REVIEWS

Statutory Interpretation and Decision Theory

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Judging under Uncertainty:
An Institutional Theory of Legal Interpretation,

In a series of articles published over the last decade, Adrian Vermeule has established himself as one of the smartest and most interesting theorists of statutory interpretation in the American legal academy. His new book uses the insights of those articles to advance a striking thesis: judges interpreting federal statutes (and, for that matter, the Constitution itself) should do much less work than most of them currently do. In Vermeule's words, "judges should sharply limit their interpretive ambitions, in part by limiting themselves to a small set of interpretive sources and a restricted range of relatively wooden decision-rules" (p 4).

As this formulation suggests, Vermeule revels in the counterintuitive. On occasion, indeed, readers may well wonder whether he is more interested in persuading them or in provoking them. But the book has all the virtues of the articles that form its backbone. Its analysis is dispassionate and incisive. Its sources are wide-ranging, reflecting the remarkable breadth of Vermeule's intellectual interests and attainments. And its exposition—especially as compared to other academic writing—is downright beautiful. While some of Vermeule's prescriptions are unlikely to win adherents, confronting his logic will help readers better understand the premises of their own preferred approaches.

I. A GUIDE TO VERMEULE'S ARGUMENT

Vermeule himself describes the book as "advanc[ing] two distinct theses" about legal interpretation (p 1). First, and less controversially, he argues that one cannot sensibly advocate a particular interpretive
approach without paying close attention to the capacities of the decisionmakers who will be applying it. Even if Approach A would unquestionably produce better results than Approach B \textit{if both were applied perfectly}, one cannot automatically conclude that real-world decisionmakers should therefore use Approach A; an interpretive theory that would be wonderful in the hands of omniscient and omnicompetent interpreters might be dreadful in the hands of interpreters who lack the information or cognitive ability that proper application of the theory requires. To determine whether particular decisionmakers should adopt a particular interpretive method, one must therefore consider what the method asks them to do and how good they are likely to be at doing it. One must also consider how, if at all, their use of the method might affect the future behavior of other relevant actors. In Vermeule’s words, “legal theory cannot reach any operational conclusions about how judges, legislators, or administrative agencies should interpret texts unless it takes account, empirically, of the capacities of interpreters and of the systemic effects of interpretive approaches” (pp 1–2).

According to Vermeule, prior scholarship has been insufficiently attentive to this point (pp 13–59). To be sure, scholars have long recognized the relevance of institutional capacities to interpretive theory. But Vermeule argues that the theorists who have paid attention to this issue have failed to analyze it properly. Rather than providing “an institutional account that is realistic about the capacities of all relevant actors,” they either have contented themselves with stylized pictures of the different branches of government or have “compare[d] a worst-case picture of one institution to a best-case picture of another” (pp 17–18).

The second aspect of Vermeule’s project, and the core of the book, is to try to do better. Given our current governmental institutions and the current state of our knowledge about their capacities, Vermeule aims to develop an institution-specific approach to interpretation. In particular, Vermeule asks two main questions: how should interpreters within the federal judiciary go about interpreting federal statutes, and to what extent should interpreters in federal administrative agencies be free to use different techniques? Ultimately, he advo-

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2 At various places in the book, and especially in the final chapter, Vermeule also discusses how judges should interpret the federal Constitution. But the bulk of the book is about statutory interpretation, and so is this Review.
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cates a dramatic shift in interpretive authority from courts to agencies. When no agency is in the picture, Vermeule urges judges to eschew the quest for interpretive perfection in favor of keeping decision costs low (pp 192–96). The result is a truly original interpretive theory—one that, for better or for worse, does not reflect how any federal judge currently acts.

Part I of this Review summarizes the gist of Vermeule’s argument. Parts II and III explain why I am not entirely persuaded.

A. “The Stalemate of Empirical Intuitions”

Suppose that you have just been appointed to the federal bench, and you are trying to identify the interpretive techniques that you should use to interpret federal statutes. In your judgment, neither the federal Constitution nor any other source of federal law answers the methodological questions that you confront (pp 31–33). Your new colleagues, moreover, disagree with each other to a sufficient extent that you cannot simply defer to an existing consensus (p 132). You must engage in what Vermeule calls “interpretive choice”—the selection, conscious or not, of a particular methodology from among an array of possible alternatives (pp 66–67).

Your first step, one might think, will be to identify some metric against which to judge the likely results of different methodologies. That task might seem daunting; so-called textualists are said to have very different views about the high-level goals of statutory interpretation than so-called intentionalists or purposivists (pp 82, 202–05). But while Vermeule does not question the true extent of this disagreement, he treats it as being largely irrelevant to how judges should behave. In his view, we do not have enough information about the real-world consequences of different interpretive techniques for the existing disagreements about high-level goals to matter much in practice (pp 2–3, 63, 289).

For the sake of simplicity, then, let us stipulate that you have a fairly typical view of what statutory interpretation is all about. Although the concept of legislative intent is complicated, you do not think it meaningless, and you care about some version of “intended
meaning”; you want the directives that interpreters enforce to correlate in some way with the directives that members of the enacting legislature understood themselves to be establishing, and you would consider it a serious problem if your chosen interpretive methodology impeded effective communication between the courts and conscientious members of Congress. But you would also consider it a serious problem if your chosen methodology impeded effective communication between Congress and the public at large (or, more realistically, the lawyers who advise people in the private sector about their legal obligations); you recognize that statutes are not secret messages from Congress to the courts, and you think it important for their meaning to be accessible both to the electorate and to the people whom the law regulates. You also want to keep the costs of the interpretive process within reasonable bounds for all concerned; interpretive techniques that would delay your processing of other cases or substantially increase the expense of litigation are not necessarily desirable, even if they might marginally improve the accuracy of the results that you reach in individual cases. Finally, you care about public policy. While you respect the limits of your institutional role and recognize that Congress has policymaking priority in our system, you believe that interpreting Congress’s statutes often entails some subsidiary policy choices, and you want those choices to promote rather than detract from overall social welfare.

In theory, you can use this set of goals to structure your thinking about the more particularized questions of interpretive practice that currently divide the federal judiciary. To determine your stance on the use of legislative history, for instance, you might ask whether supplementing statutory text with committee reports and other documents generated during the legislative process will help you better understand the directives that members of Congress collectively intended to establish, whether any incremental benefit along these lines will justify the cost of the necessary research, and whether your reliance upon such research will make the law’s operational meaning less accessible to the public at large. Unfortunately, different interpreters have dramatically different intuitions about the facts that bear on these issues. Justice Scalia asserts that it is very rare for members of Congress to

herent, or that every possible method of aggregation is just as sensible as every other possible method of aggregation.”). See also Lawrence M. Solan, Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation, 93 Georgetown L J 427, 437-49 (2005) (discussing both philosophical theories of collective intent and psychological research about the attribution of intent to groups).
have formed a true collective intention, of a sort that they mean to be authoritative, on matters that the statutory text leaves unclear; Justice Stevens suggests that such collective understandings are more common. Justice Scalia adds that judges who are insulated from the legislative process will not be very good at using legislative history to reconstruct whatever collective understandings did in fact exist; Justice Stevens has more faith in the typical judge's capacity to assess the legislative history and to sort reliable statements from unreliable ones. Justice Scalia suggests that legislative history encourages judges to find ambiguity where none really exists, and thereby magnifies the range of policies that judges can attribute to the statute; Justice Stevens believes that the use of legislative history tends to constrain the discretion that judges confronting statutory texts would otherwise indulge.

These and other disputes about the use of legislative history are empirical, in the sense that they relate to facts and that an omniscient observer would know which side has the better argument. But Vermeule plausibly suggests that the current state of our empirical knowledge does not permit us to resolve them with any confidence. What is more, there is little prospect of designing and executing empirical studies that will change this situation (p 162). We are left with what Vermeule calls "the stalemate of empirical intuitions" (p 153): Justice Scalia acts upon his intuitions about the facts, Justice Stevens acts upon his competing intuitions, and neither can prove the other wrong.

According to Vermeule, the same stalemate characterizes a host of controversies about interpretive methodology (pp 162–63). Take,

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5 Compare Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 32 (Princeton 1997) ("[W]ith respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent, so that any clues provided by the legislative history are bound to be false."), with West Virginia University Hospitals, Inc v Casey, 499 US 83, 112–15 (1991) (Stevens dissenting) (drawing a contrary lesson from various cases in which Congress passed new statutes to override Supreme Court decisions that "ignored the available [extratextual] evidence of congressional purpose").

6 Compare Conroy v Aniskoff, 507 US 511, 519 (1993) (Scalia concurring in judgment) ("If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."), with Exxon Mobil Corp v Allapattah Services, Inc, 545 US 546, 125 S Ct 2611, 2630 (2005) (Stevens dissenting) (arguing that committee reports have "special significance as an indicator of legislative intent" because "busy legislators and their assistants rely on [such reports] in casting their votes").

7 Compare Scalia, A Matter of Interpretation at 35–36 (cited in note 5) (arguing that "[l]egislative history provides ... a uniquely broad playing field" and that its use "has facilitated ... decisions that are based upon the courts' policy preferences, rather than neutral principles of law"), with BedRoc Limited, LLC v United States, 541 US 176, 192 (2004) (Stevens dissenting) ("A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process").
for instance, debates about the importance of relatively rule-like canons of construction, such as the presumption against reading federal statutes to abrogate the states' sovereign immunity. When a judge is trying to determine whether a facially ambiguous federal statute exposes states to suits by individuals, what weight should he put on this generic presumption, and what sort of statute-specific clues about the enacting Congress's understandings should be capable of trumping it? Someone trying to answer this question might want to know how often Congress collectively intends to abrogate the states' immunity without making this intention clear on the face of its statutes, what kinds of clues (if any) Congress tends to leave when it forms such a collective intent, how accurately the judge can identify and process those clues, how an additional judge's invocation of the presumption against abrogation might affect Congress's behavior in the future, and how the costs of erroneously finding abrogation where it was not intended compare to the costs of erroneously denying abrogation where it was intended. But the real-life judges who must decide cases cannot answer these questions with any confidence. All they have are their intuitions, and those intuitions differ from judge to judge.

