaust the available options, both have resonance in the legal system and plausibly identify the core disagreement about the deference question at issue.

**A. Chevron’s Assumptions About Statutory Interpretation**

Under *Chevron*, statutory questions fall into two categories. First, a question may offer a clear answer to any reasonable interpreter. When Congress has “directly spoken to the precise question at issue,” its “clear” command leaves courts and agencies no room for discretion. Second, some questions do not admit a clear answer. This ambiguity creates a statutory “gap” creates a “policy space” that an interpreting official fills through an exercise of discretion. Assuming the agency administers the statute and uses sufficient procedural formality, a court’s duty in Step Two cases is limited to ensuring that the agency’s choice does not fall outside that policy space—in other words, that the interpretation is reasonable.

---

64 *Barnhart* might be seen as the realization of the confusion promised by *Mead’s* refusal to commit to a clear rule for deference. *See* Merrill, *supra* n. __; Adrian Vermeule, *Mead in the Trenches: Introduction to the Annual D.C. Circuit Review*, 71 GEO. WASH. L. REV. 357 (2003).
65 *See* Garrett, *supra* n. __ at 2638-39.
66 *Chevron*, 467 U.S. at 842.
67 *Id.* at 843.
68 Stephenson & Vermeule, *supra* n. __ at 602.
69 467 U.S. at 844 (more searching judicial review “misconceives the nature of [the judiciary’s] role”).
possible analogies between statutory and common law interpretation.

First, this understanding is skeptical about the law’s ability to provide determinate, distinctively legal answers to novel or difficult cases. Interpreting the term “stationary source” in *Chevron* involved an “accommodation of manifestly competing interests” and a “reconciling of conflicting policies.” An “ambiguous legal rule does not have a single ‘right’ meaning; there is a range of possible meanings; the selection from the range is an act of policymaking.” As a corollary, the agency can change its mind about its interpretive choice. It is this moderate legal skepticism that leads Professor Sunstein to observe that *Chevron* “is a natural and proper outgrowth of both the legal realist attack on the autonomy of legal reasoning and . . . the shift from regulation through common law courts to regulation through administrative agencies.” Such recognition of the limits of legal craft also underlies *Chevron*’s emphasis on the agency’s political accountability and technical expertise.

Second, *Chevron* equates resolution of statutory ambiguity with making law. *Chevron* treated the meaning of the ambiguous term “stationary source” not as something to be found, but a legal “gap” that an official must “fill” by “formulation of policy and the making of rules.” As an early interpreter of *Chevron* explained, “[t]he person who fleshes out the meaning of the rule is the true law-giver in the circumstances.” It is little surprise, then, that *Chevron* suggested and *Mead* confirmed that an agency’s interpretive primacy flows from delegations of lawmaking power. To defer is to recognize the agency’s authority to make law within the policy space.

Third, *Chevron* appears to equate law with clear, binding rules, while viewing standards as delegations for further lawmaking based on policy considerations. A “rule” in this sense is a “general prescription that sets out the course of action individual actors should follow in cases that fall within the predicate terms of the rule.” The rule prescribes “what all actors subject to the rule should do in all cases that cover it.” When the rule clearly

---

70 *Chevron*, 467 U.S. at 865, 842.
72 *Chevron*, 467 U.S. at 842 (the “appellate court’s basic legal error” was to assume a “static” meaning of the statutory term).
73 Sunstein, *supra* n. __, at 2583.
74 *Chevron*, 467 U.S. at 865-66.
75 *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).
76 *Bowen*, 832 F.2d at 411.
applies, as in Step One cases, there is no room for discretion. Further
lawmaking, however, is required in Step Two cases when it is unclear
whether the case falls within the terms of the rule, and legal standards are
paradigmatic example of such ambiguity. Congress’s choice of “statutory
language such as ‘feasible,’ [or] ‘reasonable’… suggests a broad delegation
to an agency to strike the policy balance.”

Chevron’s assumptions about statutory interpretation are hardly unique
in Anglo-American legal thought. One the tradition’s most influential
thinkers, H.L.A. Hart, anticipated this approach. In his terms, Chevron can
be understood as a power-conferring “secondary rule” about which
institution has authority to create binding, gap-filling “primary” rules that
govern conduct. The Chevron rule provides that in easy (or, what Hart
would call “core”) cases, the court decides, or rather applies the law enacted
by the legislature. In harder (“penumbral”) cases, where a legal official is
required to make law, the agency decides. While Hart differed from many
Legal Realists on the extent of indeterminacy in law, he used regulatory
legislation as a key example of such uncertainty. Hart observed that
legislatures delegate decisionmaking authority to agencies by enacting
broad, ambiguous terms, such as requiring regulated parties to charge a “fair
rate.” While there will be cases in which an agency’s interpretation of a
fair rate will be plainly too high or too low, between those poles are many
“difficult cases requiring attention.” In those cases, “the rule-making
authority must exercise a discretion.” Discretion in Hart’s thought is linked
with the “law-creating power” left to courts due to the “open texture of
law.” When agencies are delegated such powers in “difficult cases,”
reviewing courts should not act “as if there were one uniquely correct
answer to be found, as distinct from an answer which is a reasonable
compromise between many conflicting interests.”

B. Translating Chevron’s Assumptions to the Common Law
If the process for resolving uncertain cases under the common law is not
meaningfully different from interpreting an ambiguous statute, theory

78 Laurence H. Silberman, Chevron and the Intersection of Law and Policy, 58 Geo.
Wash. L. Rev. 821, 823 (1990)
80 See Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 Ethics
278, 299-300 (2001); Hart at 136-37.
81 HART at 128.
82 Id. at 141.
83 Id. at 128. See also John G. Osborn, Legal Philosophy & Review of Agency
suggests a shift in favor of legal positivism and its underlying preoccupation with legal
authority.”).
suggests that agencies should receive the same kind of deference when Congress chooses to embed common law rules and principles in a statutory framework. A prominent theory of common law adjudication, with roots in Hobbes, Bentham, and Austin, and running through to thinkers like Hart and Joseph Raz, conceptualizes common law adjudication in these very terms.

This approach analogizes between statutes and precedents. Precedent is statute-like law that judges make and apply when no other authority—such as actual statutes—governs a dispute. This judge-made law can vary in its guidance. It might provide a quite general standard, like the doctrine that a worker is not an independent contractor if he is “controlled” by his employer. The counsel can be intermediate, such as the multiple factors suggesting “control” in the Restatement of Agency. Or it can be quite particular, such as a case holding that in Fact Pattern Z that satisfies “control” factors a-c and g, but not d-f, the worker is employee. A judge presented with a case indistinguishable from Fact Pattern Z does not have to exercise discretion to decide the case. In an easy—or as Raz would say a “regulated”—case, the precedential rule governs as if a statute clearly spoke to the question. “The judge here can be seen in his classical image: he identifies the law, determines the facts, and applies the law to the facts.” This is not to say resolution of regulated disputes is “mechanical.” A problem can be intricate yet determinate. The distinctive feature of a regulated case is that “the court cannot make new laws except by changing existing ones.”

Matters are different when decisional law only provides a broad standard like “control,” a multifactor balancing test, conflicting rules, or applications of the “control” test that do not speak to the fact pattern at hand. In these “unregulated cases,” a judge faces a “gap” in the law that she fills by creating a binding precedent. In so doing, the judge acts like a legislator, resolving the dispute based on the judge’s assessment of the best resolution of matter, all things considered (including prudential limits on the judiciary’s ability to implement wide-ranging reform—limits less relevant to agencies).

Precedent may rule out some options, but among the remaining choices the judge acts within the realm of discretion.

---

84 Restatement (Second) Agency §2(3).
85 See Restatement (Second) of Agency §
87 Cf. id. at 193-94 (itemizing varieties of “unregulated cases”).
88 Id. at 194.
89 Id. at 197. See also SHERWIN & ALEXANDER at 25-26 (courts either “reason deductively from rules posited by others; or they posit law, relying on moral and empirical judgments, as any other lawmaker must. There is no middle ground…”).
90 RAZ at 197 (“Yet essentially it is true that in the exercise of their law-making power
This statutory conception of the common law is consonant with *Chevron*’s assumptions about statutory interpretation. *First*, it recognizes that filling in a precedential “gap” reaches beyond legal craft and into the realm of discretionary choice and political morality. In such cases, as Legal Realists recognize, “trying to show decisions to be justified on the basis of legal rules and reasons is a failure” because judges are acting beyond “the boundaries of the class of legal reasons.” Second, a judge is making law where none existed before, and so long as the new rule does not conflict with existing rules, the law is agnostic on its content. *Third*, this approach recognizes that while standards can channel discretion, law does its most work as clearly applicable rules. Legal standards are “undetermined rules” that require further lawmaking, but cases that fall under a sufficiently specified rules “do not require judicial discretion.”

One might contend that this analysis of the common law oversimplifies discretion. Professor Gardner has argued that the fact that “there is no single correct answer” to a legal question does not entail that the gap “must be filled from extra-legal sources.” “[P]ermissive sources”—such as scholarly commentary, principles drawn from rules, or decisions from another jurisdiction may provide a complete answer to a case—even though these legal sources do not compel one decision or another. Even when an official is presented with two conflicting permissive sources, it does not follow that non-legal considerations dictate the decision: “we may simply [and rationally] ‘judge,’ without resort to any further norms” outside the law. Thus, while some hard cases require “strong discretion” that requires choice between non-legal reasons, others may only involve “weak discretion” in which judges choose among permissive sources of law. In the latter cases, political accountability and non-legal expertise are less relevant, and the case for deference is accordingly weaker.

Gardner’s explication of Hart may be correct, but as it stands it does not provide a complete answer to the case for deference to common law. First, without a more robust account of rational judgment within the law, the choice of permissive sources is vulnerable to the claim that extralegal considerations were in fact decisive. Second, the distinction between weak and strong discretion does not mesh well with *Chevron*’s treatment of ambiguity. In cases of weak discretion, there is more than one reasonable
interpretation. When there are competing reasonable interpretations, however, *Chevron* indicates deference.\(^{96}\) There is disagreement about the level of clarity required for an interpretation to clear Step One, but *Chevron* does not seem to apply only when courts must use “strong discretion,” i.e., when legal materials provide no guidance.

