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CHEVRON AND THE LEGITIMACY OF “EXPERT” PUBLIC ADMINISTRATION

Sidney Shapiro* and Elizabeth Fisher**

Charles Koch’s scholarship was very much about the need to dig deeper into the nature of public administration,¹ and in the spirit of his work, this Article considers the complex role that expertise plays in the *Chevron* doctrine. A guiding logic of that doctrine is an agency confronts a policy issue as to how to interpret a statute when “Congress has not directly addressed the precise question at issue” and/or “the statute is silent or ambiguous with respect to the specific issue.”² Scholars and lawyers understand *Chevron* as establishing a deferential scope of review for an agency’s resolution of a policy issue because, as compared to the federal courts, the agency has greater expertise and political accountability.³ Yet, while expertise is one of the reasons for deferring to an agency’s statutory interpretation, the Supreme Court did not explain what is meant by its reference to expertise,⁴ and, while scholars⁵ and courts⁶ continue to refer to the need to defer to expertise, there has been little extended discussion by them about what exactly “expertise” entails.⁷

In this Article, we show that digging deeper into the *Chevron* doctrine and its application reveals the theories of expert public administration that lie behind application of the doctrine. Expertise is central to the deference required by *Chevron* because an

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¹ See, e.g., Charles Koch, *An Extended Hypothetical for Teaching Administrative Law*, 38 BRANDEIS L.J. 313 (2000); Charles Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 469–71 (1986); Charles Koch, *Judicial Review of Administrative Policy Making*, 44 WM. & MARY L. REV. 375 (2002).

² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

³ *Id.* at 866.

⁴ See *infra* notes 51–52 and accompanying text.

⁵ See *infra* note 67 and accompanying text.

⁶ See *infra* note 66 and accompanying text.

⁷ See *infra* notes 70–74 and accompanying text.

understanding of what expert public administration entails, and how it operates is fundamental to understanding what type of power an administrative agency has to interpret a statute. The problem is, however, that scholars have not paid enough attention to theories of expert public administration and how they might justify and shape deference. In light of long-existing concerns about how to reconcile public administration with liberal theories of constitutional democracy, however, a more robust discourse about deference and its relationship to theories of expert public administration is essential.

This Article is part of an ongoing project by the authors, together, separately, and with others,⁸ that contends the coherence and effectiveness of the administrative process suffer from the failure to understand the multifaceted nature of expertise and expert public administration. Part I provides an overview of *Chevron* and the role that the concept of expertise figured in the judgment. We show that, despite the fact that the treatment of expertise is quite thin in *Chevron*, it has largely been understood as requiring deference to expertise. Nevertheless, the concept of expertise is largely understood in relative terms in that expertise has been understood as meaning that administrators are more familiar with the issues and record than judges.⁹

Part II shows that expertise is more than just a relative concept and that an understanding of any particular type of expertise requires not only an understanding of the types of expertise, but also the normative contexts used to understand and evaluate expertise.¹⁰ Indeed, most arguments made for expertise in the administrative law context are really arguments for expert public administration. Across the history of the United States' administrative state, two different paradigms of expert public administration can be seen to have operated; the rational-instrumental (RI) and deliberative-constitutive (DC) paradigms.¹¹ These two paradigms conceptualize expertise and accountability differently because each is based on a different institutional perspective of behavior within public administration. An "enlightened" administrative law would reflect both perspectives because there is considerable empirical evidence that both are valid to a degree. The problem at present is that the RI paradigm dominates, which results in a range of problems.¹² Specifically, in relation to *Chevron*, it results in a failure to see that the doctrine can operate on both an RI and DC basis. It also results in a

⁸ See ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM 4 (2007); Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. (forthcoming 2013) (manuscript at 2) (on file with author) [hereinafter Shapiro, *Missing Institutional Analysis*]; Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 464–65 (2012); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 577–78 (2011).

⁹ See *infra* notes 66–68 and accompanying text.

¹⁰ See *infra* notes 73–75 and accompanying text.

¹¹ FISHER, *supra* note 8, at 28–32.

¹² *Id.* at 32, 34.

problematic legal fiction—that statutory ambiguity becomes a reason for deference rather than grounding deference in a more robust understanding of the accountability of expert public administration.

Part III considers how variations in the application of the *Chevron* doctrine in different judgments can largely be seen as determined by whether the RI or DC paradigm is applied. We study *Chevron* itself, the litigation that resulted in the Supreme Court decision of *FDA v. Brown and Williamson Corp.*,¹³ and the Supreme Court’s recent case of *City of Arlington v. FCC*.¹⁴

We conclude that the failure to account for both the RI and DC paradigms explains much of the variation in how the *Chevron* doctrine is applied. This insight not only helps explain confusion in the application of *Chevron*, it allows us to see that recognition of a more varied and nuanced understanding of expert public administration would lead to a more enlightened justification for judicial deference concerning agency statutory interpretations.

Before starting, we should make it clear that, while we do think scholars need to dig deeper into the *Chevron* doctrine, we also do think there is a body of very high quality scholarship focusing on *Chevron*. Likewise, we do recognize that we are not the only ones to discuss expertise and public administration,¹⁵ but our point is that, by and large, there has been relatively little focused, nuanced, and sustained attention paid to the interrelationship between administrative law doctrine and theories of expert public administration.

I. CHEVRON AND ADMINISTRATIVE EXPERTISE

Since Justice Stevens’s judgment in 1984, the *Chevron* doctrine has become a defining doctrine of contemporary administrative law.¹⁶ There is a revealing paradox in its defining status. On the one hand, the two-step doctrine, with its focus on legislative text, is appealing in its simplicity and the perception that it provides a “clear rule.”¹⁷

¹³ 529 U.S. 120 (2000).

¹⁴ 133 S. Ct. 1863 (2013).

¹⁵ See, e.g., Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 354–55 (2013); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 756–57 (2011); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2116 (1990); Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 130–31, 154–55 (2013).

¹⁶ See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 833 (2001); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302 (1988); Sunstein, *supra* note 15, at 2074–75.

¹⁷ Jonathan D. Urick, *Chevron and Constitutional Doubt*, 99 VA. L. REV. 375, 381 (2013).

On the other hand, scholars have “leveled a forest of trees exploring the mysteries of the *Chevron* approach.”¹⁸ We do not attempt to tackle the *Chevron* doctrine writ large—our initial analysis is restricted to one aspect of the second step of the *Chevron* doctrine—the reliance on “expertise” as a reason to defer to an agency interpretation.¹⁹ As will become clear in Part III, however, this second step cannot be considered without regard to the first step.

In focusing on the role of expertise in the second step, we are acutely aware of two things. First, expertise is not the only factor creating the need to defer in the second step of the *Chevron* doctrine. Other factors, including concepts of delegated authority,²⁰ presidential control,²¹ and the policy nature of the decision,²² can also be identified as relevant to the second step. These other factors do not detract from our analysis—rather they bolster it because, as we shall show, it is important not to think about expertise in a vacuum. Second, deference is a concept that has proved particularly problematic in the operation of the *Chevron* doctrine. Strauss has described it as “a highly variable, if not empty, concept,”²³ and Justice Scalia has noted deference is a “mealy-mouthed word”²⁴ that is often honored in the breach. While we have no doubt about the “highly variable”²⁵ nature of deference, this does not mean it should be understood as empty—as we shall show, behind every theory of deference must be a theory of expert public administration. Stating this is getting ahead of ourselves, however. Before addressing this point, we need to return to an analysis of the *Chevron* judgment itself.

Chevron arose from a conflict focused on the Environmental Protection Agency’s (EPA) interpretation (as set out in delegated legislation) of “stationary source” as it related to the 1977 Clean Air Act Amendments.²⁶ Under the 1977 Act, a permit was required from a state regulator in states that had not attained air quality standards under previous legislation before the construction of any “new or modified stationary sources” of pollution.²⁷ The effect of the EPA’s interpretation was to treat all emissions from a

¹⁸ Peter L. Strauss, “Deference” is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1144 (2012); see also Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551, 553 (2012) (noting *Chevron* has been cited in over 8,009 articles).

¹⁹ See *infra* notes 66–68 and accompanying text.

²⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); see also Ronald J. Krotoszynski, *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 735–56 (2002) (“[A]n implied delegation of lawmaking power, rather than agency expertise, compelled the result.”).

²¹ *Chevron*, 467 U.S. at 865; see also Emily Hammond Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1765–66 (2012).

²² *Chevron*, 467 U.S. at 864–65.

²³ Strauss, *supra* note 18, at 1145.

²⁴ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514.

²⁵ Strauss, *supra* note 18, at 1145.

²⁶ *Chevron*, 467 U.S. at 841–42.

²⁷ 42 U.S.C. § 7502(c)(5) (2006).

single plant as amounting to a single “bubble” and thus a single “stationary source.”²⁸ This permitted a plant to modify or install a piece of equipment that emitted pollution if the total pollution emissions from the plant (i.e., the bubble) did not change.²⁹

This conflict is related to a broader set of developments in public administration in the United States. The EPA, set up by Executive Order in 1970, was one of a number of new administrative agencies created in an era of social reform.³⁰ The structure of these agencies differed significantly, but all were understood as departures from a New Deal model of public administration.³¹ In being so, they combined expertise and participatory processes in the pursuit of ambitious social goals.³² The Clean Air Act of 1970 was in itself an “environmental superstatute,”³³ but by the early 1980s, it, and its amendment in 1977, were subject to considerable criticism, focused particularly on the respective abilities of legislatures and expert administrative agencies to deliver environmental protection.³⁴ The application by the EPA of its interpretation of “stationary source” to nonattainment states was part of the more “flexible” approach to regulation taken by the Reagan administration.³⁵ The conflict over the interpretation of this term was thus embedded in a deeper debate about the nature of the EPA’s authority in this area.³⁶

That deeper narrative has tended to be overlooked, putting the focus on the Supreme Court’s *Chevron* doctrine. The Court of Appeals, which can be understood as following a purpose approach to the 1977 amendments,³⁷ held that the EPA had to ensure that a plant could not modify or install a piece of equipment that emitted pollution without first obtaining a permit.³⁸ In contrast, Justice Stevens, delivering a judgment for the Supreme Court, described the process of reviewing an “agency’s construction” of a statute as involving two questions³⁹:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is

²⁸ *Chevron*, 467 U.S. at 840.