B. Borrowing Tools from Decision Theory

Vermeule's main ambition, and the distinctive contribution of his book, is to use the tools of decision theory to break stalemates of this sort. In particular, Vermeule seeks to cope with the problem of "uncertainty"—the fact that judges do not have (and cannot acquire) much of the information on which a rational decisionmaker would want to base his choice of interpretive methodology.\(^8\)

\(^8\) As Vermeule notes, the problem of "uncertainty" (which involves gaps in the information available to a decisionmaker) is distinct from the problem of "bounded rationality" (which involves limitations on the decisionmaker's ability to process the information that he does have). Early on in his discussion, Vermeule suggests that one can safely lump these problems together when discussing interpretive choice (pp 154–55). Because they play somewhat different roles in his analysis, however, I will try to keep them separate. For Vermeule, the problem of bounded rationality is one of the many concerns that bear on the selection of an interpretive methodology; other things being equal, an interpretive methodology should not ask judges to perform tasks that they will be bad at performing (pp 2–3). It follows that in an ideal world, someone choosing an interpretive methodology for a particular judge would be well informed about the types of processing errors to which the judge is prone. Unfortunately, we do not have very good empirical information on this subject, either about individual federal judges or about the tendencies of judges in general. The extent to which federal judges can reliably process legislative history, for instance, is one of the subjects on which Vermeule detects a "stalemate of empirical intuitions" (p 190). Thus, some of the "uncertainty" with which interpretive choice must cope relates to the problem of "bounded rationality." Still, these two problems lie on different planes.
To lay the groundwork for his analysis, Vermeule gives readers a quick primer. In the jargon of decision theory, someone who acts under conditions of "risk" has all of the information needed to calculate the expected cost or benefit of his decisions; he knows not only all of the possible outcomes that might result from each of the options that he is considering, but also the probability of each outcome and its payoff (p 171). Someone who must act under conditions of "uncertainty" is not so fortunate; he knows the possible outcomes and their payoffs, but not the relevant probabilities (p 171). Under what Vermeule sometimes calls "severe uncertainty," indeed, he does not have any reliable sense of the probabilities at all (p 173).

As Vermeule explains, decision theorists have analyzed various techniques for coping with severe uncertainty. Vermeule does not purport to formulate a general theory about which techniques are best, but he does select a few that, in his view, have useful applications in the context of interpretive choice. Two techniques in particular seem to do most of the work in his subsequent analysis. The first, the "principle of insufficient reason," tells decisionmakers who can identify all the possible consequences of each option under consideration, but who have no reliable idea of the relevant probabilities, to assume that all of the unknown probabilities are equal and then to proceed as they would in a situation of mere risk (pp 173–75). The second, the "maximin criterion," tells decisionmakers who cannot use the principle of insufficient reason (perhaps because they do not know how to partition the relevant outcomes) to try to avoid disaster by "choos[ing] the option whose worst possible outcome is better than the worst possible outcomes of the alternatives" (pp 175–76).

For these techniques to make sense, of course, decisionmakers must genuinely face severe uncertainty. But Vermeule posits that many of the questions that are important to interpretive choice—including but not necessarily limited to questions on which judges' empirical intuitions are currently deadlocked—satisfy this condition.

Vermeule begins with the question of legislative history. Even if all judges agreed that statutory interpreters should pursue the intended meaning of statutory language, different judges would have different intuitions about whether their use of legislative history would advance or retard this high-level goal. Judge Smith might believe that legislative history frequently contains valuable information and that consulting it will edify her more often than it misleads her; Judge Jones might believe the opposite. According to Vermeule, however, neither judge should have any confidence in her intuitions on this topic. If both judges were thinking clearly, each would recognize
that her subjective assessment of the relevant probabilities is simply not meaningful, because no one has the data necessary to reach an informed conclusion. In Vermeule’s opinion, there is “severe uncertainty” about whether judges will do better by consulting legislative history or by ignoring it (pp 189–90).

That premise will strike some scholars as implausible. People who want judges to consult legislative history often quote Chief Justice Marshall’s rationale for considering a statute’s title when trying to resolve ambiguity in the statute’s operative provisions: “Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived.”9 According to people who take this statement literally, judges can be expected to make better decisions when they take account of more information, and so a strategy of flatly ignoring the available legislative history is more likely to reduce judges’ accuracy rates than to improve them. As Vermeule notes, however, that conclusion rests on some unprovable assumptions. In the real world, where decisionmakers are not perfect and information is not complete, it is at least possible that decisionmakers can increase their accuracy rates by disregarding some categories of information altogether—particularly when the decisionmakers would not be very good at processing that sort of information or when the information that would be available to them is likely to be skewed in ways that they cannot detect. Notwithstanding the contrary intuitions of many scholars, Vermeule sees no reason to assume that judges who try to read the tea leaves of legislative history will tend to reach more accurate results than judges who do not.

Of course, Vermeule also sees no reason to make the opposite assumption. But given what he considers “severe uncertainty” on this point, Vermeule nonetheless contends that decision theory should lead judges to adopt a categorical rule against consulting legislative history. If judges currently can have no reliable idea whether the use of legislative history moves their results closer to or further from the high-level goals that statutory interpretation should serve, then the principle of insufficient reason tells judges to assume that both possibilities are equally likely (p 192). Yet while the other costs and benefits of using legislative history are uncertain, its effect on “the direct costs of litigation and decision” is not; legislative history can be “voluminous,” and there is fairly widespread agreement that it is “expensive to research” (p 193). Vermeule concludes that a rational judge

9 United States v Fisher, 6 US (2 Cranch) 358, 386 (1805).
should therefore refrain from considering legislative history: given the current gaps in our empirical knowledge, judicial use of legislative history cannot be expected to improve the decisional process (because the possibility of benefits is effectively counterbalanced by the possibility of harms), but it can be expected to increase the costs of the process itself (p 193).

Vermeule reaches similar conclusions about many of the canons of construction that courts sometimes invoke (pp 198–202). To be sure, when generalist judges must resolve interpretive questions without guidance from specialists in administrative agencies, Vermeule does not object to their using default rules to handle certain issues that statutory language often raises but does not resolve. For instance, when a statute "contains a list that can either be read as exhaustive or illustrative," or when it is unclear "whether the statute applies to American firms outside the United States or only domestically" (p 200), interpreters need to resolve the matter one way or the other. Although judges might try to handle such questions on a statute-by-statute basis, Vermeule thinks it sensible—and perhaps even inevitable—for them to establish some default rules instead. But he encourages judges not to spend much time trying to figure out which way to set the defaults, and to spend no time at all trying to fine-tune them in individual cases. His argument follows the same structure as his analysis of legislative history: efforts along these lines will increase "decision costs" without achieving any predictable benefits (p 201).

Vermeule is much less tolerant of canons whose use does not strike him as inevitable. In particular, he encourages judges to abandon various "dice-loading rules," 10 such as the canon that ambiguities in federal statutes should be resolved in favor of Native Americans (p 199), the similar principle favoring veterans (p 200), and perhaps even the rule of lenity (p 202). In Vermeule's view, having more canons rather than fewer marginally increases the costs of litigation and decision (p 198); the decisional apparatus becomes more complicated, conflicts among the canons become more likely, and people have to figure out the precise contours of each of the specialized rules in question. To the extent that particular canons have obvious distributive effects, moreover, they are likely to generate "persistent disagreement over the[ir] content," and the resulting variations will both increase decision costs and reduce whatever benefit might otherwise flow from establishing rules of con-

10 I borrow this term from Justice Scalia. See Scalia, A Matter of Interpretation at 28 (cited in note 5).
struction (p 199). According to Vermeule, experience bears out this point; judicial application of the rule of lenity, for instance, has been "notoriously sporadic and unpredictable" (p 135)."11

For similar reasons, Vermeule urges scholars to stop promoting so-called "democracy-forcing rules"—canons that courts allegedly can use to make members of Congress deliberate more carefully about matters that judges deem especially sensitive (pp 132–33, 198). As Vermeule notes, the presumption against retroactivity, the canon of avoidance, and a variety of other rules of thumb are often defended in these terms (p 133). Indeed, Cass Sunstein has encouraged courts to adopt a host of additional canons designed to "promote better law-making" and "serve the purposes of deliberative government."12 But Vermeule suggests two reasons for skepticism about such proposals. First, even if all judges used the same interpretive methods, Congress's responsiveness to those methods is itself an empirical question on which people have little reliable information (pp 133–34, 199). Second, and more interestingly, even if we could safely assume that Congress would respond in salutary ways if a large group of judges consistently enforced a particular set of canons, this assumption is largely irrelevant to the calculus that an individual judge should use when selecting interpretive methods (pp 121–23). Unless the judge sits on the Supreme Court, whatever canons he personally adopts are extremely unlikely to affect how Congress legislates; any realistic mechanism for that effect requires some critical mass of judges, and no individual federal judge can force his colleagues to coordinate on a particular methodology. In Vermeule's view, indeed, even the Supreme Court cannot realistically secure coordination on particular democracy-forcing rules, because those rules tend to have political valences that work to defeat the necessary consensus.13 Vermeule concludes that canons designed "to provoke desirable legislative responses" are unlikely to work; they will generate extra decision costs but no predictable benefits (p 198).

13 According to Vermeule, different justices are likely to have sufficiently different views to prevent the Court as a whole from acting with a single mind (p 131), and any temporary coalition might fall apart before the Court encountered statutes enacted in response to it (p 128). To make matters worse, most questions of statutory interpretation never make it up to the Supreme Court, and the extent to which certiorari review generates uniformity among lower courts is another empirical question on which we have insufficient data (p 130).
Vermeule is also skeptical of canons designed to reflect Congress's existing patterns of behavior and to encourage judges to answer interpretive questions in light of those patterns. Such canons rest on the premise that when a statutory provision could be interpreted in either of two ways, one of which is consistent with Congress's established patterns and the other of which is not, Congress is more likely to have intended the former meaning than the latter. Vermeule contends, however, that the “informational value” of these canons is relatively low; because the canons are “generic,” they cannot “speak directly to the particulars of the interpretive problem at hand,” and they therefore cannot offer great insight into what members of the enacting Congress were really thinking (pp 199–200). Although Vermeule concedes that “the costs of using the canons are plausibly small,” he argues that the benefits are small too, and that “the benefits are far more conjectural than the costs” (p 200).