This understanding of the common law is of a piece with what one scholar has described as the “textualization of precedent”—the increased tendency of judges to read the Restatements like statutes and to issue opinions that provide a case’s *ratio decidendi* in explicit, canonical, and rule-like form.\(^{97}\) This approach also coheres with the explanations provided in decisions that defer to agency applications of common law. In deferring to an agency’s interpretation of the common law term “willful,” for example, the Third Circuit explained that Congress delegated the agency lawmaking authority to the interpret the statute, and because the common law term “‘willful . . . has many meanings” depending on context, the court must defer to the agency’s reasonable choice.\(^{98}\) Similarly, in deferring to an agency’s construction of a settlement agreement, the D.C. Circuit conceived of contractual ambiguity as a “gap” that the agency had lawmaking authority to fill.\(^{99}\)

The parallels between statutes and the common law also provide a response to the objection that Congress’s inclusion of common law suggests a preference for courts over agencies. If Congress wanted agencies to engage in policymaking, the objection goes, why did it use common law terms of art instead of more general language? The answer is that Congress can write statutes with varying levels of generality, and incorporation of common law doctrine is one intermediate position. The common law can provide a determinate answer (as when a worker’s status satisfies all or almost every criteria of the employee/independent contractor test), and even more often it can exclude some options. And given how common law is a familiar starting point for legal analysis, of the available intermediate options, the common law is a rich and intelligible framework for channeling discretion. But if Congress wants agencies to resolve statutory ambiguities, and if filling precedential gaps is no different, it hardly follows that

---

\(^{96}\) Courts do at times decide statutory questions of intermediate difficulty at Step One, even though *Chevron* on its terms indicates deference because the interpretive question is ambiguous. The intensity of the Court’s Step One is notoriously inconsistent, but it often appears that factors beyond the structure of the *Chevron* inquiry—such as the substance of the decision under review—drives the heightened scrutiny at Step One. *See generally,* Note, *How Clear Is Clear In Chevron’s Step One?*, 118 HARV. L. REV. 1687 (2005).


\(^{98}\) *Vineland Fireworks*, 544 F.3d at 517 n.2.

\(^{99}\) *National Fuel*, 811 F.2d at 1569-70 & n.3.
Congress wants courts to exercise the discretion for the precedential gaps that remain after the incorporation of common law.

Further, the range of choice available to an interpreter of statutorily embedded common law will likely be quite broad. Unlike a state court bound by a wealth of jurisdiction-specific precedent, interpreters of embedded common law primarily look to cases across jurisdictions, Restatements, and scholarly commentary. An interpreter may find a leading case or a Restatement example that reflects the facts at hand, but unless the law in the relevant federal circuit has treated that holding as law, the interpreter is free to choose a contrary case or understanding of the common law, so long as it is reasonable. This is so even if the interpreter chooses a reasonable option because it is most appealing from a normative or policy perspective, not because it is the majority approach. This wider scope of choice may count in favor of deference, given how *Chevron* prefers that politically accountable and technically proficient officials fill legal gaps.

In sum, the case for deference is as follows: the common law is understood as a statutory code of sorts that sometimes clearly dictates a certain result (Step One), but often provides only a range of reasonableness (Step Two). As with statutory ambiguity, filling such common law gaps with further, more specific rules is a lawmaking act, and within the range of reasonableness, no legal criteria dictate one choice or the other. *Chevron* teaches that when an agency administers the statute with the force of law, the agency is the proper actor to engage in such interpretive lawmaking.

### C. The Traditionalist Rejection of Deference

This statutory understanding of precedential reasoning is well-pedigreed and plausible, yet courts often resist deferring to agency interpretations of common law. What alternative understanding of common law doctrine and reasoning could provide a principled justification for withholding *Chevron* deference? One approach is the classical jurist’s understanding of the common law as “artificial reason” distinct from ordinary reasoning and superior to it in solving practical problems. This approach—to which the statutory theory of common law discussed above is largely a response—understands the common law as a craft tradition of practical reasoning about disputes. With roots reaching back to 16th Century England, this approach

---

100 See Nelson, *supra* n. __, at 521.

101 Precedential rules are also less binding than statutes to the extent judges retain discretion to modify precedent through distinguishing cases or to overrule precedent completely. But because distinguishing and overruling can also be seen as lawmaking acts, this increased flexibility hardly counts *against* deference to policymaking agencies. *Cf.* RAZ at 187-91 (analyzing acts of distinguishing and overruling).
claims adherents and revivalists well after the rise of Legal Realism. An exhaustive examination and evaluation of these theories is beyond the scope of this Article, but a rough sketch presents an understanding that, if correct, would make it unreasonable to understand Congress’s incorporation of common law as a delegation to agencies.

1. The “Artificial Reason” of Common Law Traditionalism

Under this alternative conception, the common law is an unwritten “body of ideas and practices received by a caste of lawyers” that gives “guidance in what is conceived to be a rational determination of disputes.” Professor Postema has helpfully identified four features that mark this “practiced discipline of practical reasoning.” Postema’s theory roughly overlaps with approaches taken by others who resist any simple analogy between common law precedent and legislation. First, common law reasoning is pragmatic, focusing on the resolution of concrete, particular disputes. The common law method may not be able to order society completely, but any wholesale structuring performs will be the product of retail decisions about individual problems, not global theorizing about just or efficient organization of society. The philosophical analogue to the common lawyer is not the Kantian system-builder or the Benthamite social planner, but the Ciceronian casuist working to apply and reconcile norms implicated in a vexing fact pattern. Appropriately, the centerpiece of Llewellyn’s exposition of The Common Law Tradition is close reading of hundreds of appellate opinions, not high

---

102 Simpson at 94.
103 Postema at 601.
105 Postema at 602. See also Scharffs, supra n. __, at 2276 (the idea of “adjudication being done ‘by hand,’ one case at a time, is central to our idea of justice”).
106 Postema at 602; see also id. 594-95 (“artificial reason” of the common law is pragmatic, contextual, and nonsystematic); Eisenberg at 4 (one of the “paramount” functions of the common law courts is “the resolution of disputes”).
level political or social theory. 108

Second, common law reasoning is *historical*, “anchoring deliberation” about new problems to previous decisions that “are understood to be prima facie normative for the community.” 109 In solving problems, judges and lawyers look first to whether and how similar disputes have been handled before, a process that helps ensure continuity with past practice and requires “transmission of traditional ideas and the encouragement of orthodoxy,” as well as “pressures against innovation.” 110 Good judges and lawyers must be steeped in the learning of the practice and habituated in its methodologically conservative approach to problem-solving.

Third, the common law depends far more on *analogical* reasoning from precedent than deductive reasoning from rules. 111 The common law’s historical bent causes its practitioners to look backward, but analogical reasoning is the engine that carries the discipline forward. 112 The analogical reasoner must be able to make determinations of “threshold relevance” to determine which past cases are provisionally salient to the present dispute, and then make judgments of “robust” relevance, grouping “like cases” while distinguishing others. 113 Assessments of relevance, which often are sufficient to decide cases, are not deductive exercises. They depend in part on a faculty of insight developed from immersion in the law, a capacity similar to the “situation sense” or “horse sense” Llewellyn ascribed to good judges, or the prudential wisdom, or *phronesis*, of Aristotle’s ethics. 114

Common law theorists do recognize that analogical reasoning will not always provide clear answers. Sometimes analogical reasoning will offer indeterminate counsel or a determinate recommendation out of sync with

108 See Llewellyn, supra n. __; see also William Twining, Karl Llewellyn & the Realist Movement 245 (1973) (appellate opinions “constituted almost the only evidence to support [Llewellyn’s] descriptive thesis”).

109 Postema at 603.

110 Simpson at 95.

111 See Postema at 603-04; see also Levi at 1 (“The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case.”) & 5 (“What does the law forum require? It requires the presentation of competing examples.”).


113 Postema, supra n. __ at 604.

114 See id. (judges assess relevance because they “have been law-conditioned” and “see significances through law-spectacles”) (quoting Llewellyn, supra n. __ at 19); Aristotle, Nicomachean Ethics VI. vii.7, 1141b; Jonsen & Toulmen at 64-68 (explaining distinction between theoretical knowledge and practical wisdom).
the broader fabric of law. Common law traditionalists also maintain that
document must be justified by some objective, normative metric, and
reasoning by example from an objectively odious precedent hardly fits the
bill. To understand how courts operate beyond the confines of analogy, it
is helpful to understand the fourth aspect of common law reasoning: its

**collaborative** quality.

Common law reasoning is collaborative in that it is “a practice of
thinking, arguing, deliberating, and deciding in common.” Law seeks to
guide action, and legal rulings that do not provide intelligible, justificatory
reasons cannot serve that purpose. To do so, the reasons must be
“congruent with background social practices and widespread public
understandings of them.” Or, as Llewellyn put more pithily, a good
judge’s decisions must be “reasonably reckonable.” This is not to say
that the common law must be a mirror of social norms; law’s coordinating
function, historical focus, and case-by-case approach preclude such
aspirations. And, in the eyes of some, the collaborative aspect does not
require social consensus on norms. The shared understanding only requires
“practical meaning and force for those who participate” in the system—
overlapping consensus or mere recognition of a reason as intelligible and
widespread can suffice.

The collaborative aspect of common law reasoning also channels
judicial creativity when analogical reasoning runs out. A judge’s reflective
deliberation must produce decisions that other “officials and citizens . . . can
anticipate or at least recognize and find intelligible.” This collaborative
facet also underlies the common law’s rhetorical structure. The common
law unfolds only through deliberation and argument between parties before

---

115 See Postema at 608.
116 See EISENBERG at 86.
117 Postema at 603.
118 Id. at 610-14.
119 Id. at 612. See also EISENBERG at 2-3 (common law justification turns in
substantial part on the doctrine’s congruence with objective “social propositions”);
Simpson at 95 (force of legal doctrines turns on extent to which they are “accepted as
accurate statements of received ideas or practice” and “are consistent with practice”); LEVI
at 6 (common law “process is one in which the ideas of the community and of the social
sciences, whether correct or not, as they win acceptance in the community, control legal
decisions”).
120 LLEWELLYN at 4.
(1991) (discussing the necessary discontinuity between morality and institutionalized law).
122 Postema at 615. See also SUNSTEIN, supra n. __, at 91. But see Simpson at 98
(breakdown of “shared values” threatens stability of the common law tradition).
123 Postema at 609. See also EISENBERG at 150 (compliance with “society’s existing
standards” gives force to law).
a court, and through an ongoing discussion between the court and the legal community. As in Aristotelian practical reasoning, the purpose of legal argument is to “carry[] the conviction” of those “whose experience has equipped them to appreciate and weigh the significance of the details of particular cases,” based on “general truths that the hearers find convincing.”