²⁹ *Id.*

³⁰ CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 26–28 (1990).

³¹ *Id.* at 29; Sunstein, *supra* note 15, at 2082.

³² FISHER, *supra* note 8, at 98.

³³ WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 276 (2010).

³⁴ BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT* 2–3 (1981); David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 *UCLA L. REV.* 740, 750–51 (1983).

³⁵ KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 161–62 (2013).

³⁶ *Id.* at 163; BRIAN J. COOK, *BUREAUCRACY AND SELF-GOVERNMENT: RECONSIDERING THE ROLE OF PUBLIC ADMINISTRATION IN AMERICAN POLITICS* 173 (1996).

³⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841–42 (1984).

³⁸ *Id.* at 857.

³⁹ *Id.* at 842.

the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁴⁰

This declaratory statement was made at the point in the opinion in which Justice Stevens began to justify the decision, and it transformed an institutional issue into a doctrinal test focused on the text of a statute. The institutional issue was whether the EPA should have the authority to override what appeared to be a congressional intention to speed up the clean-up of nonattainment areas.⁴¹ The court of appeals, using its purpose approach, had sought to give effect to this intent.⁴²

Justice Stevens followed up the statement above with references to the way in which agencies filled the “gap[s]” left by Congress,⁴³ and the “considerable weight” to be given to “an executive department’s construction of a statutory scheme it is entrusted to administer.”⁴⁴ “In light of these well-settled principles,” he concluded that the court of appeals had “misconceived the nature of its role in reviewing” the EPA regulations.⁴⁵ As such, the Court held that the EPA’s interpretation was a permissible construction.⁴⁶

Justice Stevens then spent the bulk of his judgment focusing on the legislative history of the Clean Air Act and its 1977 amendment. He described the 1977 amendment as “a lengthy, detailed, technical, complex, and comprehensive response to a major social issue.”⁴⁷ He also made clear that there was no “specific comment on the bubble concept” in the legislative history of the 1977 amendments dealing with nonattainment areas.⁴⁸ After also recounting the history of the EPA’s interpretation of source and the petitioners’ arguments, Justice Stevens noted: “Our review of the EPA’s varying interpretations of the word ‘source’ . . . convinces us that the agency primarily responsible

⁴⁰ *Id.* at 842–43 (footnotes omitted).

⁴¹ *Id.* at 843–44.

⁴² *Id.* at 840.

⁴³ *Id.* at 843–44.

⁴⁴ *Id.* at 844.

⁴⁵ *Id.* at 845.

⁴⁶ *Id.* at 866.

⁴⁷ *Id.* at 848.

⁴⁸ *Id.* at 851.

for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.”⁴⁹ It was only towards the end of his judgment and under the subheading “policy” that Justice Stevens expanded upon the issue of deference. He gave a range of reasons for deferring to the agency’s interpretation including “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”⁵⁰ He then made two references to expertise. Justice Stevens first noted that “perhaps” Congress had not spoken precisely to the question at issue “thinking that those with great expertise and charged with responsibility for administering the [statute] would be in a better position” to choose an appropriate policy.⁵¹ And he noted, “[j]udges are not experts in the field, and are not part of either political branch of the Government.”⁵² This is the sum total of the treatment of expertise in *Chevron*.

By comparison, the Court elaborated at some length on why deference was appropriate in light of the agency’s political accountability. Courts “in some cases . . . reconcile competing political interests, but not on the basis of the judges’ personal policy preferences.”⁵³ By comparison, an agency within the limits of a congressional delegation may “properly rely upon the incumbent administration’s view of wise policy to inform its judgments.”⁵⁴ And, although “agencies are not directly accountable to the people,” the President is and it is therefore “entirely appropriate for this political branch of the Government to make such policy choices”⁵⁵ “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy,” the Court went on, “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”⁵⁶ In other words, “[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”⁵⁷ Deference to expertise was thus being seen in the context of presidential control.⁵⁸

We will return to this point⁵⁹ and the judgment below. What is clear here, however, is that the judgment contains very little discussion of the concept of expertise and in particular the nature of the agency’s expertise. Thus, there is discussion of judges not

⁴⁹ *Id.* at 863.

⁵⁰ *Id.* at 864–65 (footnotes omitted).

⁵¹ *Id.* at 865.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 866.

⁵⁷ *Id.*

⁵⁸ Meazell, *supra* note 21, at 1775.

⁵⁹ *See infra* note 108 and accompanying text.

being experts,⁶⁰ the wisdom of specific interpretations or choices,⁶¹ and Congress delegating expertise,⁶² but even in the discussion of legislative history, there is little elaboration of the agency's expertise.

The concept of deference to agency expertise was of course not new to judicial doctrine concerning statutory interpretation, but *Chevron* was understood to be a reformulation of the judiciary's role.⁶³ In being so, the concept of expertise is understood as comparative in nature.⁶⁴ Sunstein, writing in 1990, put the point like this: "For the first question [the first *Chevron* step], strictly legal expertise seems relevant. For the latter question [the second *Chevron* step], it is the agency that has a comparative advantage."⁶⁵ Deference to expertise is thus largely understood as operating when the courts' expertise runs out.

II. GETTING TO GRIPS WITH EXPERTISE AND EXPERT PUBLIC ADMINISTRATION

Despite the lack of discussion of expertise in *Chevron*, case law⁶⁶ and scholarship⁶⁷ both understand the second step in *Chevron* requires involving some deference to administrative expertise, although some scholars do note that both the nature of deference and expertise are distinct from that of other previous case law.⁶⁸

At this point, it is therefore important to understand why an understanding of the nature and complexities of expertise and expert public administration are so fundamental for administrative law scholars to have. At the very least the existence of expertise

⁶⁰ *Chevron*, 467 U.S. at 865.

⁶¹ *Id.* at 863–64, 866.

⁶² *Id.* at 865.

⁶³ *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

⁶⁴ Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2193 (2011); see also Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 848, (2010); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 408 (2012).

⁶⁵ Sunstein, *supra* note 15, at 2095.

⁶⁶ See, e.g., *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1403 (2013) (Breyer, J., concurring); *Mayo Found. v. United States*, 562 U.S. 713 (2011); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 235 (2009) (Breyer, J., dissenting); *Negusie v. Holder*, 555 U.S. 511, 516 (2009); *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006); *Nat'l Cable & Telecomm. Ass'n v. Brand X*, 545 U.S. 967, 986 (2005); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995).

⁶⁷ E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 14–15 (2005); David M. Gossett, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 688–90 (1997); Mezell, *supra* note 21, at 1775; Deborah Pearlstein, *Justice Stevens and the Expert Executive*, 99 GEO. L.J. 1301, 1302 (2011); Stack, *supra* note 64, at 408.

⁶⁸ Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 89 MICH. ST. L. REV. 120 (2009).

as a factor in the *Chevron* doctrine highlights its importance. “[A]gency ‘expertise’ may be a source of innocent merriment in academic analysis of agency-court relations,”⁶⁹ but it is also part of the reality of those relations. If we are to engage with that reality, it is necessary to understand the complex and normative nature of expertise, and more importantly for administrative law, to understand expert public administration. Specifically, expertise has many facets besides the “comparative” expertise noted in *Chevron*.

A. *The Types of Expertise*

A need for expertise has long been recognized and accepted as one of the justifications for the growth of the administrative state.⁷⁰ Yet, while that need has been grudgingly accepted, it is generally not appreciated that expertise has multiple dimensions, which means that there is no definitive definition of expertise. Expertise and expert knowledge may take very different institutional and substantive forms, and have different purposes.

Skills, knowledge, and experience may be both explicit (explainable) and tacit (difficult to explain; intuitive).⁷¹ Thus, explicit knowledge can be obtained from a set of explicit techniques (i.e., manuals and procedures), while implicit knowledge is gained from observation and expertise (i.e., professional practices). For example, while one can read about how to become a lawyer, there is a limit to which that knowledge can be explained in a manner that produces expertise.⁷²

It is also useful to distinguish between those bodies of expertise that may be understood as contributing to the further advancement of a particular area of knowledge (contributory expertise) or may be simply the expertise in knowing about another area of knowledge, but not actually participating in its creation (interactional expertise).⁷³ Thus, for example, lawyers and legal scholars are contributory experts in relation to law, but to be so they must be interactional experts in terms of understanding other disciplines which law interacts with, and the problems to which it applies. It is also the case that many disciplines consist of contributory experts who work in many small areas, but whose interactional expertise allows them to interact with one another.⁷⁴

All of the above means that an argument for a need for expertise in government may be an argument for many different things. The problem is that a comparative

⁶⁹ Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1105 (1991).

⁷⁰ FELIX FRANKFURTER, *THE PUBLIC & ITS GOVERNMENT* 139 (1930) (explaining that education is the key to democratic government); William J. Butler, *The Rising Tide of Expertise*, 15 FORDHAM L. REV. 19, 23–25 (1946); see also Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1282–83 (1984).

⁷¹ HARRY COLLINS, *TACIT AND EXPLICIT KNOWLEDGE* 4 (2010).

⁷² See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 52–53 (1988).