Vermeule also discourages judges from trying to shed light on the meaning of one statute by considering other, related statutes—a standard technique for textualists and purposivists alike, but one that Vermeule believes “often fails cost-benefit analysis” (pp 202–03). Having to identify and consider these “comparison texts” unquestionably takes time. The time that judges and law clerks spend “searching out and comparing usage across the whole Code or within a database” leaves them with less time for “considering directly relevant texts in other cases” (p 204); the time that lawyers spend in similar pursuits translates into higher fees for their clients. The marginal costs of consulting these “collateral sources” can therefore be significant (pp 203–04). In Vermeule's opinion, however, the marginal benefits tend to be low: “The most important common feature of other statutes is that they are not the statute before the Court, and any information they supply will be at best collateral or low-value” (p 205). Indeed, to the extent that judges misinterpret the comparison texts that they consider, the practice of considering such texts may actually be counterproductive, and Vermeule sees “no particular reason to think that the illuminating effect of holistic textualism will predominate over its error-producing effect” (pp 204–05). Given the certain costs and the uncertain benefits of paying attention to related statutes, Vermeule advises judges to consider only the statute that they are trying to interpret.

Vermeule does not stop there. He would have judges limit themselves to “the directly dispositive clauses or provisions at hand” and not seek guidance even from other provisions in the same statute (p 204). Vermeule defends this startling idea on his usual grounds. In his view, the benefits of having judges consider the statute as a whole
are quite uncertain; while Vermeule trusts interpreters within special-
ist agencies to draw fairly accurate conclusions about how different
provisions of a statute fit together, he does not think that generalist
judges can use this technique so well. The more sources judges con-
sider, though, the greater their decision costs.

In the end, Vermeule uses sophisticated-sounding tools to reach a
crude-sounding conclusion: judges should interpret each statutory
provision according to “its surface or apparent meaning” and not
much else (p 183). When judges can identify such a meaning, they
should never attempt to enrich their understanding by drawing upon
collateral sources; on cost-benefit grounds, judges should abandon the
use of “legislative history, many of the canons of construction, and
holistic textual comparison” (p 183). Indeed, judges should not use
these tools even when they confront questions that a statute’s surface
meaning does not answer, but that nonetheless lie within the statute’s
domain. As we shall see, Vermeule’s principal suggestion for such
cases is that judges should defer to the interpretation of administrative
agencies. But if there is no agency in the picture, courts still should not
engage in “complex interpretation” (pp 214–15). Instead of trying to
maximize their accuracy rates (subject to the side constraint that the
interpretive process should not be wildly expensive), courts should
strive to minimize decision costs (subject to the side constraint that the
interpretive process should not be wildly inaccurate).

C. Administrative Agencies and Institutional Choice

Although Vermeule encourages federal judges to simplify their
interpretive techniques dramatically, he does not give the same advice
to interpreters in federal administrative agencies. In keeping with his
belief that decisionmakers in different institutions tend to have differ-
ent capacities, he tentatively suggests that agencies can productively
use many of the very techniques that he urges judges to abandon.

In Vermeule’s view, for instance, “[s]pecialist agencies ... are far
better positioned to comprehend the complex legislative histories of
their particular statutes than are generalist judges” (p 215). For one
thing, they have the luxury of being able to delve more deeply into the
available materials; while judges cannot possibly read all the committee
reports and floor debates associated with each statute they encounter,
agency interpreters confront a smaller set of statutes and can become
quite familiar with the relevant records. In addition, they may have a
better feel for the legislative process and a better grasp of any rele-
vant technical issues (p 209).
Interpreters in administrative agencies may also be better positioned than judges to use other statutory provisions to shed light on the one being interpreted (p 205). Being immersed in the relevant area of law already, they may be quite efficient at identifying provisions that are in pari materia, and their understanding of how those provisions fit together may be more reliable than the typical nonspecialist's. To the extent that administrative interpreters can conduct intertextual comparisons more cheaply and accurately than judges can, cost-benefit analysis might lead them to retain this tool even if judges should discard it.

Just as agency interpreters may be better positioned than judges to engage in these forms of complex interpretation, so too they may be better positioned to fill whatever gaps their interpretive methods identify. When choosing among different constructions, agency decisionmakers are likely to know more than generalist judges about the probable consequences of each. As compared to the life-tenured federal judiciary, agencies are also "systematically more responsive and accountable" to the political process (p 210). Thus, both technocratic and democratic ideals arguably favor giving agencies rather than courts primary responsibility for the policy judgments that the resolution of ambiguities sometimes requires.

For these and other reasons, there is one judicial canon that Vermeule very much likes (and wants to expand considerably): the presumption that when Congress commits the administration of a statutory provision to a particular federal agency, Congress is implicitly authorizing the agency to interpret the provision's language in a way that binds later courts. As the Supreme Court formulated this canon in *Chevron U.S.A., Inc v Natural Resources Defense Council, Inc*," reviewing courts must accept the agency's reading on any matter as to which (1) the statutory provision is "silent or ambiguous" and (2) the agency has supplied a "permissible" construction. Not only does Vermeule embrace this canon wholeheartedly, but he encourages judges to take an extraordinarily lenient view of both conditions. In his view, a provision qualifies as "silent or ambiguous" as long as it contains some gap or ambiguity on its surface; even if the judiciary's traditional tools of construction would completely eliminate the ambiguity, Vermeule believes that judges should not use those tools to constrain the agency's interpretive freedom (pp 206, 215). Indeed,
Vermeule suggests that judges should give agencies considerable leeway to adopt an entirely different interpretive methodology than the judges themselves would use (pp 212–14). Vermeule also seems to believe that the second step of the Chevron framework should have very little bite: rather than having courts determine whether the agency’s interpretation is “permissible” by second-guessing the agency’s reasoning process, Vermeule would let the agency supply any answer that does not contradict “clear and specific language[] in the provision immediately at issue” (pp 224, 229).

In addition to boosting the power of Chevron deference, Vermeule would also expand its scope. Under current doctrine, federal statutes are presumed to give an agency Chevron-style interpretive authority only with respect to provisions that the agency is in charge of administering, and agencies are not thought to “administer” provisions that are enforced only in court. Vermeule seems inclined to relax or eliminate that limitation. Similarly, Vermeule sharply criticizes the Supreme Court’s recent decision in United States v Mead Corp, which declined to accord Chevron deference to interpretations reflected in the Customs Service’s tariff classifications. Rather than asking on a statute-by-statute basis whether Congress intends particular agencies to be able to exercise Chevron-style interpretive authority through mechanisms other than formal adjudication or notice-and-comment rulemaking, Vermeule favors a less nuanced default rule: absent contrary directions from Congress, courts should apply Chevron deference without regard to the procedures that the relevant agency used to develop its interpretations or the form in which it chose to express them (pp 215–23).

II. JUDGING WITHOUT AGENCIES

Vermeule suggests that under his expanded version of Chevron deference, it will be relatively rare for federal judges to confront questions of statutory interpretation on which no agency’s views deserve deference (p 201). This suggestion, however, is surely exaggerated. Many important federal statutes create no significant role for agency
interpreters. Others address so many different agencies that courts cannot sensibly defer to any single agency's position; for instance, even Vermeule concedes that courts must interpret the Administrative Procedure Act on their own (p 217). Before considering the proper allocation of interpretive authority between courts and agencies, I will therefore raise a few questions about the approach that Vermeule would have judges take when no agency is in the picture.

A. How Far Does Our "Severe Uncertainty" Really Extend?

Vermeule's argument for jettisoning many of the traditional tools of statutory construction rests on the premise that we face "severe uncertainty" about the practical consequences of a judge's use of those tools; for all we know, the tools are just as likely to worsen the judge's results as to improve them. In support of this claim, Vermeule points to the "stalemate of empirical intuitions" between today's textualists and today's purposivists. But that stalemate probably does not reach as far as Vermeule's thesis requires.

It may well be true that the current state of human knowledge does not permit us to make an informed choice between textualism and purposivism; even if we could agree upon the high-level goals that we want the judiciary's methods of statutory interpretation to serve, we might still face severe uncertainty about whether the typical judge would better promote those goals by gravitating toward textualism or by gravitating toward purposivism. As Vermeule suggests, moreover, we might sensibly react to this uncertainty by favoring the approach that will be cheaper to implement; if textualism entails fewer decision costs than purposivism, that would be a reason to prefer textualism over purposivism. But one cannot automatically use this logic to support an even cheaper third alternative, which uses a more restricted interpretive palette than either textualism or purposivism, unless the

20 See, for example, the Federal Arbitration Act, 9 USC § 1 et seq (2000); the Bankruptcy Code, 11 USC § 101 et seq (2000); most of the Copyright Act, 17 USC § 1 et seq (2000); and the Judicial Code, 28 USC § 1 et seq (2000).

uncertainty to which one is reacting reaches this alternative as well. Vermeule’s approach probably does not satisfy that condition.

To make this criticism more concrete, suppose one shares the commonly held view that judges should try to identify some version of the “intended meaning” of statutory language. As Vermeule notes, different theorists disagree about whether textualist or purposivist methods will bring judges closer to this high-level goal. The same stalemate of empirical intuitions might extend to the choice between purposivism and Vermeule’s proposed alternative. But it does not extend to the choice between textualism and Vermeule’s proposal. To the contrary, nearly everyone engaged in the current debate is likely to share the intuition that judges who use standard textualist methods will come closer to the intended meaning of statutory language than judges who use Vermeule’s approach. Textualists themselves will require little persuasion on this point. As for purposivists, they are likely to regard Vermeule’s emphasis on “surface meaning” as being even cruder and more error-prone than the textualist methods that they criticize.

Even if I am right about people’s likely intuitions, of course, this consensus would not threaten Vermeule’s argument if we could dismiss it as unfounded. But notwithstanding all the gaps in our empirical knowledge, I doubt that there really is “severe uncertainty” about whether judges will grasp the intended meaning of a statute better if they read the statute as a whole than if they focus exclusively on the one provision most immediately at hand. Likewise, I see little reason to think that there is severe uncertainty about whether canons that are designed to reflect Congress’s established patterns of behavior will be better guides to the intended meaning of statutory language than canons whose content is picked at random. Although the contrarian possibilities that Vermeule raises on these points may be conceivable, they seem distinctly improbable—and Vermeule himself has no objection to basing interpretive choices upon what the available information genuinely identifies as the probabilities. It seems probable, then, that judges will do a better job of capturing the intended meaning of statutory language if they use standard forms of textualism than if they adopt Vermeule’s even more minimalist alternative.

22 As Vermeule puts it in a different context, to refuse to act upon any such assessments “is to cross the indistinct but real boundary between laudable agnosticism and debilitating skepticism” (p 215).

23 To avoid misunderstanding, I should make clear the limits of what I have just said. The argument that I have just advanced does not purport to establish that all judges should be textualists; I have said nothing about the choice between textualism and purposivism. But the argument does suggest that judges who care about identifying the intended meaning of statutory
B. To What Extent Do the Claimed Benefits of Vermeule's Approach Require Coordination?