All told, we can understand this conception of common law as a “practice” and “tradition” in the sense now made famous by Alasdair MacIntyre. To MacIntyre, a practice is a social activity in which participants realize goods according to the “standards of excellence which are appropriate to, and partially definitive of, that form of activity.” To enter a practice “is to accept the authority of [its] standards [of excellence] and the inadequacy of my own performance as judged by them.” The initiate enters into a relationship with current practitioners and with the predecessors who made the practice what it is today. “It is thus the achievement, and a fortiori the authority, of a tradition which” participants confront and from which they learn. The standards of a traditional practice are not immune from criticism and reform. “A living tradition…is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.” The argument occurs within the framework of the tradition’s standards, “transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition.”

Through this lens we can understand the common lawyers’ claim that their discipline of practical reasoning is a traditional practice distinct from ordinary reasoning about means and ends. The importance the common

---

124 See Postema at 594 (“In difficult cases, [Lord Edward] Coke argued, no individual alone and outside a court of justice, could ever discover the right reason of a rule of common law”); Fuller at 94 (adjudication marked by reasoned argument before a judge who must give a reasoned resolution); Simpson at 97 (common law is “an oral tradition, still only imperfectly reduced to writing”); Eisenberg at 12-13 (describing conversations between courts and legal profession).

125 Jonsen & Toulmin at 72-73.

126 Alasdair MacIntyre, After Virtue 187 (1985). Less immediately relevant for this discussion is MacIntyre’s emphasis that the goods of a practice are pursued for intrinsic, not instrumental, reasons, and that mastery of a practice “systematically extend[s]” human excellence. Id.

127 Id. at 190.

128 Id. at 194.

129 Id.

130 Id. at 222.

131 Id. at 221-22.

law places on precedent, both as a presumptive norm and as a resource for further development, suggests a living, developing tradition.\textsuperscript{133} as does the belief that only through study and practice can a lawyer develop the non-deductive craft of reasoning from precedent. The requirement that a judgment be intelligibly explained and justified, moreover, demands that the common lawyer understand and work from the inherited and shared standards of the legal community. As the English jurist Matthew Hale explained, the “bare exercise of the faculty of reason” is insufficient to become a common lawyer, for such skills “must be gained by the habituating and accustoming and exercise that faculty by reading, study, and observation” of the law.\textsuperscript{134}

Before considering common law traditionalism in the deference context, it is worth comparing this approach to Ronald Dworkin’s theory of law-as-integrity, which also seeks to explain why adjudication is not like discretionary legislation. Very roughly speaking, Dworkin argues that a judge deciding a hard case first identifies which principled interpretations of the law pass a threshold level of “fit” with existing doctrine, and then chooses the fitting interpretation that puts the “legal community’s institutions and decisions…in a better light from the standpoint of political morality.”\textsuperscript{135} There is some affinity between Dworkin’s approach and the critical reflection of a traditionalist judge when precedent and analogy do not provide clear answers, but they are not identical. The common law’s pragmatic, analogy-based approach seeks local “workability on the ground,” not the “coherence of broad moral vision” sought by Dworkin’s Judge Hercules.\textsuperscript{136} Further, traditionalism’s emphasis on law’s collaborative quality and public intelligibility presses the critically evaluative judge more toward the community’s shared standards than private theoretical reflections.\textsuperscript{137} Dworkin recognizes that a practiced jurist’s “judgments will be . . . a matter of feel or instinct rather than analysis,” but he seeks to “impose structure on [that judge’s] working

\textsuperscript{133} See Simpson at 97 (“To argue that this or that is the correct view [of the law], as academics, judges, and counsel do, is to participate in the system, not simply to study it scientifically.”)

\textsuperscript{134} Matthew Hale, Reflections by the Lrd. Chief Justice Hale on Mr. Hobbes His Dialogue of the Lawe, in WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th Ed 1956) at 505 (quoted in Postema at 594).

\textsuperscript{135} LAW’S EMPIRE 256 (1986).

\textsuperscript{136} Postema at 608.

\textsuperscript{137} Id. at 609.
theory" by translating hard-case adjudication into deduction from moral principles inherent in legal doctrine. Common law traditionalism, with its emphasis on tacit knowledge and phronesis-like situation sense, resists Dworkin’s Platonic aspirations.

2. Common Law Traditionalism Against Deference

Recall that we are searching for a background understanding of what Congress meant when it embedded common law within the statutory regime. If Congress conceives of common law in the manner of a traditionalist, it far less plausible to read embedded common law as a delegation of legislation-like authority to agencies. The traditionalist understanding of common law does not match up with the model of interpretation that underwrites Chevron’s deference to ordinary statutory ambiguity. Instead, imputing the traditionalist understanding to Congress would suggest that embedded common law is a statutory variable whose meaning is discerned primarily by expert courts.

First, the traditionalist understanding rejects the dichotomy between “regulated” or “core” cases that can be decided at Step One, and “unregulated” or “penumbral” cases that require Step-Two-style acts of legislative discretion. Such a dichotomy ignores how a common law rule’s vitality always depends on reasoned justification, its integration into the fabric of the common law, and its acceptance by the legal community. Existing formulations of doctrine are strong evidence of the law, but are “often imperfect and always subject to reconsideration in light of future cases.” Cases are “easy” only if they “fall within a doctrinal rule that is justified” by the standards of common law practice, the application of which is never simply deductive or mechanical, even though the need for finality and social coordination gives weight to existing precedent.

Second, Chevron deference is premised on the notion that an interpreting agency makes a discretionary choice within a realm of reasonableness. The traditionalist does not understand the common law judge to be in this position. Although common law reasoning frequently appeals to considerations of justice, morality, and policy, traditionalists hold that answers to legal questions are nevertheless “independent of the will of

---

138 Dworkin, supra n. ___ at 256.
139 See EISENBERG at 151-53; Postema at 605-06; Simpson at 95; LEVI at 3.
140 Postema at 605.
141 EISENBERG at 153.
142 See id. at 156 (common law reasoning is not deduction from rules); Postema at 617-19 (law’s function of normative guidance includes, but is not limited to, providing finality and certainty). See also Stephen R. Perry, Judicial Obligation, Precedent & the Common Law, 7 Oxford J. Legal Stud. 215 (1987) (articulating a “Burkean” theory of precedent that gives weight to previous decisions, but does not treat them as preemptive rules).
the court.”  

At the level of detail, traditionalists differ in their accounts about the intersection of general norms and legal reasoning. A rough consensus, however, coalesces around the notion that the structured practice of reasoning from precedential examples, combined with the criteria of rough congruence with community norms and integration with the broader fabric of the law, steers the judge’s discretion. Adjudication “is not a surrogate for individual deliberation leading to public action,” but rather seeks to “provide a discipline and body of resources” to find “‘the common reason of the thing[s]’” that otherwise divide citizens and philosophers.

As an aside, in this respect traditionalism may be in a stronger position to resist *Chevron* deference than law-as-integrity. Under Dworkin’s approach, the judge chooses the interpretation that makes the law the best it can be, based on “[h]is own moral and political convictions,” so long as it satisfies a threshold level of “fit.” If ordinary reasoning about political morality does most of the work past the fit threshold, this process is vulnerable to the objection that it is better done by expert and accountable officials subject to the check of *Chevron* Step Two. The traditionalist, by contrast, maintains that common law reasoning is not general reasoning about means and ends, but a habituated, rooted discipline at which initiated judges have comparative expertise.

Third, *Chevron* suggests that deference is proper when interpretation requires an official to *make* law. Like Dworkin, common law traditionalists do not equate hard-case adjudication with legislation. Even in a novel case, the court claims to find and apply existing legal rights and duties, not to author new legal obligations. That claim sounds old-fashioned and mystical, but for the notion of law—“finding” to be plausible one does not have to believe in a realm of immutable legal forms that only judges can discern. Here, thinking about the tacit knowledge involved in practices and traditions is helpful. Applying the tradition’s resources to new

---

143 Simpson at 79; *see also* id. at 78 (“In the common law system no very clear distinction exists between saying that a particular solution to a problem is according to the law, and saying that it is the rational, fair, or just solution.”).
144 *See* EISENBERG at 150; Postema at 608-09.
145 Postema at 619, 595 (quoting Hale).
146 DWORKIN, *supra* n. __, at 256.
147 Dworkin contends “it is a mistake to think that integrity” is irrelevant past the level of fit because integrity is itself part of political morality that aspires for the “best common principles politics can find.” *Id.* at 263. Fair enough, but given that Dworkin denies that a judge should choose the best “fit” independent of other considerations of political morality, it is not clear that he has avoided the claim that his theory is simply moral reasoning subject to a basic, undefined threshold of doctrinal “fit.”
148 *See* Postema at 596, 600-01, 618; Simpson at 78, 86, 91-93; EISENBERG at 156-57.
149 *See* EISENBERG at 140, 157; Simpson at 78.
150 *See* Scharffs, *supra* n. __ at 2229-30 (exploring the experience-based tacit
problems can be at once a creative act and one contemplated and guided by the practice’s collective memory and standards of excellence. A chess master does not “find” a brilliant attack on a king in a great chess-book in the sky, but the creative strategy will nevertheless elicit recognition from fellow practitioners and perhaps even the conclusion that, upon reflection, of course this what any good chess player should have done. Just as a trained musical ear can sense which note will follow in a previously unheard melody, the excellent judge can identify the sensible resolution of a dispute in light of existing doctrine and shared standards, even if the decision is in a meaningful sense something new.151

Finally, common law traditionalism also departs from Chevron’s rule formalism. The “rules” of which common law judges often speak are tentative, non-canonical formulations of the “output[s]” of the common law method, not the starting point for deductive reasoning.152 This is due to the inherently provisional character of such unwritten law, which draws its force not by virtue of its intelligibility and “continued reception” in the legal community.153 Precedents, and the “rules” one may abstract from them, provide useful (and perhaps presumptively binding) examples of legal reasoning, but serve to “invite and focus” legal reasoning, rather than to “preclude deliberation and reasoning.”154 The common law traditionalist also understands standards differently. Standards, like legal principles extracted from precedent, are as binding as rules and “often determine results without the mediation of rules.”155 It thus does not follow that a common law standard in a statute is a placeholder for further legislation.

For all these reasons, the traditionalist understanding of the common law does not mesh with Chevron’s framework for deference. A traditionalist would contend that applying legislative concepts like “delegation” of lawmaking authority and legal “gaps” to the common law trades on a misleading metaphor about common law adjudication and growth. If we must borrow the parlance of Chevron, the traditionalist would say that every common law term embedded in a statute presents a

knowledge involved in applying the legal craft).