⁷³ See Harry Collins, *Language and Practice*, 41 SOC. STUD. OF SCI. 271, 274 (2011); see also HARRY COLLINS & ROBERT EVANS, *RETHINKING EXPERTISE* 2 (2007).

⁷⁴ Collins, *supra* note 73, at 274.

definition of expertise does not enlighten us very much about what those different things might be. This is best illustrated by an example taken from a more domestic context. Fisher's sons are "experts" in *Star Wars*, as compared to her, because of their repeated watching of the films and because they like to "play" *Star Wars*.⁷⁵ She is more of an expert than them in scholarly legal analysis because of her formal training and professional experience. These types of expertise are fundamentally different and their operation will have different implications. A focus on comparative expertise (*Star Wars* versus law) gives us very little insight into the implications of these different types of comparative expertise and how they operate in practice. Thus, for example, these two types of expertise are unlikely to interrelate. In contrast, Fisher will have comparatively more experience than her sons about the long-term benefits of having enough sleep and that will interrelate and trump their desire to "play" *Star Wars* deep into the night.

B. Institutional Contexts

The previous examples are of course in the domestic realm, but by stepping out from that realm it can be seen that expertise and expert knowledge are normally organized through different institutional forms. These contexts establish the rules and norms by which expertise is practiced. The institutional context regulates how expert knowledge, skills, and experience are gained and utilized.⁷⁶ Institutional contexts can vary. Medieval guilds are a historical example,⁷⁷ but more contemporary examples include disciplines and professions.⁷⁸

The institutional context has significant ramifications for the use of expertise, making expertise more likely to accomplish an organization's purpose in some situations and less likely in others.⁷⁹ The new institutionalism literature recognizes three perspectives concerning the study of politics and government that offer an assessment of public administration: rational choice, normative, and discursive institutionalism.⁸⁰ The first (rational choice) doubts the efficacy of expertise, while the others (normative and discursive) find that properly managed organizations can take advantage of expertise to accomplish their ends.⁸¹

⁷⁵ See Michelene T. H. Chi, *Laboratory Methods for Assessing Experts' and Novices' Knowledge*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* (K. Ericsson et al. eds., 2006).

⁷⁶ See RICHARD SENNETT, *THE CRAFTSMAN* 46, 52 (2008); Shapiro, *Missing Institutional Analysis*, *supra* note 8 (manuscript at 10).

⁷⁷ SENNETT, *supra* note 76, at 56–57.

⁷⁸ See generally FRANK FISCHER, *DEMOCRACY AND EXPERTISE: REORIENTING POLICY INQUIRY* (2009); *GOVERNMENT AND EXPERTISE: SPECIALISTS, ADMINISTRATORS AND PROFESSIONALS, 1860–1919* (Roy Macleod ed., 1988); JEROME KAGAN, *THE THREE CULTURES: NATURAL SCIENCES, SOCIAL SCIENCES, AND THE HUMANITIES IN THE 21ST CENTURY* (2009) (explaining how the various sciences are studied according to varying norms).

⁷⁹ See generally Shapiro, *Missing Institutional Analysis*, *supra* note 8 (manuscript at 10, 16).

⁸⁰ *Id.* (manuscript at 1).

⁸¹ *Id.*

Rational choice institutionalism recognizes the familiar description of government offered in public choice analysis that governmental employees will seek to advance their own self-interest over the goals of the agency in which they work.⁸² This literature also finds that government managers are less able to deter such behavior than their private counterparts because they have less opportunity to rely on rewards and punishments, such as raises or dismissal.⁸³ In light of these impediments, rational choice institutionalism is skeptical that experts in the government will be reliable agents in accomplishing the government’s ends.⁸⁴

What this perspective misses is the proven potential of normative and deliberative institutionalism to channel expertise into supporting an agency’s statutory mission. Organizations can rely on a positive organizational culture—normative institutionalism—to supplement the economic incentives that are the subject of rational choice institutionalism.⁸⁵ Most institutionalism, including government, relies on professionalism as one such form of norming. A government agency does this by establishing an organizational culture that promotes the agency’s mission, a sense of public service, and professionalism.⁸⁶ The first two norms reinforce the other regarding motives of civil servants. The last norm—professionalism—promotes accountability by promoting neutral expertise, in which experts in the agency used their expertise according to their professional training.

Most experts are trained and operate as professionals, a situation that marries expertise and reliability. Professionals have been trained and socialized to interpret information according to the standards of their profession,⁸⁷ which includes discouraging the

⁸² As a result, employees’ decisions will reflect their interest in promotion within the government or employment outside of it, the accumulation of power and influence, or such self-interested goals as avoiding hard work (“shirking”) or seeking to prevent policies favored by administrators, that they oppose (“sabotage”). *Id.* (manuscript at 4).

⁸³ *Id.* (manuscript at 5).

Furthermore, this literature finds government managers lack the same economic tools used by their private counterparts to counter self-interested behavior. A private manager (the “principal”) will rely on contracting, financial incentives, and monitoring the performance of an employee (the “agent”) to align the employee’s interests with that of the company that employs the person.

Id. (manuscript at 4).

⁸⁴ *Id.* (manuscript at 4–5).

⁸⁵ Guy Peters has explained, “Part of the argument for positing a normative basis for institutions is that in effective institutions the sanctioning and enforcement processes are built into the structures themselves through socialization, rather than requiring an external enforcement mechanism.” B. GUY PETERS, *INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE NEW INSTITUTIONALISM* 38 (3d ed. 2012).

⁸⁶ Shapiro, *Missing Institutional Analysis*, *supra* note 8 (manuscript at 6–7).

⁸⁷ See HAL G. RAINEY, *UNDERSTANDING & MANAGING PUBLIC ORGANIZATIONS* 304–05 (4th ed. 2009) (describing that hallmarks of professionalism include a “code of conduct and emphasis on adherence to it” and a “feeling of ethical obligation to render service to clients without self-interest and with emotional neutrality”); see also *id.* at 305–06 (explaining that

presentation of information in a manner that serves the professional's self-interest.⁸⁸ Professional norms influence lawyers, to take but one example, to inform their client impartially about the client's options, and then to implement the decision of the client, even if they disagree with it.⁸⁹ Scientists, to take another example, are trained to undertake, read, and interpret scientific evidence in an impartial manner. Peer expectations within the professional communities reinforce these traits.⁹⁰

While choices and decisions are influenced by institutional norms and values, the obligation to act professionally does not eliminate the use of judgment by a professional.⁹¹ Nevertheless, this discretion does not become a license for experts to follow their self-interest. The reason is that government, like other institutions, relies on discursive institutionalism to channel and guide behavior when individual judgments are necessary.⁹² Discursive institutionalism refers to the discourse that requires experts to communicate and defend their ideas and concepts.⁹³ The deliberation and reason-giving debates and vets the choices available to experts within the context of their professional commitments to view and interpret evidence and arguments.⁹⁴

What this means is the institutional context, inside and outside of an organization, impacts the use of expertise by the organization. Expertise is thus not operating in a vacuum—it has an institutional life and different institutional cultures construct different concepts and ideals of expertise.⁹⁵ We can not discuss expertise as a concept without discussing the context in which it is operating.

C. Accountability Paradigms

What the analysis above highlights is that discussions about expertise also have a normative dimension. These normative ideals are not operating in isolation. They are

professionals in the Reagan administration disagreed with many of its policies but regarded it as their professional obligation to discharge those policies effectively).

⁸⁸ See *id.* at 305. See generally MICHÈLE LAMONT, HOW PROFESSORS THINK: INSIDE THE CURIOUS WORLD OF ACADEMIC JUDGMENT (2009) (highlighting the role of expertise, preparation, discourse, and socialization in interdisciplinary academic funding papers in the United States).

⁸⁹ Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 277–78 (2009).

⁹⁰ See SENNETT, *supra* note 76, at 246–49 (furnishing examples of socialized expertise and dialogical cooperation in the professions). See generally RICHARD SENNETT, TOGETHER: THE RITUALS, PLEASURES AND POLITICS OF COOPERATION (2012).

⁹¹ See PETERS, *supra* note 85, at 40.

⁹² *Id.* at 112 (noting that discursive institutionalism understands an organization as being composed of ideas and the manner in which those ideas are communicated within the institution, that is, based on “shared communication”).

⁹³ Shapiro, *Missing Institutional Analysis*, *supra* note 8 (manuscript at 9–10).

⁹⁴ *Id.* (manuscript at 11).

⁹⁵ See ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 117–18 (1988).

“co-produced” with understandings of problems and institutions.⁹⁶ Discussions about expertise are nearly always tied to prescriptions about how institutions should change, and it is hard to discuss what an expert *is* without veering into what one thinks an expert *should be*.⁹⁷ Moreover, normative prescriptions about expertise are driven by assumptions about how we should understand the role of institutions and the nature of particular problems. This means expertise is developed because of perceived institutional and resource needs, and will naturally coexist alongside different types of institutions and understandings of different types of problems. The need for expertise is therefore not just a recognition that there is a need for skills, knowledge, or experience, but also that there is a need for expertise to take a particular institutional form—expert public administration. There is, of course, no one fixed model of expert public administration, however. The history and current landscape of the administrative state in the United States is evidence of that.⁹⁸ Moreover, the issue of nature and role of public administration is an inherently normative one. As Shapiro has pointed out, the quintessential issue for administrative law scholarship is how to fit “the ‘round peg’ of administrative government into the ‘square hole’ of the nation’s constitutional culture.”⁹⁹ In particular, for public administration to be made consistent with the constitutional prescriptions, it must be connected to constitutional processes of legislation and executive power.