Even though Vermeule's approach can be expected to yield less accurate results than more familiar methods of interpretation, it might still be attractive if it reduced "decision costs" enough. But I am skeptical that individual judges could generate any significant savings by adopting Vermeule's approach. Meaningful reduction of decision costs would require precisely the sort of coordinated action that Vermeule does not think the judiciary can attain.

Vermeule himself anticipates this objection and rejects it; he argues that individual judges can use his strategy to reduce decision costs regardless of what other judges do (p 226). That is true up to a point—individual judges who use Vermeule's strategy might indeed spend somewhat less time than other judges on the questions of statutory interpretation they confront. To be sure, the time that they free up in this way cannot necessarily be used to process more cases. (Under the methods that most federal courts currently use to assign cases to judges, individual judges usually cannot get more cases to decide than their colleagues.) But judges who use Vermeule's approach may have more time either to play golf or to analyze the nonstatutory issues in their cases.

Still, these time savings are likely to be fairly small. Even judges who are willing to consider legislative history or related provisions in other statutes do not usually conduct unguided searches for this information; they read briefs submitted by the parties and they follow the citations that the parties have provided. From the judge's perspective, then, it need not take a great deal of time to consider arguments based on legislative history or statutes in pari materia.

Of course, those arguments are not costless to produce; while judges can piggyback on the efforts of the parties' lawyers, the lawyers themselves cannot. But even if lawyers were trying to present judges only with arguments about "the statutory . . . provisions directly applicable in the case at hand" (p 204), they would have to read all of the statutes that might contain such provisions. In the course of trying to identify the "provisions immediately at hand" (p 184), they would inevitably come across at least some of the sources that distinguish standard forms of textualism from Vermeule's approach (such as other

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language should not be Vermeulians. Even if the stalemate of empirical intuitions afflicts both the choice between textualism and purposivism and the choice between purposivism and Vermeule's approach, the transitive property does not apply: everyone's empirical intuitions are likely to favor standard forms of textualism over Vermeule's approach.
provisions in the same statute and statutes in pari materia). The marginal cost of calling those sources to the judges’ attention seems fairly low. Thus, Vermeule’s approach may not be substantially cheaper for the legal system to implement than standard forms of textualism.

Vermeule’s approach might seem to promise greater savings when compared to approaches that emphasize the use of legislative history. After all, if lawyers believe that arguments about legislative history might help them win their case, and if winning the case is sufficiently valuable to their clients, they are likely to do some costly research that they would not choose to do if all judges used Vermeule’s approach. If Vermeule is correct that research of this sort does not predictably improve the accuracy of the legal system’s results, moreover, then the resulting legal fees—while worthwhile from the clients’ perspective—may well represent a loss for society as a whole.

Importantly, however, an individual federal judge’s decision to embrace Vermeule’s approach would not necessarily avoid this loss in any given case. Individual circuit judges, in particular, are in a terrible position to save the parties any substantial research costs. Not only will the parties already have done much of the necessary research at the district court level, but the parties typically must submit their appellate briefs before they know which circuit judges will sit on their panel.24 Even if one of the judges on the panel has embraced Vermeule’s approach, moreover, the parties will be trying to win the votes of the other judges too. For that very reason, indeed, an individual circuit judge’s decision to adopt Vermeule’s novel approach might marginally increase the litigation costs that society incurs, because some parties would find it advantageous to address both the application of more traditional interpretive methods and the application of Vermeule’s approach.25

At least when no administrative agency is in the picture, then, Vermeule’s proposed approach does not seem very attractive. An individual judge who embraces Vermeule’s emphasis on the “surface … meaning” of “the statutory text directly at hand” (p 183) seems likely to


25 Individual district judges might be in a somewhat better position than individual circuit judges to cause the parties to economize on research costs. But the coordination problem will still have at least some effect. Even if the district judge who is assigned to a case makes clear that she will ignore all arguments based on legislative history and other collateral sources, the parties’ lawyers might research such sources anyway, both to determine their prospects on appeal and to preserve arguments that a panel of circuit judges might find persuasive.
reach less accurate results (on any plausible version of accuracy) than a judge who uses standard forms of textualism. If Vermeule is correct about the judiciary's low capacity for coordination, moreover, this loss of accuracy seems unlikely to be offset by a substantial reduction in decision costs—especially when one compares Vermeule's approach to textualism, and perhaps even when one compares it to purposivism.

III. DOES CHEVRON CONQUER ALL?

Even if Vermeule is wrong to steer judges away from all forms of "complex interpretation" when no agency is in the picture, the real focus of his book is the interpretive techniques that judges should apply to statutory provisions that a specialist agency has already construed. In particular, Vermeule is interested in the relationship between Chevron deference and what the Chevron Court called the "traditional tools of statutory construction"—in other words, the tools traditionally used by courts to determine statutory meaning. When a statutory provision seems ambiguous on its face, but an established canon of construction would resolve the ambiguity, how should reviewing courts decide whether the relevant agency can ignore the canon? What if the agency's construction does not offend any established canons, but conflicts with the available legislative history or the apparent purpose behind related statutory provisions? When reviewing courts apply the Chevron framework, which interpretive tools should they use to narrow the range of meanings from among which the agency can choose, and which interpretive tools should they permit agencies to discard?

Although these questions are central to the practical operation of Chevron deference, which in turn has become one of the cornerstones of federal administrative law, the Supreme Court has given them almost no sustained attention. Even the United States Court of Appeals for the D.C. Circuit, whose administrative-law opinions in the two decades after Chevron have often been more sophisticated than those of the Supreme Court, has shed relatively little light on the interaction between Chevron deference and other interpretive principles. The relationship between Chevron deference and the canons, for instance, remains "one of the most uncertain aspects of the Chevron doctrine."

26 Chevron, 467 US at 843 n 9.
27 Curtis A. Bradley, Chevron Deference and Foreign Affairs, 86 Va L Rev 649, 675 (2000). For surveys of the confused case law on such matters, see Elliot Greenfield, A Lenity Exception to Chevron Deference, 58 Baylor L Rev 1, 41–47 (2006) (discussing a three-way circuit split about "how Chevron interacts with the rule of lenity"); Scott C. Hall, The Indian Law Canons of Con-
With a few notable exceptions,\textsuperscript{28} moreover, legal scholars have spent little time trying to dispel the uncertainty. Vermeule therefore deserves great credit for focusing attention on these important questions.

The answer that he proposes, however, is too extreme to be very plausible. According to Vermeule, “courts should defer to agencies whenever the statutory text at issue, viewed on its face and without recourse to the traditional tools, contains a surface-level gap or ambiguity” (p 211). Even if the ambiguity would vanish if interpreters simply read other provisions of the same statute or applied some widely recognized canon that reflects Congress’s established patterns, Vermeule does not want reviewing courts to use such techniques to restrict the relevant agency’s interpretive freedom. Vermeule draws no distinctions among the “traditional tools of statutory construction,” and he believes that \textit{Chevron} deference should trump them all.

As Vermeule is well aware, of course, even to identify the “surface-level” meaning of a statutory provision requires attention to some set of linguistic conventions (pp 43–44, 188), such as the conventions about vocabulary and grammar that were widely considered part of American English at the time the provision was enacted. When Vermeule urges judges to deemphasize the traditional tools of statutory construction, he is not talking about the “fundamental canon” that interpreters should usually give statutory language its “common meaning”\textsuperscript{29}—the meaning that it would have in what the Supreme Court calls “ordinary English.”\textsuperscript{30} By and large, the tools that he wants to deemphasize are the ones that apply specifically to the interpretation of statutes (rather than English prose in general).

For people whose view of the high-level goals of statutory interpretation pays some attention to congressional intent, those tools fall into two broad categories. Some of the traditional tools of statutory

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\item Perrin \textit{v United States}, 444 US 37, 42 (1979).
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construction, such as so-called descriptive canons, are designed to minimize gaps between the directives that judges understand statutes to establish and the directives that members of the enacting Congress understood themselves to be enacting; they are aimed at identifying the intended meaning of statutory language. Others, such as so-called normative canons, are designed to guide judges when the available information about intended meaning has run out—when the judges’ primary interpretive tools have succeeded only in identifying a range of possible meanings, none of which seems significantly more likely than the others to reflect what members of the enacting legislature probably had in mind.\footnote{See Stephen F. Ross, Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?, 45 Vand L Rev 561, 563 (1992) (discussing the distinction between descriptive and normative canons).}

At least before Vermeule’s book, courts and commentators alike assumed that most of the interpretive techniques in the first category should trump \textit{Chevron} deference, in the sense that judges can properly use them to narrow the range of interpretations from which the relevant administrative agency can choose.\footnote{See Sunstein, 90 Colum L Rev at 2105, 2109–10 (cited in note 28) (concluding that “\textit{Chevron} is plainly overcome by principles that help to ascertain congressional instructions”). See also Bradley, 86 Va L Rev at 675 (cited in note 27) (“[T]he Court regularly applies text-oriented canons in determining whether Congress has spoken to an issue under Step One of \textit{Chevron}.”); Mendelson, 102 Mich L Rev at 745 (cited in note 28) (“Despite \textit{Chevron}, for example, courts generally have applied rules of syntax in preference to agency interpretations.”). For recent applications of text-based canons to restrict agencies’ interpretive freedom, see \textit{National Credit Union Administration v First National Bank & Trust Co}, 522 US 479, 501–02 (1998) (presumption of consistent usage); \textit{United States v Cooper}, 396 F3d 308, 312–13 (3d Cir 2005) (presumption against superfluity); \textit{California Independent System Operator Corp v FERC}, 372 F3d 395, 400 (DC Cir 2004) (\textit{noscitur a sociis}); \textit{City of Tacoma, Washington v FERC}, 331 F3d 106, 115 (DC Cir 2003) (construction of statutes in pari materia). For similar applications of descriptive canons designed to reflect Congress’s established patterns of behavior, see \textit{INS v St Cyr}, 533 US 289, 320 n 45 (2001) (presumption against retroactivity); \textit{ABA v FTC}, 430 F3d 457, 472 (DC Cir 2005) (presumption that Congress does not intend to regulate areas that it has traditionally left to the states); \textit{California State Board of Optometry v FTC}, 910 F2d 976, 980–82 (DC Cir 1990) (presumption that Congress does not intend to regulate the states as sovereigns).} Although Vermeule’s contrary suggestion requires us to take a fresh look at this issue, Part III.A concludes that the conventional wisdom should survive his arguments. Part III.B then considers whether any of the interpretive techniques in the second category should also be capable of trumping \textit{Chevron} deference. Part III.C discusses Vermeule’s broader ideas about the relationship between \textit{Chevron} deference and an agency’s choice of interpretive method.
A. *Chevron* and Interpretive Tools Designed to Identify a Statute’s Intended Meaning