151 Cf. Fuller, supra n. __, at 110 (adjudication is not legislation, but development “case by case what [society’s] aims or directives demand for their realization in particular situations of fact”).

152 Postema at 605. See also EISENBERG 156; ANTHONY KRONMAN, THE LOST LAWYER 223 (“the main aim of appellate judging is to locate and explore the significant situation-type exemplified by the case at hand, devise a rule to uncover and implement [its] imminent law, and fit the rule in question into a larger body of evolving doctrine”).

153 Simpson at 85-86. See Postema at 596, 600-01.

154 Postema at 597; see also Scharffs at 2286 (“being a good crafts-person is not reducible to following a prescribed set of rules”).

155 EISENBERG at 82, 77.
Step One question, even if cases are not resolved deductively. Alternatively, the traditionalist can interpret Congress’s choice of a common law term as leaving intact the residuary, unwritten law and legal practice that pertain in the absence of statutory rules.\textsuperscript{156}

While \textit{Chevron} emphasized an agency’s comparative technical expertise and political accountability, those advantages shrink under the traditionalist understanding of common law. Part of the common law’s methodological thesis is a preference for incremental decisionmaking over the kind of systemic reform that requires the comprehensive expertise that courts lack. Understanding the common law as a traditional craft into which participants must be initiated and acculturated also reverses the balance of expertise in favor of the court and underwrites judicial conclusions that interpretations “based on general common law principles” are “clearly within the competence of courts,” and do not implicate the “agency’s unique expertise and policymaking prerogatives.”\textsuperscript{157} This expertise-based rejection of \textit{Chevron} echoes the 17th Century jurists who contrasted the virtues of the common law’s “artificial reason” with the untutored and unreliable “natural reason” of the layman or philosopher, and on this basis defended the common law against the incursions of a king “not learned in the laws of his realm.”\textsuperscript{158}

The collaborative aspect of common law traditionalism is also different than the aggregation of democratic preferences that \textit{Chevron}’s discussion of accountability may suggest. Common law doctrines indeed have force “because of their continued reception” in the legal community,\textsuperscript{159} and perhaps the community at large.\textsuperscript{160} But at its most ambitious, common law traditionalism claims to be a discipline of practical reasoning that identifies commonly intelligible and appealing solutions to individual disputes, and to transcend first-past-the-post politics writ small.\textsuperscript{161} This reasoning, moreover, takes place in a precedential tradition that values continuity more than orthodox administrative law doctrine, which allows 180-degree policy reversals so long as the agency gives some non-arbitrary explanation for its

\begin{footnotesize}
\textsuperscript{156} Cf. \textit{Peters v. Ashcroft}, 383 F.3d 302, 305-06 (5th Cir. 2004) (withholding deference to agency’s interpretation of state law referenced in statute).
\textsuperscript{157} \textit{Burgin}, 120 F.3d at 498 (citing authorities).
\textsuperscript{158} Postema, \textit{supra} n. \textit{___}, at 1(quoting \textit{Prohibitions del Roy} (1607) in \textit{EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, IN THIRTEEN PARTS}, 12th Report 63, 65 (1793)).
\textsuperscript{159} Simpson at 86; \textit{see also id.} at 95 & 97 (same).
\textsuperscript{160} Postema at 612 (law can only provide normative guidance if it “congruent with background social practices and widespread public understanding of them”).
\textsuperscript{161} Cf. Lisa Schultz Bressman, \textit{Deference & Democracy}, 75 GEO. WASH. L. REV. 761, 782 (2007) (\textit{Brown & Williamson} and \textit{Gonzales v. Oregon} indicate that deference may turn on an agency’s “functional” political accountability, not merely the “formal” accountability flowing from presidential elections).
\end{footnotesize}
departure. While some critics claim that American law is “an index of [society’s] conflicts,” common law traditionalism aspires to find common, pragmatic solutions within a practice that is responsive to societal norms, but not reducible to them.

Of course, as common law theorists repeatedly emphasize, contextual competence is critical, and an agency’s familiarity with the regulated arena could suggest that any proposal to take common law out of Chevron’s domain should be packaged with Skidmore deference, rather than de novo review. Skidmore, which focuses on the agency’s expertise and consistency, can give weight to this familiarity on the ground while also freeing courts from undue respect to idiosyncratic or result-driven interpretations of the law. And this appears to be what many non-deferring courts do; the D.C. Circuit, for example, withholds Chevron deference to the NLRB’s interpretation of agency law, but will give it “due weight” if the agency “made a choice between two fairly conflicting views.”

* * * *

Common law traditionalism, like the statutory model of common law which opposes it, is controversial. Realists, social scientists, and critical theorists will see the claims of craft knowledge as at best a form of mysticism that overstates law’s determinacy and obscures the political bases of adjudication. Others, particularly formalists, are skeptical of the coherence and efficacy of the traditionalist’s claims about reasoning by analogy. But like the statutory model of common law, traditionalism also resonates in contemporary legal discussion. Jurists and practitioners no longer speak about the common law as the “artificial perfection of reason.” Yet many still affirm, or act like they believe, that through “long study, observation, and experience,” practitioners of the common law craft can reach reasoned resolution of difficult or novel problems. For

---

162 MacIntyre at 254.
163 See Postema at 612-15.
164 International Longshoremen’s Ass’n v. NLRB, 56 F.3d 205, 212 (D.C. Cir. 1995).
166 See, e.g., Frederick Schauer, Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy, 3 Perspectives on Psychological Science 454 (2008); Larry Alexander, Bad Beginnings, 145 U. Pa. L. Rev. 57 (1996); but see Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. Chi. L. Rev. 1179 (1999).
167 Coke, supra n. __ at 65.
168 Id.
the reasons discussed above, this latter understanding, if correct, provides theoretical justification for a court’s refusal to defer to agency interpretations of common law.

IV. DEFERENCE AND INSTITUTIONS

If one is ambivalent about the theoretical options discussed above, or is not convinced that abstract theory can give a complete answer to the deference problem, it is tempting to search for an alternative framework that can resolve the question without further work in the jurisprudential weeds. Institutional analysis, a prominent approach in administrative law scholarship, promises to do just that. From this perspective, the question of reviewing agency interpretations of common law is a choice about which institution—the court or the agency—is better-equipped to resolve common law ambiguity, as opposed to abstract inquiries about the nature of common law interpretation. Courts and commentators regularly use institutionalist analysis to solve similar questions about the scope of *Chevron* deference. Indeed, *Chevron’s* emphasis on agencies’ technical expertise and political responsiveness can be understood as shorthand institutional analysis. This Part undertakes an institutionalist assessment of the question of deference to agency interpretations of common law. On most variables, the analysis offers plausible arguments for both courts and agencies. Empirically testing these competing intuitions, however, appears to be quite daunting.

A. Common Law Variables

A good example of an institutional inquiry is Merrill’s analysis of whether courts should defer to an agency’s conclusion that a statute preempts state law. The institutional analysis here follows a modified version of that inquiry. The first set of criteria Merrill identifies in the preemption analysis are “constitutional” variables, which track an

---


171 The forthcoming analysis is not geared at a particular common law problem, federal statute, or agency. Agency powers, practices, and skills vary generally and with respect to different problems. A thoroughgoing analysis would account for such variations on a statute-by-statute and agency-by-agency basis.

172 Merrill, *supra* n. __.
institution’s ability to apply constitutional doctrine involved in preemption questions. By analogy, we can ask which institution will be more (1) “faithful” to the applicable common law doctrine; (2) create “stable expectations about the relevant distribution of” rights and duties assigned under the common law doctrine; and (3) “allows all affected actors to express their views” about the stakes in the dispute.\footnote{Id. at 747.}

1. Fidelity to the Common Law

If Congress’s decision to incorporate common law doctrine is to have some meaning, the interpreter must make “a conscientious effort [to] link” interpretive decisions “to the language and received traditions” of the common law in the context of the statutory regime.\footnote{Id. at 748.} The case against an agency’s comparative competence in this respect is similar to Merrill’s argument that “agencies clearly fall short” with respect to “constitutional variables.”\footnote{Id. at 755.} Agencies are less likely than courts to be familiar with common law, or to be as skillful in applying that doctrine in novel cases. As policy agents, moreover, agencies are less likely to “even care” about careful application of common law.\footnote{Ibid.} Although an agency that administers a statute with embedded common law may in fact be more familiar with the doctrine and context than a particular federal court, common law reasoning is at bottom precedential reasoning and a court used to the strictures of stare decisis is likely to be more adept at this form of reasoning and less likely to allow a broader policy agenda to color its application of the common law.\footnote{Cf. id. at 756 (agency policy agenda creates bias in favor of preemption); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (Stevens, J., dissenting) (no deference on preemption questions because agency not designed to be sensitive to federal-state balance); but see id. at 20-21 (majority opinion avoiding deference question).}

The institutionalist argument in favor of deference on this score challenges the premise of neutral, legal expertise that underlies the arguments against deference. 

\textit{Chevron} does not apply to easy cases, “expert” judges are likely to disagree on the resolution of closer cases, and those disagreements likely turn on considerations of political morality and policy. Accordingly, agencies that are politically more accountable and technically more proficient than generalist judges should be allowed to choose among reasonable options. An agency may not be as adept as a Cardozo or Hand in mapping the available doctrinal options, but if it happens to choose on a point within a zone of reasonability, courts should not second-guess this solution.\footnote{Cf. Sunstein, supra n. __ (administrative agencies should take on the dynamic role}
2. Stability

Merrill’s second variable recognizes that legal doctrine should “reflect a pattern that is stable over time.”\(^\text{179}\) This matters as much with statutorily embedded common law as it does with preemption. A compliance officer trying to understand what counts as a “material” violation of the commodities trading rules,\(^\text{180}\) or a union deciding whether a group of potential members are likely to be counted as “independent contractors,”\(^\text{181}\) will readily understand the value of a predictable legal environment.

The case for courts begins with the claim that agencies are more “prone to policy shifts” because they are not bound by a strong doctrine of stare decisis and because they can often reverse interpretations at their own initiative, rather than waiting for the appropriate case or controversy.\(^\text{182}\) Generalist courts are also likelier to create stability across regulatory regimes than parochial agencies. The NLRB, for example, may apply the term “employee” narrowly to limit the duty to bargain, while the Copyright Office may apply the term broadly to expand work-for-hire doctrine.\(^\text{183}\) Systemic coherence—not to mention norms of equal treatment—counsels in favor of a uniform, core starting point for analysis that courts are more likely to provide.