We have explained previously that two paradigms have been used in this country to legitimize public administration—the rational-instrumental (RI) and deliberative-constitutive (DC) paradigms of administrative constitutionalism.¹⁰⁰ These models and paradigms can be understood as paradigms of administrative constitutionalism in that they are models of how public administration can be constituted to ensure its constitutional legitimacy.¹⁰¹ Each embodies a different understanding of expertise and a different ideal of accountability.

1. The RI Paradigm

The RI paradigm seeks to limit the discretion of public administration, relying on institutional arrangements that work from the outside of an agency, thereby producing outside-in accountability.¹⁰² The goal of limiting discretion reflects rational choice

⁹⁶ FISHER, *supra* note 8, at 27–28; Sheila Jasanoff, *A New Climate for Society*, 27 THEORY, CULTURE & SOC’Y 233, 236, 249 (2010).

⁹⁷ See, e.g., SENNETT, *supra* note 76, at 246–52 (discussing “sociable” and “isolated” expertise).

⁹⁸ David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 611–13 (2012); Shapiro, Fisher & Wagner, *supra* note 8, at 471–76.

⁹⁹ Sidney A. Shapiro, *Pragmatic Administrative Law*, 2005 ISSUES IN LEGAL SCHOLARSHIP 1, 3.

¹⁰⁰ FISHER, *supra* note 8, at 28–32.

¹⁰¹ See *id.* at 24–25.

¹⁰² Shapiro, Fisher & Wagner, *supra* note 8, at 467–68.

institutionalism, which as noted, understands the motives of public officials to be self-interested,¹⁰³ and on this assumption, the paradigm distrusts public administration. The RI paradigm therefore relies on three types of institutional arrangements to shrink administrative discretion that operate from outside of the agency, producing outside-in accountability.¹⁰⁴

One set of institutional arrangements relies on legal frameworks of scientific and social-scientific methodologies, such as cost-benefit analysis, which are intended to “guide discretion and allow it to be easily assessed.”¹⁰⁵ The idea is that to the extent these methodologies provide objective evidence, they “will act as a constraint on administrative discretion.”¹⁰⁶ A second institution is the participation of interested parties in interest-representation rulemaking. A pluralistic participatory process is understood to reduce discretion by “gaining an account of the ‘will of the people,’” which makes the role of the agency “simply to be an umpire overseeing the process.”¹⁰⁷ In other words, the interest group process identifies appropriate resolutions of the questions presented, which has the effect of narrowing agency discretion to decide what type of rule to adopt.

Finally, the RI paradigm employs political oversight and judicial review to police the boundaries of agency discretion.¹⁰⁸ Political oversight, as *Chevron* describes it, reduces agency discretion by subjecting decisionmaking to the influence of elected officials.¹⁰⁹ Judicial review is a limit on agency discretion because it ensures agency decisions are consistent with statutory commands, scientific and social scientific evidence, and with comments filed by interested parties.¹¹⁰ At the same time, judicial review permits the resolution of issues in response to political demands, as long as the policy chosen can be defended as consistent with an agency’s statutory mandate and the rulemaking record. In such a context, deference occurs if the statutory and methodological framework allows it. What this means in practice, is that statutory ambiguity and/or technical complexity¹¹¹ are reasons to defer. The implications of this will be seen in the next part.

2. The DC Paradigm

The starting point for the DC paradigm is the recognition in a democracy for the need to have institutions that can address complex problems in a flexible and ongoing

¹⁰³ See *supra* note 82 and accompanying text.

¹⁰⁴ Shapiro, Fisher & Wagner, *supra* note 8, at 467–68.

¹⁰⁵ FISHER, *supra* note 8, at 28.

¹⁰⁶ *Id.* Whether these methodologies can in fact produce objective evidence is highly contested. See *infra* notes 125–27 and accompanying text.

¹⁰⁷ FISHER, *supra* note 8, at 29.

¹⁰⁸ Shapiro, Fisher & Wagner, *supra* note 8, at 468–69.

¹⁰⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

¹¹⁰ See generally Shapiro, Fisher & Wagner, *supra* note 8.

¹¹¹ Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Understanding Environmental Models in Their Legal and Regulatory Context*, 22 J. ENVTL. L. 251, 270–73 (2010).

way. On this basis, the DC paradigm rejects the RI premise and grants to public administration substantial and ongoing problem-solving discretion. Under the DC paradigm, legislation is understood to set out a series of general principles and parameters for the exercise of discretion.¹¹² This paradigm regards discretion as inevitable because it cannot be eliminated by reliance on scientific and social-scientific methodologies,¹¹³ as the first model aspires to do. Given this reality, it looks to normative and discursive institutionalism to deter self-interested behavior, thereby producing inside-out accountability.¹¹⁴ The capacity of agencies to assemble a diverse group of experts, to conduct a discursive process, and to reach a decision that reflects this expertise is understood to be one reason why Congress delegates discretion to agencies in the first place.

Specially, the DC paradigm relies on the normative influences mentioned earlier: an organizational culture that promotes the agency’s mission, a sense of public services, and professionalism. Discursive institutionalism is at work both within an agency (internal deliberations) and with interested outside parties (external deliberations).¹¹⁵ In the DC paradigm, rulemaking is therefore understood, not as political pluralism in which a deal is made, but a process of debate and vetting of evidence and ideas. Deliberation is thus important for what it contributes to problem solving.¹¹⁶ Finally, legal procedures require an agency to defend and rationalize its ideas, employing the reason-giving aspect of discursive institutionalism. When an agency uses these institutional arrangements, they promote democratic legitimacy by ensuring that an agency accomplishes the constitutive role that Congress delegated to the agency.¹¹⁷

3. The Two Paradigms Compared

As can be seen from above, each model promotes a very different model of expert public administration and accountability. The RI paradigm understands expert public administration as an institution that can apply its analytical expertise to any context due to the fact that expert authority derives from methodology and not an understanding of the problem.¹¹⁸ As authority derives from methodology, accountability can and should

¹¹² FISHER, *supra* note 8, at 30.

¹¹³ The methodologies, particularly cost-benefit analysis, are not accurate, require policy assumptions to work, and often can be manipulated on the basis of the analyst’s policy preference. See Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 450–59 (2008). Further, claims that rational choice methodologies are objective are simply untenable in light of postempiricism revelations that the social sciences (as well as other forms of science) are at most a mixture of empirical data and social construction. *Id.* at 459–62.

¹¹⁴ Shapiro, *Missing Institutional Analysis*, *supra* note 8 (manuscript at 1).

¹¹⁵ *Id.* (manuscript at 10).

¹¹⁶ See generally Jenny Steele, *Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach*, 21 OXFORD J. LEGAL STUD. 415 (2001).

¹¹⁷ Shapiro, Fisher & Wagner, *supra* note 8, at 469.

¹¹⁸ SENNETT, *supra* note 76, at 247 (explaining that experience and analytical skills matter).

operate from the outside in, as the process of holding expert public administration to account focuses upon how the methodology was applied. As this is the case, it is not surprising that the *raison d'être* of the RI paradigm has been the promotion of analytical methodologies such as risk assessment and cost/benefit analysis.¹¹⁹ The cost/benefit administrative state is thus an RI administrative state.¹²⁰

In contrast, the expertise of DC public administration is more “sociable” in nature in that it is focused on developing good practice, judgment, and wisdom in addressing problems.¹²¹ Part of that expertise is learning how to work within the limits of the tools and processes available, particularly the limitations of scientific and economic methodologies.¹²² A prime example of the promotion of DC expert public administration can be seen in the National Research Council’s *Understanding Risk* report in which they argued that risk characterization should be an “analytic-deliberative process.”¹²³ Such a type of expertise develops its own internal norms and concepts of accountability, thus, inside-out accountability.

The different types of accountability that the RI and DC paradigms promote can be seen in the way that each paradigm serves as a basis for a different type of judicial review doctrine.¹²⁴ Thus under the RI paradigm, the role of courts in carrying out judicial review is largely about policing legislative and methodological boundaries. Under the DC paradigm, courts need to develop more nuanced doctrines and must assess the exercise of discretion against more substantive criteria. The difference in approach is thus not about intensity or deference but relates to the nature of the judicial inquiry. Examples of both RI and DC judicial-review doctrines can be seen historically,¹²⁵ but it also must be recognized that the development of DC doctrines raises the problem of “who guards the guardians” as they require greater discretion on the part of courts in their operation.¹²⁶ What can be seen is that over time many doctrines, such as the “substantial evidence” ground of review and “hard look” review, have been subject to both RI and DC interpretations.¹²⁷ As we shall see below, the same is true for the *Chevron* doctrine.

¹¹⁹ See generally Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083 (2007).

¹²⁰ See generally CASS R. SUNSTEIN, *THE COST BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002).

¹²¹ SENNETT, *supra* note 76, at 247–49.

¹²² See *id.* at 262; Fisher, Pascual & Wagner, *supra* note 111, at 272.

¹²³ NAT’L RESEARCH COUNCIL, *UNDERSTANDING RISK: INFORMING DECISIONS IN A DEMOCRATIC SOCIETY 2* (Paul C. Stern & Harvey V. Fineberg eds., 1996).

¹²⁴ For an elaboration see generally FISHER, *supra* note 8, at 89–124.

¹²⁵ In the context of statutory interpretation, see *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹²⁶ See MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION* (1988); see also James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 265, 282 (1979).

¹²⁷ Compare *United States v. Morgan*, 313 U.S. 409 (1940) (DC interpretation), with *Indust. Union Dep’t AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (RI interpretation). See

The important point to note is that neither of these paradigms offers up a utopia and each has its flaws.¹²⁸ The RI paradigm focuses on control at the expense of fostering effective public administration and the DC paradigm does vice versa. An explicit recognition of the validity and role of both is, however, an important feature of an “enlightened” administrative law.¹²⁹

D. *The Contemporary Malaise*

The problem at present in contemporary, administrative law scholarship and doctrine is that the RI paradigm is dominating. We have written about this at length elsewhere,¹³⁰ but here we wish to note that it brings with it three very serious problems.

