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Articles

REASON AND REASONABLENESS IN REVIEW OF AGENCY DECISIONS

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INTRODUCTION

A company markets computer software that provides day traders with real-time data and recommendations for buying and selling futures on commodities markets.[1] In a late night infomercial, the firm touts the spectacular "certified" profits that purchasers would have earned had they been

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[1] This example is based on *R&W Technical Servs. Ltd. v. CFTC*, 205 F.3d 165, 168 (5th Cir. 2000), and Commodities Exchange Act § 4b, 7 U.S.C. § 6b (2006).

using this one-of-a-kind system over the past seven years. What the sun-tanned 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 reviewing agency concludes that it is and levies a substantial fine. The firm seeks review in a federal court of appeals. 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"[2] 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."[3] On the other hand, in interpreting the term "defraud," the agency simply applied the elements of the common law of fraud. In doing so, it faced the kind of legal question courts frequently confront and reached a decision that would be reviewed de novo if made by a district court.[4]

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*"[5] applied to disagreements. Less ancient theorists of the legal craft held to this view, maintaining that judicial decisions are "the product of reasoned argument," and therefore "must be prepared . . . to meet the test of reason."[6] *Chevron*'s deference doctrine, however, can be seen as the acceptance of mere *reasonableness* in resolving legal questions. *Chevron* counsels deference to agencies' reasonable constructions of ambiguous statutes because it understands such interpretation as an act of political choice—a lawmaking decision that preexisting law can constrain but not dictate. Accordingly, just as *Erie Railroad v. Tompkins*[7] 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.[8] If interpretation of ambiguity is legislative promulga-

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[2] 7 U.S.C. § 6b(a).

[3] 467 U.S. 837, 844–45 (1984).

[4] *R&W*, 205 F.3d at 169.

[5] Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OX. U. COMMONWEALTH L.J. 1, 1 (2003) (quoting EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 97b (Garland 1979) (1628)) (emphasis added) (internal quotation marks omitted).

[6] Lon Fuller, *The Forms and Limits of Adjudication*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 86, 94 (Kenneth I. Winston ed., 1981).

[7] 304 U.S. 64 (1938).

[8] Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What The Law Is*, 115 YALE L.J. 2580, 2583 (2006) [hereinafter Sunstein, *Beyond* Marbury]; *see also* Guaranty Trust Co. v. York,

tion 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.[9]

But does *Chevron* really mean all that? As evidenced by the Court's mercurial record in applying deference, *Chevron* hardly caused a Copernican revolution placing agencies at the center of the interpretive universe. Indeed, numerous decisions—and Justice Stevens, the author of the *Chevron* opinion—maintain that there are purely *legal* interpretive questions of ambiguity that courts, not agencies, should decide.[10] 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.[11] 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 test for the administrative-*Erie* thesis and its limits.

With the aim of situating deference doctrine in broader debates about the nature of legal reasoning, this Article explores this problem of deference to agency interpretations of common law rules and principles. Courts' doubts about their ability to resolve difficult questions without issuing legislative-like commands often lead them to accept merely reasonable agency interpretations. At the same time, the inherited common law notion of law aspiring to reason blocks courts' complete retreat from all legal ambiguities. This straddling of the line between reason and reasonableness, which appears in sharp relief in cases where agencies construe common law terms, also structures a number of other deference problems and poses the broader question of whether deference doctrine as a whole is rooted in statutory command or common law discernment. Such confusion 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 step for shaping a coherent deference regime, or at least recognizing the limits of any such doctrine's theoretical purity.

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 analyzes two theories of

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326 U.S. 99, 101–02 (1945) (describing *Erie*'s legacy); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 205–06 (2006) [hereinafter Sunstein, Chevron *Step Zero*] (analogizing between *Chevron* and *Erie*). *But see* Jack Goldsmith & Stephen Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 675 (1998) (arguing that *Erie*'s constitutional holding can be decoupled from the decision's theoretical discussion about the nature of common law).

[9] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

[10] *See* discussion *infra* Parts I, V.B.

[11] *See, e.g.*, Sunstein, Chevron *Step Zero*, *supra* note 8, at 190 ("[T]he simplest interpretations of *Chevron* have unraveled. Like a novel or even a poem, the decision has inspired fresh and occasionally even shocking readings.").

legal reasoning in exploring whether *Chevron*'s understanding of statutory interpretation 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 these conflicting intuitions appears daunting.

Part V considers the implications of these two analyses. First, they suggest that in large part, institutional analysis of the deference question is inseparable from the more general theoretical disagreement that institutionalism aspires to avoid, thus suggesting that the methodological debate about the superiority of institutional analysis is overdrawn.[12] Second, the patterns of disagreement over deference to common law interpretations 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, and by hypothesis uncertainty about the nature of *Chevron* deference, may reflect neither unclear thinking nor a failure to realize *Chevron*'s full revolutionary potential, but rather basic and perhaps ineliminable tensions in thought 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 whether a court should apply the *Chevron* two-step or a less deferential standard of review. It does so in order to highlight a primary source of confusion in deference doctrine: the choice between basing deference upon 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.[13] The Environmental Protection Agency (EPA),

[12] *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889 (2003) (arguing that institutional analysis is necessary to justify any higher-level interpretative theory and sometimes sufficient for resolving disputes).

[13] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

which administers the Act, issued a legislative regulation that adopted the "bubble" concept, thereby reversing the previous administration's interpretation of "stationary source."[14] On review, the Court articulated the two-step rule that now structures judicial review of many agency interpretations of law. 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."[15] If the court discerns a clear answer, that interpretation governs. If the court finds the statute to be ambiguous, it proceeds to "Step Two," asking whether the agency's interpretation is "based on a permissible construction of the statute."[16] 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.[17]

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.[18] 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.[19] In cases where *Chevron* does not apply, courts assess the agency interpretation under the less deferential doctrine of *Skidmore v. Swift & Co.*, or, in some cases, under de novo review.[20] 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."[21] The "respect" given to the agency interpretation due under *Skidmore* "depend[s] upon the

[14] *Id.* at 857–58.

[15] *Id.* at 842, 843 n.9.

[16] *Id.* at 843.

[17] *See* Animal Legal Def. Fund v. Glickman, 204 F.3d 229, 234 (D.C. Cir. 2000) (recognizing overlap between *Chevron* review and arbitrary and capricious review); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6 (4th ed. 2002) (arguing that *Chevron* Step Two is the same as arbitrary and capricious review). *But see* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005) (reviewing the decision under an arbitrary and capricious framework separately from the *Chevron* analysis); *Chevron*, 467 U.S. at 844 (describing arbitrary and capricious review as distinct from the *Chevron* step analysis).

[18] Some also contend that the *Chevron* inquiry should only be understood as one step: "whether the agency's construction is permissible as a matter of statutory interpretation." Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

[19] *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271 (2008); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735 (2002); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001); Sunstein, Chevron *Step Zero*, *supra* note 8.

[20] United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

[21] *Id.* at 234 (quoting *Skidmore*, 323 U.S. at 139, 140).

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."[22] Evidence suggests that, at least at the court of appeals level, application of *Chevron* increases an agency's chances of prevailing.[23]

After *Chevron*, there was uncertainty about the basis for deference, a puzzle which made it difficult for courts and commentators to agree on what kinds of interpretations qualified for the two-step framework.[24] *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.[25] Second, the Court emphasized the EPA's superior expertise and political accountability in reaching a "reasonable accommodation of manifestly competing interests" at stake.[26]

In *Chevron*, both delegation and the need for expertise and accountability weighed in favor of deference. There are many cases, however, in which an agency possesses delegated authority but no particular expertise on a question, and vice versa.[27] This possible tension came to a head in *United States v. Mead Corp.*, where the Supreme Court found that the lack of delegation was dispositive of the deference question, notwithstanding any considerations of expertise.[28]

Mead concerned a tariff classification ruling by the United States Customs Service.[29] 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.[30] The company challenged the ruling and the Service sought *Chevron* deference.[31] In its opinion, the Court appeared to embrace

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[22] *Skidmore*, 323 U.S. at 140.

[23] *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Administrative Law*, 1990 DUKE L.J. 984, 1029–43 (cataloguing the "*Chevron* effect" of increased deference in the courts of appeals to agency interpretations post-*Chevron*).

[24] *See, e.g.*, Merrill & Hickman, *supra* note 19, at 863–72 (cataloguing competing rationales for deference).

[25] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding that 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").

[26] *Id.* at 865. Politics and expertise do not always run together, and the Court has appeared skeptical of agency politicization of expertise. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (arguing that the Court is increasingly worried about the politicization of administrative expertise, particularly during the Bush administration).

[27] *See, e.g.*, Krotoszynski, *supra* note 19, at 742–43 (discussing the themes of delegation and expertise in the *Chevron* opinion, but concluding that *Chevron* favored a delegation rationale).

[28] 533 U.S. 218, 224–29 (2001).

[29] *Id.* at 221.

[30] *Id.* at 224–25.

[31] *Id.* at 225–26.

the delegation model of *Chevron*. Though it noted that expertise is relevant under *Skidmore*,[32] the Court emphasized that an explicit or implicit delegation of lawmaking authority is the key factor distinguishing interpretations which deserve *Chevron* deference.[33]

Mead identified two factors which signal a delegation and thus trigger *Chevron* deference: "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."[34] The Court held that regardless of any expertise on the part of the Customs Service, its interpretation did not qualify for *Chevron* deference because the letter ruling was neither the product of notice-and-comment rulemaking nor an adjudication that created a binding effect on third parties.[35] *Mead* thus established a procedural "safe harbor"—rulemaking and formal adjudication—within which Step Zero is satisfied.[36] When "agencies have been given power to use relatively formal procedures" to implement statutes they administer, "and . . . they have exercised that power," *Chevron* deference is appropriate.[37] The Court's holding can be understood as a bright-line 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,[38] concluded after *Mead* that deference turns on a general congressional delegation of lawmaking power to agencies, not the expertise underpinning *Skidmore*'s "respectful consideration" of agency interpretations.[39]

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[32] *Id.* at 228.

[33] *Id.* at 226–27, 229.

[34] *Id.* at 229–30 (citations omitted).

[35] *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 (1) is beside the point, or (2) 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 and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 833–34 (2002) (arguing for a force-of-law delegation rule, rather than a standard that includes the level of agency formality); Thomas Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 472 (2002) (arguing that only agencies with powers to issue rules backed by sanctions should be eligible for *Chevron* deference).

[36] *Mead*, 533 U.S. at 246 (Scalia, J., dissenting).

[37] Sunstein, Chevron *Step Zero*, *supra* note 8, at 214.

[38] *See, e.g.*, Krotoszynski, *supra* note 19, at 736–37 (arguing that the expertise rationale provides a stronger justification for deference to agency decisions than the implied delegation theory).

[39] *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2637 (2003); Merrill & Hickman, *supra* note 19, at 855; Merrill & Watts, *supra* note 35, at 576. *But see* Criddle, *supra* note 19, at 1284–85 (asserting that delegation theory is "[a]rguably the leading rationale" for deference, but is inconsistent with the APA and Congress's more specific grants of delegation).

Step Zero, however, is more complex than the *Mead* safe harbor suggests. The *Mead* Court indicated—and later decisions have reinforced—that less formal agency interpretations may merit *Chevron* deference.[40] The Court in *Barnhart v. Walton* read *Mead* as generally prescribing a multifactor standard for finding a delegation of authority at Step Zero, even when an agency acts with formality.[41] 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 State Department sought deference to 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 receive deference.[42] The Court has also explained that *Chevron*'s presumption of delegation is unwarranted in "extraordinary cases," such as "major questions" of national policy, including whether the FDA should be able to regulate tobacco as a drug.[43]

The Court's jurisprudence thus suggests two competing approaches to deference: (1) a bright-line rule based on the agency's exercise of delegated lawmaking power through issuing regulations or undertaking formal adjudication; or (2) a contextual inquiry about the plausibility of assuming Congress wanted the agency to decide a question rather than a court. The first understanding turns on the delegation and exercise of formal powers irrespective of the subject matter of the question at issue. The second approach, by contrast, focuses on the character of the legal question and the capacities of the agency. These two approaches to Step Zero may seem incompatible, but the Court has apparently tried to reconcile them by softening the bright-line rule to a presumption rebuttable by sufficiently strong contextual factors weighing against deference. In short, the Court's Step Zero allows for substantive carve-outs from *Mead*'s formal safe harbor.

II. THE PROBLEM OF DEFERENCE TO COMMON LAW INTERPRETATIONS

Judicial review of agency interpretations of common law is another potential carve-out from *Mead*'s safe harbor. While many deference questions

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[40] *See Mead*, 533 U.S. at 227–31.

