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Chevron as a Voting Rule

ABSTRACT. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court created a new framework for judicial deference to agency interpretations of law: courts should defer to an agency interpretation unless the relevant statute is clear or the agency interpretation is unreasonable. In the past two decades, however, the doctrinal *Chevron* framework has come under increasing strain. We suggest an alternative, which is to cast *Chevron* as a judicial voting rule, thereby institutionalizing deference to administrative agencies. Our thesis is that a voting rule of this sort would capture the benefits of the doctrinal version of *Chevron* while generating fewer costs. The principal advantage of institutionalizing *Chevron* as a voting rule is that it makes agency deference an aggregate property that arises from a set of votes, rather than an internal component of the decision rules used by individual judges. A voting-rule version of *Chevron* would also allow more precise calibration of the level of judicial deference over time, and holding the level of deference constant, a voting rule would produce less variance in deference across courts and over time, yielding a lower level of legal uncertainty than does the doctrinal version of *Chevron*. We consider and respond to various objections.

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INTRODUCTION

Of central importance to administrative law and theory is the question of whether, and when, courts will defer to agency interpretations of law. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] the Supreme Court replaced earlier answers to that question with a new framework: courts should defer to an agency interpretation unless the relevant statute is clear or the agency interpretation is unreasonable. In the past two decades, however, the *Chevron* framework has come under increasing strain. Doctrinally, there are many ambiguities and uncertainties about the nature of the inquiry at the first and second steps of *Chevron*, including questions about the admissibility and weight of various legal sources.[2] In practice, recent evidence suggests that *Chevron*'s effect varies markedly with the ideological and political preferences of the judges who apply it.[3]

In what follows, we will suggest that these problems arise, in part, from a dubious premise of the *Chevron* enterprise, one that should be rethought. The dubious premise is that the legal system should adopt a doctrinal solution—the *Chevron* rule—for what is, after all, an institutional problem: the allocation of interpretive authority between agencies and courts when congressional instructions are absent or ambiguous. We explore an alternative, which is to cast *Chevron* as a voting rule, thereby institutionalizing deference to administrative agencies. The precise details of the voting rule might vary, and we will discuss different versions. To motivate the discussion, however, imagine a voting rule stating that when a litigant challenges agency action as inconsistent with an organic statute, the agency will prevail unless the judges, asking simply what the best interpretation of the statute is, vote to overturn the agency by supermajority vote—say, by a 6-3 vote on the Supreme Court, or by a 3-0 vote on a court of appeals panel.

Our thesis is that a voting rule of this sort would capture the benefits of the doctrinal version of *Chevron* while generating fewer costs. In the doctrinal version, judges must develop and internalize a legal distinction between the best interpretation of the statute and a reasonable interpretation of the statute.

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1. 467 U.S. 837 (1984).

2. For an overview of the doctrinal puzzles, see STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 319-413 (5th ed. 2002).

3. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

For conceptual, psychological, and motivational reasons, this distinction is tenuous, even unstable. This should be unsurprising; the doctrinal solution requires judges to internalize a legal norm of deference, but it is accompanied by none of the traditional mechanisms that law uses to force decision-makers to internalize the consequences of their choices. Conversely, the principal advantage of institutionalizing *Chevron* as a voting rule is that it makes agency deference an aggregate property that arises from the whole set of votes, rather than an internal component of the decision rules used by individual judges. Casting *Chevron* as a voting rule has other benefits as well. A voting-rule version of *Chevron* would allow more precise calibration of the level of judicial deference over time, and, holding the level of deference constant, a voting rule of agency deference would produce less variance in deference across courts and over time, yielding a lower level of legal uncertainty than does the doctrinal version of *Chevron*.

We begin, in Part I, by laying out a distinction between legal doctrine and institutional rules. Part II explains the benefits of casting *Chevron* as a voting rule, while Part III examines the costs. Part II suggests that recasting *Chevron* as a voting rule would produce three major benefits: it would make agency deference an aggregate property of a multi-member panel's vote rather than a legal norm to be internalized by individual judges; it would allow more precise calibration of the level of agency deference and greater fine-tuning of the areas in which deference is to apply; and it would reduce the legal uncertainty that currently arises from the complexities of the *Chevron* framework. Part III turns to costs. We examine objections based on May's Theorem and the Jury Theorem; the problems of single-member courts; the uncertainty of the voting rule's triggering conditions; the effects of judicial precedent on agency flexibility; the costs of decision-making; the possibility of strategic behavior; the loss of positive byproducts of the doctrinal solution; and the unlikelihood that any institution would supply such a rule. Many of these objections, however, apply with equal force to the doctrinal version of *Chevron*; the rest are unpersuasive or irrelevant on their own terms.

I. LEGAL DOCTRINE AND INSTITUTIONAL PROBLEMS

A. Problems, Soft Solutions, and Hard Solutions

In many domains, legal doctrine is developed by judges, lawyers, and commentators to solve institutional problems—for example, the allocation of power across different institutions or among different officials within the same

institution. Thus the presumption of constitutionality for legislation allocates a measure of interpretive authority over the Constitution to legislatures;[4] the "clear error" standard of review allocates fact-finding competence to trial courts;[5] and the legal norm of precedent or stare decisis allocates decision-making authority from present judges to past judges, whose views control the judgment of the present on some questions.

But legal doctrine is rarely the only possible solution to institutional deference problems, and it is not always the best solution. An alternative is to change the rules that govern the composition, powers, or voting mechanisms of the relevant institutions. We call these "hard" solutions, in contrast to "soft" doctrinal solutions. The relative costs and benefits of soft and hard solutions vary across contexts and over time. Our point is not that hard solutions are always superior, for they are not. What we do suggest is that hard solutions prove superior in many domains yet are frequently overlooked by lawyers.

We consider here some examples of legal problems for which there is an important choice between soft and hard solutions. For manageability, and to hew closely to the *Chevron* issue, we confine ourselves to the choice between legal doctrine and voting rules, rather than other sorts of hard solutions.

1. *Deference to Legislatures*

The presumption of constitutionality for legislation, according to which courts should uphold legislation if there is a reasonable argument for its constitutionality, was advocated by James Bradley Thayer and many later judges and commentators, including Justices Oliver Wendell Holmes and Felix Frankfurter and Judge Learned Hand.[6] The strength of the doctrinal presumption, however, has waxed and waned over the course of American constitutional history. Today, many believe that the presumption has withered away, particularly in certain contexts.[7] A hard alternative periodically surfaces

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4. *See* United States v. Morrison, 529 U.S. 598, 607 (2000); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

5. For a recent overview of the clear error standard and related issues, see Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005).

6. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 661-62 (1943) (Frankfurter, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525, 567-68 (1923) (Holmes, J., dissenting); Coppage v. Kansas, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting); Fairbank v. United States, 181 U.S. 283, 285 (1901) (Brewer, J.); LEARNED HAND, THE BILL OF RIGHTS 56 (1958); Thayer, *supra* note 4; *see also* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 121 (1994). *See generally* Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978).

7. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting).

in the form of proposals that the Supreme Court, and perhaps lower courts, should use (or be required to use) a supermajority rule to invalidate statutes on constitutional grounds.[8] A voting rule of this sort would build Thayerian deference into judicial decision-making at the aggregate level of the whole court, rather than urge individual judges to internalize deference as a legal norm.

2. Precedent

Just as judges might defer to legislatures when there is reasonable doubt about legal questions, so too judges might and do defer to past judges when there is reasonable doubt about legal issues. The doctrine of stare decisis has many formulations and complexities, but a simple version requires judges to follow horizontal precedent—the previous decisions of the same court—unless the precedent is clearly erroneous.[9] This is a soft solution; a hard alternative would be to say that the precedent decision must be followed unless overruled by a supermajority vote or even a unanimous vote of the later court.

3. The Rule of Four

The previous examples involved legal norms that have been embodied in doctrine but that might also be embodied in voting rules, with a different set of costs and benefits. Here we provide the converse example: a voting rule that might be recast as a legal doctrine. Consider the Rule of Four, according to which the votes of any four of the nine Supreme Court Justices are sufficient to grant certiorari for a full hearing on the merits of a case.[10] A soft analogue of the Rule of Four would be an ordinary majority vote on the decision to grant certiorari, accompanied by an internalized legal norm that Justices would follow in casting their individual votes.[11] The content of the internalized norm

8. *See* Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003).

9. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (suggesting that divergence from precedent is justified only when the prior judgment was "egregiously incorrect").

10. *See* Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 (1988).

11. *Cf.* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 418-20 (2004) (describing how individual Justices develop a subjective "feel" for cases that are good candidates for Supreme Court review).

might be something along the following lines: Justices should vote for certiorari if a reasonable Justice could believe that the petition warrants a full hearing. Whatever its precise content, the internalized norm might yield roughly the same number of certiorari grants, all else being equal, as a nonmajority voting rule under which each Justice directly asks whether, in his or her judgment, the Court's criteria for granting certiorari are satisfied.