The first is that, as Richard Sennett has noted, types of expertise that are akin to RI expertise are largely understood to operate separately from any context.¹³¹ This can be seen in the way in which analytical methodologies such as risk assessment and cost/benefit analysis are understood to displace other forms of decisionmaking.¹³² The application of RI expertise is thus experienced as the trumping of authority for no reason necessarily connected to the issue at stake, and this creates an “invidious comparison.”¹³³ The “invidiousness” of the situation arises because it awakens resentment in those who are trumped and makes those using such tools feel embattled. In such circumstances, the debate fractures along a fault line between science and democracy, and expertise is largely understood as trumping the democratic process. The science/democracy dichotomy, however, is a false dichotomy because, as seen above, both the RI and DC models of public administration encapsulate both scientific and democratic inputs.¹³⁴

This is a problem in part because the promotion of RI expertise means that administrative law scholars generally distrust agency expertise, as it does seem to be a type

Elizabeth C. Fisher, *The Risks of Quantifying Justice: The Use of the Substantial Evidence Test in Judicial Review of OSHA Rule-Making*, in *LAW AND UNCERTAINTY: RISKS AND LEGAL PROCESSES* 293–311 (Robert Baldwin ed., 1997); Elizabeth Fisher, *Risk, Expertise and Judicial Review: Scope of Review and Decision-Making Under Scientific Uncertainty* (1998) (unpublished D.Phil. thesis, University of Oxford). On “hard look review” compare the opinions of Judges Bazelon and Leventhal in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). See also FISHER, *supra* note 8, at 89–124.

¹²⁸ FISHER, *supra* note 8, at 32–35.

¹²⁹ Shapiro, Fisher & Wagner, *supra* note 8, at 486.

¹³⁰ *Id.* at 479; Shapiro & Wright, *supra* note 8, at 608–18. See generally Shapiro, *Missing Institutional Analysis*, *supra* note 8.

¹³¹ SENNETT, *supra* note 76, at 249.

¹³² See FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 4, 11 (2004); Thomas O. McGarity, *A Cost Benefit State*, 50 *ADMIN. L. REV.* 7, 9–10 (1998).

¹³³ SENNETT, *supra* note 76, at 249.

¹³⁴ FISHER, *supra* note 8, at 11–13.

of expertise at odds with democratic constitutionalism. The rise in popularity of presidential administration, rather than expertise, as the justification for deference, reflects this distrust. Moreover, the dominance of the RI paradigm leads to a lack of discussion concerning the nature and legitimacy of the administrative state. Compared to the New Deal era,¹³⁵ our understandings of expert public administration, as expressed in doctrine and scholarship, are impoverished. While *Chevron* “did speak explicitly about the role of expertise and accountability in statutory interpretation,”¹³⁶ the discussion was quite limited as compared to the richer concepts of expert public administration that we just explored. Moreover, although considerable ink has been spilt on *Chevron*, these bottles have been emptied in a pursuit of, and when, each step applies and how the courts are to resolve step one and step two issues. These aspects of the case have become the defining features of *Chevron*.¹³⁷ This is even when, as seen above, the case was embedded in a deeper narrative about the power of expert public administration.

The failure to recognize both paradigms has also adversely affected public administration because administrative law has developed in ways that unnecessarily weaken inside-out accountability, as we have detailed previously.¹³⁸ For example, the rise of presidential administration has tended to displace and denigrate the role of expertise in public administration.¹³⁹ We would therefore prefer institutional arrangements that optimize the mix of outside-in and inside-out accountability. Moreover, it is not uncommon for those who promote a DC model of public administration to be understood as challenging the system, rather than recognizing that the goal is to find the most appropriate combination of the DC and RI paradigms in making public administration democratically accountable. Indeed, a striking feature of U.S. administrative law is its polarized nature.¹⁴⁰

Third, and perhaps most importantly, the dominance of the RI paradigm creates blindspots and narrows our vision in that it becomes difficult to see that the legitimacy of public administration can be grounded and based on other understandings of expert public administration. It is not just that we are not discussing models of expert public administration, but we cannot even begin to figure out how to do so. Doctrine and practice are constantly being viewed through an RI lens, making it increasingly

¹³⁵ See generally Mark Fenster, *The Birth of a “Logical System”: Thurmond Arnold and the Making of the Modern Administrative State*, 84 OR. L. REV. 69, 69–74 (2005).

¹³⁶ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 206 (2006).

¹³⁷ See, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1258 (1997).

¹³⁸ Shapiro, Fisher & Wagner, *supra* note 8, at 476–85; Shapiro & Wright, *supra* note 8, at 608–17; Shapiro, *Missing Institutional Analysis*, *supra* note 8 (manuscript at 2).

¹³⁹ Shapiro, *Missing Institutional Analysis*, *supra* note 8 (manuscript at 12); Shapiro & Wright, *supra* note 8, at 608–17.

¹⁴⁰ Dhvani Mehta, ‘Balancing’ and ‘Absolutism’ in Cost-Benefit Analysis and the Clean Water Act: The ‘Pushmi-Pullyu’ in U.S. Environmental Law (2011) (unpublished M. Phil. in Law thesis, University of Oxford) (manuscript at 12–14).

difficult for lawyers, scholars, and judges to envisage other ways to constitute, limit, and hold expert public administration to account—even when the history of U.S. administrative law shows this is the case.¹⁴¹ This compares sharply to the situation in other jurisdictions.¹⁴²

III. THE CHEVRON DOCTRINE REVISITED

Despite the narrowing of scholarly vision, it is the case that theories of expert public administration will shape the nature and scope of judicial review.¹⁴³ This is because such theories will directly influence how it is best understood to constitute, limit, and hold a decisionmaker to account. We discussed this briefly above, but here we want to undertake a more extended analysis to show how such theories influence how courts approach questions of statutory interpretation. Whether the “intent of Congress” is clear in a statute is going to be dependent on what is understood to be the role of that statute in policing administrative power.¹⁴⁴ Yet, the role of such theories has been ignored, even when the variations in how *Chevron* is applied are well recognized.¹⁴⁵

In this Part, we want to show how the application of the *Chevron* doctrine requires a consideration of a theory of expert public administration. We do so through analyzing *Chevron* itself, the litigation that resulted in the Supreme Court decision of *FDA v. Brown and Williamson Corp.*,¹⁴⁶ and the Supreme Court’s recent case of *City of Arlington v. FCC*.¹⁴⁷

¹⁴¹ Frug, *supra* note 70, at 1282–83; Shapiro, Fisher & Wagner, *supra* note 8, at 465; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669–70 (1975).

¹⁴² See CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 1–44 (3d ed., Cambridge Univ. Press 2009) (discussing the difference between red light and green light theories of public administration); see also JUDICIAL REVIEW AND THE CONSTITUTION (Christopher Forsyth ed., Hart Publishing, Oxford 2000) (discussing a wide range of theories); MARTIN LOUGHLIN, PUBLIC LAW AND POLITICAL THEORY 59–61 (Oxford Univ. Press 1992) (discussing normativist and functionalist ideals).

¹⁴³ FISHER, *supra* note 8, at 89–124.

¹⁴⁴ Thus, for example, we see the relevance of the nondelegation doctrine in construing the application of *Chevron* in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). This is more obvious in the decision of the D.C. Circuit in the same case. *Am. Trucking Ass’n v. EPA*, 175 F.3d 1027, 1040, 1052 (D.C. Cir. 1999). See Elizabeth Fisher, *Risk Regulation and the Rule of Law: Searching for ‘Intelligible Principles’ in the Administrative State*, 3 ENVTL. L. REV. 139, 141 (2001) (commenting on *American Trucking*). Likewise, whether an agency’s interpretation of a statute is understood to be “reasonable” under step two will depend on a background theory about what a judge thinks is legitimate for an expert agency to do. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

¹⁴⁵ Sunstein, *supra* note 136, at 192 (comparing Justice Scalia’s and Justice Breyer’s approach).

¹⁴⁶ 529 U.S. 120 (2000).

¹⁴⁷ 133 S. Ct. 1863 (2013).

A. Chevron Itself

Justice Stevens in *Chevron* did not engage very much with the concept of expertise, but his judgment does involve a careful analysis of the legislative background, and this discussion is primarily embedded in an RI paradigm. This can be seen most obviously in the fact that much of his judgment is focused on legislation and what it allows and limits, rather than upon the nature of the administrative power it constitutes.¹⁴⁸

This focus can be seen at both steps one and two of the two-step test. The first step is focused on the legislative text,¹⁴⁹ in which the point of consulting legislative history is to determine exactly what delegations and gaps the legislation created.¹⁵⁰ The “reasonableness” of the agency’s interpretation under step two is dependent upon the extent to which the agency clings to the statutory framework and how it reconciles competing political interests within that framework.¹⁵¹ Although Justice Stevens refers to the need for the EPA to mostly consider “the wisdom of its policy on a continuing basis,”¹⁵² the concept of policy is primarily understood as a conduit for delivering legislative commands in light of further technical information and an understanding of the different interests at play. Justice Stevens notes that “respondents are now waging in a judicial forum a specific policy battle,”¹⁵³ but that “[s]uch policy arguments are more properly addressed to legislators or administrators, not to judges.”¹⁵⁴ In other words, the EPA is simply a tool for delivering congressional policy, and the wisdom of “its policy choice” is less about the exercise of its own discretion and more about it delivering congressional policy in light of “a reasonable accommodation of manifestly competing interests.”¹⁵⁵ The need for the EPA’s expertise, therefore, arises because “Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases.”¹⁵⁶

Moreover, the Court finds that it is appropriate to defer to the EPA’s reconciliation of these interests because it is accountable to the President, who is in turn accountable to the people.¹⁵⁷ Expertise is defined narrowly and in the context of other forms of control. In thinking about how to defer to an administrative body, the constant focus is on the legislative text and what it does and does not allow. There is no need to expand on the concept of the expertise in this context because expertise has limited scope. In other words, while Congress may find it necessary to delegate interpretive authority to an

¹⁴⁸ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984).