[41] 535 U.S. 212, 222 (2001) (considering "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time").

[42] Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448 (1987)) (internal quotation marks omitted).

[43] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); *see also* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (citing *Brown & Williamson* in holding that the Attorney General lacked delegated authority to regulate physician-assisted suicide). *But see* Massachusetts v. EPA, 549 U.S. 497, 530–31 (2007) (rejecting EPA's argument, based on *Brown & Williamson*, that it lacked authority to regulate greenhouse gases).

involve interpretation of technical terms specific to a regulatory regime, statutory terms are often more general. The Supreme Court presumes that when Congress uses a term with a "settled meaning" at common law, such meaning is incorporated into the statute as a matter of federal law.[44] Recently, for example, the Court assumed that common law tort principles governed the scope of liability for toxic waste cleanup under the Superfund statute.[45] Courts interpreting these pockets of "general law" often apply principles of *general* common law jurisprudence, rather than the law of any particular jurisdiction.[46] Agencies also interpret many of these statutes incorporating common law rules and principles in the course of rulemaking and formal adjudication.[47] 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.[48]

The National Labor Relations Act (NLRA) offers a prominent example of common law embedded in an administered statute. The NLRA's protections extend only to "employees," a term the statute originally did not define.[49] In *NLRB v. Hearst Publications*, the Court first addressed the scope of the term, deciding whether newsboys were "employees" with a right to organize under the NLRA.[50] The publishers argued that the definition of "employees" should be coextensive with the traditional scope of the term at common law, and contended that the newsboys were independent contractors exempt from the NLRA's protections.[51] The Court rejected this argument. It held that based on "the history, terms and purposes of the

[44] *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (applying rule and citing cases).

[45] *See* Burlington N. and Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1880–81 (2009). The government did not seek *Chevron* deference in *Burlington Northern*. Brief for the United States, Burlington N. and Santa Fe Ry. Co., 129 S. Ct. 1870 (Nos. 07-1601 & 1607), 2008 WL 5266416 (no request for *Chevron* deference).

[46] Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 521–25 (2006). In similar cases, federal courts sometimes adopt as rules of decision the common law of a particular state. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 63 n.9 (1998) (noting but not resolving the question of whether to borrow the common law of a particular state or fashion a more general federal common law rule).

[47] I use the term "formal adjudication" to refer to proceedings conducted pursuant to the trial-like procedures outlined in the Administrative Procedure Act, 5 U.S.C. §§ 554, 556, 567 (2006). *See* A GUIDE TO FEDERAL AGENCY ADJUDICATION 203 (Michael Asimow ed., 2003) (describing how formal hearings must comply with §§ 554, 556, 567 of the APA).

[48] This issue is distinct from the unsettled question of whether an agency receives deference for 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. *Id.*

[49] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120 (1944).

[50] *Id.* at 120.

[51] *Id.* at 119–20.

legislation,"[52] a broader understanding of the term "employee," informed by the "economic and policy considerations within the labor field," should govern.[53] In response, Congress amended the NLRA to exclude independent contractors from the definition of "employee." The Court concluded in *NLRB v. United Insurance Co.* that "[t]he obvious purpose" of the amendment was to have the Board and courts interpreting the NLRA apply the common law distinction between employees and independent contractors.[54]

Subsequently, courts and the 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 considered whether a union could represent four rabbis who performed kosher slaughtering services at a meat packing plant.[55] 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. Importantly, the Act's interpreters look to general common law principles, like those enunciated in the Restatement (Second) of Agency, not the common law of any particular jurisdiction.[56] 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,"[57] there will often be room for reasonable disagreement about a given worker's status under the Act.[58] In such cases, courts must decide whether to defer to the agency's application of such rules and principles.[59]

The problem of deference to agencies' common law interpretations also arises when agencies interpret contracts in the course of adjudications. For example, in *National Fuel Gas Supply Corporation 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.[60] The agency denied the request because a settlement agreement between the utility and its customers forfeited the right to seek recoupment.[61]

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[52] *Id.* at 124.

[53] NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (describing the Court's reasoning in *NLRB v. Hearst*).

[54] *Id.*

[55] Aurora Packing Co. v. NLRB, 904 F.2d 73, 74–75 (D.C. Cir. 1990).

[56] *See, e.g.*, N. Am. Van Lines v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989).

[57] *Aurora Packing*, 904 F.2d at 75.

[58] 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 transactions to have a "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, e.g.*, 26 C.F.R. § 1.368-1(c) (2008) (requiring transactions to have a business or corporate purpose).

[59] *See, e.g.*, *Aurora Packing*, 904 F.2d at 75–76 (raising *Chevron* question and withholding deference).

[60] 811 F.2d 1563, 1565–69 (D.C. Cir. 1987).

[61] *Id.* at 1566.

On review before the D.C. Circuit, the validity of the agency's action depended on whether the agency properly interpreted the contract.[62] Addressing the question, the court noted that "the issue simply involves the proper construction of language" in a contract for services,[63] a task not obviously different from "the application of canons of [contractual] construction employed by the courts."[64] When contracts and the common law rules and principles for interpreting are ambiguous, reviewing courts must decide whether an agency's "reasonable" interpretation should prevail when the court would rule differently under de novo review.

The courts do not provide clear answers to these questions—indeed, the D.C. Circuit has held *Chevron* deference to interpretations of common law inappropriate in *Aurora Packing* and other NLRA cases while nevertheless applying it in *National Fuel* and other cases of contract interpretation.[65] The Supreme Court has not provided clear guidance on the matter, either. Prior to *Chevron*, the Court indicated that any substantial deference was inappropriate. One of administrative law's most famous cases, *SEC v. Chenery Corp.*, is exemplary.[66] There, the agency voided a corporate reorganization because the company's directors breached the "duty of fair dealing" that the agency understood to be incorporated in the regulatory statute.[67] The Court reviewed the decision de novo, explaining that the agency decided the case "according to settled judicial doctrines" governing fiduciary duty, rather than considerations of administrative policy.[68] Similarly, the pre-*Chevron* Court later invoked *Chenery* while withholding deference to agency interpretations of contracts on the grounds that such "canons of contract construction" regularly deployed by courts are not within the agency's "special competence."[69]

After *Chevron*, the picture is murkier. When asked to interpret statutorily embedded common law, the 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.[70] The most recent case to raise the question, however, may indicate that the Court

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[62] *Id.* at 1568.

[63] *Id.* at 1569.

[64] *Id.* at 1570 (quoting Tex. Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960)).

[65] *Compare* Aurora Packing Co. v. NLRB, 904 F.2d 73, 74–75 (D.C. Cir. 1990) (withholding *Chevron* deference), *with National Fuel*, 811 F.2d at 1570 (asserting that *Chevron* commands deference to agencies' interpretations of contracts).

[66] 318 U.S. 80 (1943).

[67] *Id.* at 85.

[68] *Id.* at 89–90.

[69] *Tex. Gas*, 363 U.S. at 270.

[70] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009) (no request for deference or discussion thereof); Clackamas Gastroenterology Assocs., P. C. v. Wells, 538 U.S. 440, 449 n.9 (2003) (no deference to agency interpretation of "employee" in compliance manual because interpretations announced in manuals do not have "force of law"); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 n.5 (1992) (noting government did not seek *Chevron* deference).

is willing to apply *Chevron* to agency interpretations of common law doctrine. *Cuomo v. Clearing House*[71] concerned a section of the National Banking Act prohibiting state governments from exercising "visitorial powers" over national banks.[72] In *Cuomo*, New York sought nonpublic information from national banks suspected of violating state lending laws.[73] Federal regulations interpreting the Act treated such requests pursuant to law enforcement investigations as exercises of visitorial powers precluded by the Act.[74] Reviewing the regulation, the *Cuomo* majority and dissent both treated the Act as incorporating the general common law meaning of "visitorial powers."[75] Both also found the precise scope of "visitorial powers" at common law uncertain,[76] and both considered the *Chevron* framework applicable.[77] The Justices differed only over whether the regulation's understanding of the traditional scope of visitorial powers was a reasonable one. Based on its review of case law and treatises, the *Cuomo* majority found the regulation's inclusion of law enforcement inquiries within "visitorial powers" as falling beyond the "outer limits" of the admittedly ambiguous concept.[78] The dissent would have upheld the regulation as reasonable at *Chevron* Step Two because precedential and scholarly evidence indicated that "the common-law understanding of visitorial powers" included such law enforcement requests.[79]

Cuomo may suggest that the Court finds deference to an agency's common law interpretation unproblematic, but it hardly closes the book on the matter. First, for the majority that found the agency interpretation of "visitorial powers" unreasonable, the question of deference was superfluous. *Chevron* deference, after all, does its work when an agency interpretation falls within the bounds of reasonableness; no standard of review

[71] 129 S. Ct. 2710 (2009).

[72] 12 U.S.C. § 484(a) (2006).

[73] 129 S. Ct. at 2714.

[74] *See* 12 C.F.R. § 7.4000 (2009); *Cuomo*, 129 S. Ct. at 2715 (reasoning that "[b]y its clear text, this regulation" would prohibit New York's request for information).

[75] *See* 129 S. Ct. at 2715; *id.* at 2723–25 (Thomas, J., concurring in part and dissenting in part). Justice Scalia authored the *Cuomo* majority, joined by Justices Stevens, Ginsburg, Breyer, and Souter. Justice Thomas concurred in part and dissented in part, joined by Chief Justice Roberts and Justices Kennedy and Alito. For a thorough and illuminating discussion of *Cuomo*, see Arthur J. Wilmarth, Jr., Cuomo v. Clearing House: *The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection*, *in* THE PANIC OF 2008: CAUSES, CONSEQUENCES AND IMPLICATIONS FOR REFORM (Lawrence E. Mitchell & Arthur J. Wilmarth, Jr., eds.) (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499216.

[76] *See* 129 S. Ct. at 2715 ("There is necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers . . . .'"); *id.* at 2723 (Thomas, J., concurring in part and dissenting in part) ("'[V]isitorial powers' is susceptible to more than one meaning.").

[77] *See id.* at 2715 (invoking *Chevron*); *id.* at 2722 (Thomas, J., concurring in part and dissenting in part) (observing that *Chevron* "provides the framework for deciding this case").

[78] *Id.* at 2715; *see id.* at 2715–16 (surveying case law and treatises).

[79] *Id.* at 2726 (Thomas, J., concurring in part and dissenting in part).

protects interpretations a court deems unreasonable.[80] Second, the Court did not address, let alone distinguish or overrule, pre-*Chevron* cases withholding any robust kind of deference to common law interpretations. Lower courts, agencies, and litigants accordingly may hesitate to conclude *Cuomo* has done so.[81]

The courts of appeals offer conflicting conclusions. When regulatory regimes incorporate common law concepts, there are more appellate decisions withholding deference on *Chenery*-like grounds than there are opinions deferring under *Chevron*. The D.C. Circuit, for example, reads the common law definition of "employee" in the NLRA as reflecting Congress's choice to give courts, not policymaking agencies, decisionmaking authority over who is an "employee."[82] Other courts of appeals have withheld deference to agencies' interpretations of statutory regimes (or their own regulations) raising similar questions, such as: whether a litigator's success on the merits was substantial enough to displace the default rule against rewarding attorney's fees;[83] the application of a presumption of death for purposes of receiving survivors' benefits;[84] whether an election of in-kind royalties counted as a "purchase" of natural gas under property law;[85] and whether violations of statutes were "material"[86] or immunized by "reasonable diligence."[87] The common thread in these rejections of deference to common law interpretations is that they concern legal questions over which courts have equal or superior competence.[88]

Fewer appellate decisions defer when an agency interprets a common law concept embedded in a statute, though that trend may change in the wake of the Court's decision in *Cuomo*. In contrast to its NLRA cases, the D.C. Circuit applies *Chevron*-strength reasonableness review to the FCC's conclusions that telecommunications providers are "common carriers" even though such determinations are made pursuant to a "test derived from the common law as interpreted in [the] circuit's case law."[89] Similarly, a di-

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80 *Cf.* Stephenson & Vermeule, *supra* note 18, at 599 ("The single question [in *Chevron*] is whether the agency's construction is permissible as a matter of statutory interpretation.").

81 *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

82 *See, e.g.*, Int'l Longshoremen's Ass'n, AFL-CIO v. NLRB, 56 F.3d 205, 248 (D.C. Cir. 1995).

83 *See, e.g.*, W. Va. Highlands Conservancy, Inc. v. Norton, 343 F.3d 239, 245–46 (4th Cir. 2003).

84 *See, e.g.*, Green v. Shalala, 51 F.3d 96, 100 (7th Cir. 1995).