The standard defense of *Chevron* deference starts from the premise that statutes do not have determinate meanings on each and every legal issue within their domain, and asks whether the legal system will work better if primary responsibility for filling gaps and resolving ambiguities lies with judges or with decisionmakers in a specialist agency. As compared to generalist judges, agency decisionmakers are likely to have more experience in the relevant field, better information about problems that need solving, and a better sense for the practical consequences of various possible rules. Agency decisionmakers also are subject to more effective presidential control than life-tenured judges, and they interact more regularly with the relevant congressional committees and staffs; assuming that it is desirable for interpreters to pay some attention to current political preferences when resolving ambiguities in statutory language, many agency decisionmakers are probably better positioned than the typical federal

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33 Of course, to the extent that Congress has already confronted and resolved this policy question, interpreters would not have to address it for themselves. The rule articulated in *Chevron* is commonly described in just these terms, as a presumption about how Congress intends to allocate interpretive authority between courts and agencies. But scholars agree that this presumption is largely fictional. At least before *Chevron* was in place, there was no more reason to believe that Congress typically understood its statutes to delegate interpretive authority to administrative agencies than that Congress typically understood its statutes to leave all such authority in judges’ hands. With respect to most enactments, indeed, members of Congress probably formed no understanding on this issue at all. The *Chevron* canon therefore cannot plausibly be defended as an estimation of some preexisting legislative intent. See David J. Barron and Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 S Ct Rev 201, 212–25.

It does not follow that judges who care about the effectuation of congressional intent should reject *Chevron* deference. Even if Congress has not spoken to this issue, judges reviewing the administration of federal statutes need to figure out how much to defer to the relevant agency’s interpreters. In the absence of contrary direction from Congress, judges could make the necessary decisions on a statute-by-statute or provision-by-provision basis, without any guiding presumption. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J 511, 516–17 (asserting that this is precisely what the Supreme Court did before *Chevron*). In the face of consistent congressional silence or ambiguity about the allocation of interpretive authority, however, members of the Supreme Court could sensibly conclude that a broader presumption would generate more predictable decisions without frustrating any genuine legislative intent. Id. In setting the presumption’s content, moreover, they could legitimately rely upon their own normative judgments about the circumstances in which agencies are likely to do a better job than judges at resolving ambiguities in statutory language. As discussed more fully in Part III.B, canons that formalize such normative judgments are a common response to issues that the judiciary must confront when applying federal statutes, but on which Congress has provided little or no guidance.
judge to do so. To be sure, specialist agencies might be more prone than generalist judges to harmful forms of tunnel vision (or, on some accounts, to capture by regulated industries). On balance, though, both their greater expertise and their greater responsiveness to the political branches arguably give them a sounder basis than courts for many types of discretionary judgments.

Notably, this standard defense of *Chevron* does not claim that agencies will systematically be better than courts at discerning a statute's intended meaning. It focuses, instead, on the resolution of matters that the enacting Congress left obscure—gaps and ambiguities as to which the statute has no single discernible intended meaning. The argument that agencies have more expertise in their specialized fields does spill over to affect a few of the techniques that judges sometimes use to glean intended meaning: courts should give considerable deference to a specialist agency’s understanding of terms of art, and courts also should hesitate to conclude that an interpretation endorsed by the relevant agency is likely to produce such absurd results that Congress must have meant something else. By and large, though, *Chevron* deference is less about the determination of a statute’s intended meaning than about the exercise of discretionary judgment within the zone in which courts deem that meaning unclear. That is why, on the standard account, courts are free to use descriptive canons (and other traditional techniques for discerning intended meaning) at Step One of the *Chevron* process.

In criticizing this aspect of current practice, Vermeule argues that agencies are better positioned than courts not only to make discretionary judgments in their fields of specialty but also to identify the judgments that Congress has already made. As he notes, “[a]gencies will often possess far better information about the legislative process that produced the statute, about the specialized policy context surrounding the statute’s enactment, and about the resulting legislative

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34 See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 Colum L Rev 2027, 2126–59 (2002) (defending *Chevron* on this basis). See also Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 Geo Wash L Rev 821, 824 (1990) (tracing *Chevron* to “the sound premise that agencies enjoy a comparative institutional advantage as a matter of legitimacy in resolving ambiguities in legislation they are charged with administering” because “Congress and the President have a great deal more continuing influence over those agencies than over the judiciary”).

35 See Peter S. Heinecke, Comment, *Chevron and the Canon Favoring Indians*, 60 U Chi L Rev 1015, 1023 (1993) (“One of the motivating factors behind *Chevron* deference is that agencies have greater expertise; they presumably know better than courts what constitutes an ‘absurd’ result.”).
deal" (p 209). Largely because of their superior information about what members of the enacting Congress had in mind, Vermeule suggests that agencies need not resort to the tools of construction that courts have developed for their own use, such as generic canons or inferences drawn from related statutes in the same field. If reviewing courts nonetheless use those tools to invalidate an agency's interpretation, the courts might well be driving the legal system's results away from the statute's true intended meaning; according to Vermeule, there is great uncertainty about "[whether] judicial resort to the traditional interpretive tools produces better accounts of original legislative intentions ... than does judicial deference to agencies" (p 210). But while no one can know whether judges tend to help or hurt when they engage in complex forms of interpretation over and above the interpretive work that agencies have already done, this practice plainly does add to the legal system's "decision costs" (p 210). Vermeule concludes that reviewing courts therefore should not invalidate agency interpretations for failure to conform to the traditional tools of construction. As long as the agency's interpretation does not conflict with the surface meaning of the particular provision at hand, reviewing courts should simply accept it "without consideration of legislative history, holistic textual comparison to collateral provisions, or other tools" (pp 227-28).

The critical premise of this argument—that agencies are likely to have better information than courts about the intended meaning of particular statutes—may well be correct. For one thing, lawyers from the relevant agency often work with Congress on regulatory legislation, and those lawyers might well emerge from the legislative process with a good feel for the compromises that members of Congress understood themselves to be striking. But if one accepts standard

36 In addition to claiming that this proposal will reduce the legal system's overall "decision costs," Vermeule suggests an additional reason to discourage judges from using the traditional tools of statutory construction in this context: "Where canons of various sorts, legislative history with its high volume and internal heterogeneity, and indeed the whole enacted code are all in the judicial kit-bag waiting to be used, agencies and other actors will find it difficult to predict what the eventual fate of an agency interpretation will be" (p 210). If one accepts Vermeule's own arguments, however, this point should not really persuade any individual judge to embrace Vermeule's proposal. Even if it is possible for a single judge to make an incremental contribution to the predictability of the legal system (as Vermeule asserts but does not explain (p 226)), this incremental contribution cannot be expected to produce any positive effects in the real world. For the reasons laid out by Vermeule himself, neither agencies nor other actors are likely to alter their behavior in any discernible way simply because an additional federal judge has embraced Vermeule's proposed approach.

views of the high-level goals of statutory interpretation, one will not actually want interpreters to rely upon this sort of inside information; on the standard account, the search for the intended meaning of statutory language is tempered by the desire for interpreters to rely only upon information available to the public at large.\textsuperscript{38} Perhaps for that reason, the Supreme Court has specifically refused to base \textit{Chevron} deference on the premise that an agency’s role during the enactment of a statute gives the agency special insight into the statute’s intended meaning.\textsuperscript{39}

Admittedly, specialist agencies may also be better than courts at processing the information about intended meaning that is publicly available. To the extent that related statutory provisions shed light on the provision being interpreted, for example, agency lawyers may be better positioned than generalist judges to draw the right inferences.\textsuperscript{40} But even if judges would have lower accuracy rates than agency lawyers if both were forced to interpret statutes entirely on their own, it does not follow that judges should embrace Vermeule’s proposal. After all, judges applying \textit{Chevron} deference are not proceeding on their own; they have the benefit of the views of a specialist agency, and they will give substantial deference to those views even if they also take account of the traditional tools of statutory construction. For purposes of assessing Vermeule’s proposal, the key question is whether it would be desirable for judges to give \textit{even more} deference to agency interpretations and to cut the traditional tools of statutory construction out of the process entirely.

Although no one can possibly develop empirical data on this question, my own strong intuition is that the legal system as a whole will do a worse job of capturing the intended meaning of statutory language if judges adopt Vermeule’s proposal than if judges allow the traditional tools of statutory construction to temper their deference to agencies. Unless an agency is impermissibly relying upon inside infor-

\begin{itemize}
\item[\textsuperscript{38}] That is one reason why judges interpreting federal statutes do not consider testimony from legislators who participated in the enactment process. See Nelson, 91 Va L Rev at 359 (cited in note 3).
\item[\textsuperscript{39}] See \textit{Smiley v Citibank (SD), NA}, 517 US 735, 740-41 (1996). See also Michael Herz, \textit{Deference Running Riot: Separating Interpretation and Lawmaking under Chevron}, 6 Admin L J Am U 187, 194 (1992) (agreeing that “[a]lthough this justification for deference has a lengthy pedigree, it is not the theory that underlies \textit{Chevron}”).
\item[\textsuperscript{40}] I leave aside judges who are themselves specialists in the field of law that the agency administers. As Judge Posner has suggested, there is little reason to think that decisionmakers within the Securities and Exchange Commission have a better sense of how the federal securities laws are supposed to interact than Chief Judge Easterbrook of the Seventh Circuit, or that lawyers within the Patent and Trademark Office have a better understanding of intellectual property law than Judge Leval of the Second Circuit. See Posner, 101 Mich L Rev at 964 (cited in note 1).
\end{itemize}
formation, the techniques that the agency uses to determine a statute's intended meaning are likely to resemble the traditional tools used by courts themselves. Under current versions of *Chevron* deference, moreover, judges will not reject the agency's interpretation simply because the agency has used those tools better than the judges could have done on their own; if the agency uses its expertise to figure out the relationship between the provision at hand and other statutory provisions, the mere fact that reviewing courts might not have understood that relationship without the agency's guidance will not cause them to throw out the agency's interpretation. For that matter, judges who care about the traditional tools of statutory construction will not necessarily reject an agency's interpretation simply because the agency has decided not to apply one of those tools in a particular case, if the agency has provided a sensible explanation for that decision. Instead, judges applying the current version of *Chevron* deference are likely to reject an agency's interpretation only when the agency has been unable to explain its position in a way that makes sense to them. Assuming that federal judges are reasonably skilled lawyers even though they are generalists, I strongly suspect that they will have higher accuracy rates than agency lawyers in this set of cases—that is, the set of cases in which judges who have reviewed the agency's position, and who have assessed it in light of both the traditional tools of statutory construction and the explanations offered by the agency itself, have concluded that the agency's interpretation goes beyond the zone of discretion permitted by *Chevron*.