¹⁴⁹ *Id.* at 842–43.

¹⁵⁰ *Id.* at 843.

¹⁵¹ *Id.* at 845, 847, 848.

¹⁵² *Id.* at 864.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 865.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

agency because of its expertise, expertise does not legitimate agency decisionmaking. As Krotoszynski notes, “An implied delegation of lawmaking power, rather than agency expertise, compelled the result.”¹⁵⁸

This interpretation has been confirmed by *Chevron*’s biggest fan, Justice Scalia, writing extrajudicially.¹⁵⁹ He noted that deference to agency expertise was for the practical reason that such expertise meant an agency was more likely than a court to reach the “correct result,” but that this was not a “valid theoretical justification” for deferring to expertise.¹⁶⁰ For him, *Chevron* meant “agency expertise” was “no longer relevant, or no longer relevant in the same way.”¹⁶¹ This is because, as noted above, under the RI paradigm of expert public administration, expertise is not a source of legitimacy.

What this has meant is that, despite the fact that *Chevron* had the appearance of a straightforward “rule,” and despite its focus on the legislative text, its operation remains dependent on a theory of expert public administration. This does not mean, however, that the *Chevron* doctrine always needs to be interpreted in RI terms, and because there are two such theories, not one, it should come as no surprise that the application of *Chevron* results in different approaches and that it requires consideration of a variety of issues.¹⁶² This is because, despite the focus on *Chevron* on text, its application is less about text and far more about what is understood as the nature of administrative power. As others have pointed out, the result is a trail of confusion left behind by the post-*Chevron* cases.¹⁶³

B. Interpreting the Food, Drug, and Cosmetic Act

We could give many examples of where different judicial applications of *Chevron* have been shaped by different theories of public administration.¹⁶⁴ In light of space, here we provide two further examples. The first is an extended case study of how the doctrine was applied by the different levels of court in the litigation that ultimately led to *FDA v. Brown & Williamson Tobacco Corp.*¹⁶⁵

In 1996, the FDA promulgated a regulation that restricted the sale and distribution of cigarettes and smokeless tobacco to children and adolescents.¹⁶⁶ Since tobacco was

¹⁵⁸ Krotoszynski, *supra* note 20, at 739.

¹⁵⁹ See Scalia, *supra* note 24.

¹⁶⁰ *Id.* at 514.

¹⁶¹ *Id.* at 521.

¹⁶² Sunstein, *supra* note 136, at 190.

¹⁶³ See, e.g., Lisa S. Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

¹⁶⁴ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

¹⁶⁵ 529 U.S. 120 (2000). An earlier version of this analysis can be found in Elizabeth Fisher, *Food Safety Crises as Crises in Administrative Constitutionalism*, 20 HEALTH MATRIX J. OF LAW-MEDICINE 55 (2010).

¹⁶⁶ Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996) (to be codified at 21

not mentioned in the Food, Drug, and Cosmetic Act (FDCA), whether the FDA had the jurisdiction to regulate tobacco largely depended on whether, as a matter of statutory interpretation, tobacco products fell within one of the classes of products that the FDA was allowed to regulate.¹⁶⁷

The FDCA states that the FDA can regulate “combination products,” which are defined as products that “constitute a combination of a drug, device, or biologic product.”¹⁶⁸ A “drug” is defined under that Act as “articles (other than food) intended to affect the structure or any function of the body.”¹⁶⁹ Jurisdiction, as a result, rested, not on the existence of a serious health hazard, but rather on the objective intent of the manufacturers.¹⁷⁰ In light of new evidence about the addictive effects of nicotine and of manufacturers’ manipulation of tar and nicotine levels in cigarettes, the FDA felt that it could establish that nicotine “affect[ed] the structure and function of the body” and that manufacturers intended for that to occur.¹⁷¹ The FDCA required the FDA to provide “reasonable assurance of the safety and effectiveness of the device,”¹⁷² once it was regulated. While this would suggest the need to ban cigarettes, the FDA rejected this outcome because it would lead to a black market. In light of the fact that eighty percent of smokers started smoking under the age of eighteen, the FDA concluded that a regulation banning the sale of tobacco cigarettes to minors was a more effective way of meeting the requirement of “reasonable assurance.”¹⁷³

Inevitably, the FDA’s decision to regulate was challenged, and while all judges at all levels applied the *Chevron* doctrine, they did so in different ways.¹⁷⁴ Stepping back, it can be seen that the question of whether tobacco was a drug was part of a broader debate about the power and nature of the FDA. As the majority in the Fourth Circuit noted, “at its core, this case is about who has the power to make this type of major policy decision.”¹⁷⁵ Whether a judge found that the FDA did or did not have jurisdiction

C.F.R. pts. 801, 803, 804, 807, 820, 897). The regulation banned sales of tobacco and smokeless tobacco to minors and limited the advertising and promotion of tobacco products. *Id.*

¹⁶⁷ See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133–43.

¹⁶⁸ 21 U.S.C. § 353(g)(1) (2006).

¹⁶⁹ § 321(g)(1)(C).

¹⁷⁰ See *Action on Smoking & Health v. Harris*, 655 F.2d 236, 238–39 (D.C. Cir. 1980) (discussing the FDA’s arguments).

¹⁷¹ Nicotine in Cigarettes and Smokeless Tobacco is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619, 44,629–30 (Aug. 28, 1996).

¹⁷² *E.g.*, § 360c(a)(1)(A)(i).

¹⁷³ Cass R. Sunstein, *Is Tobacco A Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1021, 1047, 1050 (1998). It is also interesting to note that the Synar Amendment (passed in 1992) makes it a precondition of federal grants to states that those states ban the sale of tobacco products to minors and as such the rule already exists in all states. See 42 U.S.C. § 300x-26(a)(1) (2006).

¹⁷⁴ See *supra* notes 160–61 and accompanying text.

¹⁷⁵ *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998).

largely depended on their understanding about the role and nature of the FDA and its relationship to Congress. In line with step one of the *Chevron* test, the point of departure was *what* authority Congress was assumed to have delegated to the FDA.¹⁷⁶ In other words, the textual question of step one could not be divorced from the institutional question in step two.

That exercise of judicial construction did not occur in a vacuum. The answer to the question what is and should be the role of the FDA should ideally be derived from a legislative and institutional history. The FDCA and the FDA developed in a piecemeal fashion, mainly in response to a variety of crises and legal developments.¹⁷⁷ On the one hand, the original logic behind the FDCA was a very limited RI one concerned with a specific task—the proper labelling of foods.¹⁷⁸ Later amendments, such as the Delaney clause, were consistent with this, in that they gave very little discretion to the FDA.¹⁷⁹ However, these amendments were interspersed with other legislative and administrative reforms that granted greater discretion to the FDA, and in particular significant rule-making power. The most dramatic metamorphosis occurred in the FDCA.¹⁸⁰ The picture that emerges of the FDA is one of a body whose purpose and nature had evolved with new Presidents, new Commissioners, and with legislative amendments.¹⁸¹ Thus, just as with the EPA in *Chevron*, the expert administrative nature of the FDA had been shaped over time and was open to question and debate.

In applying *Chevron*, judges were required to make a decision about the appropriate model of expert public administration in this shifting context. Judge Osteen in the district court embraced a DC approach. “He noted that the intentionally broad definition of ‘drug,’ along with other amendments, was intended to ‘amplify and strengthen the FDCA so as to ensure that the consumer was protected against “a multiplicity of abuses not subject to the present law.””¹⁸² Likewise, he drew attention to the expertise and discretion of the FDA.¹⁸³ For Judge Osteen, the issue was whether it was obvious that Congress had *not* intended the FDA to regulate tobacco and, as he found there was no

¹⁷⁶ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

¹⁷⁷ See generally CHARLES O. JACKSON, *FOOD AND DRUG LEGISLATION IN THE NEW DEAL* (1970); JAMES H. YOUNG, *PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906* (1989); David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and its Substantive Contents*, 6 *LAW & CONTEMP. PROBS.* 2 (1939).

¹⁷⁸ See *United States v. Johnson*, 221 U.S. 488, 498 (1911) (describing an interpretation of the Pure Food and Drug Act of 1906).

¹⁷⁹ See *Pub. Citizen v. Young*, 831 F.2d 1108, 1111, 1116 (D.C. Cir. 1987) (discussing an interpretation of 21 U.S.C. § 348(c)(3)(A) (2006)).

¹⁸⁰ See Ralph F. Fuchs, *The Formulation and Review of Regulations Under the Food, Drug, and Cosmetic Act*, 6 *LAW & CONTEMP. PROBS.* 43 (1939).

¹⁸¹ See generally Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Structures)*, 93 *CORNELL L. REV.* 901 (2008).

¹⁸² Fisher, *supra* note 165, at 70 (quoting *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997)).