85 Jicarilla Apache Tribe v. FERC, 578 F.2d 289, 292–93 (10th Cir. 1978). *Jicarilla* was decided prior to *Chevron*, but has been cited in more recent cases. *See, e.g.*, Burgin v. Office of Pers. Mgmt., 120 F.3d 494, 497 (4th Cir. 1997).

86 R&W Technical Servs. Ltd. v. CFTC, 205 F.3d 165, 169 (5th Cir. 2000).

87 Maloley v. O'Brien & Assocs., Inc., 819 F.2d 1435, 1442 (8th Cir. 1987).

88 *See, e.g.*, *Norton*, 343 F.3d at 246 ("'When the administrative interpretation is not based on expertise in the particular field . . . but is based on general common law principles, great deference is not required.'" (quoting *Burgin*, 120 F.3d at 497)).

89 U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002). The court did not refer to the less deferential NLRA cases.

vided Third Circuit panel in *Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* recently applied *Chevron* to an agency interpretation of a statute incorporating judge-made mens rea doctrine.[90] There, the agency found that a company "willfully" violated an explosives licensing regime, holding that willfulness neither requires that the defendant have acted with a "bad purpose" nor permits a "justifiable excuse" defense.[91] Finding the meaning of "willful" ambiguous for purposes of *Chevron*, the court found the agency's interpretation reasonable because it accorded with court decisions in analogous contexts.[92] In an echo of decisions that withhold deference on questions of common law, however, one panel member found *Chevron* inapplicable because the agency was simply applying a general legal standard in light of judicial precedent, not making administrative policy.[93]

The appellate courts more sharply and evenly disagree on whether to defer when an agency applies the common law rules and principles of contract interpretation when resolving disputes. The Fourth,[94] Fifth,[95] Sixth,[96] and Seventh Circuits[97] 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."[98] The D.C. Circuit, however, has deemed obsolete the pre-*Chevron* Supreme Court precedent that withholds deference from an agency's application of "canons of [contract] construction employed by courts."[99] 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"[100]—a holding that the First,[101] Tenth,[102] and Eleventh[103] Circuits have followed.

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.[104] Rather than focusing on features

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[90] 544 F.3d 509, 515 (3d Cir. 2008).
[91] *Id.* at 517.
[92] *Id.* at 518–19.
[93] *Id.* at 523 (Jordan, J., concurring in the judgment).
[94] Melton v. Pasqua, 339 F.3d 222, 225 (4th Cir. 2003); Burgin v. Office of Pers. Mgmt, 120 F.3d 494, 498 (4th Cir. 1997).
[95] Davidson v. Glickman, 169 F.3d 996, 1000 (5th Cir.1999).
[96] Dayton Power & Light Co. v. FERC, 843 F.2d 947, 953 n.12 (6th Cir.1988).
[97] City of Kaukauna v. FERC, 214 F.3d 888, 895 (7th Cir. 2000).
[98] *Burgin*, 120 F.3d at 497–98.
[99] Nat'l Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1570 (D.C. Cir. 1987).
[100] *Id.* (citation omitted).
[101] Boston Edison Co. v. FERC, 441 F.3d 10, 12–13 (1st Cir. 2006).
[102] Nw. Pipeline Corp. v. FERC, 61 F.3d 1479, 1486 (10th Cir. 1995).
[103] Muratore v. Office of Pers. Mgmt, 222 F.3d 918, 923 (11th Cir. 2000).
[104] Merrill & Hickman *supra* note 19, at 898–99.

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.[105] Another commentator has similarly argued for deference to agency constructions of contracts because such questions often require interpretation of agency-administered statutes.[106] Professor Kahan has made the case for deference to government interpretations of criminal statutes by arguing that while federal criminal law is ostensibly statutory, judge-made common law in fact fills many of the statutory gaps and governs the background rules.[107] Kahan argues that applying this common law in unclear cases is no less policy-laden than resolving statutory ambiguities and silences, and that allowing prosecutors to fill these gaps reasonably will lead to superior doctrine.[108] Kahan, however, focuses on the benefits of *Chevron* deference without a full explanation of why expounding common law is functionally identical to interpreting statutes.[109]

In short, scholars have touched on aspects of the problem of agencies' common law interpretations or have championed the policy benefits of deference to such interpretations in discrete contexts. This Article addresses the problem as a whole and unpacks the conflicting jurisprudential assumptions at the base of confusion over the question. Reflecting on this jurisprudential disagreement, moreover, will shed light on the persisting and endemic disagreement about the nature and scope of deference doctrine more generally.

III. DEFERENCE AND COMMON LAW THEORY

The question here is whether an agency possesses delegated power to apply common law rules and principles that fall within its administrative bailiwick. Answering that question is not straightforward. Under *Mead*, an agency receives *Chevron* deference if Congress has "delegated" the agency the power to resolve authoritatively the ambiguity at hand.[110] *Mead* appeared to presume an exercise of delegated authority, and thus deference, when the agency offered its interpretation in a rulemaking or formal adjudication.[111] The picture is more muddled, however, with *Barnhart*'s suggestion of a general multifactor test for deference,[112] and other decisions

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[105] *Id.* at 897–98. Under the filed rate doctrine, rate-setting contracts filed with a regulatory agency have the force of law unless later modified by the agency. *See id.*

[106] Phillip G. Oldham, Comment, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393, 405–06 (1995).

[107] Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 472–79 (1996).

[108] *Id.* at 489–90.

[109] *Id.* at 489.

[110] 533 U.S. 218 (2001).

[111] *Id.*

[112] Barnhart v. Walton, 535 U.S. 212, 222 (2001).

excluding certain interpretations from *Mead*'s safe harbor based on the character of the question.[113] Some have gone so far as to suggest that "delegation" tracks what the Court thinks is reasonable for Congress to have delegated.[114]

One approach to determining whether it is "reasonable" to infer delegated agency authority over embedded common law is to consider the nature of the common law and common law adjudication. As Part III.A argues, *Chevron* suggests a particular thesis on statutory interpretation: resolution of ambiguity frequently involves policy-laden lawmaking. We can ask whether a similar thesis applies when the application of common law rules and principles is unclear. Part III.B discusses a "statutory" approach to common law that answers that question in the affirmative, arguing that common law reasoning in novel cases requires judges to engage in lawmaking activity similar to legislation. Part III.C explores an alternative, "traditionalist" theory, which understands common law reasoning as an autonomous tradition of practical reasoning distinct from legislation, and thus does not run parallel to *Chevron*'s model of statutory interpretation. While these two theories 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.[115] Second, some questions do not admit a clear answer. This ambiguity creates a statutory "gap,"[116] a "policy space,"[117] that an interpreting official fills through an exercise of discretion. A court's duty in Step Two is limited to ensuring that the agency's choice does not fall outside that policy space—in other words, that the interpretation is reasonable.[118] This basic structure has three features worth keeping in mind when considering possible analogies between statutory and common law interpretation.

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[113] *See supra* notes 42–43 and accompanying text. *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* note 35, at 833; Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 356–57 (2003).

[114] *See* Garrett, *supra* note 39, at 2638–39 ("[T]he judicial branch decides whether or not to defer to agencies based on judges' views of policy, institutional competence, and other factors.").

[115] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[116] *Id.* at 843.

[117] Stephenson & Vermeule, *supra* note 18, at 602.

[118] *Chevron*, 467 U.S. at 845 (stating that more searching judicial review "misconceive[s] the nature of [the judiciary's] role in reviewing the regulations at issue").

First, this understanding is skeptical about the law's ability to provide determinate, distinctively *legal* answers in novel or difficult cases. Interpreting the term "stationary source" in *Chevron* involved an "accommodation of manifestly competing interests" and "reconciling conflicting policies."[119] 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."[120] As a corollary, the agency can change its mind about its interpretive choice.[121] 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."[122] Such recognition of the limits of legal craft also underlies *Chevron*'s emphasis on the agency's political accountability and technical expertise.[123]

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 as a legal "gap" that an official must "fill" by "formulation of policy and the making of rules."[124] 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."[125] 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* equates law with specific, binding rules, while viewing more general 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."[126] The rule prescribes "what all actors subject to the rule should do in all cases it covers."[127] When the rule clearly 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; legal standards are paradigmatic example of such ambiguity. Congress's choice of "statutory lan-

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[119] *Id.* at 865.

[120] Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987).

[121] *See Chevron*, 467 U.S. at 842 (recognizing that the "appellate court's basic legal error" was to assume a "static" meaning of the statutory term).

[122] Sunstein, *Beyond* Marbury, *supra* note 8, at 2583.

[123] *See Chevron*, 467 U.S. at 865–66.

[124] *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[125] *Homemakers*, 832 F.2d at 411.

[126] LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 11 (2008).

[127] *Id.* *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) (undertaking a rigorous exploration of legal rules in the tradition of analytical jurisprudence).

guage such as 'feasible,' [or] 'reasonable' . . . suggests a broad delegation to an agency to strike the policy balance."[128]

Chevron's assumptions about statutory interpretation are hardly unique in Anglo-American legal thought. One of 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.[129] The *Chevron* rule provides that in easy (or what Hart would call "core")[130] cases, courts apply the law enacted by the legislature. In harder ("penumbral")[131] cases, where a legal official is required to make law, the agency decides. While Hart differed from many Legal Realists in his view of the extent of indeterminacy in law,[132] he used regulatory legislation as a key example of such uncertainty. He observed that legislatures delegate decisionmaking authority to agencies by enacting broad, ambiguous provisions, such as those requiring regulated parties to charge a "fair rate."[133] 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."[134] Discretion in Hart's model is linked with the "law-creating power" left to courts by virtue of the "open texture of law."[135] 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."[136]

B. The "Statutory" Case for Deference

If the process for resolving uncertain cases under the common law does not meaningfully differ from interpreting an ambiguous statute, *Chevron* suggests that agencies should also receive 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, Ben-

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[128] Laurence H. Silberman, Chevron—*The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990).

[129] H.L.A. HART, THE CONCEPT OF LAW 77–96 (1961).

[130] *Id.* at 9, 63–64.

[131] *Id.* at 9.

[132] *See* Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 299–300 (2001) (noting Hart would locate indeterminacy at the margin, while Legal Realists are more likely to find indeterminacy closer to the core of appellate litigation); *see also* HART, *supra* note 129, at 136–37.

[133] HART, *supra* note 129, at 127–28.

[134] *Id.* at 128.

[135] *Id.* at 141.

[136] *Id.* at 128; *see also* John G. Osborn, Comment, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 118 (1999) ("*Chevron* quite clearly suggests a shift in favor of legal positivism and its underlying preoccupation with legal authority.").

tham, and Austin, and running through to thinkers like Hart and Joseph Raz—models common law adjudication in these very terms.[137]

This approach analogizes statutes to precedents. Precedent is statute-like law which 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.[138] Its counsel can be intermediate, such as the multiple factors suggesting "control" in the Restatement of Agency.[139] Or it can be quite particular, such as a case holding that in Fact Pattern Z that satisfies certain specific "control" factors, but not others, the worker is an independent contractor.[140] 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.[141] "The judge here can be seen in his classical image: he identifies the law, determines the facts, and applies the law to the facts."[142] This is not to say resolution of regulated disputes is "mechanical."[143] 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."[144]

Matters are different when decisional law is indeterminate. Such law may only provide a broad standard like "control," a multifactor balancing test, or even conflicting rules. Alternatively, applications of the "control" test may not speak to the fact pattern at hand.[145] In these "unregulated cases," a judge faces a "gap" in the law which she fills by creating a binding precedent.[146] In so doing, the judge acts like a legislator, resolving the dis-

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[137] *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832) (understanding adjudication as judicial legislation backed by the sanction of the sovereign); HART, *supra* note 129 (discussing how the open texture of laws leaves courts with law creating power); THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND (1681) (arguing that all law is reducible to legislative command); GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986) (exploring Bentham's criticisms that the common law system leads to judge made law); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979) (arguing that when the law is indeterminate, judges fill the gaps through legislative acts).

[138] RESTATEMENT (SECOND) OF AGENCY § 2(3) (2006).

[139] *See id.* § 220(2).

[140] For example, a truck driver who owns his own vehicle, receives assignments through a third-party agent, and works on a day-to-day basis without benefits is an independent contractor even if he is paid by the hour and subject to substantial supervision at the worksite. *See, e.g.*, Constr., Bldg. Material, Ice & Coal Drivers, Helpers & Inside Employees Union, Local No. 221 v. NLRB, 899 F.2d 1238 (D.C. Cir. 1990) (Ginsburg, J.) (upholding agency's treatment of such a case).

[141] *See* RAZ, *supra* note 137, at 181–82.

[142] *Id.* at 182.

[143] *Id.*

[144] *Id.*

[145] *Cf. id.* at 193–94 (itemizing varieties of "unregulated cases").