4. Appointments and Senatorial Deference

So far the examples have focused on courts, but the distinction between hard and soft rules is relevant to other institutional contexts as well. Doctrinal norms exist outside of courts; many institutions have more or less explicit systems of precedent and more or less canonical verbal formulations of norms that are embodied in the institutions' past decisions. Consider the view, often advanced by senators of both parties, that the Senate should give some degree of deference to the President's appointments, especially for executive offices but for judges as well.[12] The level of deference is hard to capture in any single verbal formula, but many senators say they will defer unless a nominee is "clearly" unsuitable. More recently, a decisive fraction of the Senate—the "Gang of Fourteen"—agreed to defeat filibusters unless "extraordinary circumstances" exist.[13] One might imagine a system of presidential appointments that embodied these ideas in a hard voting rule, something like a reverse filibuster: unless a supermajority votes to defeat a nominee, the appointment will be deemed confirmed. It is hardly clear that such a rule would be constitutional, because the best reading of the Advice and Consent Clause might be that an affirmative majority vote is necessary to approve a nominee (whether or not it is sufficient to do so). For present purposes, it is irrelevant whether the hard solution would indeed be constitutionally permissible; as a conceptual matter it is an entirely viable alternative to the soft norm of deference to the President.[14]

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12. *See* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

13. Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees: Senators Agree on Votes for 3; 2 Could Still Face Filibusters*, WASH. POST, May 24, 2005, at A1; Charles Babington & Susan Schmidt, *Filibuster Deal Puts Democrats in a Bind: Pact May Hinder Efforts To Block High Court Nominee*, WASH. POST, July 4, 2005, at A1.

14. As another suggestive example, in Congress the floor gives a soft form of deference to the proposing committee. *See* Daniel Diermeier, *Commitment, Deference, and Legislative Institutions*, 89 AM. POL. SCI. REV. 344, 344 (1995); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 85 (1987).

These examples could easily be multiplied. The central point is that the bare specification of a problem in the legal system does not entail that the solution should be doctrinal, rather than institutional in a hard sense. Lawyers frequently overlook this choice among solutions, perhaps because their training focuses on legal doctrine and because some hard solutions can only be supplied by nonjudicial institutions—as when a statute or constitutional amendment is necessary to change voting rules. We return to the supply-side issues in Part III. As a general matter, hard solutions are not the dominant solution, but they are not rare either.

B. General Tradeoffs

With these examples in hand, we are in a position to say something about the general tradeoffs that determine the choice between soft and hard solutions. Here we indicate some frequently encountered variables, together with a rough estimate of their signs. The magnitude of the relevant variables, however, will differ greatly across contexts, and often there will be special considerations that do not generalize. These qualifications notwithstanding, there are regularities that make some tentative generalizations possible.

1. Aggregate Norms Versus Individual Norms

Consider the problem of partial deference, by which we mean the recurring situation in which it would be good or right for institution *A* to defer to institution *B* but only if institution *B*'s decision is not clearly wrong or unreasonable. Institution *A* might be a court, and institution *B* an agency (or a legislature); *A* might be a higher court, and *B* a lower court; and so on. We bracket, for now, the question of why deference would be good or right in this situation; our focus is on the choice of means for attaining a posited goal, not on the theory that makes the goal desirable. We also assume that institution *A* is a multi-member decision-making body, such as an appellate court. Single-member bodies like district courts present distinct problems, and in any event single-member bodies rarely make final decisions in our legal system.[15]

A problem that arises in many situations of partial deference is that the triggering conditions for deference are vague or imprecise. What is "clear" or "unreasonable" to one judge is not "clear" or "unreasonable" to another.

15. We discuss the problem of district courts at greater length *infra* Section III.B. For a useful if somewhat dated discussion of district court resolution of administrative law questions, see David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).

Conceptually, it is not clear what "clear" means. Psychologically, it may be difficult for judges and other decision-makers to avoid collapsing their conception of a *reasonable* legal answer into their conception of the *best* legal answer, thereby defining all second-best answers as unreasonable. Motivationally, deference rules based on vague triggering conditions allow scope for ideological and even partisan biases. We return to these points below, with specific illustrations from administrative law. The basic problem in such cases is that individual decision-makers are charged with internalizing a legal norm of deference that is conceptually ill defined and that cuts against both their individual judgments of what is best and their biases and prejudices. And this duty of internalization is not aided by any of the usual mechanisms by which law encourages or forces actors to internalize legal rules, principally material rewards or penalties. The rewards and sanctions that affect judicial behavior are weak, second-order forces like professional reputation.[16] Moreover, vague triggering conditions for deference make it more difficult to monitor and therefore sanction deviations. Of course legal doctrine requires judges to internalize norms in many settings, but the burden of internalization is especially heavy when judges are required to make second-order judgments about deference, as we illustrate below.

A shift from a soft legal norm to a hard institutional solution would help solve these problems. Imagine a supermajority voting rule under which institution *A* defers to institution *B* unless two-thirds of the members of *A* believe that *B* is wrong on the merits. Each decision-maker asks simply what legal answer is best and votes accordingly. Deference is an emergent property of the aggregate vote, rather than of individual decisions. Conceptually, there is no need for decision-makers to develop a theory about what counts as a "clear" (as opposed to merely correct or incorrect) legal answer. Psychologically, there is no requirement that the decision-maker simultaneously hold in her mind two conflicting legal standards, so the cognitive load is greatly reduced. Motivationally, each judge may be biased or prejudiced in some sense, yet assuming some diversity of preferences the biases will be washed out at the aggregate level, with deference enforced by the voting rule. Moreover, it is easier for voters or other principals to monitor the behavior of their agents, the decision-makers in institution *A*, because those agents have less room to maneuver in a supermajority voting-rule system. Instead of concealing their

16. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 970-72 (1995); Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 825-26 (1998); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 5-7 (1993); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629-31 (2000).

biased votes by claiming that institution *B*'s decision is or is not clearly wrong or unreasonable—claims whose second-order character makes them inherently costly for outside observers to evaluate—the decision-makers must now simply state their understanding of the correct legal answer. There is one fewer degree of freedom for bias to operate.

These points abstract from the level of deference that actually results from either the soft or hard solution. It is an empirical question whether or not a 6-3 supermajority rule on a nine-member court produces more, less, or the same level of deference as an internalized legal norm of deference. Holding constant the level of deference, our suggestion is that a shift from deference as an internalized norm to deference as an aggregate property can produce a given level of deference at lower total cost to decision-makers themselves and to other actors in the system.

2. *Calibration Versus Fuzziness*

Suppose that an internalized norm of deference produces too much or too little deference from institution *A* to institution *B*, with "too much" or "too little" defined by some extrinsic theory.[17] How can the level of deference be adjusted up or down? If a soft solution is in place, adjustment is difficult and imprecise. Verbal formulae are typically too crude to capture the fine shades of difference that are needed to tweak deference rules in either direction. As Judge Richard Posner suggests, "[T]he cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review."[18] Legal language can capture the idea of the best legal answer and can indicate the idea of deference when decisions under review are not clearly erroneous, subject to the problems we have discussed. More fine-grained standards of deference, however, are

17. Others have urged or implied that *Chevron* produces too high or too low a probability of overturning final agency decisions. *Compare* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (too low), Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000) (too low), *and* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990) (too low), *with* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (too high), Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 308-14 (1988) (too high), *and* 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 (1987) (too high).

18. Sch. Dist. v. Z.S. *ex rel.* Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002).

difficult to express; cognitive capacities are typically inadequate to sustain a fine-grained schema of deference standards.[19] Administrative law is replete with arguments about the possible differences between different standards of review, such as clear error, substantial evidence, and so on.[20] Such arguments are, for the most part, unilluminating. These crude attempts at distinction often collapse in practice,[21] as we illustrate in detail below.

A voting rule can be more precisely calibrated. If a 6-3 supermajority rule produces too little deference, a 7-2 rule can be substituted. If a submajority rule such as the Rule of Four produces too few grants of certiorari, a Rule of Three might be adopted instead. The calibration will still be imperfect because voting rules remain slightly lumpy; perhaps the optimal level of deference, according to the extrinsic theory, lies just in between the level produced by a 6-3 rule and that produced by a 7-2 rule. Comparatively, however, adjustments in voting rules will be less lumpy, and more fine-grained, than slight manipulations in the wording of judicial doctrine.

3. Certainty Versus Variance

A corollary of the last point is that hard solutions generally increase legal certainty. Suppose that a particular doctrinal formulation produces a particular level of deference, *D*. This level is a kind of expected value, with variance around that value. Some courts applying the doctrine will exceed *D*; some will fall short; and some courts will exceed *D* in one period while falling short in another period. A voting rule will produce greater certainty about deference, holding constant the expected level of deference. To the extent that reducing variance is a benefit for actors in the legal system, a voting rule may be preferable to a doctrinal solution.