The institutionalist argument for agencies looks to the danger of courts interpreting the same statute differently.\(^\text{184}\) The NLRB may shade its application of “employee” in light of labor policy goals, but it will do so with one voice for all across the country. If courts had interpretive primacy, employers and unions operating in the Fifth and the Ninth Circuits could face different bargaining regimes absent episodic intervention by the Supreme Court.\(^\text{185}\) Further, under a deference rule courts would not have to devote resources to deciding whether and how a particular statutory regime modifies or limits the background common law norm.\(^\text{186}\)

\(^\text{179}\) Merrill, *supra* n. _, at 748.

\(^\text{180}\) *R&W Technical Servs.*, 205 F.3d at 169.

\(^\text{181}\) *Aurora Packing*, 904 F.2d at 75.

\(^\text{182}\) 102 Nw. U. L. Rev. at 756.

\(^\text{183}\) *Cf. Community for Creative Non-Violence v. Reid*, 490 U.S. 830 (1989) (applying common law definition of “employee” for purposes of work-for-hire doctrine). Such variance could also occur in contract interpretation. An agency, for example, could shade its application of the parole evidence rule based on whether the outcome would promote the public interest, so long as its application of the malleable rule was reasonable.

\(^\text{184}\) *Vermeule, supra* n. __ at 208 (*Chevron* prevents the “balkanization of federal law”).

\(^\text{185}\) Peter Strauss, *One Hundred Fifty Cases Per Year*, 87 COLUM. L. REV. 1093 (1987).

\(^\text{186}\) *Vermeule, supra* n. __ at 224 (deference reduces “decision costs”).
3. Representation

It is also important to consider which institution will better allow “the interests of all affected parties [to be] represented in the process” of applying the common law.\(^{187}\) The argument in favor of agencies is the most intuitive, given the broader participation rights in proceedings like notice-and-comment rulemaking.\(^{188}\) An agency’s comparative advantage is less in formal adjudication, which affords narrower participation rights than rulemaking.\(^{189}\) Even there, however, agency officers with broader portfolios and regular interactions with expert staff and an array of stakeholders often get the last word on interpretation.\(^{190}\)

An institutionalist argument for courts focuses on the superiority of adjudication. A problem “may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule,” or the agency may not have sufficient experience to confidently adopt a “hard and fast” rule, or “unforeseeable situations” may limit the usefulness of legislative rules.\(^{191}\) If common law growth is best cultivated in this fashion, that fact could counterbalance the superior representation in rulemaking proceedings. Further, while agency adjudicators have a broader base of knowledge, oral hearings are generally not required in agency proceedings when a dispute turns only on questions of law—an exception that agencies often exploit.\(^{192}\) If oral argument improves decisionmaking and is more common in courts, the gap in institutional competence may further narrow.

---

\(^{187}\) Merrill, supra n. __, at 749.

\(^{188}\) See id. at 756 (notice-and-comment gives agencies institutional advantage compared to courts); Pierce, supra n. __ § 7.4 at 443 (agency’s failure to respond to criticism of proposed rule increases risk of reversal on appeal).

\(^{189}\) The judiciary has expanded rights to participate in adjudications beyond the apparent text of the APA, though there has been some retreat from this more liberal approach. See Elizabeth Magill, Agency Choice of Policymaking Forum, 71 U. Chi. L. Rev. 1383, 1433 & n. 174 (2004);

\(^{190}\) See generally Alan B. Morrison, Administrative Agencies Are Just Like Legislatures and Courts—Except When They’re Not, 59 Admin. L. Rev. 79, 103-06 (2007) (discussing agencies’ dual duties of lawmaking and adjudicating). Limits on ex parte communications in adjudication partially close the access gap between agencies and courts. See Louisiana Ass’n of Indep. Producers v. FERC, 958 F.2d 1101 (D.C. Cir. 1992) (officials permitted to meet with party to discuss agency business related to dispute, but not concerning the merits of pending adjudication).

\(^{191}\) SEC v. Chenery, 332 U.S. 194, 202-03 (1947)

\(^{192}\) 5 U.S.C. § 556(b), (d); Pierce, supra n. __ § 8.4 at 542-43 (agencies avoid hearings through “rules that make it difficult, or impossible, for a party to identify disputed issues of material fact”).
B. Interpretation

A second category is one Merrill calls “interpretative.” Good decisions about preemption require an “accurate” and “fair” reading of the statutes involved. Principled interpretation involves “a degree of stability and predictability,” and “[n]early all” interpretive theorists would agree that such characteristics are a virtue of good decisionmaking. Interpretive skills are also necessary for applying common law embedded in statutes, even if understanding the core common law concept is not a matter of ordinary statutory interpretation. Other features of the statutory regime inconsistent with the background common law rule may require the court to modify of the core concept. A decisionmaker also must be aware of how the facts and common law interact with the statutory regime. Such understanding can shed light on the course of dealing and expectations of the parties in contract disputes or inform a judgment about whether failure to comply with a licensing regime should be considered willful. This context is discerned in part through understanding the statutory regime.

The institutionalist argument for agencies here is identical to the one for Chevron deference generally. An agency is intimately familiar with the statute it administers and will have a sensitive understanding of the context in which the common law doctrine will operate. To the extent that the meaning of a collateral provision of the statutory scheme is unclear, agencies have superior expertise and political accountability for making the policy choices involved in resolving ambiguity. On the other hand, as Merrill explains, “courts specialize in interpretation” and that, “[i]nsofar as issues arise that agencies have not addressed, courts are always regarded as appropriate institutions to resolve these issues.” The notion of “principled” interpretation seems to be doing much of the work here. The political accountability and policy expertise that Chevron applauds raise concerns that an agency is more likely to adopt the interpretation that best suits its own purposes, rather than the best reading on the legal merits.

---

193 Merrill, supra n. __, at 747; see id. at 751 (“whatever substantive theory of interpretation we adopt, interpretation can be carried on in a more or less principled fashion”).
194 Cf. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) (general common law rules and principles of torts govern liability under the Federal Employers’ Liability Act, with the exception of the common law defenses explicitly excluded by the statute).
195 See Oldham, supra n. __, at 405-06 (statutory background informs agency’s interpretation of consent decrees).
196 See Merrill, supra n. __, at 755 (“the agency may well have superior capacity to engage in principled interpretation” of “detailed federal regulatory statutes” it administers).
197 Id. at 758.
C. Pragmatic

Merrill also considers what he calls “pragmatic” variables. In the preemption context, applying relevant constitutional doctrine requires “a sophisticated understanding of the relevant market” and the extent of the interference that state and local law impose on the “single national market.”\(^{198}\) To make such judgments, a decisionmaker must gather and analyze “legislative facts” about society, the regulatory scheme, and the dynamic effects of legal decisions on both.\(^{199}\) The same pertains for applying common law in the regulatory context. The Federal Trade Commission Act, for example, prohibits “unfair methods of competition” and “deceptive acts or practices,”\(^ {200}\) terms with roots in the common law of unfair competition. The Federal Trade Commission (FTC) has implements these provisions through rulemaking and formal adjudication.\(^ {201}\) If, as courts presume in other contexts, the common law is the starting point for understanding these terms, the question arises whether an agency like the FTC is best-suited to gather legislative facts.

As in the preemption context, there is very good reason to believe that agencies like the FTC “excel on the pragmatic variables.”\(^ {202}\) The agency, which has at its disposal economic experts, regulatory specialists, and a broad and deep knowledge of the field, will have superior expertise on the relevant markets and the dynamic effects of regulation on conduct. Similarly, agencies are far better suited to gather facts and “undertake wide-ranging investigations”; a lay judge’s understanding will “be fragmentary and quite likely outdated.”\(^ {203}\) So strong is the agency’s advantage that it seems only a naïve trust in the adversarial process would find court’s powers on this score superior.\(^ {204}\)

Accordingly, the most plausible institutional argument for courts questions how the agency will use these superior powers. Recall that the factgathering body is often the same one that undertakes rulemaking and decides adjudications, and the factfinder’s broader agenda may, consciously or unconsciously, affect its search. That agenda may involve expanding the reach of the agency’s jurisdiction, serving the interests of repeat regulatory

\(^{198}\) 102 Nw. L. REV. at 752.
\(^{199}\) Id. at 753.
\(^{201}\) See id. (giving FTC power to declare such practices unlawful and to enforce declarations); id. § 57a(a) (giving agency rulemaking authority). The FTC has primarily exercised its authority through adjudication. See Magill, supra n. __, at 19 & n.46.
\(^{202}\) Merrill, supra n. __, at 755.
\(^{203}\) Id. at 758.
players, or simply implementing the agenda of the President or interested members of Congress. Consequently, an agency’s findings may be in part a function of what it sought, not an objective assessment. It thus may be possible that generalist judges, despite their limitations, can have a more “accurate” grasp of legislative facts than biased experts. This objection, of course, assumes a neutrally defined set of legislative facts to be found, such that bias can skew the agency from the truth that is out there. It also assumes that we can compare courts’ and agencies’ performances in finding these facts despite their limitations. All told, the intuitive case for agencies on the pragmatic variable seems strong, and establishing the case for courts appears quite difficult.

D. Assessment of Institutional Variables

An assessment of the institutional choice between agencies and courts presents plausible arguments for both sides, and an empirical resolution appears daunting. Even if one can identify a neutral metric for legal accuracy, one still must isolate the effects of varying procedures and forms of decisionmaking on decisional outputs. For example, such an inquiry must determine whether a generalist, better-trained court is more adept at interpreting common law doctrine and statutes it occasionally confronts than a less-skilled agency that more frequently encounters the same in a statute it administers. On stability, one must consider: how often agencies will reverse course compared to courts; the social costs of agency reversals; the likelihood that federal courts will diverge in their interpretations; and costs of such disagreement. There are also optimization problems regarding stability and accuracy. For example, if courts reach more wrong answers, but encourage stability through stare decisis, the institutionalist has to measure the error costs against the stability gains. On representation, the institutionalist must compare the benefits of adjudication versus rulemaking, weigh the benefits of an agency decisionmaker’s increased access to stakeholders against the costs of potential bias, and determine the comparative frequency and benefits of oral argument.

This list is hardly exhaustive, but one last element to consider is the potential spillover effect of the agency decisions to which courts defer. A private defendant in a garden-variety employment suit may point to a case in which the NLRB reasonably treated a worker like the plaintiff as an independent contractor, or a nuisance plaintiff may rely on the EPA’s interpretation of tort principles to argue that the defendant is jointly and

severally liable. Of course, a case upholding an agency interpretation under Step Two of *Chevron* does not bind even the deferring court in a later case under *de novo* review. Still, under a deference regime, agency interpretations of common law would plausibly have some effect as persuasive authorities. Citation of persuasive authority “is a species, albeit a weak one, of genuine authority,” because convention gives weight to the mere fact that some other legally constituted tribunal reached the same conclusion.