[146] *Id.* at 194.

pute based on the judge's assessment of the best resolution of the matter, all things considered.[147] Precedent may rule out some options, but among the remaining choices the judge acts within the realm of discretion.[148]

This statutory conception of the common law is consonant with *Chevron*'s three assumptions about statutory interpretation, discussed above. 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."[149] 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 with regard to its content.[150] Third, this approach recognizes that while standards can channel discretion, law works most effectively when it consists of clearly applicable rules. Legal standards are "underdetermined rules" which require further lawmaking, but cases that fall under a sufficiently specific rule do "not require judicial discretion."[151]

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."[152] "[P]ermissive sources"—such as scholarly commentary, principles drawn from rules, or decisions from another jurisdiction—may provide a complete answer to a case without compelling one decision or another.[153] Even when an official is presented with two conflicting permissive sources, it does not follow that nonlegal considerations dictate the decision: "we may simply [and rationally] 'judge,' without resort to *any* further norms" outside the law.[154] Thus, while some hard cases require "strong discretion," namely, a choice between nonlegal reasons, others may only involve "weak discretion," in which judges choose among permissive sources of law.[155] In the latter cases, political accountability and nonlegal expertise are less relevant, and the case for deference is correspondingly weaker.

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[147] *Id.* at 197; *see also* ALEXANDER & SHERWIN, *supra* note 126, at 25–26 (arguing that courts either "reason deductively from rules posited by others; or they posit law, relying on moral and empirical judgment, as any other lawmaker must" because "there is no middle ground").

[148] RAZ, *supra* note 137, at 197 ("Yet essentially it is true that in the exercise of their law-making power the courts should—within legally imposed restrictions—act as one expects Parliament to act, i.e., by adopting the best rule they can find.").

[149] Leiter, *supra* note 132, at 284, 292.

[150] RAZ, *supra* note 137, at 71 ("[T]here is a legal gap [if] there is no decision required by law.").

[151] *Id.* at 181.

[152] John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEGAL STUD. 457, 457 (1988).

[153] *Id.* at 458.

[154] *Id.* at 460.

[155] *Id.*

Gardner's explication of Hart may or may not be correct, but as it stands it does not provide a complete answer to the case for deference to common law interpretations. First, without a more robust account of rational judgment within the law, the choice of permissive sources is vulnerable to later claims 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, *Chevron* indicates deference.[156] 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"—that is, when legal materials provide little or no guidance.

Overall, this statutory understanding of the common law is consistent 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.[157] This approach also meshes with the explanations provided by courts deferring 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 to the agency lawmaking authority to 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.[158] Similarly, in deferring to an agency's construction of a settlement agreement, the D.C. Circuit treated contractual ambiguity as part of the "gap" that the agency had lawmaking authority to fill.[159]

The parallels between statutes and the common law also answer the objection that Congress's inclusion of common law terms rather than more general language suggests a preference for courts' judgments over those of agencies. 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

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[156] Even though *Chevron* on its terms indicates deference, at times courts do decide statutory questions of intermediate difficulty at Step One because the interpretive question is ambiguous. The intensity of the court's Step One inquiry is notoriously inconsistent, but it often appears that factors beyond the structure of *Chevron*—such as the substance of the decision under review—drive this heightened scrutiny at Step One. *But see* Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687 (2005) (arguing courts should adjust the standard of required clarity at *Chevron's* Step One based upon an analysis of relevant institutional considerations).

[157] Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187 (2007); *see also* Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1455–56 (1995) (defending judicial opinions written in a statutory style).

[158] Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 544 F.3d 509, 517 n.12 (3d Cir. 2008).

[159] Nat'l Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1569–70, 1570 n.3 (D.C. Cir. 1987).

when a worker's status satisfies all or almost every criterion of the employee–independent contractor test), and even more often it can exclude some options. Moreover, given that common law is a familiar starting point for legal analysis, it is a rich and intelligible framework for channeling discretion. And if filling precedential gaps is not meaningfully different from resolving statutory ambiguities, it is reasonable to presume that Congress wants agencies to fill these precedential gaps of intermediate generality.

Further, the broader range of choices available to an interpreter of statutorily embedded common law may counsel in favor of deference as well. Unlike a state court applying a developed body of binding, jurisdiction-specific precedent, interpreters of embedded common law primarily look to cases across jurisdictions, Restatements, and scholarly commentary.[160] An interpreter may find a leading case or a Restatement example that reflects the facts at hand, but unless the relevant federal court of appeals 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.[161] 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. Because *Chevron* prefers that politically accountable policy experts fill legal gaps, deference may be appropriate given the considerable discretion involved in interpreting embedded common law.

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. Because the law is silent, the decision is one of policy. *Chevron* teaches that when an agency administers a statute with the force of law, the agency is the proper actor to engage in such interpretive lawmaking. Consequently, it does not follow that because Congress chose a common law term, all deference-animating concerns about agency expertise and policymaking fall out of the picture.[162]

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[160] *See* Nelson, *supra* note 46, at 521–22.

[161] Precedential rules are also less binding than statutes to the extent judges retain discretion to modify precedent by distinguishing cases or overruling the precedent completely. Because distinguishing and overruling can also be seen as lawmaking acts, this increased flexibility hardly counts *against* deference to policymaking agencies. *Cf.* RAZ, *supra* note 137, at 185–91 (analyzing acts of distinguishing and overruling).

[162] *Cf.* Aurora Packing Co. v. NLRB, 904 F.2d 73, 76 n.1 (D.C. Cir. 1990) ("*Chevron* presumes that Congress delegated primarily to executive branch agencies the interpretation of ambiguous terms like 'employee,' in part because of an agency's expertise, and in part because of the policy role inherent in that function—which the Court thought Congress prefers the agencies rather than the nonelected judiciary to perform. When Congress indicated that it wanted the judge-made common law of agency to govern the construction of 'employee,' it rejected the basis of these presumptions." (citation omitted)).

C. The "Traditionalist" Rejection of Deference

The statutory understanding of precedential reasoning discussed above 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.[163] With roots reaching deep into English legal history, this approach still claims adherents and revivalists well after the rise of Legal Realism. 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 and rejects the notion of the common law as a gap-filled code awaiting further legislative specification.

An exhaustive examination and evaluation of these theories is beyond the scope of this Article. Instead, this section will first provide a rough sketch of this alternative conception of the common law. It will then apply this conception in the administrative law context and explore the implications of presuming that Congress adopted it by using common law terms in statutes. Under this presumption, Congress's use of common law terms most plausibly calls for judicial integration of the common law concept into the fabric of the statute, rather than deference to policy-based resolution of close cases by agencies.

1. The "Artificial Reason" of Common Law Traditionalism.—Under the traditionalist conception, the common law is an unwritten "body of practices observed and ideas received by a caste of lawyers" who are able to identify rational resolutions to current disagreements.[164] Professor Postema has helpfully identified four features that mark this "practised discipline of practical reasoning."[165] Postema's theory roughly overlaps with approaches taken by others who resist any simple analogy between common law precedent and legislation.[166]

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[163] Postema, *supra* note 5, at 1.

[164] A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE: SECOND SERIES 77, 94 (A.W.B. Simpson ed., 1973).

[165] Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 601 (Jules Coleman & Scott Shapiro eds., 2002).

[166] *See generally* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988) (expounding a "generative conception" of common law that rejects legal positivists' legislative theories of common law adjudication); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8–27 (1949) (arguing that common law reasoning is primarily evolutionary reasoning by example, not creation of, and deduction from, rules); KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960) (rejecting the notion that adjudication is either mechanical rule following or legislative discretion); Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001) (arguing that common law reasoning is more like participating in craft tradition than deductive reasoning from legislative rules); Simpson, *supra* note 164, at 84–88 (rejecting the notion that the common law can be neatly analogized to statutory law).

First, common law reasoning is *pragmatic*. It is focused on the resolution of concrete, particular disputes.[167] Any broader impact on society will be the product of case-by-case decisions about individual problems, not global theorizing about just or efficient organization of society.[168] The philosophical analogue to the common law 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.[169] Appropriately, the centerpiece of Llewellyn's exposition of *The Common Law Tradition* is close reading of hundreds of appellate opinions, not high level political or social theory.[170]

Second, common law reasoning is *historical*. It grounds consideration of new problems in previous decisions that "are understood to be prima-facie normative for the community."[171] 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 while confronting new problems. Accordingly, good judges and lawyers must be steeped in the learning of the practice and habituated in its methodologically conservative approach to problem solving.[172]

Third, common law reasoning is *analogical*. It relies far more on comparative reasoning from precedent than deductive reasoning from rules.[173] The common law's historical bent causes its practitioners to look backward, but analogical reasoning is the engine that carries the discipline forward.[174] The practitioner must be able to make determinations of "threshold relevance" to determine which past cases are salient to the present dispute, and then make judgments of "robust" relevance, grouping "like

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[167] Postema, *supra* note 165, at 602; *see also* Scharffs, *supra* note 166, at 2276 (noting that the idea of "adjudication being done 'by hand,' one case at a time, is central to our idea of justice").

[168] *See* Postema, *supra* note 165, at 602–03; *see also* EISENBERG, *supra* note 166, at 4 (observing that one of the "paramount" functions of the common law courts is "the resolution of disputes"); Postema, *supra* note 165, at 594–95 (recognizing that "artificial reason" of the common law is pragmatic, contextual, and nonsystematic).

[169] *Cf.* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 121–36 (1996) (defending casuistic approach). *See generally* ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988) (articulating and defending tradition of case-based ethical reasoning).

[170] *See* LLEWELLYN, *supra* note 166; *see also* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 245 (1973) (noting that appellate opinions "constituted almost the only evidence adduced to support [Llewellyn's] descriptive thesis").

[171] Postema, *supra* note 165, at 603.

[172] Simpson, *supra* note 164, at 95 (common law requires the "transmission of traditional ideas and the encouragement of orthodoxy," as well as "pressures against innovation").

[173] *See* Postema, *supra* note 165, at 603–04; *see also* LEVI, *supra* note 166, at 1 ("The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case."); *id.* at 5 ("What does the law forum require? It requires the presentation of competing examples.").

[174] *Cf.* EISENBERG, *supra* note 166, at 87 (recognizing that extending precedent by analogy is "the mirror image of the process of distinguishing [cases]"); Gerald Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 155 (2002) ("[C]ommon law anchors solidly in the past its normative demands on present actions and guidance for future actions.").

cases" while distinguishing others.[175] Assessments of relevance, which often are sufficient to decide cases, are not deductive or scientific 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.[176]

Common law theorists recognize that analogical reasoning will not always provide clear answers. Sometimes competing analogies and authorities make for very close calls.[177] At other times, precedent may provide a tight analogy, but those prior authorities may run against the broader grain of current doctrine even if it is still "good" law. For example, in a jurisdiction that has recently rejected contributory negligence in favor of comparative negligence and joint-and-several liability in favor of probabilistic apportionment of responsibility, earlier cases barring market-share liability as overly speculative are less likely to be sources of further doctrinal development.[178] Common law traditionalists also maintain that doctrine must be justified by some objective, normative metric.[179] For that reason, reasoning by analogy to an objectively odious precedent will have little force.[180] To understand how courts operate beyond the confines of analogy, it is helpful to understand common law reasoning's *collaborative* quality.

The "artificial reasoning" judges and lawyers use to expound the common law is collaborative in that it is "a practice of thinking, arguing, deliberating, and deciding in common."[181] Law seeks to guide action, so common law rulings must provide intelligible justifications that mesh with the community's lived norms and expectations.[182] As Llewellyn put it, a good judge's decisions should be "reckonable" and offer "reasonable regularity" in light of the legal community's expectations.[183] This is not to say

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[175] Postema, *supra* note 165, at 604.

[176] *See id.* (arguing that judges assess relevance because they "have been law-conditioned" and "see significances . . . through law-spectacles") (quoting LLEWELLYN, *supra* note 166, at 19); ARISTOTLE, THE NICOMACHEAN ETHICS VI. vii.7, 1141b (David Ross trans., Oxford World Classics 2009); JONSEN & TOULMIN, *supra* note 169, at 64–68 (explaining distinction between theoretical knowledge and practical wisdom).

[177] *See* Postema, *supra* note 165, at 608.

[178] *Cf.* Sindell v. Abbott Labs., 607 P.2d 924, 937 (1980) (allowing a plaintiff to hold manufacturers liable in proportion to their share of the market of a defective, fungible product at the time of harm); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. a (stating that the emergence of "[c]omparative responsibility has a potential impact on almost all areas of tort law").

[179] *See, e.g.*, EISENBERG, *supra* note 166, at 44–47 (arguing that common law decisions must be sufficiently congruent with objective social norms and sufficiently coherent with other existing legal doctrines).