In part, this is a result of the calibration point. A single judge will over time likely produce different degrees of deference, as will multiple judges within the same time period. Variation in individual-level deference translates into confusion about the overall level of deference. By making deference a characteristic of the aggregation mechanism, the voting rule removes this source of uncertainty. Beyond the calibration point, as long as a voting rule that builds in deference is more difficult for any intentionally biased judges to thwart, there will be greater certainty that deference will be applied. For

19. United States v. McKinney, 919 F.2d 405, 423 (7th Cir. 1990) (Posner, J., concurring).

20. *See infra* notes 52-54 and accompanying text.

21. *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 682-85 (2002).

reasons relating to clarity, predictability, and stability, the voting rule generates greater certainty.

II. *CHEVRON* AS A VOTING RULE

So far we have proceeded abstractly. We now turn to *Chevron*, its problems, and the choice between hard and soft solutions. Section A sets out the basics of *Chevron*'s doctrine and rationales, explains that *Chevron*'s most distinctive innovation relative to pre-*Chevron* law is to require judges to develop a theory of permissible interpretation rather than to choose the best interpretation, and sets out the possible deference regimes that we will compare. Section B examines three benefits of aggregating judgments through a voting rule. A voting rule sidesteps conceptual problems that arise under the doctrinal version of *Chevron*, ameliorates the psychological difficulties of *Chevron* deference, and reduces the scope for political or ideological bias. Sections C and D discuss calibration and certainty, respectively.

A. Chevron *Rudiments*

1. Rules and Rationales

Chevron sets out a framework for judicial review of agencies' statutory interpretations. At Step One of *Chevron*, judges ask whether the statute speaks to the "precise question at issue"; if so, then the judges simply enforce its commands.[22] If the statute contains a gap—if it is silent on or ambiguous about the relevant question—then judges are to proceed to Step Two, at which they ask whether the agency interpretation of the statute is "reasonable," that is, whether the agency interpretation falls within the scope of the statute's ambiguity.[23]

Chevron's theoretical rationale is unclear. In the important *United States v. Mead Corp.* decision,[24] the Court, following preexisting commentary,[25]

22. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). There are many subtle problems with Step One, which we do not attempt to review here. For a comprehensive treatment, see Elizabeth Garrett, *Step One of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 55 (John F. Duffy & Michael Herz eds., 2005).

23. *See Chevron*, 467 U.S. at 845.

24. 533 U.S. 218 (2001).

25. *See id.* at 230 n.11 (citing Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 872 (2001)).

suggested that *Chevron* rests on Congress's implicit delegation of law-interpreting authority to agencies. On this view, *Chevron*'s global default rule—namely, that statutory silence or ambiguity confers law-interpreting authority on agencies—derives from an implicit general instruction by Congress. As both Justices and commentators have noted, however, this rationale is a fiction.[26] The Administrative Procedure Act (APA), which is the closest Congress has come to providing a general instruction on the allocation of law-interpreting authority, says that courts are to decide all relevant questions of law.[27]

Some scholars argue that deference to agencies could itself be among the legal rules that courts are to apply.[28] Even if true, that argument still provides no affirmative evidence whatsoever that Congress intended to enact (in the APA or elsewhere) a general meta-instruction that courts treat statutory silence or ambiguity as a delegation of law-interpreting authority to agencies.[29] The implied-delegation rationale for *Chevron* risks treating Congress as a ventriloquist's dummy, into whose mouth may be inserted whatever fictional legal meta-instructions are necessary to square agency deference with the conviction that courts must say what the law is.

The *Chevron* opinion itself did not adopt this approach. In a crucial passage, the Court explicitly rejected the idea that statutory gaps necessarily represent a congressional meta-instruction to delegate law-interpreting authority to the agency:

> Congress intended to accommodate both [economic and environmental] interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so;

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26. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

27. 5 U.S.C. § 706 (2000) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . .").

28. *See, e.g.*, Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 25-28 (1983).

29. We bracket here the claim that a well-understood legal convention, which later vanished from view, made a statutory grant of rulemaking authority, coupled with a statutory provision imposing sanctions for violating agency rules, equivalent to a delegation of authority to agencies to make rules with the force of law, and thus gave agencies law-interpreting authority. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

> perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. *For judicial purposes, it matters not which of these things occurred*.[30]

On this picture, a congressional meta-instruction might exist (as in the first scenario the Court gave) or it might not (as in the second or third scenarios), but the issue of whether it does exist lacks the dispositive importance that later commentators have tried to give it.[31] The real basis for agency deference, according to the *Chevron* opinion itself, was not an implicit congressional meta-instruction but a candid recognition by judges of the limits of their own institutional capacities: "Judges are not experts in the field, and are not part of either political branch of Government."[32] Agencies' superior expertise and political accountability better position them to fill statutory gaps.

It might be said that these two components of *Chevron*'s rationale are in tension with each other because political accountability distorts expertise, but this overlooks two points. First, when statutes contain gaps, the executive may pursue either a technocratic course or a political one; on the logic of *Chevron*, either approach is permissible.[33] Second, *Chevron*'s claim is a strictly comparative one about the relative institutional capacities of agencies and courts. By analogy, even if speed and power trade off against one another at the outer margins of athletic performance, still one baseball player might be both speedier and more powerful than another. So too, even if there is a marginal tradeoff between expertise and political accountability, agencies might be both systematically more expert and systematically more accountable than generalist judges.

2. *Permissible Interpretations and Best Readings*

For present purposes, the most important feature of *Chevron* is that—in the doctrinal version—it requires an individual judge to develop a theory of reasonable or permissible interpretation, distinct from her theory of what interpretation is best. Under pre-*Chevron* doctrine, many decisions suggested

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30. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (emphasis added).

31. *See, e.g.*, Merrill & Hickman, *supra* note 25.

32. 467 U.S. at 865.

33. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2588 (2006).

that the judicial task is to identify the statute's "meaning" or best reading.[34] This is the standard conception of the judicial task when no agency is in the picture, or when the relevant agency does not receive deference at all—as in criminal cases, in which the nominal rule is that judges do not defer to prosecutors' legal interpretations. To be sure, judges seeking the best legal answer might take agency interpretations as persuasive guidance, depending upon the agency's accumulated experience, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[35] Yet, in principle, these are just helpful pointers to the best interpretation.

Chevron departs from this baseline in a crucial respect. Under the doctrinal version of *Chevron*, the judge must be able to say or think, in some set of cases, that the agency's interpretation of a statute is "reasonable" or "permissible," even though it is not the one the judge herself would deem best were her law-interpreting authority to be exercised de novo. The judge must, in effect, add to her first-order theory of statutory interpretation a second-order theory that identifies some first-order interpretations as reasonable, whether or not they are correct.

The point of this innovation is to open up space for discretionary policy judgments by agencies. *Chevron* does this by distinguishing between judges' views about a statute's best reading, on the one hand, and a range of permissible agency interpretations, on the other. Instead of an interpretation that is a "point estimate," *Chevron* aims to open up a "policy space" that gives agencies breathing room to pursue policies based on technocratic judgments or democratic politics.[36] We will take this goal as given, putting aside root-and-branch criticisms of *Chevron* based on the separation of powers.[37] *Chevron*'s second-order approach to interpretation, however, has proven problematic on conceptual, psychological, and motivational grounds. Our basic claim is that there is a better way to achieve *Chevron*'s goals. Agencies should be given breathing room by means of voting rules rather than legal doctrine.

Chevron's requirement of a theory of permissible interpretation, as distinct from a theory of the best interpretation, implicates Step One of *Chevron* as well as Step Two. At Step One, the logic of *Chevron* does not permit the judge

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34. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120-23 (1944).

35. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

36. E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 11-12 (2005); *see* Sunstein, *supra* note 33, at 2599.

37. *See, e.g.*, Farina, *supra* note 17.

simply to ask what the best interpretation of the statute is, by her lights, and then pronounce the statute "clear." (To be sure, some decisions do seem to adopt this course, as we will see, but these are failures of the *Chevron* framework, not examples of its successful operation.) Rather, the Step One inquiry asks whether the agency interpretation, even if not the one the judge would deem best in a de novo consideration, is or is not clearly ruled out by the statute. Step One contemplates that the judge, viewing all relevant legal materials, will in some cases conclude that (1) the best reading of the statute is *X* rather than *Y*, but also that (2) the statute does not *clearly* mandate *X* rather than *Y*. The latter possibility makes a theory of permissible interpretation necessary at Step One as well as at Step Two. And as we will see, the need for a second-order theory of this kind gives rise to a range of distinctive problems.