This is all the more true when, as here, the agency decision will have a federal court’s imprimatur of reasonableness. Unlike permissive sources such as Restatements and treatises, the agency interpretation will also be the product of delegated lawmaking authority. Finally, courts in a system that defers to agency interpretations of common law will tend to appreciate the agency’s contextual competence and not see a stark difference between an agency process and its own common-lawmaking.

At the very least, potential spillovers amplify the stakes of the institutional debate. Agency skeptics will be concerned about any gravitational pull that lower-quality, destabilizing decisions will have on the broader fabric of the law. Agency enthusiasts may applaud such influence. To further complicate matters, it could also be that deference is appropriate in the administrative setting, but that giving weight to those underlying decisions elsewhere is not. The contextual factors of the regulatory scheme may be inapposite to later disputes. Or it could be that factors tipping the balance in a deference calculus—such as concerns regarding uniformity within a statutory regime—will not be relevant in these other cases, such that respect for agency decisions in other contexts is unwise. If there is reason to believe that more general reliance on agency interpretations of common law will be substantial and problematic, that is a factor to consider in the deference calculus as a whole.

At this point, one is sympathetic to Judge Posner’s claim that institutional analysis, at least in the form popular in administrative law scholarship, suffers from a “poverty of feasible suggestions for moving the study of the institutional framework of judicial interpretation forward” beyond “casual empiricism.” Institutionalism’s adherents accede that their research project, while valuable and feasible, “is in its infancy.”

---

206 I thank Tom Miles for raising this aspect of the problem.


our intuitions about how courts and agencies work.

V. IMPLICATIONS

If the analysis in the Parts II and III is sound, providing a complete answer to the problem of agency interpretations of embedded common law requires choosing and defending a controversial theory of common law adjudication, undertaking a difficult empirical inquiry about institutional capacities, or both. Of course, jurists firm in their jurisprudential and intuitive commitments (or short of time or interest) can simply choose to defer or not, and the discussion above provides a framework and justificatory arguments for that choice.

As explained below, however, the payoff from these analyses is more than a decisional map. First, the discussion highlights a substantial overlap between jurisprudential and institutional analysis of deference questions. To argue about deference to common law is to deploy rival sets of mutually reinforcing jurisprudential and institutional arguments. This suggests that the methodological debate about the superiority of institutionalism versus “first-best” approaches to legal theory is overdrawn. Second, the debate over common law sheds light on other unresolved, individual deference questions, and may provide the key to understanding disagreement over the meaning of *Chevron* generally. Third, the confusion about deference to common law, and by hypothesis confusion over deference more generally, may reflect not unclear thinking or a failure to realize *Chevron*’s revolutionary potential, but rather basic and perhaps ineradicable tensions in understandings about the character of legal reasoning.

A. Theory and Institutions

Some proponents of institutionalism self-consciously contrast their approach with “first-best” approaches of “more general theorizing” about the nature of legal interpretation.\(^\text{210}\) They argue that, at a minimum, “[i]t is impossible to derive interpretive rules directly from first-best principles” without considering the strengths and limitations of the actor trying to apply those principles. More strongly, proponents of institutional analysis contend that their approach might, in some cases be *sufficient* to resolve interpretive problems.\(^\text{211}\) Institutionalists Professors Sunstein and Vermeule explain, it is “simply a logical blunder to suppose that interpreters must agree on some *particular* theory” to resolve interpretive problems.\(^\text{212}\) Institutional analysis “rests ultimately on empirical judgments about the capabilities of different legal institutions,” and while such analysis may be

\(^{210}\) Cass R. Sunstein & Adrian Vermeule, *supra* n. __, at 887.

\(^{211}\) *Id.* at 915.

\(^{212}\) *Id.* at 916.
“difficult to undertake,” \textsuperscript{213} it hopes to avoid indeterminate and interminable theoretical debate.\textsuperscript{214} The preceding discussion challenges—or at least suggests limits to—this stronger claim by highlighting the extent to which institutional analysis is inseparable from the more general theoretical questions that institutionalism aspires to avoid.

This fusion in deference questions is evident in the arguments about the institutional variables. The most obvious connection occurs in debate over whether courts or agencies will better apply common law and interpret the surrounding statutory provisions. The institutionalist argument in favor of courts—that courts are experts at principled interpretation in challenging cases—makes the most sense if one assumes the autonomy of legal reasoning and trusts the judicial craft to reach the best resolution independent of the judge’s private assessments of policy or political morality. A novel case, from this perspective, is not an implicit delegation of further rule-specification. By contrast, if resolution of ambiguity is discretionary, interstitial lawmaking, the institutionalist’s appeal to the agency’s policy expertise and political accountability has far more force.

The dueling understandings of common law reasoning also bubble below the surface of institutionalist arguments about legal stability. The preference for incremental doctrinal evolution by courts rather than abrupt policy shifts harkens to a precedential tradition that adapts slowly over time. Further, to trust different courts to apply a common law concept coherently within and across statutory regimes is to have faith in a traditional discipline and a core of common learning that initiated judges will better preserve and expound. On the other hand, if common law traditionalism only masks political decisionmaking in underdetermined cases, institutional arguments for agencies are more powerful. Continuity over time is unlikely, and it is unrealistic to hope that a pluralist judiciary will coherently apply a common law concept across time and context. Synchronic national continuity within a regulatory scheme is the best we can hope for, and an agency can provide this uniformity by expounding the common law with one voice across federal circuits. In other words, we should, and can only, aspire for the predictability analogous to a legislature whose dictate is uniform within a limited range of a statute subject to amendment.\textsuperscript{215}

More basically, this analysis indicates how institutionalist arguments

\textsuperscript{213} Merrill, \textit{supra} n. __, at 779.

\textsuperscript{214} Sunstein & Vermeule, \textit{supra} n. __, at 885 (“most of the time, large-scale claims of these kinds cannot rule out any reasonable view about interpretation”).

\textsuperscript{215} Institutionalist arguments in favor of courts regarding the “representation” variable may also be theory-dependant. Valuing case-by-case decisionmaking over \textit{ex ante} rulemaking, and trusting in the efficacy of oral argument in open court are stances characteristic of the traditionalist understanding of common law.
presume controversial theories of law and legal error.\textsuperscript{216} This point is particularly clear in discussions of bias and capture. A common law traditionalist will see as an institutional vice an agency’s tendency to choose a merely reasonable interpretation that suits its policy goals, rather than the most reasonable one that does not. Similarly, if legal resolution turns in part on an accurate understanding of the broader context, the traditionalist will see an agency’s result-driven search for legislative facts as inviting legal error. To a theorist who sees precedential lacunae as discretionary gaps, it is simply not sensible to call either kind of decision legal error, so long as the agency’s choice falls within the range of doctrinal reasonableness. To be sure, if the agency’s accountability or expertise is compromised by capture, empire-building, or incompetence, the non-traditionalist may still prefer courts even if the agency chooses within the policy space. His preference will be for very different reasons than the traditionalist, however. The traditionalist will define error in terms of fidelity to “the law,” whereas the discretionary theorist will judge define an erroneous choice within the range of reasonableness as one that creates suboptimal results in terms of policy or political morality.

How one understands error under the common law defines what it means for an institution to “work” better as an empirical matter, and the definition of error here depends on a theory of common law adjudication. A similar relationship holds with respect to the notion that deference rules, like all standards of review, could be viewed as economizing devices for the judiciary. Under this view, as federal litigation dockets crowd, \textit{Chevron} gives courts time to handle matters within their core competency while allowing agencies to apply their expertise to administrative matters.\textsuperscript{217} Deciding whether embedded common law falls into the courts’ core competency—and thus deciding whether an agency is overreaching or a deferring court is shirking its duties—is tightly interwoven with contestable theories about law and adjudication.

For these reasons, just as there are at least two approaches to common law theory, there will be at least two corresponding and incommensurate “institutionalisms” for comparing courts and agencies. These institutionalisms may in some circumstances provide the same counsel—as in the case of the captured or grossly incompetent agency that makes bad policy within the zone of legal reasonableness—but any overlap will be contingent and episodic. Legal theory need not necessarily be anterior to

\textsuperscript{216} Cf. Posner, 101 Mich. L. Rev. at 966 (“The proposal for a study to determine whether a formalist or nonformalist judiciary ‘will produce mistakes and injustices’ is a nonstarter unless there is some objective method of determining which decisions are mistaken or unjust”).

\textsuperscript{217} I again thank Tom Miles for raising this consideration.
one’s understanding of institutional competence. The causal arrow may point the other way—a belief about the best way as a practical matter to order society and resolve disputes can shape a concept of law. Either way, the interpenetration of more general theory and institutional analysis suggests limits on institutionalism’s aspiration to rescue us from indeterminate jurisprudential disagreement.

B. The Common Law and Chevron

There is also reason to believe that the structure of the debate over deference to common law reasoning runs through a host of other deference questions, as well as disagreement over how to understand Chevron as a whole. The analysis in Part IV already suggests the parallels between the arguments over deference to agency interpretations of common law and deference to the constitutional common law that is preemption doctrine. Consideration of further problems suggests that critical thinking about deference to embedded common law can aid our understanding of a wider swath of administrative law problems.

1. Normative Canons

“Normative canons” are “rules of construction that reflect important . . . principles that there is reason to think that Congress . . . will not safeguard adequately, and that are traditionally underenforced by courts.”218 Examples are construing ambiguous statutes to avoid constitutional doubt, the presumption that federal statutes do not preempt state law, and the canon of liberal interpretation in favor of Native Americans.219 The purpose of such default rules is not to decipher actual legislative intent, but to resolve ambiguity in a manner that promotes extrastatutory norms. Like Chevron normative canons are often described as legal fictions about congressional intent.220 Chevron, however, presumes congressional intention for agencies to resolve ambiguity, while normative canons place that power in the hands of courts.