¹⁸³ *Id.*

such intent (except in regard to the provisions that limited advertising and promotion), he found that the FDA did have jurisdiction.¹⁸⁴

The majority of the Fourth Circuit reversed the decision of the district court stating that it had proceeded on a “fundamental misconception” that “unavoidably skewed the remainder of its analysis.”¹⁸⁵ This sharp disagreement arose because the majority’s approach was underpinned by the RI paradigm; they were construing the FDA as a “servant” of Congress. The real question, according to the majority, was “whether Congress intended to *delegate*” such jurisdiction to the FDA or, in other words, whether the FDA had explicit authorization.¹⁸⁶ They explained, “We begin with the basic proposition that agency power is ‘not the power to make law. Rather, it is the ‘power to adopt regulations to carry into effect the will of Congress as expressed by the statute.’”¹⁸⁷ This was a fundamentally different question than that Judge Osteen asked and a very RI one.¹⁸⁸

The majority’s answer to the question that they had posed was that there had been no explicit authorization. While tobacco fell literally under the definition of “drug,” they found this conclusion was largely contrary to the statute for a number of reasons.¹⁸⁹ First, they reasoned that if tobacco fell under the jurisdiction of the FDA, its failure to ban tobacco products would amount to an abuse of discretion.¹⁹⁰ Second, the FDA had constantly stated they did not have the jurisdiction to regulate tobacco and Congress’s action in the face of such statements was proof of its acquiescence in this judgment.¹⁹¹ Finally, and following on from this, Congress developed its own regulatory regime for tobacco when it passed a number of statutes from 1965 onwards, which suggested it did not give the task of tobacco regulation to the FDA.¹⁹² They also noted that any decision “involving countervailing national policy concerns” should be left to Congress.¹⁹³ The majority was taking a hard RI line—the FDA as a rational-instrumental body had little discretion to take initiative on this issue.

A strong dissent from Circuit Judge Hall reprised and strengthened the DC line of analysis used by the lower court judge.¹⁹⁴ Indeed, Hall’s opinion is an exemplar of DC reasoning, particularly in the way in which it encompasses the different aspects of the FDA’s power. The FDA, for him, was an institution that was set up to address a series of problems. He stated, “The FDCA delegates to the FDA the duty of promulgating and enforcing regulations aimed at protecting the nation’s citizens from misbranded and

¹⁸⁴ *Id.*

¹⁸⁵ *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998).

¹⁸⁶ *Id.* (emphasis added).

¹⁸⁷ *Id.* (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14 (1976)).

¹⁸⁸ *See supra* notes 182–84 and accompanying text.

¹⁸⁹ *Brown & Williamson Tobacco Corp.*, 153 F.3d at 164.

¹⁹⁰ *Id.* at 167.

¹⁹¹ *Id.* at 171.

¹⁹² *Id.* at 175–76.

¹⁹³ *Id.* at 164.

¹⁹⁴ *See id.* at 176–84 (Hall, J., dissenting).

unsafe drugs and food.”¹⁹⁵ He then went on to note the importance of understanding the FDCA in broad purposive terms.¹⁹⁶ This was particularly important regarding the FDA’s change of position concerning their jurisdiction to regulate tobacco. For him, it was unnecessary for Congress to have had a specific intent that the FDA had the power to regulate tobacco products. Instead, he noted, “The operative congressional intent at the outset was simply to confer broad discretionary powers on the FDA to regulate ‘drugs’ and ‘devices.’ The FDCA was written broadly enough to accommodate both new products and evolving knowledge about existing ones, and it was written that way on purpose.”¹⁹⁷

Judge Hall characterized the FDA’s decision that tobacco regulation was within its jurisdiction as growing out of the rulemaking process and the administrative record. As such, the decision to regulate was the result of the active exercise of the agency’s discretion.¹⁹⁸ In other words, the FDA had acted legitimately in changing its mind because of the analysis and deliberation that took place in that rulemaking process. Hall also responded to the majority’s argument that tobacco could not fall under the Act because if it did it must be banned.¹⁹⁹ He pointed out that this confused the issue of *how* the FDA regulated with *whether* it regulated.²⁰⁰ This is a common feature of the RI paradigm because, ideally, very little discretion should be left to the administrator.

The Supreme Court upheld the Fourth Circuit’s decision by a 5–4 margin.²⁰¹ The majority favored an RI approach, again by emphasizing the first step of the *Chevron* test and characterizing it as one of whether Congress had explicitly authorized the FDA to regulate tobacco products. Justice O’Connor stated for the majority:

[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of “safety” as it is used throughout the Act—a concept central to the FDCA’s regulatory scheme—but also ignore the plain implication of Congress’ subsequent tobacco-specific legislation.²⁰²

As in the court below, Justice O’Connor determined it was significant that the FDA would need to ban tobacco if it fell under the regulatory scheme.²⁰³ The majority

¹⁹⁵ *Id.* at 176.

¹⁹⁶ *Id.* at 179.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 180.

¹⁹⁹ *Id.* at 179.

²⁰⁰ *Id.*

²⁰¹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

²⁰² *Id.* at 160.

²⁰³ *Id.* at 137.

understood the objective of the FDCA to make sure that the products the FDA regulated were “safe” and “effective,”²⁰⁴ which meant that the FDA’s failure to do this would constitute a failure to follow congressional intent because Congress had granted no remedial discretion under the Act.²⁰⁵ Likewise, the existence of tobacco specific legislation not only ratified the FDA’s previous view, but also showed that Congress had developed a specific legislative response to the issue.²⁰⁶

For the dissent, Justice Breyer took a very DC approach by recognizing the constitutive nature of the FDCA. He explained:

After studying the FDCA’s history, experts have written that the statute “is a purposefully broad delegation of discretionary powers by Congress,” . . . and that, in a sense, the FDCA “must be regarded as a constitution” that “establish[es] general principles” and “permit[s] implementation within broad parameters” so that the FDA can “implement these objectives through the most effective and efficient controls that can be devised.”²⁰⁷

Indeed, for Justice Breyer, the FDA should largely be understood as a product of the New Deal and that Congress’s enactment of the FDCA was premised on the belief that regulatory bodies, such as the FDA, “need[] broad authority and would exercise that authority wisely.”²⁰⁸ A narrow reading of the statute, therefore, contravened the statute’s overall purpose of protecting health.²⁰⁹ The additional tobacco-specific legislation did not oust the jurisdiction of the FDA to regulate tobacco products because the FDA was an institution founded on DC principles.

C. *City of Arlington v. FCC*

Our final example is of more recent vintage and relates to a case of the Justices channelling different paradigms of expert public administration. Five Justices held that the second step of the *Chevron* doctrine was applicable to situations where an agency was interpreting a statute so as to determine the scope of its authority, although Justice Breyer’s concurrence differed as the methodology for determining when *Chevron* applies in this context.²¹⁰ Justice Breyer concurred with the plurality opinion written by Justice Scalia in order to renew their split over how *Chevron* should be applied, which

²⁰⁴ *Id.* at 133.

²⁰⁵ *Id.* at 136.

²⁰⁶ *Id.* at 157.

²⁰⁷ *Id.* at 165 (citations omitted).

²⁰⁸ *Id.*; see also STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) (expressing the same view).

²⁰⁹ *Brown & Williamson Tobacco Corp.*, 529 U.S. at 174.

²¹⁰ *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); see *id.* at 1875 (Breyer, J., concurring).

we have seen before.²¹¹ The plurality opinion reveals Justice Scalia’s ongoing promotion of an RI interpretation of the *Chevron* doctrine focused on text,²¹² while the concurrence shows Justice Breyer’s commitment to a DC paradigm.²¹³ A dissent authored by Chief Justice Roberts strongly promotes a more multifaceted RI paradigm favored by Justice Scalia.²¹⁴

The issue in the case concerned the Telecommunications Act of 1996, which had imposed limitations on the authority of states to restrict the location of wireless telephone towers and antennas using their zoning authority.²¹⁵ One such restriction was that state or local governments must act on siting applications “within a reasonable period of time after the request is duly filed.”²¹⁶ The Federal Communications Commission (FCC) promulgated a rule that defined this time period.²¹⁷ Although the FCC’s jurisdiction to regulate was at issue, the case did not involve the sweeping discretion that was at issue in the previous case. With that said, the power of the FCC has long given rise to a debate about its nature and legitimacy.²¹⁸

The plurality held that *Chevron* furnished the scope of review because this was an ordinary case of statutory interpretation governed by *Chevron*.²¹⁹ Justice Scalia rejected the dissent’s contention that the case involved a jurisdiction issue to which a *de novo* scope of review should be applied on the ground that jurisdictional issues could not meaningfully be distinguished from nonjurisdictional issues.²²⁰ He also pointed out that *Chevron* should be applied because it provides a “stable background rule against which Congress can legislate,” and because “Congress knows how to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”²²¹

Justice Scalia reverted to his usual approach to *Chevron*—when an ambiguity exists, it indicates a congressional intent to delegate interpretive authority to an agency, assuming that the agency has employed its law-making authority in resolving the issue.²²² He characterized efforts to remove “jurisdictional” issues from the scope of *Chevron* as inviting every litigant to “play the ‘jurisdictional card’ in every case.”²²³ This would invite the federal judiciary to take the primary role in interpreting statutory

²¹¹ See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

²¹² *City of Arlington*, 133 S. Ct. at 1865–74.

²¹³ *Id.* at 1875–77 (Breyer, J., concurring).

²¹⁴ *Id.* at 1877 (Roberts, J., dissenting).

²¹⁵ *Id.* at 1866.

²¹⁶ 47 U.S.C. § 332(c)(7)(B)(ii) (2006).

²¹⁷ *City of Arlington*, 133 S. Ct. at 1864.

²¹⁸ Thus, the early formulations of “hard look review” were in relation to it. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 850–51 (D.C. Cir. 1970).

²¹⁹ *City of Arlington*, 133 S. Ct. at 1874–75.

²²⁰ *Id.* at 1869 (describing any distinction between the two types of issues as “illusory”).