Even though this claim rests on "empirical intuitions" and conventional wisdom rather than hard data, and even though its accuracy is therefore uncertain, I am not persuaded that the uncertainty is severe enough to warrant invoking the principle of insufficient reason. Perhaps Vermeule is correct that judges should not reject agency interpretations on the basis of some commonly used tools, such as legislative history; people's empirical intuitions may genuinely be stalemated about whether judicial use of legislative history in this context is likely to help or hurt. But there is no similar stalemate about whether courts reviewing an agency's interpretation of a statute should be willing to consider other provisions in the same statute or sensible descriptive canons—especially when the relevant agency has no apparent reason for neglecting these tools. Here, the very originality of Vermeule's thesis is a strike against his conclusion: no one other than Vermeule seems to believe that when federal judges use these tools to conclude that an agency's interpretation goes beyond the zone of discretion conferred by Congress, the possibility that the tools will
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affirmatively lead the judges into error completely counterbalances the possibility of any benefits. Unless that condition is satisfied, however, the traditional tools have a positive expected value in the hands of reviewing courts—which would defeat Vermeule's argument.

To the extent that one wants the legal system to enforce the intended meaning of statutory language (on matters as to which such meaning exists), there is another reason to be wary of Vermeule's proposal. If a critical mass of judges were to embrace Vermeule's approach, agency decisionmakers would face less risk of reversal, and they might be expected to react by expanding the set of interpretations that they consider adopting. As a result, even if agency decisions currently reflect the intended meaning of statutory language better than court decisions can, widespread relaxation of the constraints on agency interpretations might change this calculus. In an odd way, then, Vermeule's analysis has a self-defeating character: the more judges Vermeule persuades, the more his approach risks producing systemic effects that would undercut his arguments.

B. Which Normative Canons Should Chevron Deference Trump?

Even if reviewing courts should not permit administrative agencies to thumb their noses at descriptive canons and other traditional techniques for determining the intended meaning of statutory language, normative canons might well be different. Indeed, scholars sometimes suggest that unless Chevron deference trumps at least some such canons, it does not really exist at all, because reviewing courts would use the canons to eliminate all of the ambiguities that Chevron might otherwise permit administrative agencies to resolve. This argument is overstated; the set of recognized canons is not nearly comprehensive enough to resolve all potential ambiguities in statutory language, and in any event reviewing courts could require an agency to take account of particular canons while simultaneously giving considerable deference to the agency's judgments about the proper appli-

41 See Cass R. Sunstein, Chevron Step Zero, 92 Va L Rev 187, 189 n 3 (2006) ("[A]gencies and their lawyers are likely to adjust their own practices to deference doctrines ... and take legal risks that they would not assume if courts were less likely to defer.").

42 See, for example, Mendelson, 102 Mich L Rev at 746 (cited in note 28) ("[I]ncorporating substantive canons into Step One implies the survival of the Chevron doctrine. Chevron does not actually survive this approach, however, because when it is taken, the substantive canon will always dictate the result."). Vermeule gestures in the same direction, saying that when a court "draw[s] upon the traditional tools to decide whether there is a gap for the agency to fill," it "in effect reads agency deference out of the picture by narrowing agencies' gap-filling power to the residual area in which judicial tools run out" (p 206).
cation of those canons. Still, if one accepts the underlying rationale of *Chevron* deference, there are good reasons for reviewing courts to let agencies entirely disregard at least some of the normative canons that judges would apply in the agencies' absence.

In order to approach this issue, we must first understand exactly why courts might apply normative canons when no agency is in the picture. Even if a court cares deeply about trying to identify and enforce the intended meaning of statutory language, the interpretive tools that the court uses for this purpose will not resolve every single question that the statute authorizes interpreters to answer; the court will inevitably confront issues that come within the statute's domain but that Congress has not authoritatively answered in an intelligible way. Courts could try to handle all such gaps and ambiguities in statutory language on an entirely ad hoc basis, so that the answers they supply for one statute have no bearing on the answers they supply for any other statute. With respect to certain issues, however, courts interested in a more rule-like approach have articulated broader canons or presumptions that they proceed to apply across a range of different statutes. These rules are classified as "normative" canons because their content typically reflects some normative judgments, such as the relevant court's own sense of what makes for good policy, or the values that the court imputes to our Constitution or to other aspects of our legal traditions, or the importance that the court places on promoting the overall coherence of American law.

At least for theorists who emphasize the search for a statute's intended meaning, purely normative canons rank below descriptive canons in the interpretive hierarchy. According to the common account, normative canons guide the choices that interpreters must make when they confront a set of possible interpretations, none of which seems substantially more likely than the others to reflect what members of Congress understood themselves to be enacting. To de-

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43 See, for example, *NLRB v Catholic Bishop of Chicago*, 440 US 490, 501 (1979) (describing the canon of constitutional avoidance as "the Court's prudential policy").

44 See, for example, *Bell v United States*, 349 US 81, 83 (1955) (applying the rule of lenity and stating that "[i]t may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment"). See also William N. Eskridge, Jr., and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand L Rev 593, 598 (1992) ("A good many of the substantive canons of statutory construction are directly inspired by the Constitution.").

45 See, for example, *FDA v Brown & Williamson Tobacco Corp*, 529 US 120, 143-44 (2000) (resolving ambiguities in language that Congress enacted in 1938 in such a way as to maximize its consistency with statutes that Congress enacted much more recently).
termine whether that condition is satisfied, interpreters should use their tools for determining intended meaning (including any relevant descriptive canons) before they resort to normative canons. Indeed, the fact that courts commonly use descriptive canons to help set the parameters for Chevron deference is simply an application of this principle; on the conventional account, the basis for Chevron deference is itself a normative canon.

The relationship between Chevron deference and other normative canons is thus a subset of a broader question: within the space in which normative canons matter, how should courts proceed when two normative canons point in opposite directions? For instance, what should courts do when a statute lends itself to two possible interpretations, one of which would raise a substantial constitutional question and the other of which would run contrary to international law? Should the normative portion of the canon of avoidance trump the normative portion of the Charming Betsy canon, or vice versa?

Instead of establishing any firm pecking order among normative canons, current doctrine encourages courts to approach such conflicts

46 See Nelson, 91 Va L Rev at 393–98 (cited in note 3) (discussing the role of normative canons in an interpretive philosophy that emphasizes fidelity to intended meaning). See also id at 395 n 143 (discussing hybrid canons such as the presumption against retroactivity, which has both a descriptive component and a normative component).

47 As noted above, Chevron deference is not conventionally seen as a tool for courts to identify the intended meaning of statutory language; rather, it is a tool for the legal system as a whole to fill gaps and resolve ambiguities left by the enacting Congress. This tool, moreover, was not dictated by Congress itself, but instead was developed by the Supreme Court in response to Congress's persistent failure to address questions of interpretive authority. See note 33. The general presumption announced in Chevron—that when Congress entrusts the administration of a statutory provision to a federal agency, Congress should usually be understood to be letting the agency take the lead in resolving any indeterminacies in the provision—is thus a paradigmatic normative canon.

In the years since the Supreme Court articulated this presumption, of course, Chevron deference has become a prominent part of federal administrative law, and one can plausibly assume that members of Congress now know about it and draft bills in light of it. The version of Chevron deference that they can be presumed to know, however, is limited to matters on which Congress's intended meaning is unclear. As a result, even if there is a sense in which the presumption articulated in Chevron is now a descriptive canon (because members of Congress factor it into their own understanding of the bills that they consider), it still should not trump other descriptive canons.

48 See Catholic Bishop, 440 US at 501 (expressing a preference for interpretations that do not "give rise to serious constitutional questions").

49 See Murray v Schooner Charming Betsy, 6 US (2 Cranch) 64, 118 (1804) (endorsing the view that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"). For discussion of the history and development of this canon, see generally Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Georgetown L J 479 (1998).
on a statute-by-statute basis and to tailor their resolutions to particular circumstances.\(^5\) I am certainly sympathetic to the idea that courts should try to develop a more rule-like approach, so that the relationship among different canons will be stable across a range of different statutes. In a peculiar way, however, the very firm rule that Vermeule proposes for the relationship between *Chevron* deference and other normative canons would actually undercut this goal. If, as Vermeule proposes, reviewing courts systematically allowed *Chevron* deference to trump any and all normative canons that the courts might otherwise apply, then each federal agency would be free to decide for itself whether to apply those canons with respect to any particular statutory provision that the agency administers. As a result, the normative canons would lose some of their own rule-like features; from the perspective of the legal system as a whole, they would apply to some statutes and not others, and the distinction would depend on the discretionary determinations of individual agencies.

Depending upon what a particular normative canon is designed to achieve, that result might be perfectly acceptable. For instance, there are good reasons for *Chevron* deference to trump normative canons that appellate courts have articulated simply for the purpose of promoting uniformity in the lower courts’ interpretations of statutes. Drawing upon the work of Peter Strauss,\(^5\) Vermeule plausibly suggests that *Chevron* deference not only is a good substitute for such canons, but might actually be better than such canons at fostering national uniformity in the interpretation of federal law. If the central board that sits atop the hierarchy of the typical federal administrative agency interprets a statute in a particular way, and if judges scattered throughout the country give considerable deference to its conclusions, then the statute will have a more “genuinely national” meaning than it would if the relatively decentralized federal judiciary engaged in more independent interpretation (p 208).\(^5\)

\(^5\) See, for example, *Chickasaw Nation v United States*, 534 US 84, 95 (2001) (refusing to conclude that “the pro-Indian canon” always trumps “the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed” and explaining that the Court’s precedents “are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons’ relative strength”).

\(^5\) See Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 Colum L Rev 1093, 1121 (1987) (arguing that in light of practical limits on the Supreme Court’s ability “directly to enforce uniformity upon the courts of appeals,” the *Chevron* doctrine “enhances the probability of uniform national administration of the laws”).