3. *Deference Regimes*

We have mentioned two different distinctions: de novo judicial interpretation, on the one hand, versus *Chevron* doctrine, on the other; and majority rule, on the one hand, versus supermajority rule, on the other. Combining these two distinctions, four deference regimes are possible.

(1) De novo judicial interpretation with a majority rule. This is a regime of no deference at all. Before *Chevron*, many cases suggested that this was the law, although there were contrary decisions as well.[38] Starting from this baseline, there are two ways to push the law toward greater deference: by adopting a legal doctrine of deference and by adopting a voting rule weighted in the agency's favor. We take up these possibilities in turn.

(2) Chevron *with a majority rule*. This is the solution the Court adopted in 1984. In our terms, it is a soft rather than a hard solution. We suggest below that this solution produces a range of costs and problems that might be avoided by adopting a hard solution instead. Of course, if (1) and (2) were the only options, (2) might well be thought preferable.[39] But we will argue that a different regime is better still.

(3) De novo judicial interpretation with a supermajority rule (weighted in favor of agency interpretations). This is the regime we denote by the label "*Chevron* as a

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38. *Compare Hearst*, 322 U.S. at 130-31 (suggesting de novo judicial interpretation of pure questions of law), *with* Gray v. Powell, 314 U.S. 402, 411 (1941) (suggesting judicial deference to agency interpretations), *and* Rochester Tel. Corp. v. United States, 307 U.S. 125, 145-46 (1939) (same).

39. One of us has argued as much. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 205-29 (2006) (arguing for strong *Chevron* deference, while holding voting rules constant).

voting rule"; our suggestion is that it is superior to (2) because it captures the benefits of (2) at lower cost. Starting from the current regime—*Chevron* combined with majority rule—a move to *Chevron* as a voting rule requires two legal changes, not just one. Both the legal standard and the voting rule must be changed; the former by abolishing *Chevron* doctrine in favor of de novo judicial interpretation, the latter by adopting a supermajority rule in lieu of a simple majority rule.

(4) Chevron *with a supermajority rule*. In principle, there is no reason to think that soft and hard solutions are mutually exclusive; the two might be combined so as to capture the distinctive benefits of both regime (2) and regime (3). In practice, however, this regime should suffer from the same problems as regime (2), problems that we detail in full below. The defects of regime (2) arise from the two-level structure of *Chevron* reasoning and the burdens that structure imposes upon judges; merely grafting a supermajority rule onto *Chevron* leaves the two-level structure in place and thus fails to get at the root of the problem. Moreover, the pure cases—regimes (2) and (3)—illustrate the relevant considerations more cleanly. Subject to that caveat, *Chevron* with a supermajority rule could provide some of the benefits of a hard voting rule, albeit without avoiding the costs of a soft doctrinal approach.

B. Aggregation: Solving Chevron *Problems*

We have suggested that *Chevron* doctrine requires judges to distinguish between first-order interpretation—namely, finding the best reading of the statute—and second-order interpretation, which supposes a theory of permissible or reasonable interpretation. In operation, this requirement produces a range of problems, many of which can be avoided or ameliorated by adopting a voting-rule solution. For simplicity, we assume throughout that the relevant case is binary—an agency offers one interpretation of the statute, a challenger offers another, and the judicial task is to choose between them. Some cases are not like this, but most cases are.

1. Conceptual Problems

What exactly does it mean to say that an agency's interpretation, although not best by the judge's lights, is nonetheless reasonable or permissible? What does it mean to say that a statute "clearly" means *X*, as opposed to saying that the statute is best read to mean *X*? The answers to these questions are themselves unclear. When applying the *Chevron* doctrine, the hardest question is where, even in principle, the bounds of permissible interpretation should be taken to lie.

Consider the following scenario for expository purposes. Under standard first-order interpretation, the judge (let us suppose) is considering two different readings of the statute, *X* and *Y*. Consulting all legal materials that are relevant under the judge's first-order interpretive theory (text, perhaps legislative history, perhaps various interpretive default rules, and so on), the judge decides that reading *X* is, all things considered, somewhat superior to *Y*—that *X* is 65% likely to be correct, while *Y* is only 35% likely to be correct. Under de novo interpretation, the judge would vote in favor of *X*. *Chevron*, however, requires another layer of decision-making. The judge must ask whether *X*, at the 65% level, is "clearly" correct as opposed to simply better; alternatively, the judge could ask whether *Y*, at the 35% level, is reasonable or permissible.

The example suggests that first-order interpretation is often strictly comparative—the judge simply decides which interpretation is better—while a theory of permissible interpretation must build in an absolute threshold above which an interpretation may, but need not, be adopted by agencies. The problem is that nothing in *Chevron* tells judges, even in principle, where the threshold should be located, and the metric for setting the threshold is obscure. Perhaps an interpretation that is plausible at the 35% level suffices; perhaps it does not. Perhaps an interpretation that reaches the 65% level is "clearly" correct, or perhaps not. And in both of these cases, it is hardly clear even what the relevant "level" is. With judges of reasonably diverse preferences and psychologies, thresholds may vary widely, and it is not possible to say that any threshold is conceptually preferable to any other.

The switch to regime (3), *Chevron* as a voting rule, avoids the problem of an absolute threshold altogether. Each judge now asks, simply in comparative terms, what the better reading of the statute is. The purpose of *Chevron*'s second-order approach to interpretation—providing space for agency policy judgments—is still fulfilled, just at the aggregate level of the whole court rather than at the level of individual judicial judgments. Assuming reasonable and predictable diversity of first-order interpretations across judges on multi-member courts, breathing room for agency policy judgments will arise from the operation of the voting rule itself. In our example, some judges will decide that the agency's interpretation is worse than the one offered by the challenger; other judges will decide that the agency's interpretation is much better. No consideration of levels, thresholds, or percentages is required. Unless a supermajority of the judges believes that the challenger has offered the better interpretation, the agency will prevail. Across cases, as agency interpretations become less and less plausible, it is more and more likely that a supermajority will be found to overturn them. Crucially, however, none of the judges in any

given case need wrestle with the conceptually obscure problem of where to locate the threshold of permissible interpretation.

A nuance in this picture is worth emphasizing: to say that under de novo judicial interpretation judges search for the "best" reading is imprecise, although useful as a shorthand. When the case is binary, as we assume throughout, judges need only decide which of the two readings offered by the parties is the better one. This comparative judgment is, plausibly, much easier than the judgment that *Chevron* requires about the location of the reasonableness threshold. The latter judgment is an absolute one, with no clear metric against which to make the judgment in the first place. It is familiar that categorical judgments are often more difficult than comparative ones. The question "Was the Duke of Wellington tall?" is harder than the question "Was the Duke of Wellington taller than Napoleon?" People can get confused when they make implicitly category-bound judgments, as when they say that an eagle is "big" while a cabin is "small," but presumably few people would say that an eagle is bigger than a cabin.[40] Voters who know little about candidates' views or positions, in absolute terms, are very good at knowing which candidate is farther to the left or right, in relative terms.[41] We suggest that assessing the plausibility of an agency's interpretation has similar features.

Of course, there may well be settings in which a judgment about plausibility is easier or less psychologically costly than a judgment about optimality. For example, a reviewer evaluating a scientific study's conclusions might easily find the conclusions plausible given the data, while a judgment about whether the conclusions are best might require more aggressive investigation. Our claim, however, is local rather than global. Under *Chevron* doctrine, a judge consults the full panoply of sources to derive statutory meaning at Step One. Although it is possible to imagine a parallel world in which judges quickly glance at the statute to make sure an agency's interpretation is not implausible, that is not our world; currently, *Chevron* doctrine requires a far more elaborate inquiry.

These points bracket any questions about outcomes—about the rate at which agency interpretations are upheld. It is possible, in particular cases, that a shift from doctrinal *Chevron* to *Chevron* as a voting rule would result in invalidations of agency interpretations that would not have occurred under

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40. *See* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1171-77 (2002).

41. *See, e.g.*, Stuart Elaine MacDonald et al., *Political Sophistication and Models of Issue Voting*, 25 BRIT. J. POL. SCI. 453, 458 (1995) ("It is easier to know the side a party takes on an issue than its particular policy proposals, and it is especially easy to know the side a party takes when it is intense on an issue.").

doctrinal *Chevron*. Consider a case in which (1) a supermajority of judges believes that the agency's interpretation is reasonable (or, equivalently, that the statute does not clearly rule it out) but also believe that (2) the agency's interpretation is not the better reading. Under doctrinal *Chevron* the agency will win if judges have internalized the doctrinal norm, because a majority will vote in the agency's favor; under *Chevron* as a voting rule the agency will lose because a supermajority will vote against the agency.