²²¹ *Id.* at 1868.

²²² *Id.*

²²³ *Id.* at 1873.

ambiguities, and therefore violate Congress's decision to delegate such decision to agencies: "The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts."²²⁴

Justice Scalia offered two responses to the concerns of the dissent that applying *Chevron* to so-called jurisdictional questions would lodge too much discretion in agencies. First, anything but a bright-line test would invite unpredictability: "Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*. The excessive agency power that the dissent fears would be replaced by chaos."²²⁵ Second, a different test was unnecessary to control agency discretion because the rigorous application of step one was sufficient to protect against misuse of discretion:

The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by . . . applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.²²⁶

Scalia's judgment is grounded in his understanding of the RI paradigm. His focus is upon the textual commands set out in legislation and, because of that, he rejects any distinction between jurisdictional and nonjurisdictional issues. For him, this distinction is a "bogeyman," "a Hound of the Baskervilles"²²⁷ because "[o]nce those labels are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."²²⁸ This statement indicates that his understanding is that an agency has no power except that granted by the statute. To put it another way, the distinction between a jurisdictional and nonjurisdictional issue is a "false one" because an agency has no power in its own right.

This understanding reveals the limits of Justice Scalia's vision of RI expert public administration. Since *Chevron* operates only if there is ambiguity, a very odd understanding of the power of an agency results. A question of institutional legitimacy becomes fully dependent upon the answer to an exercise of textual analysis.

²²⁴ *Id.*

²²⁵ *Id.* at 1874.

²²⁶ *Id.*

²²⁷ *Id.* at 1872.

²²⁸ *Id.* at 1870–71.

The concurrence picks up the problems with this result. Justice Breyer agreed that any distinction between jurisdictional and nonjurisdictional issues was a “mirage.”²²⁹ However, he renewed his ongoing argument with Justice Scalia concerning whether there should be a bright-line test for application of *Chevron*.²³⁰ For him, “[d]eciding just what those statutory boundaries are, however, is not always an easy matter.”²³¹ Instead, “our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant.”²³² Thus, the issue of whether Congress intended to delegate interpretive authority to an agency should be more nuanced than whether an ambiguity exists and the agency issued a legally binding interpretation.

As in *FDA v. Brown & Williamson Tobacco Corp.*, Justice Breyer would require an analysis of the whole of the statutory, institutional, and policy context so as to understand the nature of the power constituted in the FCC.²³³ He proposed that a number of different features are relevant to determining whether there should be deference:

(1) [T]he language of the Telecommunications Act grants the FCC broad authority (including rulemaking authority) to administer the Act; (2) the words are open-ended—*i.e.* “ambiguous”; (3) the provision concerns an interstitial administrative matter, in respect to which the agency’s expertise could have an important role to play; and (4) the matter, in context, is complex, likely making the agency’s expertise useful in helping to answer the “reasonableness” question that the statute poses.²³⁴

Here, as in *Brown*, the inquiry promotes a more DC understanding of expert public administration than Justice Scalia’s bright-line test. Unlike a bright-line test, which turns on whether the statutory words are ambiguous, Justice Breyer’s approach focuses on whether it is likely that an agency’s expertise is relevant to the resolution of the ambiguity. This is why in *Mead* he raises the possibility of applying *Chevron* deference in circumstances where the agency’s interpretation is not legally binding.²³⁵

In contrast, the Chief Justice’s dissent is a very different response to the limits of Scalia’s RI approach. He would have the judiciary review apply a *de novo* scope of review to jurisdictional issues.²³⁶ For him, before *Chevron* is applied, a court must determine whether Congress has in fact given the agency the power to interpret ambiguous

²²⁹ *Id.* at 1875 (Breyer, J., concurring).

²³⁰ *See supra* note 207–09 and accompanying text.

²³¹ *City of Arlington*, 133 S. Ct. at 1875.

²³² *Id.*

²³³ *Id.* at 1876; *see also* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

²³⁴ *City of Arlington*, 133 S. Ct. at 1876.

²³⁵ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

²³⁶ *City of Arlington*, 133 S. Ct. at 1883 (Roberts, C.J., dissenting).

jurisdictional issues: “Agencies are creatures of Congress; ‘an agency literally has no power to act . . . unless and until Congress confers power upon it.’ Whether Congress has conferred such power is the ‘relevant question[] [sic] of law’ that must be answered”²³⁷ This requires a specific determination of whether such a delegation occurred concerning the specific statutory ambiguity at issue. The existence of an ambiguity, which is resolved in a legally binding manner, is not sufficient to indicate that the agency has the power to determine its own power. In other words, he diverges from Scalia because he understands that Scalia’s approach will not deliver sufficient outside-in accountability to ensure that RI public administration is kept under control.

The Chief Justice defends his approach because of the danger of agency discretion. He begins with the observation, “A court should not defer to an agency until the court decides on its own, that the agency is entitled to deference.”²³⁸ The Chief Justice then warns: “One of the principal authors of the Constitution famously wrote that the ‘accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.’”²³⁹ Observing the combination of powers in modern agencies, he finds the “accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.”²⁴⁰ Thus, not only did the Framers not envision “today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities. ‘[T]he administrative state with its reams of regulations would leave them rubbing their eyes.’”²⁴¹

Further, presidential oversight cannot possibly “keep federal officers accountable,” allowing them “in practice a significant degree of independence.”²⁴² Nor is normal judicial review sufficient to hold agencies accountable. Citing *Chevron*, the Chief Justice finds: “As for judicial oversight, agencies enjoy *broad* power to construe statutory provisions over which they have been given interpretive authority.”²⁴³ Although “[i]t would be a bit much to describe the result as ‘the very definition of tyranny,’” nevertheless “the danger posed by the growing power of the administrative state cannot be dismissed.”²⁴⁴

There is more, but the reader gets the idea. Given the risks posed by the administrative state, only *de novo* judicial review will do when the issue is a jurisdictional issue. Thus, the Court should “not defer to an agency’s interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question

²³⁷ *Id.* at 1880 (citations omitted).

²³⁸ *Id.* at 1877.

²³⁹ *Id.* (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961)).

²⁴⁰ *Id.* at 1878.

²⁴¹ *Id.* (citation omitted).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 1879.

that courts, not agencies, must decide. Simply put, that question is ‘beyond the *Chevron* pale.’”²⁴⁵

It is hard to imagine a more enthusiastic endorsement of the RI paradigm and outside-in accountability. A court must determine on a section-by-section basis whether Congress has delegated its interpretive authority concerning provisions that define the extent of its power. The idea that Congress creates agencies to use their expertise to fill in the gaps of a statutory scheme is nowhere to be seen. All of this is necessary because of the shortcoming of presidential and judicial oversight relying on *Chevron*. That expertise might furnish another source of legitimization is not contemplated and apparently rejected.

CONCLUSION

Variations in applying the *Chevron* doctrine are due to different judges understanding expert public administration in different ways. This insight becomes apparent once it is understood that both an RI and DC paradigm have and continue to influence how we think about the normative basis of the administrative state in the United States. We see the existence of conflict between these paradigms as offering at least a partial explanation for the legal uncertainty that is often identified by scholars as a feature of the *Chevron* doctrine in practice.

Rather than defending that uncertainty, the goal of this Article has been to dig more deeply into administrative doctrine in order to see the important, but often ignored role that understandings of expert public administration play in the *Chevron* doctrine. *Chevron* itself offers a very thin account of expertise, essentially ignoring the existence of the DC paradigm. A more robust understanding of expertise is necessary to appreciate the role that the DC and RI paradigms play in administrative law. This understanding highlights both that expertise is multifaceted and contextual. In *Chevron*, the court recognizes only comparative expertise, but expertise normally operates in agencies as both contributory and interactional expertise, both of which involve higher or more sophisticated levels of expertise than recognized in *Chevron*. Context matters because it affects how expert knowledge, skills, and experience are gained and utilized. Three institutional contexts are particularly relevant for administrative law: rational choice, normative, and discursive institutionalism. The RI paradigm reflects only rational choice institutionalism, while the DC paradigm reflects normative and discursive institutionalism. The DC paradigm, unlike the RI paradigm, acknowledges the potential of institutional norms and a discursive process to overcome self-interest as the dominant influence in an organization.

Our analysis above is not an argument for a “new” vision of administrative law, but we do contend that scholars need to take a more careful look at what is actually before them. The failure to do so has led administrative law scholarship into a corner in which

²⁴⁵ *Id.* at 1883 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)).

expertise is understood to operate apart from any context. As a result, the discipline distrusts expertise to an extent that is inconsistent with what we know about the reliability of agency governance due to normative and discursive institutionalism. Moreover, the failure to appreciate the potential of the DC paradigm, as a partner to the RI paradigm, has led us to develop outside-in accountability in ways that have unnecessarily weakened DC accountability. As we have said here and previously,²⁴⁶ the paradigms are ideal types and what we should be seeking is the optimal combination of the two paradigms, based on a realistic look at public administration.

We trust that this deeper look at *Chevron* and expertise honors Charles Koch and his efforts to understand the nature of public administration. As Bill Jordan points out in this symposium, “Charles’s scholarship reflects a faith in the ability to design complex administrative systems to achieve our collective goals.”²⁴⁷ We hope that this paper, in its own way, will advance that aspiration. At the heart of that enterprise is the need to foster richer understanding of expertise. As *Chevron* demonstrates, we have a ways to go.

²⁴⁶ Shapiro, Fisher & Wagner, *supra* note 8, at 471.

²⁴⁷ William S. Jordan, III, *Charles Koch, Jr.—The Casebook and the Scholarship*, 22 WM. & MARY BILL RTS. J. 381, 392 (2013).