The question of whether a court’s application of normative canons trumps Chevron has divided courts and commentators, including avowed institutionalists like Sunstein and Vermeule.221 Canons, like common law rules, may conflict with each other, can appear indeterminate in application,

219 Bamberger at 72-73.
220 Id. at 73-75.
221 See id. at 77-84 (cataloging circuit split) & 111-25 (arguing that canons should be considered at Chevron Step Two); VERMEULE, supra n. __, at 201 (Chevron trumps canons completely); Sunstein, supra n. __, at 2607-10 (canons should trump Chevron).
and require the balancing of policy priorities. As with common law and preemption, the normative-canons deference question intersects judge-made law with statutory commands, and forces courts to consider whether reasoning from precedent is meaningfully different than reasoning from statutes. Pro-deference courts and commentators point to the discretionary policy choices inherent in applying and reconciling canons.\(^{222}\) The policymaking branches, the argument goes, are better equipped to balance statutory and nonstatutory norms, and there is reason to be skeptical of judicial gap-filling that occurs when doctrine lacks the force of clear statutory commands. By contrast, opponents of deference find it unreasonable to infer that Congress delegated agencies the power to shape judge-made doctrines that protect basic values of the legal system, particularly given the courts’ comparative doctrinal expertise.\(^{223}\) As with the common law, the anti-deference arguments assume the existence of distinctly extrastatutory legal norms that legislators and administrators cannot and will not value appropriately.

2. Major Questions and Jurisdictional Questions

The Supreme Court has indicated that it may withhold *Chevron* deference from an agency’s interpretation of “major” questions of national policy embedded in statutes, such as whether the FDA has authority to regulate tobacco as a drug.\(^{224}\) While Sunstein rejects the “major question” exception, he has persuasively argued that it is best understood as a kind of normative canon requiring a clear statement for congressional delegations of major decisions of national policy to agencies.\(^{225}\) For this reason, the debate over a “major question” exception to deference will have the same structure as arguments about deference to normative canons more generally, and for that reason analysis about deference to common law can inform this question as well.

A similar structure also pertains to disagreement about whether agencies should receive deference for interpretations of their own jurisdictional grants.\(^{226}\) Often, as in *Brown & Williamson*, the “major” question concerns

\(^{222}\) See *Vermeule* at 209, 215; Bamberger, *supra* n. __, at 83; *Morales-Izquierdo v. Gonzales*, 484 F.3d 484 (9th Cir. 2007) (en banc) (holding, for similar reasons, that canon of constitutional doubt does not trump *Chevron*).

\(^{223}\) See Bamberger, *supra* n. __, at 78-79; Sunstein, *supra* n. __, at 2607-10.

\(^{224}\) See *Brown & Williamson*, 520 U.S. at 159; see also *Gonzales v. Oregon*, 546 U.S. 243 (2006) (citing *Brown & Williamson* to reject notion that Congress delegated Attorney General authority to regulate physician-assisted suicide).


the agency’s regulatory jurisdiction over a subject matter. Analytically, both categories also involve concerns about excessive delegation, for giving the agency wide berth to decide what it can and cannot regulate is perhaps the ultimate congressional punt. The case for deference is by now familiar: resolution of ambiguous jurisdictional questions turn on political choices about the appropriateness of such regulation (of, say, tobacco), or expert assessments that jurisdiction over a matter (say, greenhouse gases) is feasible or necessary to implement the broader statutory mandate. Further, background nondelegation principles are sufficiently flexible that, so long as the agency’s interpretation of its own authority is reasonable, a court should defer rather than finding “too much” delegation—an assessment that usually means the judge does not like the decision to regulate at all. The case against deference, offered here by Justice Brennan, is also familiar: an agency’s “institutional interests in expanding its own power” make courts more likely to be faithful interpreters of jurisdictional questions, and in any event “agencies can claim no expertise in interpreting a statute confining its jurisdiction.” To the extent Brennan’s argument restates non-delegation concerns, it is of a piece with the case for judicial fidelity to extrastatutory norms. To the extent Brennan distinguishes between “pure questions” of statutory constructions and policy-laden questions, however, his argument brings us to yet another exception to Chevron deference illuminated by the discussion over common law.

3. Pure Questions of Statutory Construction

   The Court has suggested that questions of “pure” statutory interpretation—those that do not obviously require technical expertise—are exempt from Chevron deference. In INS v. Cardoza-Fonseca, Justice Stevens, who wrote Chevron, authored a majority opinion explaining that where there is “a pure question of statutory construction for the courts to decide,” defining the meaning of the term “is well within the province of the judiciary.” Justice Scalia objected that a pure-question exception is


   Accordingly, Prof. Sunstein links jurisdictional questions and major questions in his discussion of Chevron’s Step Zero. See id. at 231-36.

   See id. at 235; Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 381-82 (Scalia, J., concurring in the judgment); Connecticut Dep’t of Public Util. Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009) (deferring under Chevron).

   487 U.S. at 387 (Brennan, J., dissenting); see also Northern Ill. Steel Supply Co. v. Sec’y of Labor, 294 F.3d 844, 846-47 (7th Cir. 2002) (withholding deference); Sales & Adler, supra n. __ (arguing against deference).

   Id. at 447-48.
unjustified under *Chevron.* While some thought a pure-question exception was soon interred, as recently as 2004 a Stevens-led majority invoked it in withholding deference from the government’s reading of the Foreign Sovereign Immunity Act.

In its most modest form, the pure-question exception presumes two types of gaps in statutory texts: those that require legislative-like policymaking, and those that courts can resolve through distinctively legal technique. We can thus understand questions involving common law terms of art and normative canons of construction as species of the “pure question” genus. It may be hard, however, in other cases to distinguish between pure questions and those that implicate policy. The question in *Cardozo-Fonseca*—whether a “well-founded fear” of persecution upon removal from the United States meant a probability of persecution—may implicate matters of immigration policy and foreign relations, even if such burden-of-proof questions seem more judicially tractable than defining a pollution “source” under the Clean Air Act.

Applied aggressively, a pure-question exception may swallow *Chevron* whole. It is not hard to imagine a jurist sympathetic to common law traditionalism to think about “ordinary” statutory interpretation in similar terms. In fact, the progenitors of the traditionalist approach—17th Century common law jurists—would “interpret and stretch statutory language wherever possible to make it consistent with basic common law doctrine and integrate it into the body of the common law. This was not much different from the way the common law courts dealt with their own past decisions.” The Legal Process School, Judge Calabresi’s proposal for judicial updating of statutes, and Professor Eskridge’s dynamic statutory interpretation provide more modern analogues, as does the D.C. Circuit’s

---

231 Id. at 452, 453-54 (Scalia, J., concurring in the judgment).
233 *Altmann,* 541 U.S. at 701 (FSIA retroactivity “a pure question of statutory construction. . .well within the province of the Judiciary”) (quoting *Cardoza-Fonseca,* 480 U.S. at 446, 448).
234 See *Anthony,* 7 YALE J. REG. at 20-21 (courts could “readily” turn any question into a “pure question”).
236 Postema, *supra* n. __, at 19; see also VERMEULE, *supra* n. __, at 19 (common law statutory interpretation marked by “flexible treatment of the statutory text, based on a nuanced sensitivity to legislative intentions or purposes and to the surrounding fabric of the common law”).
237 See VERMEULE at 26-27, 40-45 (linking the Legal Process School and Eskridge to
purposive, non-deferential construction of the Clean Air Act rejected in *Chevron*. If the case for deference to common law treats all ambiguities as opportunities for policy-laden rule-promulgation, a broad reading of the pure-question exception may threaten the inverse, reducing all legislatively promulgated rules to malleable materials for the judicial construction.

4. *Chevron* Step Zero

As discussed in Part I, *Chevron*’s “Step Zero” is the threshold question about what kinds of agency interpretations are eligible for *Chevron*’s reasonableness review. *Mead* emphasized that deference depends on a delegation of lawmakership authority from Congress to the agency. The character of this delegation is controversial. Those who argue against deference to interpretations involving preemption, normative canons, major questions, pure questions, and the like usually do not argue that *Chevron* is illegitimate, but rather inapplicable because the agency lacks delegated authority to expound those questions. Advocates for deference, in turn, claim that the agency has delegated authority, leaving one to wonder what people mean when they talk about the “delegation” that decides Step Zero. Just as features of the debate over common law reemerge in discussions over other individual carve-outs from *Chevron*’s delegation, we can understand this pattern of arguments as structuring the meta-debate over how to think about delegation and such carve-outs generally.

One approach seeks understand “delegation”—and thus to ground deference—in a clear rule, preferably linked to a statute. Under “statutory *Chevron*,” deference stems from positive grants of authority to agencies to impose legally binding commands.\(^{238}\) Depending on the source one chooses, the delegation may be limited to an agency’s exercise of legislative rulemaking,\(^ {239}\) or it may be broader and include any agency action that has the force of law.\(^ {240}\) More broadly, a court can treat *Chevron* as a strong precedential rule recognizing “a more general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce.”\(^ {241}\) Whatever the scope of delegation, deference on these grounds is not a mere creature of judicial grace, but a product of Congress’s grant of power to the agency, a *McCulloch*-style, necessary-and-proper flexibility afforded to agencies in the face of ambiguity.\(^ {242}\)

---

238 Duffy, *supra* n. __, at 207.
239 Id. at 199-203.
240 See, e.g., Merrill & Hickman, *supra* n. __.
241 *Mead*, 533 U.S. at 233 (Scalia, J. dissenting).
242 Duffy, *supra* n. __, at 199-203.
Because statutory *Chevron* shares the features of the statutory model of common law discussed in Part III.B, this approach to Step Zero will have almost axiomatic appeal to those who think courts should defer to agency interpretations of common law. It draws on the insight that agencies are engaged in discretionary lawmaking, not craft-bound lawfinding, when they resolve ambiguity. It harmoniously grounds lawmaking authority in a positive source of law, be it a power-conferring statute or a precedential rule sufficiently firm so as to act as a statute. Statutory *Chevron* also provides a clear, rule-like understanding of delegation. While superior agency expertise and political accountability may justify deference as a general matter, a deference rule has little value if judges assess the relevance of expertise and accountability in every case. A piecemeal approach would create uncertainties in individual cases and undermine *Chevron*’s ability to encourage uniform interpretation of statutes across jurisdictions. Accordingly, the jurisprudential approach and institutional assumptions that reject an individual carve-out for common law also reject the approach that would justify judge-made carve-outs as a category.

*Mead* and its progeny, however, suggest that “delegation” should be regarded not as a statute-like rule, but a proxy for a case-by-case judgment of whether it is reasonable to assume Congress wanted agencies to have ultimate authority over an interpretive question. Regulatory authority and formality are “very good indicator[s] of delegation,” but not preemptive reasons. On this reading, a “common law *Chevron*” based in precedent and case-sensitive assessment of comparative expertise thrives after *Mead* notwithstanding the decision’s emphasis on delegation and lawmaking authority. The multifactor test outlined in *Barnhart* and post-*Mead* carve-outs based on particular features of the interpretive question suggest the vitality of common law *Chevron*, with a focus on comparative expertise coming in under the banner of delegation.