\(^5\) Vermeule himself takes this argument much farther, implicitly treating it as one reason for *Chevron* deference to trump all of the canons that courts might otherwise use to limit agen-
Assuming that one accepts Chevron’s own rationale, Chevron deference should also trump normative canons that reflect the Supreme Court’s assessment of policy questions specific to the field in which a particular administrative agency specializes. The logic of Chevron, after all, suggests that agencies are better suited than courts to take the lead in making such assessments with respect to the statutory provisions that they administer.

Many normative canons, however, rest on broader policy judgments that go well beyond any single agency’s particular specialty. To the extent that generalist courts are less prone to tunnel vision than specialist agencies, courts may actually be better positioned to make those judgments than the typical agency. Figuring out whether Chevron deference should trump normative canons of this sort therefore requires one to decide what to do when the “expertise” and “political accountability” rationales for Chevron deference diverge—a question on which Chevron itself suggests no answer.

By the same token, it is possible for normative canons to be policy-based without resting entirely on policy judgments made by courts. Some normative canons, although developed and articulated by agencies’ interpretive freedom. As Vermeule explains, “centralizing interpretive authority in agencies reduces the disuniformity of law across judicial circuits and thus reduces the net uncertainty and decision costs of the interpretive regime” (p 224). This argument, however, cannot really do much work for Vermeule. To the extent that Vermeule is simply advising individual judges about the interpretive methods that they should adopt (notwithstanding the fact that other judges will be using different methods), it is far from clear that a single judge’s decision to expand his personal version of Chevron deference can reduce “net uncertainty” in a way that has any practical impact for the legal system as a whole. Conversely, if a critical mass of judges were able to coordinate on Vermeule’s proposal, agencies might well react by pushing the limits of their newfound interpretive freedoms, presenting reviewing courts with a new set of hard cases that might again generate circuit splits.

Even if Vermeule’s proposal were capable of solving the problem of persistent circuit splits about the meaning of federal statutes, moreover, that problem might be more of an aesthetic concern for law professors than a significant drag on the American economy. Companies that do business nationwide will always have to figure out how to handle geographic differences in the substance of state law, and they presumably can handle geographic differences in the interpretation of federal law the same way. In any event, the possibility of unresolved circuit splits about the meaning of federal law is an artifact of the structure that Congress has deliberately chosen for the federal judiciary, combined with Congress’s decision not to require courts in one circuit to follow precedents of another circuit and not to give district court opinions any formal precedential effect at all. If Congress itself is content with the “balkanization” (p 208) that results from the judicial structure that Congress has chosen (perhaps on the theory that decentralization has benefits as well as costs), then the alleged problem identified by Vermeule may not be one that courts should take it upon themselves to solve.

53 Compare Michigan Citizens for an Independent Press v Thornburgh, 868 F2d 1285, 1292–93 (DC Cir 1989) (concluding that Chevron deference trumps the canon that exemptions to the anti-trust laws should be narrowly construed), affd by an equally divided Court, 493 US 38 (1989).
judges, are designed to guide the resolution of ambiguities toward outcomes that reflect values gleaned from the federal Constitution or from our legal system as a whole. It is not clear that even *Chevron*’s “political accountability” rationale provides strong reason for reviewing courts to let administrative agencies dispense with these canons.

Of course, even if *Chevron*’s own internal logic does not itself compel reviewing courts to elevate *Chevron* deference over all other policy-based normative canons, other institutional considerations might provide independent reasons for courts to do so. I am not a great fan of normative canons, and I have no particular stake in where *Chevron* deference ranks among them. Developing a position on that issue, however, probably requires a more thoroughgoing institutional analysis than Vermeule provides. While it is possible to speak in general terms about the structure and institutional capabilities of the federal judiciary, federal administrative agencies are much more heterogeneous. Different agencies have very different internal structures and are subject to very different mechanisms for external oversight and control. These differences affect both how centralized their decisionmaking is and how much the president and Congress influence it. The kinds of decisions that Congress commits to particular agencies also vary widely, with the result that technical expertise matters more in some agencies than in others. Similarly, jobs in different agencies come with different levels of prestige, with the result that some agencies can attract better lawyers and higher-powered staffs than others.

Despite all this variability, scholars might still conclude that reviewing courts should take a one-size-fits-all approach to the relationship between *Chevron* deference and other normative canons; although the variability of agency structures surely increases the costs of such an approach, the benefits of having a universal rule might still exceed those costs. But Vermeule does not even sketch out how this analysis might proceed. Notwithstanding his repeated calls for “a resolutely institutional account” that pays attention to on-the-ground empirical realities (pp 12, 85), he contents himself with broad-gauged references to the advantages that “agencies” enjoy over “judges.” As a result, he does not really fulfill his claim to establish that sophisticated institutional analysis, when applied to the current state of our knowledge about all of the entities at work in our legal system, counsels reviewing courts never to use any normative canon to reject any specialist agency’s interpretation of a statute.
C. Chevron and an Agency’s Choice of Interpretive Method

Although Vermeule insists that judges should never use “complex interpretation” to reject constructions that a specialist agency has embraced, he is not entirely clear about whether judges should ever use complex interpretation to uphold a specialist agency’s construction. Suppose, for instance, that the surface meaning of a particular statutory provision seems unambiguous, but the relevant agency has embraced a different reading on the strength of one of the traditional tools of statutory construction; the agency has invoked a canon that supports reading certain kinds of exceptions into seemingly unqualified statutory language, or it has detected some hidden ambiguity generated by the provision’s interaction with other provisions in the same statute, or it has concluded that a literal reading of the provision would produce such absurd results that a more flexible interpretation is warranted. Should reviewing courts reject all such arguments for deviating from the provision’s surface meaning, or can they take account of the traditional tools of construction to recognize the existence of an ambiguity that the relevant agency is empowered to resolve?

In a gesture at answering this question, Vermeule asserts that judges should not defer to agencies “where ambiguities are extrinsic rather than intrinsic” (p 228). But the illustration that he offers—that judges should not let agencies deviate from “the clear and specific text of the provision at hand” because of contrary statements in the legislative history (p 228)—is too easy to tell us much about his position. Even supporters of the use of legislative history do not usually argue that interpreters can properly invoke it to contradict clear and specific statutory text; they focus, instead, on “cases in which statutory language is unclear.” Thus, Vermeule’s illustration does not really ad-

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54 See, for example, Young v United States, 535 US 43, 49–51 (2002) (applying a longstanding “background principle” to read an equitable tolling exception into a federal statute of limitation); National Private Truck Council, Inc v Oklahoma Tax Commission, 515 US 582, 588 (1995) (inferring an exception to 42 USC § 1983 on the strength of “the background presumption that federal law generally will not interfere with administration of state taxes”); United States v Mez- zanotto, 513 US 196, 203–04 (1995) (reading federal rules in light of the “background presumption that legal rights . . . are subject to waiver by voluntary agreement of the parties”); Staples v United States, 511 US 600, 605 (1994) (reading a mens rea requirement into seemingly broad statutory language); Leuthner v Blue Cross and Blue Shield of Northeastern Pennsylvania, 454 F3d 120, 125 (3d Cir 2006) (“As a matter of statutory interpretation . . . Congress is presumed to incorporate background prudential standing principles, unless the statute expressly negates them.”).

55 Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S Cal L Rev 845, 847 (1992). See also Molot, 106 Colum L Rev at 38 (cited in note 3) (observing that “virtually all interpreters today—both self-proclaimed textualists and purposivists—tend to exclude legislative history if the text, in context, otherwise is clear”). But see Exxon Mobil Corp
dress what judges should do when an agency’s deviation from the surface-level meaning of a particular provision rests on a respectable application of some recognized tool of statutory construction.

If other parts of his analysis are any guide, though, Vermeule would have judges defer to agency interpretations of this sort. The reason that Vermeule wants judges to focus on surface meaning when left to their own devices is that, as he understands the available empirical information, their use of more complex interpretive techniques would consume resources without producing any predictable benefits. Vermeule believes that the calculus is different for interpreters in specialist agencies; they can apply the same interpretive techniques more cheaply and accurately, and so their use of complex interpretation has some positive expected value. According to Vermeule, moreover, that value might well exist even when judges would say that a provision has a clear surface meaning; as compared to judges, “agencies are likely to be in a better position to know whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme,” and so “the case for formalistic interpretation by judges is stronger than the case for formalistic interpretation by agencies” (p 213). Thus, Vermeule suggests that reviewing judges should allow agencies not only to resolve ambiguities in the statutes that they administer, but also to select the interpretive approach that is used to identify those ambiguities (pp 213–14). More generally, Vermeule seems inclined to have judges defer to agencies whenever there is any “reasonable basis for interpretive dispute” (p 233)—even if the dispute arises because the agency has adopted a more complex method of interpretation than Vermeule advises judges to use in the agency’s absence.

The idea that reviewing courts should extend Chevron deference to an agency’s choice of interpretive method does not necessarily hinge on Vermeule’s other positions. Thus, even if one rejects Vermeule’s efforts to develop an alternative to standard forms of textualism and purposivism, one must still consider the possibility that reviewing courts should leave the choice between these standard interpretive methods up to individual agencies. Again, however, I am not entirely persuaded.

\[v\textit{ Allapattah Services, Inc,} 545 US 546, 125 S Ct 2611, 2628 (2005) (Stevens dissenting) ("Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity \textit{vel non} of a statute as determinative of whether legislative history is consulted.").\]
1. Should textualist judges defer to an agency's choice of purposivism?

Imagine that a particular judge has decided (for the reasons suggested in Part II of this Review) that when no agency is in the picture, he will better advance the high-level goals of statutory interpretation if he adopts standard textualist methods than if he follows Vermeule's cruder approach. The harder choice is between textualism and purposivism, but let us suppose that this particular judge makes that choice in favor of textualism too. He recognizes, of course, that statutes are mechanisms for members of Congress to achieve certain policy objectives, and he does not want the method of interpretation that he adopts to raise unwarranted obstacles to the accomplishment of the purposes that Congress as a whole collectively wanted to advance. But he also recognizes that even when Congress as a whole collectively embraces particular goals, it still faces important policy questions about the nature of the statutory directives that will best promote those goals. In particular, Congress must decide how rule-like to make those directives: should the relevant statute simply express the goals that Congress is trying to achieve and leave implementing authorities in charge of deciding what is most likely to advance those goals in each set of circumstances that arises, or should Congress hardwire some such decisions into the statute itself, so that implementing authorities will sometimes have to take actions that they themselves would not have identified as the best way of achieving Congress's underlying purposes in the particular circumstances at hand? When attempting to identify any decisions that Congress has authoritatively made on this point, our hypothetical judge sees no reason to apply background principles of interpretation that make statutory language less rule-like than it seems on its face. In other words, our hypothetical judge identifies himself with textualism rather than with purposivism: at least with respect to statutes that courts must implement on their own, he believes that he will best advance the high-level goals of statutory interpretation if he refrains from reading purpose-based embellishments into seemingly rule-like provisions.