This is merely one possible case, however. Consider the opposite possibility: any case in which a bare majority of judges believes that the statute clearly rules out the agency's interpretation, or equivalently that the agency's interpretation is impermissible. In such cases, the agency will lose under doctrinal *Chevron* but will win under *Chevron* as a voting rule. It is unclear, before the fact, which type of case is more frequent, and thus unclear what the outcome effects of the change in regime would be. Moreover, if *Chevron* as a voting rule produces too little deference according to some extrinsic theory, the supermajority requirements can be calibrated upwards.

It follows that a shift to *Chevron* as a voting rule may change the *mix* of cases in which the agency wins, even if the level or frequency of deference is held constant. Low-intensity cases—in which a large supermajority of judges thinks that the case is close but that the agency's reading is worse—will now be decided against the agency; high-intensity cases—in which the judges are polarized into a bare majority and a minority with sharply opposed views—will be decided in the agency's favor. Intuitively, this switch seems perfectly consistent with the rationales for *Chevron*. If the goal is to provide breathing space to agencies to make technocratic or democratic judgments, especially in contested domains of law and policy, then this change in the incidence of deference is either an improvement or neutral. Whether the justification for deference hinges on agency expertise or democratic pedigree, *Chevron* as a voting rule performs equally well. Rather than encourage individual judges to set aside their own views in favor of more expert or more democratic judgments, the voting mechanism enforces respect for agency views at the aggregate level.

Finally, our suggestion also sidesteps current controversies about which legal sources count, and what weights are given to the sources that do count, at *Chevron* Step One. Consider "nondelegation canons"—canons that trump agency interpretations of otherwise ambiguous statutes and thus count as reasons to hold statutes "clear" at Step One.[42] On our view, such canons would just be folded into the legal inquiry as reasons for individual judges to reject

42. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

agency interpretations, all things considered, on the ground that the agency's reading of the statute is likely to be wrong. The effect of such canons would then be picked up by the voting rule; when a canon of this sort has weight, it is more likely that individual judges will contribute to the supermajority necessary to override the agency's interpretation.

2. *Psychological Burdens*

In an influential early discussion of *Chevron* and agency deference, then-Judge Stephen Breyer touched on the problems inherent in judging under a second-order theory of permissible interpretation:

> A third reason why neither a strict view of *Chevron* nor any other strictly defined verbal review formula requiring deference to an agency's interpretation of law can prove successful in the long run, is that such a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable. More often one concludes that there is a "better" view of the statute for example, and that the "better" view is "correct," and the alternative view is "erroneous."[43]

Case law after *Chevron* provides some evidence for this view. Consider the decision in *MCI Telecommunications Corp. v. AT&T Co*.[44] The Court, per Justice Antonin Scalia, concluded that an FCC rule exempting nondominant long-distance carriers from a filed-rate requirement exceeded the agency's statutory authority, which was merely the authority to "modify" that requirement.[45] In part, Scalia argued that the plain meaning of "modify" encompassed only small changes, not large changes, pointing to dictionaries supporting his reading and discounting a prominent dictionary that said the contrary.[46] Scalia seemed to assume that the statute's best reading (his own) was also the only permissible reading. It is unclear whether, in fact, Breyer's conjecture is systematically correct, but it is certainly plausible in light of decisions like *MCI*. If Breyer's

43. Breyer, *supra* note 26, at 379.

44. 512 U.S. 218 (1994).

45. *See id.* at 231–32.

46. *See id.* at 227–28.

claim is correct, then the requirements of *Chevron* doctrine are unstable because second-order interpretation is psychologically demanding for judges.

Perhaps Breyer's claim proves too much. In many areas of law, judges are asked to distinguish between their first-order judgments about what is correct and their second-order judgments about what is permissible or reasonable. Judges do this all the time; so how can it be unstable in the *Chevron* setting?

One possibility is that the distinction between first-order judgments and second-order judgments is more likely to be stable with regard to questions of fact than of law, as when trial judges ask whether a jury verdict is based on a permissible view of the facts or when an appellate court does the same. The idea that decisions on legal questions might be more or less plausible, as opposed to correct or incorrect—that there might be different standards or thresholds for "proving the law"[47]—is still alien to many judges trained in the pre-*Chevron* era.

More importantly, that judges make similar distinctions in other areas of law does not show that they do so successfully or that Breyer was incorrect about *Chevron*. It is certainly imaginable that, in those other areas, the distinction tends to collapse as well, just as it does under *Chevron* (on Breyer's view). The same social-scientific tools that have usefully exposed decision-making distortions under *Chevron* might well be applied in other areas, with similar debunking effect. That judges themselves think the distinction between correctness and reasonableness works in some area of law is, of course, neither here nor there. Breyer's critique itself suggests that judges will think they are faithfully distinguishing the correct from the reasonable, while in fact self-serving bias, motivated reasoning, and other mechanisms cause them to think that the only reasonable view is the one they happen to find correct. Absent some evidence about whether and when judges make such distinctions successfully, the objection that "judges do it all the time" assumes away Breyer's argument rather than rebuts it.

Suppose Breyer was right, about *Chevron* at least. Then it is straightforward that the shift to *Chevron* as a voting rule will eliminate the psychological burdens of second-order interpretation, removing a major source of instability in the law of agency deference. The distinction between agency interpretations that are correct and agency interpretations that are reasonable will still exist. But the distinction need not be internalized by individual judges. Instead, it will arise from the operation of the voting rule itself. Agency interpretations that are reasonable will be more likely to attract the votes necessary to block formation of a contrary supermajority.

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47. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

3. Bias

Justice Breyer's psychological conjecture about *Chevron* is plausible, but unproven. By contrast, there is ample evidence that a related sort of slippage occurs under doctrinal *Chevron*: judges tend systematically to uphold agency interpretations that accord with their political preferences and to invalidate agency interpretations that do not. On both the Supreme Court and the lower federal courts, judges are more likely to uphold liberal agency action if they are liberal and more likely to uphold conservative agency action if they are conservative.[48] The concern is not that judges' first-order legal views collapse into their second-order legal views but that their views are not being driven by legal materials at all, or at least not wholly.

Of course, the attitudinal model of judging describes judicial behavior in many settings, not just the law of agency deference.[49] The *Chevron* doctrine is not the cause of biased judging. Yet we may plausibly conjecture that the *Chevron* doctrine provides greater scope for the operation of bias than would *Chevron* as a voting rule. Under the former regime, judges acting in bad faith or in the grip of unconscious bias have, in effect, two margins on which to advance their agendas: the first-order interpretive question and the second-order interpretive question. A judge who wishes, for quite extrinsic reasons, to uphold the agency interpretation may claim *either* that the agency

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48. *See* Miles & Sunstein, *supra* note 3, at 826-27. This is not to say that *Chevron* has made no difference; there is conflicting evidence about whether it has increased deference to agencies. An early study found a significant effect. Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1057-59. However, other studies suggest either that *Chevron* has had little effect overall on deference or that its effects are unclear. *See* Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 474-75 (1996) ("Our tests show that the Court does not uniformly endorse judicial deference, but rather does so discriminately in the years where the doctrine yields policy outcomes more to the Court's liking."); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 359 (1994) (asserting that *Chevron* had a limited impact on the rate of affirmance of agencies' interpretations in the Supreme Court); Miles & Sunstein, *supra* note 3, at 826 ("[I]t is unclear whether *Chevron* has any effect within the Court."). Our thesis is not affected by this issue. Whatever level of deference *Chevron* has produced, high or low, our argument is that the same level of deference can be produced at lower cost by switching to a voting rule that favors agencies.

49. The literature is vast, but for a canonical overview, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). *See also* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997); *cf.* Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721 (2000) (questioning the adequacy of the attitudinal model in explaining the Justices' adherence to precedent).

interpretation is correct *or* that it is reasonable. Under *Chevron* as a voting rule, by contrast, the judge who wishes to uphold the agency interpretation must argue that the agency's reading is correct. To be sure, that determination may be made in a biased fashion, just as determinations of the best reading of the Constitution. Yet it is plausible that removing one margin on which bias can operate will improve matters. Removing a degree of freedom for the biased judge, all else being equal, should lower the costs of monitoring by other judges, legislators, litigants, and interested publics.

What about the opposite case, in which the political judge wishes to invalidate agency action? Under doctrinal *Chevron*, the judge must say that the agency's interpretation is clearly incorrect. Under *Chevron* as a voting rule, more simply, the judge must say that the agency's interpretation is incorrect. In either case, the judge has only one degree of freedom; the difference between them is that in the former case the legal inquiry is weighted in the agency's favor, while in the latter case the voting rule is weighted in the agency's favor. The upshot is that *Chevron* as a voting rule provides no more scope for biased judges who wish to invalidate agency action, provides less scope for biased judges who wish to validate agency action, and yet weights the scales in the agency's favor to the same degree across all cases (or can be calibrated to do so, as we discuss below). If reducing biased judging is desirable, then this is a pure improvement, whatever level of deference to agencies one desires and whatever particular conception of biased judging one holds.