The rationales for carving out common law questions from the *Chevron* delegation parallels the justification for understanding the Step Zero inquiry as a judicially crafted, case-by-case inquiry. Here, applying *Chevron* is not like following a statute that ratchets down a standard of review, but rather is
a judicious exercise of humility when confronted with regulatory complexity that reaches beyond the judicial grasp. Precedent will inform application of the deference doctrine in new cases, but trained judgment is as important as clear rules, for “understanding the meaning of a rule or example . . . cannot be separated from grasping its practical point.”249 It is little surprise, then, that Justice Breyer’s defense of a standard-like approach to *Chevron* justifies for exemption of major policy questions, and that Justice Stevens—whose *Chevron* opinion Duffy has described as the apotheosis of the common law approach to deference250—has led the charge to exempt “pure questions” of statutory construction.

C. *Chevron* and Legal Theory

The question remains, then, about the choice between a “statutory” and “common law” *Chevron*. Following “statutory” *Chevron*, at least in its broadest form, could make *Chevron* the *Erie* of the administrative state. Construed broadly, it could put agencies at the center of the interpretative universe and provide a clear, formal, and statute-based rule for deferring to agency constructions of ambiguous statutes.251 The effects of statutory *Chevron* seem particularly sensible when courts confront technical statutory questions that obviously implicate complex policy choices. As we have seen, a proponent of statutory *Chevron* can also justify deference to “pure” legal questions and judge-made norms incorporated statutes by denying the autonomy of legal reasoning in difficult cases. Nevertheless, statutory *Chevron* is more controversial when agencies seek deference for interpretations of law that judges make and shape. Further, a strong statutory *Chevron* approach has the counterintuitive implication that, all else being equal, it would always be better for an agency to get a first cut at statutory interpretation. Unsurprisingly, courts are often inclined to withhold deference to agency interpretations of common law and similar judge-made doctrines implicated in statutory interpretation. Even Justice Scalia, perhaps the Court’s greatest champion of *Chevron*, joined an opinion that would have not deferred to an agency’s conclusion that a federal statute preempted state law.252

---

249 Postema, *supra* n. __, at 613.
250 Duffy, *supra* n. __, at 189 (*Chevron* “provides one of the best examples of a pure common-law method. The *Chevron* Court did not trouble itself to consider the APA or any other statutory authority; it justified its ruling with case law and its own assessment of the policy reasons . . . for preferring agency interpretation over judicial interpretation”).
251 As noted, if statutory *Chevron* is limited to instances of legislative rulemaking or agency actions with the force of law, courts would retain interpretative authority in other instances. Still, courts would always have to defer to interpretations within the confines of the statutory delegation, even if other nonstatutory norms were implicated in the question.
252 Watters, 500 U.S. at 41 (Stevens, J., dissenting).
The justification for a “common law” Chevron comes with its own challenges. First, as the discussion of the “pure question” exception to deference indicated, there is the risk that a common law approach to statutory interpretation may undermine deference entirely. The common law theorist can reply that this problem is not insuperable. The belief that legal craft can sometimes identify the best, reasoned solution to a dispute does not entail belief that it always can. No less a champion of legal reason than Lon Fuller recognized that “polycentric” problems, such as setting industry wages or prioritizing economic production, cannot be rationally solved through adjudication. Because addressing one aspect of a polycentric problem affects all the other centers of the web, “[o]ne must deal with the whole structure” of such problems through managerial direction or contract. Tellingly, Fuller identified administrative agency tasks as examples of polycentric problems not amenable to traditional, issue-by-issue adjudication. While one can imagine polycentric implications of the simplest disputes—butterfly effects, if you will—polycentricism exists in degrees of immediacy, and courts may be able to identify pockets of comparative simplicity and withhold deference accordingly. Such an approach could allow carve-outs for interpretations of embedded common law, preemption doctrine, normative and nondelegation canons, and the like, which presumably lie closer to the core of judicial competence. Such an approach understands deference as a matter of judicial discernment closer to abstention or primary jurisdiction doctrines than the statutory command of reasonableness review of state court interpretations of federal law in habeas proceedings.

But this reply only pushes the problem back one step, for by assuming judicial situation-sense in discerning when agency primacy is appropriate, it presumes the very kind of legal craft knowledge that proponents of the statutory approach to common law and deference dispute. The discretionary power to pick and choose deference, the response goes, is a

---

253 Fuller, supra n. __, at 111-21.

254 Id. at 120. But see Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) (models like Fuller’s are too limited in conceptualizing adjudication’s function).

255 Fuller, supra n. __ at 117-20.

256 Cf. id. at 120-21 (“The court gets into difficulty, not when it lays down rules about contracting” in a polycentric market, “but when it attempts to write contracts”).

257 Compare U.S. v. Western Pac. R. Co., 352 U.S. 59, 64 (1956) (court may in its discretion stay federal action to allow administrative resolution of “cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion”) with 28 U.S.C. § 2254(d) (habeas corpus “shall not be granted” unless underlying state court ruling involved an “unreasonable application of clearly established federal law” or “unreasonable determination of facts”).
standardless inquiry\textsuperscript{258} or simply an opportunity to second-guess policy choices under the guise of a neutral craft.\textsuperscript{259} Like the belief in the autonomy of common law reasoning, giving wise judges responsibility for neutrally calibrating deference doctrine suggests a faith in autonomous judicial craft and a trust in consensus that may seem “old-fashioned, even quaint and mildly embarrassing.”\textsuperscript{260} On the other hand, a belief in reasoned resolution of disputes about the meaning of the common law (or the common law of deference) by neutral, learned arbiters still has valence, at least as an aspiration. Like the statutory approach to deference, common law \textit{Chevron} tugs both ways in the legal mind.

A theory of common law or deference could work itself pure by rejecting or, alternatively, by embracing the notion of adjudication as the application of reasoned, if tacit, knowledge of the law. Or it may be that such tension is basic, that, as Fuller claimed, “judge-made law is in part an arbitrament . . . a fiat intended to fill the space left blank by defaulting reason,” and also “by its aspirations reason.”\textsuperscript{261} Both conceptions—law as discretionary command and law as reasoned resolution—are prominent and perhaps ineradicable in discussion of legal reasoning. To the extent that courts are hesitant to defer to agency interpretations of judge-made law, it could be because that species of law is more commonly associated in the legal mind with “reason” than the “fiat” of ordinary statutory command.

More importantly, the tension between reason and fiat \textit{within} the common law is quite sharp after the Realist attack on the autonomy of legal reasoning. Accordingly, uncertainty about \textit{Chevron}’s application to common law plausibly reflects that deeper tension between fiat, which counsels deference to policymakers, and reason, which does not.\textsuperscript{262} If the pattern of uncertainty over deference to common law also emerges in multiple \textit{Chevron} problems, including the Step Zero meta-question, that parallel suggests that confusion about the scope and nature of \textit{Chevron} also

\begin{flushright}
\textsuperscript{258} The courts’ lax review of agency choices to make policy through adjudication rather than rulemaking could suggest that identifying polycentrism is itself a polycentric task to which courts are not suited. \textit{See} John Manning, \textit{Nonlegislative Rules}, 72 GEO. WASH. L. REV. 893, 901-14 (2004) (a meaningful rulemaking requirement would raise judicial administrability problems on par with the non-delegation doctrine).


\textsuperscript{262} Cf. Peter Wesley-Smith, \textit{Theories of Adjudication and the Status of Stare Decisis} 73, 77 in \textit{PRECEDENT IN LAW} (Laurence Goldstein, ed. 1987) (judges “exhibit a striking ambivalence between [adjudicative] and positivist positions without noticing the theoretical inconsistency”).
\end{flushright}
reflects the courts’ broader struggle between these two “conceptions of law [that] can perhaps be thought of as singling out a particular aspect of the legal process as theoretically fundamental.”

The *Chevron-as-Erie* understanding conceive of precedents as discretionary rules and seeks to entrench deference as a statute-like command; it grasps the “fiat” aspect of law with both hands, but the notion of law as justified by reason rather than merely reasonable command remains. It may be that the *Erie* revolution is still in offing, and that courts simply need to eschew magical thinking about their craft. Or it could be that the courts’ tendency to carve out matters from *Chevron* is a rejection of theoretical unity on the grounds that, “[i]n law as in life, we sometimes do better by reconciling ourselves to complexity than by insisting upon artificial simplicity.”

Either way, this discussion indicates that the relationship between administrative law and jurisprudence is richer than the legal literature suggests. *Chevron* forces judges to confront and explain their understandings about the nature of their craft. Accordingly, for theorists seeking to understand how judges think about adjudication and legal reasoning, *Chevron* cases provide data points as useful as jurisprudential mainstays like *Riggs v. Palmer* and *MacPherson v. Buick Motor Co.*

For judges and administrative lawyers, understanding the difference, if any, between reasoning from statutory commands and reasoning from precedent can help provide answers about whether and how to draw the lines between *Chevron* and *Skidmore*. Here, jurisprudence is not a distraction, but a resource for critical and coherent thinking about administrative law.

**CONCLUSION**

This Article began by asking why the courts have not followed through on the legal revolution many saw *Chevron* portending. It used one

---

263 See Perry, supra n. __, at 216.
265 Cf. ARISTOTLE, NICOMACHEAN ETHICS 1.iii.13, 1094b (“precision is not to be sought for alike in all discussions, any more than in all the products of the crafts”).
266 22 N.E. 188 (N.Y. 1889).
267 111 N.E. 1050 (N.Y. 1916).
268 Cf. Kevin M. Stack, *The Divergence of Constitutional & Statutory Interpretation*, 75 COLO. L. REV. 1 (2004) (challenging the notion that constitutions and statutes should be interpreted by the same method). This dichotomy may also shed light on other questions in administrative law, such as how courts should treat binding agency rules promulgated in legislative rulemaking versus those originating in adjudications.
problem—deference to common law—as a lens to view this wider dilemma. This lens, Part V hypothesizes, unfolds telescopically, with the pattern of theoretical and institutional arguments extending to higher levels of generality of deference doctrine. This pattern of disagreement, which the question of deference to common law raises in sharp relief, suggests that confusion about the scope of Chevron deference is linked to deeper ambivalence in the legal system about the nature and autonomy of law and legal reasoning. Resolving such disagreements is hardly easy, but focusing on them may be a necessary first step toward a more coherent deference doctrine, or at least an understanding of the limits of such a doctrine’s theoretical purity.