[180] *See id.* at 86–87.

[181] Postema, *supra* note 5, at 8; Postema, *supra* note 165, at 603.

[182] *See* Postema, *supra* note 165, at 610–14; Postema, *supra* note 5, at 8–10.

[183] LLEWELLYN, *supra* note 166, at 216; *see also* EISENBERG, *supra* note 166, at 2–3 (asserting that common law justification turns in substantial part on the doctrine's congruence with objective "social propositions"); LEVI, *supra* note 166, at 6 (stating that common law "process is one in which the ideas

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.[184] In fact, for some traditionalists, the collaborative aspect does not even require social consensus on norms; the shared understanding only requires recognition of a reason as intelligible and widespread.[185]

The collaborative aspect of common law reasoning and its requirement of reckonability channels judicial creativity when analogical reasoning runs out and reduces the chances that the judge's reflection will produce a mere private opinion backed by the force of the state.[186] This collaborative facet also underlies the common law's rhetorical structure. The common law unfolds through deliberation and argument between parties before a court, and through an ongoing discussion between the court and the legal community.[187] As in Aristotelian practical reasoning, the purpose of legal argument is to persuade 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."[188]

To avoid confusion, it is worth comparing this approach to Ronald Dworkin's theory of law-as-integrity, which also seeks to distinguish adjudication from discretionary legislation. 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 structure of institutions and decisions . . . in a better light from the standpoint of political morality."[189] There is some affinity between Dworkin's approach and the traditionalist account above, particularly when a judge

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of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions"); Postema, *supra* note 165, at 612 (explaining that common law reasoning must be "congruent with background social practices and widespread public understandings of them"); Simpson, *supra* note 164, at 95 (arguing that the 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").

[184] Postema, *supra* note 165, at 609 (explaining that collaborative reasoning limits discretion because "officials and citizens . . . can anticipate or at least recognize and find [doctrines arising from past decisions] intelligible"); *cf.* Larry Alexander, *The Gap*, 14 HARV. J. L. & PUB. POL'Y 695 (1991) (discussing the necessary discontinuity between morality and institutionalized law).

[185] *See* Postema, *supra* note 165, at 615. *But see* Simpson, *supra* note 164, at 98 (arguing that a breakdown of "shared values" threatens stability of the common law tradition).

[186] Postema, *supra* note 165, at 609; *see also* EISENBERG, *supra* note 166, at 150 (arguing that compliance with "society's existing standards" gives force to law).

[187] *See* Postema, *supra* note 165, 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."); *see also* EISENBERG, *supra* note 166, at 12–13 (describing conversations between courts and legal profession); Fuller, *supra* note 6, at 94 (noting that adjudication is marked by reasoned argument before a judge who must give a reasoned resolution); Simpson, *supra* note 164, at 97 (recognizing common law as "an oral tradition, still only imperfectly reduced to published writing").

[188] JONSEN & TOULMIN, *supra* note 169, at 72–73.

[189] RONALD DWORKIN, LAW'S EMPIRE 256 (1986).

must appeal to broader principles when analogy and precedent do not provide clear answers, but they are not identical. The common law's pragmatic, analogy-based approach seeks "workability on the ground," not the "coherence of broad moral vision" sought by Dworkin's Judge Hercules.[190] 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.[191] Dworkin recognizes that a practiced jurist's decisions are "a matter of feel or instinct rather than analysis," but he seeks to "impose structure on [that judge's] working theory"[192] by translating hard-case adjudication into deduction from moral principles inherent in legal doctrine. Common law traditionalism, with its emphasis on tacit knowledge and situation sense, resists such Platonic aspirations.

All told, we can understand this conception of common law as a "practice" and "tradition" in the sense 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."[193] Successful practitioners accept and internalize the norms of the practice, understand their success on those terms, and enter into a relationship with current practitioners and with the predecessors who made the practice what it is today.[194] To be sure, the standards of a traditional practice are not immune from criticism and reform; any practice devoid of such arguments may well be dead or at risk of desiccation.[195] This argument occurs, however, within the framework of the tradition's standards, thus allowing the practice to grow and flourish while still being continuous with the past.[196]

Through this lens we can understand the common law lawyers' claim that their discipline of practical reasoning is a traditional practice distinct from ordinary reasoning about means and ends.[197] The importance the common law places on precedent, both as a presumptive norm and as a re-

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[190] Postema, *supra* note 165, at 608–09.

[191] *Id.* at 609.

[192] DWORKIN, *supra* note 189, at 256.

[193] ALASDAIR MACINTYRE, AFTER VIRTUE 187 (2d ed. 1985). Less immediately relevant for this discussion is MacIntyre's assertion 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.*

[194] *Id.* at 194 ("To enter into a practice is to [accept] . . . the authority . . . of a tradition which [one] must confront and from which [one must] learn.").

[195] *Id.* at 222 ("A living tradition . . . is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.").

[196] *Id.* at 221–22 (explaining that such argument allows the practice to "transcend[] through criticism and invention the limitations of what had hitherto been reasoned in that tradition").

[197] *See* Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMW. L.J. 1, 2–3 (2003) (describing Hale and Coke's argument that the "artificial reason" of the common law is distinct and superior to unaided, natural reason); Simpson, *supra* note 164, at 95–96 (describing the common law as a tradition into which its participants must be initiated).

source for further development, suggests a living, developing tradition,[198] as does the belief that only through study and practice can a lawyer develop the skill of reasoning from precedent. Moreover, the requirement that a judgment be intelligibly explained and justified forces the common law lawyer to 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 law lawyer, for such skills "must be gained by the habituating and accustoming and exercising that faculty by reading, study, and observation" of the law.[199] As the next subsection explains, this claimed faculty of tradition-embedded reason and judgment underwrites the common law lawyer's case against deference to agencies' common law interpretations.

2. *Common Law Traditionalism Against Deference.*—If Congress conceives of the common law in the manner of a traditionalist, it is far less plausible to read statutorily embedded common law as a delegation of law-making authority to agencies. Instead, imputing the traditionalist understanding to Congress would suggest that embedded common law is a statutory variable whose meaning is to be 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 deference to acts of interpretive discretion at Step Two. In assuming that there are "easy" cases which can be resolved at Step One, that 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.[200] A precedent's holding is not like a statute with plain, binding meaning, but is rather provisional or presumptive evidence of what the law is on a given matter. These existing formulations of doctrine are "often imperfect and always subject to reconsideration in light of further cases."[201] So even if an instant case is analogous to governing precedent, a judge still must decide whether the precedent maintains the support of the legal community and runs with the grain of doctrine in that particular field.[202] Of course, the goods of finality and social coordination will give presumptive weight to

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[198] *See* Simpson, *supra* note 164, 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.").

[199] 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, 505 (7th ed. 1956), *quoted in* Postema, *supra* note 165, at 594.

[200] *See* EISENBERG, *supra* note 166, at 151–53; LEVI, *supra* note 166, at 3; Postema, *supra* note 165, at 605–06; Simpson, *supra* note 164, at 95.

[201] Postema, *supra* note 165, at 605.

[202] *See* EISENBERG, *supra* note 166, at 153 (arguing that cases are "easy" only if they "fall within a doctrinal rule that is justified" by the standards of common law practice).

existing precedent in that inquiry.[203] Nevertheless, that inquiry is neither the deductive reasoning from clear commands (Step One) nor the policy-infused gap-filling (Step Two) into which *Chevron* divides the world of statutory interpretation. This traditionalist common law reasoning requires a faculty of judgment gained through acculturation and experience in a practice. To assume that Congress contemplated the *Chevron* framework when it embedded common law in a statutory regime is to confuse legal paradigms and to channel legal decisions from trained judges to agencies that are at best untutored in the relevant craft.[204]

Second, *Chevron* deference is premised on the notion that an interpreting agency makes a policy choice within a realm of reasonableness. The traditionalist does not understand the common law judge to be in the position of an agency at *Chevron* Step Two. 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 the court."[205] 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.[206] Adjudication "is not to provide a surrogate for individual deliberation leading to public [action]," but rather seeks to "provide a discipline and a body of resources" to find "'the common reason of the thing[s]'" that otherwise divide citizens and philosophers.[207] Even when lawyers struggle to find that common reason, disagreement about what the law requires is not disagreement about what political morality or good policy require. At most, common law judges labor to identify communal norms through this practice of reasoning and argument, a task different than deciding what the *best* policy is in a given situation.[208]

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[203] *See* Postema, *supra* note 165, 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, 221–23 (1987) (articulating a "Burkean" theory of precedent that gives weight to previous decisions, but does not treat them as preemptive rules).

[204] Or, to the extent that the statutory framework is a more "modern" paradigm of legal reasoning and ontology than common law traditionalism, applying *Chevron* to embedded common law imputes anachronistic reasoning to Congress.

[205] Simpson, *supra* note 164, at 78; *see also id.* at 79 ("In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution.").

[206] *See* EISENBERG, *supra* note 166, at 150; Postema, *supra* note 165, at 608–09 (citation omitted).

[207] Postema, *supra* note 165, at 595, 619.

[208] For this reason, traditionalism may be in a stronger position to resist *Chevron* deference than Dworkin's law-as-integrity theory, in which a 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." DWORKIN, *supra* note 189, at 256. If reasoning about political morality does most of the

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.[209] Even in a novel case, the court claims to find and apply existing legal rights and duties, not to author new legal obligations.[210] That claim sounds old-fashioned and mystical, but one does not have to believe in a realm of immutable legal forms in order for the notion of judges "finding" law to be plausible. 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 that, upon reflection, *of course* this what any good chess player should have done. Applying a tradition's tacit knowledge and practices to new problems can be at once a creative act and one contemplated and guided by the practice's collective memory and standards of excellence.[211] Just as a trained musical ear can sense which note will follow in a previously unheard melody, an 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.[212]

Finally, common law traditionalism also departs from *Chevron*'s rule formalism. The "rules" of which common law judges often speak are tentative, noncanonical formulations of the "output[s]" of the common law method, not the starting point for deductive reasoning.[213] This is due to the inherently provisional character of such unwritten law, which draws its force by virtue of its intelligibility and "continued reception" in the legal community.[214] Precedents, and the "rules" one may abstract from them, provide useful (and perhaps presumptively binding) examples of legal reasoning, but nevertheless serve to "invite and focus" legal deliberation rather

critical work, this process is vulnerable to the objection that it is better done by accountable officials limited only by the check of *Chevron* Step Two.

[209] *See* EISENBERG, *supra* note 166, at 156–57; Postema, *supra* note 165, at 596, 600–01, 618; Simpson, *supra* note 164, at 78, 86, 91–93.

[210] *See* EISENBERG, *supra* note 166, at 140, 157; Simpson, *supra* note 164, at 78.

[211] *See* Scharffs, *supra* note 166, at 2329–30 (exploring the experience-based tacit knowledge involved in applying the legal craft).

[212] *Cf.* Fuller, *supra* note 6, at 110 (arguing that adjudication is not legislation, but development "case by case what [society's] aims or directives demand for their realization in particular situations of fact").

[213] Postema, *supra* note 165, at 605; *see also* ANTHONY KRONMAN, THE LOST LAWYER 220 (1993) ("[T]he 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."); EISENBERG, *supra* note 166, at 156 ("To determine the content of the common law, courts do not begin with doctrinal propositions adopted in past texts and work backward to determine their validity; they begin with a set of institutional principles and work forward to generate legal rules.").

[214] Simpson, *supra* note 164, at 85–86; *see also* Postema, *supra* note 165, at 596, 600–01 ("[A rule's] normativity depends on its being treated as such by those who practise it.").

than to preclude it.[215] 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."[216] It thus does not follow that a common law standard in a statute is a placeholder for further lawmaking by an agency.

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. Rather, the traditionalist would 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.[217]

While *Chevron* emphasized an agency's comparative technical expertise and political accountability, those advantages shrink under the traditionalist understanding. 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 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."[218] This expertise-based rejection of *Chevron* echoes the seventeenth 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 of England."[219]

The collaborative aspect of common law traditionalism also differs from the aggregation and comparison of democratic preferences that *Chevron*'s discussion of accountability may suggest. Common law doctrines indeed have force "because of their continued reception" in the legal community,[220] and perhaps the community at large.[221] But at its most ambitious,

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[215] Postema, *supra* note 165, at 597; *see also* Scharffs, *supra* note 166, at 2286 ("[B]eing a good craftsperson is not reducible to following a prescribed set of rules." (citation omitted)).

[216] EISENBERG, *supra* note 166, at 77.

[217] *Cf.* Peters v. Ashcroft, 383 F.3d 302, 305–06 (5th Cir. 2004) (withholding deference to agency's interpretation of state law referenced in statute).