4. A Note on Bias in the Lower Courts

The foregoing point applies to all courts, including the Supreme Court, in which recent findings have shown discernible ideological voting in *Chevron* cases.[50] Lower courts present additional issues, in light of a recent finding that ideological bias interacts with panel composition in *Chevron* cases. When three judges of the same political party sit together, they are likely to show marked ideological bias; when two judges of one party sit with one judge of the other, the one is more likely to vote in line with the political predilections of the other two than if she sat with two judges of her own party.[51] How do these findings bear on the choice between deference regimes?

Assuming for argument's sake that the findings reveal a problem, the switch to *Chevron* as a voting rule would constitute an improvement. In the 2-1 case, under doctrinal *Chevron* plus majority rule, the lone dissenter knows that

50. *See* Miles & Sunstein, *supra* note 3, at 825-27.

51. *See id.* at 851-65.

her dissenting vote will not change the outcome and thus may have an incentive to acquiesce in the majority's decision; whether the dissenter acquiesces or records a dissent depends on, among other factors, the costs of writing a sole opinion. Under *Chevron* as a voting rule, by contrast, any single judge can decide the case in the agency's favor (because a 3-0 vote is necessary to override the agency's interpretation); any incentive to acquiesce disappears.

What of the case in which three judges of the same political party sit together on a panel and herd toward a preferred ideological outcome? Here the only effect of *Chevron* as a voting rule is the one we previously discussed: by removing a degree of freedom, *Chevron* as a voting rule makes it more difficult, at the margin, for a biased group to justify its preferred results. If the three judges are sufficiently determined, they may still rule as they please. But this should be no surprise. When the judges on a panel are unanimously bent on indulging their biases, there is little that either legal doctrine or voting rules can do. Even this concern assumes that the desire to indulge bias is intentional. If the bias is unconscious, then *Chevron* as a voting rule should still improve matters for the psychological reasons already discussed. The switch to *Chevron* as a voting rule is no cure-all, of course; we merely suggest that it would make things better.

5. *Internalization Versus Aggregation*

There is a common thread running through the foregoing points. Doctrinal *Chevron* imposes greater demands on the individual judge than does *Chevron* as a voting rule. Doctrinal *Chevron* requires the individual judge to internalize a complex, two-tier legal structure that has unclear conceptual foundations, that is psychologically burdensome to maintain, and that provides multiple degrees of freedom for the operation of bias, all without providing any meaningful sanctions for deviation. Against this background, it is hardly surprising that *Chevron* often fails, in the sense that the *Chevron* two-step does not seem to be fairly applied; what is surprising is that it often succeeds. *Chevron* as a voting rule, by contrast, makes deference an aggregate property of the voting group, rather than a norm to be internalized by the individual judge, and thus alleviates these burdens.

C. *Calibration*

1. *On Large Appellate Courts*

Another advantage of *Chevron* as a voting rule is the ability to better calibrate the level of deference given to agency decisions. We begin with

calibration on appellate courts with many members, such as the Supreme Court and en banc courts of appeals.

Under doctrinal *Chevron*, judges are told to defer to reasonable agency interpretations. The soft version of *Chevron* treats deference as though it were an on-off switch, a binary variable. In our view, deference is better conceived as a matter of degree. If the doctrinal solution is like a traditional light switch, the voting rule is akin to a dimmer, allowing more fine-grained degrees of deference to be matched to underlying legal goals. If, in practice, a deference rule produces too little deference, then the voting rule allows deference to be ratcheted up or ratcheted down with greater precision. On a nine-member court, if a 5-4 majority rule generates too little deference to agencies, then a 6-3, 7-2, 8-1, or 9-0 requirement can be adopted. Requiring eight or nine votes to overturn an agency action is the equivalent of an extremely strong norm of deference within the doctrinal *Chevron* framework. We do not assert here that such a strong deference rule is the optimal one. Our point is merely that no matter what the optimal level of deference, be it strong, weak, or nonexistent, the voting-rule model allows for more fine-grained calibration toward that goal.

Such gradation is, of course, possible with doctrine as well. A doctrine might command that agency action be overturned only if the decision is (a) unreasonable, (b) clearly unreasonable, or (c) ridiculous. There is no shortage of linguistic variants in theory, and as a result soft doctrinal rules are capable of calibration too. Historical experience, however, suggests the categorical distinctions are riddled with uncertainty. How much less deference does the "unreasonable" standard produce than the "clearly unreasonable" standard? A lot? A little? None at all? Indeed, the more linguistic variants one uses, the greater a morass the doctrinal approach becomes.

For an example from administrative law, consider the arbitrary and capricious and substantial evidence standards for review of factual determinations in agency proceedings. The arbitrary and capricious standard of review for informal proceedings[52] is more deferential than the substantial evidence standard the APA uses in formal proceedings,[53] or so many commentators have suggested.[54] But over time the two standards have

52. 5 U.S.C. § 706(2)(A) (2000); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

53. 5 U.S.C. § 706(2)(E).

54. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1429-30 (2004) (noting the debate over which test is more deferential); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*,

arguably converged,[55] further illustrating the instability that arises when linguistic distinctions are used to calibrate deference. Although the standards are different in theory, in practice the dividing line seems to have been all but erased. This is not the fault of judges, at least not directly. It is a consequence of the difficulty of using relatively crude linguistic distinctions to calibrate different levels of deference in particular settings.

2. *In the Lower Courts*

The larger the number of judges or Justices on a multi-member court, the greater the ability to calibrate. The calibration argument therefore applies to the Supreme Court or to circuit courts sitting en banc, but not to three-judge panels. With three judges, the only possible voting rules are majority (2-1) and unanimity (3-0), which yields only one degree of calibration. This does not mean that voting-rule deference is bereft of benefits for three-judge panels; quite the contrary. But we cannot count calibration as one of them.

This might simply suggest that the size of lower court panels be increased—perhaps to five judges in administrative law cases. This transition would significantly increase the decisional burdens on individual judges by requiring them to sit in more cases and is a separate proposal, one we will not pursue here. The larger point is that some objections to *Chevron* as a voting rule might easily be remedied by small changes on other margins of institutional design.

Administrative law is centrally concerned with identifying the appropriate degree of deference that courts should give agencies. We have explicitly set aside the question of how much deference is optimal, as the calibration benefit exists regardless of how much deference an extrinsic theory suggests. In any given case, calibration may prove difficult independent of whether deference is achieved using voting rules or norms. Our focus is not on adjustment in any specific case but on the calibration of overall systemic deference. Calibration via voting rules is no more difficult than calibration using linguistic categories. In either case, a court must decide that more or less deference is justified in certain settings. Either doctrine or voting rules theoretically could be calibrated in

44 DUKE L.J. 1051, 1065 & n.48 (1995) (same); *see also* Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 412 n.7 (1983).

55. *See, e.g.*, Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) (holding that the arbitrary and capricious test is the same as the substantial evidence test as applied to findings of fact); *see also* Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, 553-63 (1986).

precisely the same way. But the tools judges and legislators use to calibrate should be up to the task. As compared to voting rules, linguistic distinctions are fragile and often ineffective tools for calibrating deference levels.

D. Certainty

The shift from a soft internalized norm of deference to deference as an aggregate property also reduces costly uncertainty of several sorts in administrative law. Voting-rule deference increases predictability and stability and reduces subjective uncertainty. To the extent that clarity, precision, and the ability of potential litigants to predict litigated outcomes confidently are desirable, *Chevron* as a voting rule is preferable to doctrinal deference.

1. Predictability

To say that there is uncertainty in a legal regime is really to say that it is difficult to predict the content of legal rules, the likelihood that a given rule will be applied, or how such rules will translate into legal outcomes.[56] *Chevron* supposedly displaced two lines of cases, one of which commanded courts to review agency determinations of law de novo and the other of which suggested deference.[57] Before *Chevron*, the Court would emphasize either one line of cases or the other in an ad hoc, unpredictable way, creating uncertainty for agencies and litigants. *Chevron* was supposed to remedy this, but it has hardly fulfilled its promise. On our view, that should not be surprising. One of the key reasons for the apparent failure of *Chevron* to eliminate or even significantly reduce uncertainty about deference is that the framework makes deference an individual rather than aggregate property of the judicial system and therefore relies on under-specified norms that are imperfectly internalized by judges.

To get some traction on these questions, return to two points above. First, doctrinal *Chevron* contains inherent ambiguity about what it demands of judges. All agree that judges should defer to reasonable—that is to say, permissible—agency interpretations. But as we have already discussed, what permissible means is itself highly uncertain. How unlikely must an agency interpretation be before it is impermissible? Ninety percent unlikely? Forty-five percent unlikely? The Court has not said, and the views of individual judges will vary; again, even the metric or scale for answering such questions is

56. For a general treatment of predictability and uncertainty in the context of precedent, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597-98 (1987).