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56 For discussion of these issues, and of the costs and benefits that members of Congress might consider as they decide how rule-like to make particular directives, see generally Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford 1991).

57 See Nelson, 91 Va L Rev at 398-403 (cited in note 3) (discussing what distinguishes judges whom we think of as textualists from judges whom we think of as purposivists).
A judge who accepts this tenet of textualism has no obvious reason to conclude that agency interpreters should be free to apply the background principles that he has rejected for his own use. To be sure, Congress may well cast statutory directives in less rule-like terms when it is committing their administration to a specialist agency than when the directives will be administered only by courts; members of Congress might plausibly conclude that certain agencies are better positioned than courts to decide what will advance Congress's underlying purposes in particular sets of circumstances. If Congress takes account of agencies' superior capabilities at the drafting stage, though, interpreters should not automatically invoke the same considerations again to make the formulation that Congress has chosen even less rule-like than it seems.

This point is sufficiently important that it is worth belaboring. Suppose that members of Congress agree on a particular objective and want to draft a statutory provision to promote that objective. In their opinion, generalist judges cannot be trusted to figure out what policies will advance Congress's chosen objective in any given situation. If Congress were entrusting administration of the provision directly to the courts, Congress would therefore make the provision relatively rule-like; if one imagines a "ruleness" scale of zero to ten (with zero representing the paradigmatic "standard" and ten the paradigmatic "rule"), Congress might choose language that makes the provision a seven. But members of Congress instead plan to have a specialist agency administer the provision, and they have more confidence in the agency's ability to exercise sound discretion about how best to achieve Congress's underlying objectives in particular circumstances. They therefore draft the provision in such a way as to make it a five. For textualist judges, the fact that the agency is better able than courts to make direct application of Congress's purposes is no reason to let the agency apply interpretive principles that effectively push the provision's ruleness down to three; by hypothesis, Congress took the agency's superior capabilities into account when it made the provision a five rather than a seven. For the very same reasons that textualist judges assume that Congress chooses the level of ruleness it wants when it legislates for the courts, textualist judges are likely to assume that Congress also chooses the level of ruleness it wants when it legislates for agencies.  

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58 This analysis would lose force if agencies were better positioned than reviewing courts to determine the level of ruleness that Congress intended to adopt. But except to the extent that
Admittedly, there are some other respects in which textualist judges might think it perfectly fine for agencies to use interpretive techniques that are not associated with textualism. For instance, if an agency wants to consult publicly available legislative history to help it resolve some ambiguity in statutory language that it administers, textualist judges will generally let the agency do so; as long as the judges agree that the relevant provision is genuinely ambiguous, and as long as the agency's interpretation stays within what the judges regard as the permissible bounds (which textualist judges might determine without regard to the legislative history), judges will not reject the agency's interpretation simply because they would not themselves have paid attention to the legislative history. For reasons that I have discussed elsewhere, however, debates about the proper use of legislative history strike me as less central to the practical differences between textualism and purposivism than disagreements about whether to take a statute's level of ruleness at face value. On that crucial topic, a judge who is committed to textualism for courts is unlikely to think that agencies should be free to be purposivists.

2. Should purposivist judges defer to an agency's choice of textualism?

By the same token, a judge who is committed to purposivism might well see no reason to approve agency interpretations that can be defended only in textualist terms. To the extent that the differences between purposivism and textualism entail disagreements about the high-level goals of statutory interpretation, so that the type of "meaning" that purposivist judges seek differs from the type of "meaning" that textualist judges seek, neither set of judges is likely to think that agencies have access to inside information of the sort that interpreters should not consider, it is not apparent why that would be true. See Part III.A.

59 Indeed, a regime in which agencies consider legislative history while reviewing courts do not may be a good way of finessing disputes about whether the use of legislative history tends to restrict or to expand interpreters' discretion. See note 7 and accompanying text. To the extent that legislative history is a useful restraint on interpreters' discretion, it will have a salutary effect on agency decisions; to the extent that agencies try to use legislative history to create ambiguity where none exists, reviewing courts will rein them in. The legal system as a whole might thus get the best of both worlds.


61 On one account, for instance, the concept of "meaning" that is central to textualism focuses on the semantic import of the text that Congress enacted, while the concept of "meaning" that is central to purposivism is more receptive to inferences (drawn from the publicly available evidence) about exceptions or embellishments that members of the enacting Congress probably would have wanted to incorporate into the text if the relevant questions had occurred
the relevant concept of "meaning" changes whenever Congress gets an agency involved. Of course, the most significant differences between purposivism and textualism may not reflect disagreements about the high-level goals of interpretation at all; purposivist judges may simply disagree with textualist judges about the pragmatic methods that will bring courts closest to achieving those goals. Given their stance in this debate, however, purposivist judges will resist the idea that textualism can be good for agencies even though it is not good for courts. After all, the pragmatic argument for embracing textualism over purposivism is driven by constraints on interpreters' information and capabilities. A judge who does not consider those constraints sufficient to justify textualism even for generalist courts is unlikely to think textualism appropriate for the more expert decisionmakers in specialist agencies.

3. Should the stalemate of empirical intuitions affect these questions?

The combined conclusion of the two previous parts—that textualist judges will see no reason to defer to an agency's choice of purposivism, while purposivist judges will see no reason to defer to an agency's choice of textualism—may itself seem to supply a powerful reason for such deference. As Vermeule notes, the judiciary as a whole is unlikely to coordinate upon either textualism or purposivism (pp 129–30); both camps are well represented, and the stalemate of empirical intuitions means that neither camp is likely to persuade the other. If the judiciary remains divided between textualists and purposivists, and if each camp tries to impose its preferred methodology on the same administrative agencies, reviewing courts risk engaging in a tug-of-war over those agencies' methods, producing considerable costs but no lasting benefits.

This problem may seem especially severe for agencies whose interpretations are equally likely to come before a variety of different courts, as opposed to agencies that face more concentrated review in a single federal court (such as the United States Court of Appeals for the D.C. Circuit). Not only does the D.C. Circuit have many fewer judges than the federal judiciary as a whole, but it follows the standard rule that individual panels set binding precedent for the circuit; thus, different panels are unlikely to give an agency mutually exclusive commands about how to interpret the very same provision. Yet even

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agencies that can keep their eyes primarily on the D.C. Circuit must announce particular interpretations without knowing which judges will sit on the panels that review them. If textualist judges do not defer to agency purposivism and purposivist judges do not defer to agency textualism, the judges put agencies in an awkward position.

If Vermeule is correct about the judiciary’s low capacity for coordination, however, individual judges cannot necessarily solve this problem. Even if they personally defer to each agency’s decision about whether to embrace textualism or purposivism, their colleagues may well engage in the same old tug-of-war. Especially when multiple different courts all have jurisdiction over cases that implicate an agency’s interpretation (which is when the tug-of-war problem is greatest), the decisions that any individual judge makes about whether to defer to the agency’s methodological choices might have no discernible impact on how the judiciary as a whole interacts with the agency. The desire to produce good systemic effects might therefore be a weak reason for individual judges to tolerate methodological choices with which they disagree.6

If judges do not defer to individual agencies’ decisions about whether to be textualists or purposivists, moreover, the current methodological divisions within the federal judiciary may actually produce some good systemic effects of their own. Vermeule is quite correct that as things currently stand, neither Congress nor administrative agencies can know whether the judges who confront their handiwork will be textualists or purposivists; an individual judge therefore should not embrace textualism because of the feedback effects that might ensue if all judges were textualists. What Congress and administrative agencies can know, however, is that some judges are textualists and others are purposivists. Knowledge of these very divisions can itself have useful feedback effects. Most notably, an administrative agency that confronts a divided federal judiciary, and that cannot know whether its interpretation of a particular statutory provision will be reviewed by textualist judges or by purposivist judges, might try to develop an interpretation that is acceptable to both camps.

62 The tug-of-war problem might conceivably give individual judges a reason to defer to each agency's varying methodological choices if the judiciary as a whole seemed more likely to coordinate on that approach than on either textualism or purposivism. But it is not clear why that would be true, and Vermeule does not suggest that it is. Instead, he maintains that the benefits of his approach are “strictly marginal or divisible” and do not assume any coordination among judges (p 226).
Because the differences between textualism and purposivism are not nearly so stark as the rhetoric of the two camps sometimes suggests, such overlaps will often be possible. To the extent that there is indeed "severe uncertainty" about whether textualism or purposivism is best, moreover, it seems affirmatively desirable for agencies to seek them out. Ironically, the system that gives agencies the greatest incentive to do so may be the system in which textualist judges and purposivist judges each insist that their chosen methodology is correct.

IV. CONCLUSION

When books begin as a series of law-review articles, their authors often have difficulty weaving them into a coherent theme. Not so Vermeule; he integrates his prior work smoothly and effectively. To be sure, a few seams do show: it is odd to find an extensive "case study" of a single Supreme Court decision (pp 86–117)\(^63\) in a book that promises to deemphasize "concrete cases and examples" (p 6), and sections of the book based on Vermeule’s earlier articles do not always seem to take full account of his recent insights about the judiciary’s low capacity for coordination in matters that have a political valence. But Vermeule has succeeded admirably in distilling eight years of articles into a sustained and cohesive argument.

Even readers (like me) who resist his broad conclusions, moreover, will profit from the more particularized insights that leap off his pages. The book is overflowing with important points; Vermeule’s observation that what individual judges should do cannot always be determined by what one would like the judiciary as a whole to do, his reasons for skepticism about arguments premised on feedback effects, his distinction between situations of genuine uncertainty and situations in which decisionmakers can put more stock in their empirical intuitions, his recognition of the practical importance of the relationship between *Chevron* deference and the interpretive tools that courts use when no agency is in the picture, and a host of other insights are all significant contributions to the legal literature. Above all, his call for decisionmakers in every institution to have a decent humility, and to make honest appraisals of what they do and do not know, is advice that all should heed.

\(^63\) This chapter is based on Vermeule’s important article *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan L Rev 1833 (1998).