[218] Burgin v. Office of Pers. Mgmt., 120 F.3d 494, 497–98 (4th Cir. 1997) (internal quotation marks and citation omitted).

[219] Postema, *supra* note 197, at 1 (quoting *Prohibitions del Roy* (1607), *in* EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, IN THIRTEEN PARTS, 12th Report 63, 65 (1793)).

[220] Simpson, *supra* note 164, at 86; *see also id.* at 95, 97 (stating "[the] relative value of formulated propositions of the common law depends upon the degree to which such propositions are accepted as accurate," and "settled doctrines . . . of common law are settled because . . . they happen to be matters upon which agreement exists").

common law traditionalism claims to be a discipline of practical reasoning that explores precedent for commonly intelligible and appealing solutions to individual disputes, and thereby transcends politics.[222] By contrast, orthodox administrative law doctrine allows 180-degree policy reversals so long as the agency gives some nonarbitrary explanation for its departure.[223] While some critics claim that American law is "an index of [society's] conflicts,"[224] common law traditionalism aspires to find common, pragmatic solutions within a practice that is responsive to societal norms, but not reducible to them.[225]

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 advantage while also freeing courts from undue respect to idiosyncratic or result-driven interpretations of the law. And this appears to be what many nondeferring courts do; the D.C. Circuit, for example, withholds *Chevron* deference to the NLRB's interpretation of agency law, but will give "due weight" to the interpretation if the agency "made a choice between two fairly conflicting views."[226]

* * *

Common law traditionalism, like the statutory model of common law which opposes it, is controversial. Realists, social scientists, and critical theorists see the claims of craft knowledge as, at best, a form of mysticism which overstates law's determinacy and obscures the political bases of adjudication.[227] Others, particularly formalists, are skeptical of the coherence

[221] Postema, *supra* note 165, at 612 (arguing that law can only provide normative guidance if it is "congruent with background social practices and widespread public understanding of them").

[222] *Cf.* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 782 (2007) (stating that *Brown & Williamson* and *Gonzales v. Oregon* indicate that deference may turn on an agency's "functional" political accountability, not merely the "formal" accountability flowing from presidential elections).

[223] *See, e.g.*, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review" than the arbitrary and capricious test).

[224] MACINTYRE, *supra* note 193, at 254.

[225] *See* Postema, *supra* note 165, at 612–15.

[226] Int'l Longshoremen's Ass'n v. NLRB, 56 F.3d 205, 212 (D.C. Cir. 1995) (internal quotation marks and citation omitted).

[227] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870–1960, at 250 (1992) ("In much the same way that scholarly fields as disparate as literary criticism and philosophy turned inward to technical questions of professional craft and technique, Llewellyn appears to have continued to do 'open penance' for the destabilizing consequences of realism. In a period in which it was common to deplore the loss of a sustaining faith in legal objectivity, Llewellyn offered a new basis for belief in professional craft as the source of predictability and stability in law."); William Twining, *The*

and efficacy of the traditionalist's claims about reasoning by analogy.[228] But like the statutory model of common law, traditionalism also resonates in contemporary legal discussion. Jurists and practitioners no longer speak of the common law as the "artificial perfection of reason."[229] Yet many still affirm (or at least act as if they believe) that through "long study, observation, and experience," practitioners of the common law craft can reach *reasoned* resolution of difficult or novel problems.[230] For 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 INSTITUTIONALISM

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.[231] Courts and commentators regularly use institutional analysis to answer similar questions about the scope of *Chevron* deference.[232] Indeed, *Chevron*'s emphasis on agencies' technical expertise and political responsiveness is a nod in the institutionalist direction. This Part undertakes an institutionalist assessment of the question of deference to agency interpretations of common law. On most variables, the analysis offers plausible ar-

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Idea of Juristic Method: A Tribute to Karl Llewellyn, 48 U. MIAMI L. REV. 119, 124 (1993) (asserting that critical scholars like Horwitz viewed "Llewellyn as a radical who . . . sold out to conservative forces").

[228] *See, e.g.*, Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57 (1996); Frederick Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454 (2008). *But see* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999).

[229] COKE, *supra* note 219, at 65.

[230] *Id.*

[231] *See* Sunstein & Vermeule, *supra* note 12, at 925–32.

[232] *See id.* (supporting an institutional approach to decision making); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 225 (2006) ("Where agencies rather than courts are charged with updating statutes to reflect public values, it follows that courts should defer to agencies whenever the current meaning of a statute discloses a gap or ambiguity."); Kenneth A. Bamberger, *Normative Canons in the Review of Agency Policymaking*, 118 YALE L.J. 64, 84–108 (2008) (applying institutional analysis to the question of deference to agency applications of normative canons of statutory interpretation); Garrett, *supra* note 39, at 2638–39 ("[T]he judicial branch decides whether or not to defer to agencies based on judges' views of policy, institutional competence, and other factors."); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 779–80 (2008) (applying institutional analysis to the question of deference to agency conclusions that a statute preempts state law).

guments for both courts and agencies. Empirically testing these competing intuitions, however, appears to be quite daunting.

A helpful model for institutional inquiry is Professor Merrill's analysis of whether courts or agencies should decide if a statute preempts state law.[233] Merrill's approach is appealing because his analysis is clear, careful, and thorough. Furthermore, the preemption and the common law deference questions are structurally similar. The preemption inquiry marks the intersection of statutory interpretation and the application of "constitutional common law" implicated in a regulatory regime.[234] As when it applies the Restatement of Agency,[235] an agency undertaking a preemption analysis interprets statutory language in light of extrastatutory, precedential norms. Merrill identifies three sets of criteria for his approach: constitutional variables, interpretive variables, and pragmatic variables. The institutional analysis below follows a modified version of that inquiry by discussing and applying each of Professor Merrill's three sets of criteria in turn.[236]

A. *Common Law Variables*

The first set of criteria identified by Professor Merrill are "constitutional" variables, which track an institution's ability to apply constitutional doctrine involved in preemption questions. Because we are concerned with the application of common law rather than preemption doctrine, we can ask by analogy how both institutions measure up along *common law* variables. We therefore consider which institution will (1) be more "faithful" to the applicable common law doctrine; (2) better create "stable expectations about the relevant distribution of" rights and duties assigned under the common law doctrine; and (3) more readily "allow[] all affected actors to express their views" about the stakes in the dispute.[237]

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.[238] The case against an agency's comparative competence in this respect is similar to Professor Merrill's argument that "agencies clearly

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[233] Merrill, *supra* note 232, at 727 ("The law of preemption is ripe for reconsideration in light of this kind of comparative institutional analysis." (citation omitted)).

[234] *Id.* at 738.

[235] *See* RESTATEMENT (SECOND) OF AGENCY (2006).

[236] As a caveat, the forthcoming analysis is not geared toward particular common law problems, federal statutes, and agencies. Agency powers and practices vary, as do relevant agencies' skill sets. A thoroughgoing institutional analysis must take into account such variations on a statute-by-statute and agency-by-agency basis. The discussion below will lack this specificity, but provides a framework for more granular inquiries.

[237] Merrill, supra note 232, at 747.

[238] *Id.* at 748.

fall short" with respect to "constitutional variables."[239] 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 be concerned about careful application of common law.[240] 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 ultimately precedential reasoning. A court, familiar with the strictures of stare decisis, is more likely to be adept at this form of reasoning and less likely to allow a broader policy agenda to color its application of the common law.[241]

On the other hand, one might challenge the premise of neutral, legal expertise that underlies the argument against deference presented above. *Chevron* does not apply to "easy" cases, and judges are likely to disagree on the resolution of closer cases. Though a traditionalist would likely deny it, these disagreements may well turn on considerations of political morality and policy. Agencies, an institutionalist could argue, are more politically accountable than courts. Furthermore, to the extent that common law reasoning is in substantial part contextual reasoning, agencies' expertise in the regulatory theater would recommend them over courts. On these grounds, agencies rather than generalist federal 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 its choice is within a zone of reasonableness, courts should not second-guess this solution.[242]

2. *Stability.*—Professor Merrill's second constitutional variable recognizes that legal doctrine should "reflect a pattern that is stable over time."[243] This is equally important with statutorily embedded common law. A compliance officer trying to understand what counts as a "material" violation of the commodities trading rules,[244] or a union deciding whether a group of potential members are likely to be counted as "independent contractors,"[245] will readily understand the value of a predictable legal environment.

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[239] *Id.* at 755.

[240] *Id.*

[241] *Cf.* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting) (arguing against deference on preemption questions because agency not designed to be sensitive to federal-state balance); Merrill, supra note 232. at 756 ("There are also reasons to worry about bias on the part of agencies in favor of exclusive federal regulation."). *But see Watters*, 550 U.S. at 20–21 (majority opinion avoiding deference question).

[242] *Cf.* Cass R. Sunstein, *Is Tobacco A Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998) ("[A]gencies have become modern America's common law courts, and properly so.").

[243] Merrill, *supra* note 232, at 748.

[244] R&W Technical Servs. Ltd. v. CFTC, 205 F.3d 165, 169 (5th Cir. 2000).

[245] Aurora Packing Co. v. NLRB, 904 F.2d 73, 75 (D.C. Cir. 1990).

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, they can often reverse interpretations at their own initiative, rather than waiting for the appropriate case or controversy.[246] Generalist courts are also more likely 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.[247] 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 counterargument in favor of agencies looks to the danger of courts interpreting the same statute differently.[248] The NLRB may shade its application of "employee" in light of labor policy goals, but it will do so with one voice for all employees 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.[249] 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.[250]

3. Representation.—Professor Merrill's model also requires us to consider which institution will better allow "the interests of all affected parties [to be] represented in the process" of applying the common law.[251] The argument in favor of agencies is the most intuitive, given the broader participation rights in proceedings like notice-and-comment rulemaking.[252] This advantage is less significant in the case of formal adjudication, which af-

[246] Merrill, *supra* note 232, at 756. As a recent example on preemption, President Obama repudiated the preceding administration's willingness to override state law. *See* Memorandum for the Heads of Executive Departments and Agencies, Preemption (May 20, 2009), 74 Fed. Reg. 24693 (May 22, 2009); Center for Progressive Reform, Federal Preemption: Undercutting State Protections for Health, Safety and the Environment, http://www.progressivereform.org/preemption.cfm (last visited Sept. 12, 2010) ("On May 20, by the stroke of a pen, President Obama reversed the Bush administration's preemption policy, ending the Bush attempt at stealth tort reform.").

[247] *Cf.* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (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 parol evidence rule based on whether the outcome would promote the public interest, so long as its application of the malleable rule was reasonable.

[248] VERMEULE, *supra* note 232, at 208 (asserting that *Chevron* prevents the "balkanization of federal law").

[249] Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105–17 (1987).

[250] VERMEULE, *supra* note 232, at 224 (maintaining that deference reduces "decision costs").

[251] Merrill, *supra* note 232, at 749.

[252] *See id.* at 756 (contending that notice-and-comment, when employed, can give agencies institutional advantage compared to courts); PIERCE, *supra* note 17, § 7.4, at 443–44 (claiming that agency's failure to respond to criticism of proposed rule increases risk of reversal on appeal).

fords narrower participation rights than rulemaking.[253] 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.[254]

An institutionalist argument for courts focuses on the superiority of adjudication in courts. A problem "may be so specialized and varying in nature" that it is not distillable to a single rule, the agency may not have sufficient experience to confidently adopt a rule, or "unforeseeable situations" may limit the usefulness of legislative rules.[255] If common law rules are best cultivated in a case-by-case fashion, and courts have greater expertise with such decisionmaking, this advantage could counterbalance agencies' representational advantage 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.[256] If oral argument improves decisionmaking and is more common in courts, agencies' advantage on this count may further narrow.

B. Interpretation

The second criterion is one Professor Merrill calls "interpretative."[257] Good decisions about preemption require an "accurate" and "fair" reading of the statutes involved.[258] Principled interpretation involves "a degree of predictability and stability," and "[n]early all" interpretive theorists would agree that such characteristics are a virtue of good decisionmaking.[259]

Interpretive skills are equally 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

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[253] 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* M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383, 1433 & n.174 (2004).

[254] *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* La. Ass'n of Indep. Producers and Royalty Owners v. FERC, 958 F.2d 1101, 1112–13 (D.C. Cir. 1992) (holding that officials may meet with a party to discuss agency business related to the dispute, but not concerning the merits of a pending adjudication).

[255] SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

[256] 5 U.S.C. § 556(b), (d) (2006); PIERCE, *supra* note 17, § 8.3, at 542 (asserting that agencies avoid hearings through "rules that define disputes in ways that make it difficult, or impossible, for a party to identify disputed issues of material fact").