57. *See supra* note 38.

conceptually obscure. Variation in views on this question across judges generates an additional dimension of uncertainty.

Moreover, suppose we are correct that compressing *Chevron* into a single-step inquiry—thereby removing one degree of freedom for bias to operate—reduces the ability of biased judges to manipulate the outcome of cases. As long as the potential injection of bias is a source of uncertainty about how judges will behave, the reduction of that source should produce a corresponding gain along the certainty dimension. The core intuition is simply that adopting decision processes that are less discretionary and more parsimonious should reduce uncertainty.

Within the doctrinal *Chevron* framework, agencies and regulated parties know that as a formal matter deference will be given to agency interpretations. But whether deference will be given in practice is a function of heterogeneous interpretive methods used by individual judges and divergent views about the degree of clarity in statutes. Take Justices Breyer and Scalia as ideal types. Scalia favors a broad application of deference to all agency decisions that represent the authoritative view of the agency, a strong rule-like presumption about whether to apply the deference framework at all, and aggressive textualist statutory analysis that is alleged to be far more likely than not to find that Congress definitely resolved the issue.[58] Breyer favors application of the *Chevron* doctrine to a narrower range of cases, a case-by-case inquiry into whether to apply the deference framework, and an interpretive method that is alleged to be more likely to find statutory ambiguity at *Chevron* Step One.[59] Focusing on just two Justices produces confusion about how *Chevron* will function in each of these three dimensions. The picture is no rosier when we expand the universe of potential judges beyond Scalia and Breyer. Each judge brings interpretive idiosyncrasies to the task. The unfortunate result is marked heterogeneity of views about how doctrinal *Chevron* functions. Unfortunately, the more heterogeneity we observe at the level of the individual judge, the less certainty there is about how (and even whether) doctrinal *Chevron* will function in practice.

Chevron as a voting rule need not negotiate these pitfalls. Conditional on an agreed-upon trigger for either doctrinal or voting-rule deference, the agency's decision will be upheld unless a supermajority of the panel concludes that the agency's interpretation of the statute was incorrect. Different judges may well have different thresholds for identifying the "right" answer in statutory interpretation. But doctrinal *Chevron* produces uncertainty at an additional

58. *See* Merrill & Hickman, *supra* note 25, at 859-60.

59. *See* Breyer, *supra* note 26, at 372-82.

stage of the analysis as well—the determination whether the agency's interpretation is permissible.

To be sure, the increase in predictability may vary somewhat with respect to certain subsets of cases. Consider a statute that is vaguely phrased or specified at a high level of generality. If each judge on a panel is completely unsure whether the agency is correct, such that each would flip a coin, individual-level deference would cause each judge to vote for the agency. *Chevron* doctrine essentially constitutes a tie-breaker for each judge in this scenario. Given the same circumstances, under *Chevron* as a voting rule, the agency's decision will be rejected roughly 12% of the time on a three-judge panel, because there is a one-in-eight chance that all three judges will "decide" (randomly) to vote against the agency. In this stylized example, it is possible that doctrinal deference would produce greater predictability than voting-rule deference. However, the voting rule still produces extremely predictable deference—in about 90% of the draws the agency's decision will be upheld. Even in a world where judges essentially flip coins, the voting rule produces quite predictable outcomes.[60]

60. A closely related but analytically distinct question is whether voting-rule deference produces greater stability in the law, a question that parallels stare decisis commentary. *See generally* Lawrence E. Blume & Daniel L. Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405, 408-10 (1982); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000). Strong norms of stare decisis are supposedly desirable because they support reliance interests and reduce uncertainty in the legal system. *See, e.g.*, Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 823 (2002). With respect to precedent, both courts and commentators focus on stability. Stability in turn reduces to the actual probability of legal change. A low probability of legal change corresponds to a strong norm of stare decisis, and a high probability to a weak or nonexistent norm. We have little to add to the debate about the optimal level of change or stickiness in the law. *See generally* Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161 (2003) (developing a conceptual framework for assessing the desirability of different policy approaches to undertaking legal change); Frederick Schauer, *Legal Development and the Problem of Systematic Transition*, 13 J. CONTEMP. LEGAL ISSUES 261 (2003) (comparing the costs of small-scale legal transition to those of large-scale legal transition). However, all the arguments we have made about voting-rule deference apply with equal force to stare decisis. Stare decisis is a somewhat crude mechanism for ensuring the stability of precedents. Supermajority voting rules would accomplish identical goals, with greater calibration and fewer costs. The flexibility afforded by the voting rule avoids the inevitable uncertainty involved in lumpy linguistic formulations like "strong" and "super-strong" deference accorded to prior judicial decisions. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988); *see also* Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 427 (1988); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

2. *Subjective Uncertainty*

Related to the predictability issue, *Chevron* as a voting rule also reduces subjective uncertainty. What matters is not only the actual content of the law, the probability that a given legal rule will be applied, or the ultimate probability that an agency decision will be overturned, but also how agencies and regulated parties perceive events in judicial challenges. How costly is it for potential litigants to accurately predict these dynamics in the respective deference frameworks?

When an agency promulgates a rule, both the agency and the regulated parties will attempt to estimate the probability that the decision will survive a challenge in the courts. If the EPA thinks a final rule is unlikely to survive, it may not promulgate it at all. More likely, the agency will revise the rule to reduce the probability that the rule will be struck down. A private party affected by the rule must make a similar calculation. Suppose the EPA Administrator estimates the probability of overturning to be p=0.25. This estimate carries with it a variance that can be understood as the degree of subjective uncertainty about the point estimate.

Imagine a simple bell curve with the agency's point estimate (in the hypothetical example, 0.25) as the mean.[61] As the variance of the estimate diminishes, the slope over the curve becomes steeper; the distribution becomes more compressed around the point estimate. As the variance increases, the slope becomes more gradual and the distribution more spread out. In Bayesian terms, the precision of the estimate changes. The Administrator may be extremely confident that p=0.25, believing, for example, that there is some reasonable chance that p actually equals 0.30 or 0.20, but that there is virtually no chance it is higher or lower than that. In this case, the curve, representing her subjective uncertainty, will be quite compact, and we characterize this as a low-uncertainty case. Alternatively, the Administrator may hold the same point estimate, p=0.25, that the courts will strike down the final rule, but may have greater subjective uncertainty about the estimate. (Envision a longer-tailed distribution, with the low end of the curve approaching zero and the high end of the curve approaching 0.85.) We characterize this as a high-uncertainty case. Our claim is that *Chevron* as a voting rule reduces subjective uncertainty of this sort; it allows potential litigants to form better, more confident, estimates of the probability that agency decisions will be upheld. The two regimes might also produce actual changes in p, but we intentionally hold p constant for purposes of discussion.

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61. The technically proper probability distribution function would not be normal, but a distribution bounded by 0 and 1, like the beta distribution.

Why might *Chevron* as a voting rule reduce subjective uncertainty? To start with, the variance of an aggregate judgment is partially a function of the variance of its component parts. Suppose that the EPA must decide how a randomly selected judge will vote in a given case. To calculate that estimate in the doctrinal *Chevron* framework, the agency must ascertain whether the judge will find a clear congressional statement in the statute and whether, absent a clear statutory resolution of the issue, the agency's interpretation is reasonable. One possibility is that the EPA takes the statute to be clear and estimates that the judge will agree. Here, there is uncertainty about that judgment, but there is no additional uncertainty from *Chevron* Step Two. If, however, the EPA takes the statute to be ambiguous and estimates that the judge will agree, it must also estimate the probability that the judge will find its interpretation reasonable as well. There is a variance associated with the estimates required at both Step One and Step Two of *Chevron*. Because *Chevron* as a voting rule requires only one stage of estimation, the variance will be lower. The simple claim is that the fewer stages of judicial decision that the EPA must guess about, the less subjective uncertainty will characterize the Administrator's judgment.

Subjective uncertainty is also reduced by making deference an aggregate rather than individual characteristic. A supermajority voting rule generates less subjective uncertainty than does doctrinal deference because an external observer need not estimate whether each individual judge and a majority of judges will fully internalize the norm of deference. Figuring out whether deference will result no longer requires potential litigants to guess whether or how individual judges will defer. Rather, deference is an unavoidable characteristic of the voting procedure. As a result, external observers can have greater confidence in their judgments.

In none of these uncertainty contexts does *Chevron* as a voting rule fare worse than doctrinal *Chevron*, and in many contexts it fares better. Outcomes of administrative law cases will be more predictable and likely clearer and simpler from the view of external observers. On balance, infusing deference into the law via voting rules should reduce confusion and uncertainty and replace it with greater clarity and transparency.