[257] Merrill, *supra* note 232, at 747.

[258] *Id.* at 747, 752.

[259] *Id.* at 752; *see also id.* at 751 ("[W]hatever substantive theory of interpretation we adopt, interpretation can be carried on in a more or less principled fashion." (citation omitted)).

the court to modify the core concept.[260] 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 by gaining understanding of the statutory regime.[261]

The institutionalist argument for agencies here is identical to that 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.[262] To the extent that the meaning of a collateral provision of the statutory scheme is unclear, agencies have superior expertise to make—as well as political accountability for making—the policy choices involved in resolving ambiguity. On the other hand, as Merrill explains, "courts have a strong tradition of engaging in principled interpretation" that agencies do not.[263] While agencies may be superior interpreters of technical regulatory statutes they administer, Merrill doubts that agencies are the judiciary's equal in "good faith interpretation."[264] The notion of "principled" or "good faith" interpretation seems to be the critical difference between courts and agencies on this score.[265] 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.

C. *Pragmatic*

Professor 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."[266] To make such judgments, a decisionmaker must gather and analyze these "legislative facts" about society, the regulatory scheme, and the dy-

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[260] *Cf.* Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 544 (1994) (holding that 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).

[261] *See* Oldham, *supra* note 106, at 405–06 (observing that statutory background informs agency's interpretation of consent decrees).

[262] *See* Merrill, *supra* note 232, at 755 (arguing that "the agency may well have superior capacity to engage in principled interpretation" of "detailed federal regulatory statutes" it administers).

[263] *Id.* at 758.

[264] *Id.* at 755.

[265] Merrill identifies "principled" interpretation as "that which accounts for the text and other material conventionally regarded as bearing on questions of interpretation, responds to objections from others grounded in these materials, and offers a reasoned justification for the conclusion it adopts." *Id.* at 751.

[266] *Id.* at 743, 752.

namic effects of legal decisions on both.[267] The same goes 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,"[268] terms with roots in the common law of unfair competition. The Federal Trade Commission (FTC) implements these provisions through rulemaking and formal adjudication.[269] If, as courts presume in other contexts, the common law is the starting point for understanding these terms, and if common law doctrine and its growth are context dependent, the question arises whether an agency like the FTC is best suited to gather relevant legislative facts.

As in the preemption context, there is very good reason to believe that agencies like the FTC "excel on the pragmatic variables."[270] 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 gathering facts and "undertak[ing] wide-ranging investigations"; by contrast, a lay judge's understanding will "be fragmentary and quite likely outdated."[271]

Accordingly, the most plausible institutional argument in favor of courts questions how the agency will use these superior powers. Recall that the fact-gathering body is often the same one that undertakes rulemaking and decides adjudications, and the fact-finder'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 players, or simply implementing the agenda of the President or interested members of Congress.[272] Consequently, an agency's findings may be in part a function of what it sought, not an objective assessment.[273] 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

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[267] *Id.* at 753. *See id.* (defining "legislative facts" as "facts about society and about how different institutions and incentives influence the behaviour of different actors within society" and distinguishing them from "adjudicative facts" regarding "who did what when and where in some historical episode").

[268] 15 U.S.C. § 45 (2006).

[269] *See id.* (giving the 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* note 253, at 1399 & n.48.

[270] Merrill, *supra* note 232, at 755.

[271] *Id.* at 755, 758; *cf.* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (exploring the limits of case-by-case litigation).

[272] *Cf.* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 207 (2004) (arguing that due process principles should preclude affording deference when agency's interpretation is "arguably self-interested").

[273] Of course the judicial skeptic would argue that the same holds for judges. Courts, the judicial advocate would reply, at least have institutional norms of objectivity that may limit politicization, while an agency with an explicit mandate to *implement* politics does not.

be found, such that bias can skew the agency from the truth that exists. 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 basis of pragmatic variables 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 court with greater interpretive experience is more adept at interpreting common law doctrine in 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 such reversals; the likelihood that federal courts will diverge in their interpretations; and the costs of such disagreement. There are also optimizational 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.

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."[274] Institutionalism's adherents concede that their research project, while valuable and feasible, is "in its infancy."[275] At this point, the most institutional analysis can offer on the question of deference to common law interpretations is a ready framework for expressing and focusing our intuitions about how courts and agencies work.

V. IMPLICATIONS

If the analysis in Parts III and IV 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 ad-

[274] Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 965, 967 (2003).

[275] Cass R. Sunstein & Adrian Vermeule, *Interpretive Theory in Its Infancy: A Reply to Posner*, 101 MICH. L. REV. 972, 978 (2003).

judication, 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 either 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 interpretations 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—discussed in greater detail below—is overdrawn. Second, the debate over common law sheds light on other unresolved, individual deference questions, and may provide a key to understanding disagreement over the meaning of *Chevron* generally. Third, the confusion about deference to common law interpretations, 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.[276] Examples of such "first-best" approaches in contemporary debates in statutory interpretation are dynamic, textualist, and pragmatic approaches to interpretation.[277] The general theoretical disagreement relevant to this Article is the competing "first-best" understandings of common law reasoning offered by the statutory and traditionalist understandings of common law adjudication.[278] Advocates of institutional analysis contend it is impossible to decide which of these competing approaches to statutory interpretation is best in principle without assessing the capacities of the institutional actors who would be applying those theories. They argue that, at a minimum, "[i]t is impossible to derive interpretive rules directly from first-best principles" without considering the strengths

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[276] Sunstein & Vermeule, *supra* note 12, at 887.

[277] *See id.* at 904. *See generally* Richard A. Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 235, 235–53 (Morris Dickstein ed., 1998) (describing the pragmatic approach); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (discussing a dynamic approach); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695 (1997) (advocating a textualist approach).

[278] Fittingly, institutionalists identify disagreement between Blackstone and Bentham, early advocates of forms of traditionalist and statutory understandings of common law, respectively, as an example of disagreement about "first-best" approaches to statutory interpretation. *See* Sunstein & Vermeule, *supra* note 12, at 890–97.

and limitations of the actor trying to apply those principles.[279] More strongly, proponents of institutional analysis contend that their approach may be *sufficient* to resolve interpretive problems.[280] Professors Sunstein and Vermeule—both institutionalists—explain that it is "simply a logical blunder to suppose that interpreters must agree upon some *particular* theory" to resolve interpretive problems.[281] Institutional analysis "rests ultimately on empirical judgments about the capabilities of different legal institutions,"[282] and while such analysis may be challenging, its practitioners argue it nevertheless helps to avoid indeterminate and interminable theoretical debate.[283] Part IV 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 example 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. Temporary national

[279] *Id.* at 914.

[280] *Id.* at 915 ("[An] assessment of institutional issues might, in some cases, be not only necessary but indeed sufficient to resolve conflicts over interpretive theories, simply because the assessment might lead people with different views on the theoretical issues to agree on the appropriate practices.").

[281] *Id.* at 916.

[282] Merrill, *supra* note 232, at 779.

[283] Sunstein & Vermeule, *supra* note 12, at 885 ("[M]ost of the time, large-scale claims of these kinds cannot rule out any reasonable view about interpretation.").

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 to the predictability offered by a legislature whose dictate is uniform within a limited range of a statute subject to amendment.[284]

More basically, the above analysis reveals how institutionalist arguments presume controversial theories of law and legal error.[285] This point is particularly clear in discussions of bias and capture. A common law traditionalist will see an agency's tendency to choose a merely plausible interpretation that suits its policy goals, rather than the most reasonable one that does not, as an institutional vice. 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 nontraditionalist 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 define an erroneous choice 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, *Chevron* gives courts time to handle matters within their core competency while allowing agencies to apply their expertise to administrative matters. 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 institutional-

[284] Institutionalist arguments in favor of courts regarding the "representation" variable may also be theory dependent. Valuing case-by-case decisionmaking over *ex ante* rulemaking and trusting in the efficacy of oral argument in open court are stances characteristic of the traditionalist understanding of common law.

[285] *Cf.* Posner, *supra* note 274, 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.").

isms 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 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 one's conception 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 arguments over deference to common law interpretations is mirrored in a host of other deference debates, including that 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 indicates that critical thinking about deference to embedded common law can aid our understanding of a wider swath of administrative law questions. The section addresses four unresolved deference problems with analytical structures identical to common law interpretations: (1) the intersection between *Chevron* and so-called "normative canons" of statutory interpretation; (2) deference to agency interpretation of "major" questions and jurisdictional grants; (3) review of agency interpretations of "pure" questions of statutory interpretation; and (4) *Chevron*'s Step Zero itself. Thinking through the problem of common law interpretations can provide answers to these problems or at least diagnose the source of deeper judicial and scholarly disagreement over them.

1. Normative Canons.—Normative canons are rules of statutory construction that direct courts to resolve ambiguities with an eye not toward identifying what Congress meant or said, but rather toward advancing important norms and policies that would otherwise go underprotected.[286] 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.[287] Normative canons—

[286] *See* Bamberger, *supra* note 232, at 72; *see also* Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 356 (2007) ("According to the common account, normative canons guide the choices that interpreters must make when they confront a set of possible interpretations, none of which seems substantially more likely than the others to reflect what members of Congress understood themselves to be enacting."); Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lowly Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (coining and defining the term "normative canons").

[287] Bamberger, *supra* note 232, at 72–73.

as with *Chevron*—are often described as legal fictions about congressional intent.[288] *Chevron*, however, presumes congressional intention for agencies to resolve ambiguity, while the fictitious intent associated with normative canons traditionally places interpretive power in the hands of courts.[289] The question of whether a court's application of normative canons trumps *Chevron* has divided courts and commentators, including avowed institutionalists like Professors Sunstein and Vermeule.[290] Canons, like common law rules, may conflict with each other, can appear indeterminate in application, and require the balancing of policy priorities. As with common law and preemption, the issue of normative-canons deference lies at the intersection of judge-made law and statutory commands, and thus 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.[291] 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.[292] As with the common law, the antideference 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.[293] While Professor Sunstein rejects the "major question" exception, he has persuasively argued that it is best understood as a kind of normative

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[288] *Id*. at 73–75.

[289] *See* Ross, *supra* note 286, at 563 (arguing that normative canons "clearly reflect *judicial*, not congressional, policy concerns").

[290] *See* VERMEULE, *supra* note 232, at 201 (claiming that *Chevron* trumps canons completely); Bamberger, *supra* note 232, at 77–84 (cataloging circuit split), 111–25 (arguing that canons should be considered at *Chevron* Step Two); Sunstein, *Beyond* Marbury, *supra* note 8, at 2607–10 (contending that canons should trump *Chevron*).

[291] *See* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 492–93 (9th Cir. 2007) (en banc) (holding, for similar reasons, that the canon of constitutional doubt does not trump *Chevron*); VERMEULE, *supra* note 232, at 209, 215; Bamberger, *supra* note 232, at 83.

[292] *See* Bamberger, *supra* note 232, at 78–79; Sunstein, *Beyond* Marbury, *supra* note 8, at 2607–10.

[293] *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (citing *Brown & Williamson* to reject the notion that Congress delegated to the Attorney General authority to regulate physician-assisted suicide); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("In extraordinary cases [of major questions], there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

canon requiring a clear statement for congressional delegations of major decisions of national policy to agencies.[294] For this reason, the debate over a "major question" exception to deference should have the same structure as arguments about deference to normative canons more generally, and for that reason analysis about deference to common law interpretations can inform this question as well.[295]

A similar structure also pertains to disagreement about whether agencies should receive deference for interpretations of their own jurisdictional grants.[296] Often, as in *Brown & Williamson*, the "major" question concerns the agency's regulatory jurisdiction over a subject matter.[297] 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.[298] The case for deference is by now familiar: resolution of ambiguous jurisdictional questions turns on political choices about the appropriateness of such regulation—say, of tobacco—or expert assessments that jurisdiction over a matter—say, greenhouse gases—is feasible or necessary to implement the broader statutory mandate.[299] 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 in *Mississippi Power & Light* 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 special

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[294] Sunstein, Chevron *Step Zero*, *supra* note 8, at 232; *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 237 ("[A]lthough the Court never explicitly invoked the canon of avoidance, *Brown & Williamson*'s reasoning fits neatly within the Court's practice of aggressively narrowing administrative statutes to avoid serious nondelegation concerns.").

[295] Despite the analytical parallel this Article identifies, commentators like Professor Sunstein have not treated "major questions" the same as other normative canons. *Compare* Sunstein, Chevron *Step Zero*, *supra* note 8, at 243 (arguing "there is no justification for the conclusion that major questions should be resolved by courts rather than agencies"), *with* Sunstein, *Beyond* Marbury, *supra* note 8, at 2607–10 (contending that canons should trump *Chevron*).

[296] *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (examining disagreement over deference to jurisdictional interpretations).

[297] *See* 529 U.S. at 126 ("In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.").

[298] Accordingly, Professor Sunstein links jurisdictional questions and major questions in his discussion of *Chevron*'s Step Zero. *See* Sunstein, Chevron *Step Zero*, *supra* note 8, at 231–36.

[299] *See id.* at 235; *see also* Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring) (arguing for deference to agency's interpretation of its statutory jurisdiction); Conn. Dep't of Pub. Util. Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009) ("We afford *Chevron* deference to the Commission's assertion of jurisdiction.") (citation omitted).

expertise in interpreting a statute confining its jurisdiction."[300] To the extent Brennan's argument restates nondelegation concerns, it is of a piece with the case for judicial fidelity to extrastatutory norms. However, given that Brennan distinguishes between "pure questions" of statutory constructions and policy-laden questions, 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—the author of *Chevron*—wrote a majority opinion explaining that where there is "a pure question of statutory construction for the courts to decide," defining the term "is well within the province of the judiciary."[301] Justice Scalia objected that a pure question exception is unjustified under *Chevron*.[302] While some thought the pure question exception was soon abandoned,[303] as recently as 2004 a Stevens-led majority invoked it in withholding deference from the government's reading of the Foreign Sovereign Immunity Act.[304]

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 techniques. 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.[305] The question in *Cardoza-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 manageable 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 that a jurist sympathetic to common law traditionalism might think about "ordinary" statutory interpretation in simi-

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[300] 487 U.S. at 387 (Brennan, J., dissenting); *see also* N. Ill. Steel Supply Co. v. Sec'y of Labor, 294 F.3d 844, 846–47 (7th Cir. 2002) (withholding deference); Sales & Adler, *supra* note 296 (arguing against deference).

[301] 480 U.S. 421, 446–48 (1987).

[302] *Id.* at 452, 453–54 (Scalia, J., concurring).

[303] *See* NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 133–34 (1987) (Scalia, J. concurring); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187, 223–25 (1992).

[304] Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) (treating FSIA retroactivity as "a pure question of statutory construction . . . well within the province of the Judiciary") (quoting *Cardoza-Fonseca*, 480 U.S. at 446, 448).

[305] *See* Anthony, *supra* note 19, at 20–21 (arguing that courts could "readily" turn any question into a "pure question").

lar terms.[306] In fact, the progenitors of the traditionalist approach—seventeenth 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."[307] The Legal Process School, Judge Calabresi's proposal for judicial updating of statutes, and Professor Eskridge's dynamic statutory interpretation provide more modern analogues,[308] as does the D.C. Circuit's purposive, nondeferential construction of the Clean Air Act rejected in *Chevron*.[309] If the case for deference to common law interpretations 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 lawmaking authority from Congress to the agency.[310] 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.[311] Advocates for deference, in turn, claim that the agency *possesses* delegated authority,[312] 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

[306] *Cf.* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

[307] Postema, *supra* note 5, at 19; *see also* VERMEULE, *supra* note 232, at 19 (arguing that common law statutory interpretation is marked by "flexible treatment of statutory text, based on a nuanced sensitivity to legislative intentions or purposes and to the surrounding fabric of the common law").

[308] *See* VERMEULE, *supra* note 232, at 26–27, 40–45 (linking the Legal Process School and Eskridge to common law statutory interpretation). *See generally* CALABRESI, *supra* note 9 (arguing for more creative flexibility in judicial interpretation of statutes).

[309] *See* Natural Res. Def. Council v. Gorsuch, 685 F.2d 718, 725–28 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[310] United States v. Mead Corp., 533 U.S. 218, 229 (2001).

[311] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

[312] *See, e.g.*, Teper v. Miller, 82 F.3d 989, 998 (11th Cir. 1996) ("An agency . . . to which Congress has delegated broad discretion in interpreting and administering a complex federal regulatory regime, is entitled to significant latitude when acting within its statutory authority, even in its decisions as to the scope of preemption of state law.") (citation omitted).

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 conceives of "delegation" as a clear rule, preferably arising out of a statute. Under this "statutory" approach to *Chevron*, deference stems from positive grants of authority to agencies to impose legally binding commands.[313] Depending on the source one chooses, the delegation may be limited to an agency's exercise of legislative rulemaking,[314] or it may be broader and include any agency action that has the force of law.[315] More broadly, a court can treat *Chevron* as a strong precedential rule recognizing "a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce."[316] Whatever the scope of delegation, deference under statutory *Chevron* is not a mere creature of judicial grace, but rather is a product of Congress's grant of power to the agency. This grant is a *McCulloch*-style, necessary-and-proper flexibility afforded to agencies in the face of ambiguity.[317]

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 law-finding, 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.[318] Statutory *Chevron* also provides a clear, rule-like understanding of delegation.[319] 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.[320] A piecemeal approach would create uncertainties in individual cases and undermine *Chevron*'s ability to

[313] John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 207 (1998) (coining the phrase "statutory *Chevron*").

[314] *Id.* at 199–203 (identifying legislative rulemaking power as the statutory home for *Chevron* deference).

[315] *See, e.g.*, Merrill & Hickman, *supra* note 19, at 837 ("Congress impliedly delegates the power to interpret only when it grants the agency power to take action that binds the public with the force of law.").

[316] United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

[317] Duffy, *supra* note 313, at 199–203.

[318] *See, e.g.*, Osborn, *supra* note 136, at 118 (arguing that *Chevron* marks a clear shift toward a framework of legal positivism in judicial review).

[319] *See generally* Merrill, *supra* note 35, at 809 (arguing for a force-of-law delegation rule, rather than a standard that includes the level of agency formality).

[320] *See* ALEXANDER & SHERWIN, *supra* note 127; RAZ, *supra* note 137 (arguing that a legal rule should be applied without case-by-case reassessment of the rule's underlying justifications); SCHAUER, *supra* note 127.

encourage uniform interpretation of statutes across jurisdictions.[321] 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 as 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,"[322] but not exhaustive reasons. On this reading, a "common law *Chevron*"[323] basing deference 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.

When Professor Duffy coined the phrase "common law *Chevron*," he was not referring to the subsidiary question of deference to an agency's interpretation of common law doctrines like the employee–independent contractor distinction. The traditionalist rationale for exempting such questions from the *Chevron* delegation, however, parallels "common law *Chevron*'s" overarching justification for understanding Step Zero 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. In essence, *Chevron* deference from this "common law" perspective is itself a judge-made normative canon of construction, not a response to a statutory allocation of interpretive authority.[324] 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."[325] It is little surprise, then, that Justice Breyer's defense of a standard-like approach to *Chevron* justifies the exemption of major policy questions, and that Justice Stevens—whose *Chevron* opinion Duffy has described as the

[321] *See, e.g.*, *Mead*, 533 U.S. at 245 (Scalia, J., dissenting) ("The principal effect [of *Mead*'s limits on deference] will be protracted confusion."); Silberman, *supra* note 128, at 824 ("Wholly apart from jurisprudential doctrine, *Chevron* further affords practical advantages because it increases the prospect of uniform federal regulatory law and reduces the burden on the Supreme Court of ensuring that uniformity.").

[322] *Mead*, 533 U.S. at 229.

[323] Duffy, *supra* note 313, at 190.

[324] *See* Ross, *supra* note 286, at 568–70 (treating *Chevron* as a normative canon of statutory interpretation).

[325] Postema, *supra* note 165, at 613.

apotheosis of the common law approach to deference[326]—has led the charge to exempt "pure questions" of statutory construction. A common law traditionalist is more likely to embrace the "common law *Chevron*" approach to Step Zero and identify areas of judicial competence—such as the scope of "employee"—in which deference is inappropriate.

C. Chevron *and Legal Theory*

The question remains, then, whether "statutory" or "common law" *Chevron* is more appealing. Following statutory *Chevron*, at least in its broadest form, could make *Chevron* the *Erie* of the administrative state, putting agencies at the center of the interpretative universe and providing a clear, formal, and statute-based rule for deferring to agency constructions of ambiguous statutes.[327] The effects of statutory *Chevron* seem particularly sensible in cases where courts confront technical statutory questions that 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 into statutes by conceiving of those bodies of law as gap-filled codes and denying the autonomy of legal reasoning in difficult cases. Nevertheless, statutory *Chevron* is more controversial when agencies seek deference for interpretations of this law that judges make and shape. In such cases, courts are often inclined to adopt a "common law" model of *Chevron* and 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.[328]

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 traditionalist—who champions a "common law" Step Zero and its corresponding lack of deference to agency interpretations of common law doctrine—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

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[326] Duffy, *supra* note 313, 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.").

[327] 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 non-statutory norms were implicated in the question.

[328] Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting).

or prioritizing economic production, cannot be rationally solved through adjudication.[329] 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.[330] Tellingly, Fuller identified administrative agency tasks as examples of polycentric problems not amenable to traditional, issue-by-issue adjudication.[331] 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.[332] 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.[333]

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 standardless inquiry[334] or simply an opportunity to second-guess policy choices under the guise of neutral know-how.[335] 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

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[329] Fuller, *supra* note 6, at 111–21.

[330] *Id.* at 120. *But see* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (responding that models like Fuller's are too limited in conceptualizing adjudication's function).

[331] Fuller, *supra* note 6, at 117–20.

[332] *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.").

[333] *Compare* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) (holding that 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) (2006) (stating that habeas corpus "shall not be granted" unless underlying state court ruling involved an "unreasonable application of clearly established federal law" or "unreasonable determination of the facts").

[334] 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. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 901–14 (2004) (arguing that a meaningful rulemaking requirement would raise judicial administrability problems on par with the nondelegation doctrine).

[335] *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 870–71 (2006) (finding correlation between deference decisions and judicial ideology).

in consensus that may seem "old-fashioned, even quaint and mildly embarassing."[336] On the other hand, a belief in reasoned resolution of disputes about the meaning of the substantive common law doctrine (or the meta-common law of deference) by neutral, learned arbiters still has valence, at least as an aspiration. Like the statutory approach to deference, common law *Chevron* tugs both ways in the legal mind.

A theory of deference to common law interpretations 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."[337] 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 *within* the common law reasoning is quite sharp after the Realist attack on the autonomy of legal reasoning.[338] Accordingly, uncertainty about *Chevron*'s application to common law doctrine embedded in statutory regimes plausibly reflects that deeper tension between fiat, which counsels deference to policymakers, and reason, which does not.[339] If the pattern of uncertainty over deference to common law interpretations also emerges in multiple *Chevron* problems, including the Step Zero meta-question, that parallel suggests that confusion about the scope and nature of *Chevron* also 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."[340]

The *Chevron*-as-*Erie* understanding conceives 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 re-

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[336] Scharffs, *supra* note 166, at 2250 (quoting William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 148 (1993)).

[337] Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 376–77 (1946).

[338] *See id.* at 377 (discussing "the antinomy of reason and fiat as it affects case law").

[339] *Cf.* Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, *in* PRECEDENT IN LAW 73, 77 (Laurence Goldstein ed., 1987) (claiming that judges "exhibit a striking ambivalence . . . between [adjudicative] and positivist positions without noticing the theoretical inconsistency").

[340] *See* Perry, *supra* note 203, at 216.

conciling ourselves to complexity than by insisting upon an artificial simplicity."[341] If the latter, the criticism of deference doctrine post-*Mead* may constitute demands for precision beyond that which the nature of the inquiry admits.[342]

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*[343] and *MacPherson v. Buick Motor Co.*[344] 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*.[345] 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 problem—deference to common law interpretations—as a lens to view this wider problem. 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 interpretations 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.

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[341] Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 109 (1991).

[342] *Cf.* ARISTOTLE, *supra* note 176, at 1.iii.13, 1094b ("[P]recision is not to be sought for alike in all discussions, any more than in all the products of the crafts.").

[343] 22 N.E. 188 (N.Y. 1889) (addressing whether a claimant may inherit under the will of a man he murdered); *see also* DWORKIN, *supra* note 189, at 15–20 (using *Riggs* as a launching point for a theory of legal prinicples); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1215 (2009) (paying "particular attention" to *Riggs* in exploring the purported challenge that existence of theoretical disagreement poses to legal positivism).

[344] 111 N.E. 1050 (N.Y. 1916) (abolishing requirement of privity for stating a claim in products liability cases); *see also* LEVI, *supra* note 166, at 8–27 (using line of cases leading to abolition of privity in *MacPherson* to demonstrate the nature of common law growth).

[345] *Cf.* Kevin M. Stack, *The Divergence of Constitutional and 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 shed light on other administrative law questions, such as how courts should treat binding agency rules promulgated in legislative rulemaking as opposed to adjudications.