III. COSTS AND OBJECTIONS

So far we have discussed the benefits of switching from doctrinal *Chevron* to *Chevron* as a voting rule; our suggestion has been that the switch would accomplish the objectives of doctrinal *Chevron* at lower cost. Are there offsetting costs that would arise from switching to the new regime? Here we examine some objections to *Chevron* as a voting rule. We suggest that these

objections either are invalid, or apply equally to doctrinal *Chevron*, and thus afford no basis for preferring one regime to the other.

A. Voting Theorems

Under *Chevron* as a voting rule, a supermajority of a multi-member judicial panel would be necessary to overturn agency interpretations of law. Two well-known voting theorems—May's Theorem and the Condorcet Jury Theorem—support majority rule. Neither theorem, however, supplies a cogent objection to a supermajority rule in this setting.

1. May's Theorem

In the simplest version, when two options are involved, May's Theorem says that only majority rule satisfies a stipulated set of conditions, including neutrality (neither option is preferred by the voting rule), anonymity (the outcome does not depend upon which voter ends up on which side), and two more technical conditions.[62] The force of May's Theorem is that if the conditions are attractive, majority rule should also be attractive. Conversely, if one rejects majority rule in some setting, one should also be willing to explain why one or more conditions of the Theorem are unattractive.[63]

In this setting, the nub of the argument is that neutrality should be rejected. The outcome in which the agency interpretation prevails is more desirable than the outcome in which the agency interpretation is rejected, and the voting-rule version of *Chevron* merely reflects this. The point of *Chevron* is to put a thumb on the scales in favor of agency interpretations of law, in order to allocate interpretive authority between agencies and courts. A *Chevron* supermajority rule does so formally, through the aggregation mechanism; doctrinal *Chevron* with a majority rule does so as well, just informally, through

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62. Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952). The other two conditions are universal domain or decisiveness (roughly, the voting rule yields a definite outcome for any set of preference orderings) and positive responsiveness (roughly, any voter can break a tie by changing her vote).

63. We bracket here recent extensions of May's Theorem to multiple options. *See* Robert E. Goodin & Christian List, *A Conditional Defense of Plurality Rule: Generalizing May's Theorem in a Restricted Informational Environment* (EconWPA, Working Paper No. 0409010, 2005), *available at* http://129.3.20.41/eps/pe/papers/0409/0409010.pdf. We have assumed, throughout, that in most cases judges will face a choice between the agency's interpretation and one offered by a litigant, and in any event many of our points hold, with appropriate modifications, when extended to the multiple-option case.

legal doctrine that individual judges are required to internalize. The move to doctrinal *Chevron* in 1984 already rejected neutrality, in substance if not in form. Our suggestion is just that the rejection of neutrality is best done explicitly in the voting rule itself. Whether or not the suggestion is persuasive on other grounds, May's Theorem supplies no valid objection to it.

2. *Supermajority Rules and the Status Quo*

Related to the foregoing is a point about agencies and policy change. A standard observation in voting theory is that supermajority rules, by violating neutrality, place a thumb on the scales in favor of the status quo.[64] One might worry that using a supermajority rule in place of *Chevron* deference will produce too much status quo bias.

However, the status quo must be understood here in a legal rather than factual sense. Suppose, as is usually the case, that the agency moves first by issuing an interpretation of the statute; this interpretation then becomes the new legal status quo. A supermajority rule in favor of the agency's interpretation protects the new status quo as defined by the agency. This approach does not protect the policy status quo, however. To the contrary, freeing up agencies to change policies, as *Chevron* does in either the doctrinal version or the voting-rule version, works to prevent regulatory policy from becoming obsolete. Under either version of *Chevron*, it is entirely legitimate for agencies to update policies in light of changing circumstances or changing democratic preferences.[65]

3. *The Jury Theorem*

The Condorcet Jury Theorem says that when right answers exist, and when the average voter in the group is more likely than not to get the right answer (i.e., average voting competence exceeds 0.5), then the probability that majority voting will hit the right answer increases as the group's size increases and as its average competence increases.[66] Perhaps the Jury Theorem suggests

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64. This is (by definition) only true of "asymmetrical" supermajority rules, not of symmetrical ones; the latter respect neutrality but yield nontrivial ties. For an explanation of these terms, see Robert E. Goodin & Christian List, *Special Majorities Rationalized*, 36 BRIT. J. POL. SCI. 213, 215-16 (2006).

65. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

66. The Jury Theorem can be extended to multiple options, in which case plurality rule is preferred. *See* Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 283-88 (2001).

that majority rule is preferable because a simple majority of judicial votes is most likely to get the answer right.

It is important to be clear that this point does not support regime (2), *Chevron* plus a majority rule, as compared to regime (3), de novo judicial interpretation plus a supermajority rule. The only plausible candidate for a "right answer" here is that there might be a right answer about what the relevant statute means. To ask that question is to engage in de novo judicial interpretation, not *Chevron* deference. The Jury Theorem objection is in effect an argument for regime (1), de novo judicial interpretation with majority rule. As our concern is to compare regimes (2) and (3), the objection is somewhat tangential to our enterprise. The regime we suggest is not Condorcetian, but neither is the current regime.

In any event, the objection is also dubious on its own terms, for two reasons. First, we have said that de novo judicial interpretation requires judges to decide which party offers the better interpretation of the statute, after considering all permissible sources. It is an open question whether this sort of legally better answer counts as a "right answer" within the terms of the Jury Theorem. Even if the better legal answer is quite indisputable relative to the rules, conventions, and practices of the law, it is a separate and complex jurisprudential question whether that answer can be right or wrong in the same way that a guess about the number of beans in a jar can be right or wrong.

The second and more critical point is that even if the legally best answer counts as a "right answer" in the required sense, the Jury Theorem does not at all support a simple majority voting rule *among judges*. The confusion here is a common one in discussions of the Jury Theorem. The Jury Theorem itself says nothing at all about the composition of the group that should be governed by majority rule; it is always necessary to ask "a majority of what?" Arguments from the Jury Theorem to judicial majority rules are often flawed because they assume, arbitrarily, that *only* the votes of a majority of *judges* should be decisive, when in fact the votes of agency decision-makers are also useful inputs for Jury Theorem purposes.

Here is an artificial example, for clarity. Suppose a multi-member administrative commission, like the FCC, votes 4-1 in favor of an interpretation, and suppose there is a correct interpretation within the terms of the Jury Theorem. Suppose also that review goes directly to the nine-member Supreme Court, which splits 5-4 against the rule. The Jury Theorem, taken by itself, does not in the least suggest that the Court's view should trump the agency's. If all voters possess the same average competence, it is arbitrary to exclude the voters who happen to sit on the Commission; with their votes, there is an 8-6 majority in the rule's favor. Even if the Justices have higher average competence, including the agency voters can only improve the group's

aggregate accuracy, as long as the agency voters' average competence exceeds 0.5. At a minimum, even if courts should not look behind an agency's decision to count the votes cast inside the agency, the agency should at least be counted as having cast one vote.[67]

In the above example, the distribution of votes cuts in favor of the agency, but in other examples it would not. Our point is simply that that the Jury Theorem alone says nothing about why only judicial votes should be counted. From this perspective, a supermajority rule in the agency's favor is, in effect, a way to ensure that the agency has at least one virtual "vote" in the judicial proceedings. The objection assumes, without foundation, that majority rule among the judges alone should be decisive. The Jury Theorem, rightly understood, does not require this; indeed it supports the expansion of the group whose views are aggregated to include agency officials, and the supermajority rule in effect does just that.

B. Single-Member Courts

A voting rule cannot be used to generate deference on single-member panels. When a single judge considers and resolves a question of administrative law, an internalized norm of decision is the only viable way to provide deference to agency views. If most *Chevron* questions were ultimately resolved by district courts, that would surely limit the significance of our proposal. However, most agency rules and many orders are appealed directly to the courts of appeals.[68] Statutes providing authority to a diverse universe of agencies provide for direct review of agency actions in the courts of appeals.[69]

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67. Evan Caminker makes similar points in discussing courts, legislatures, and supermajority voting in the constitutional setting. *See* Caminker, *supra* note 8, at 98-101.

68. *Cf.* Currie & Goodman, *supra* note 15, at 5 (discussing agency orders).

69. The Federal Trade Commission Act of 1914 was a model for many subsequent statutes on this front. Ch. 311, 38 Stat. 717, 720 (1914) (codified as amended at 15 U.S.C. § 45(c) (2000)). For example, the Natural Gas Act provides that a party aggrieved by an order of the Federal Energy Regulatory Commission may petition for review directly to the courts of appeals. 15 U.S.C. § 717r(b) (2000). The Natural Gas Policy Act of 1978 provides that adjudicative orders issued under the statute may be appealed directly to the D.C. Circuit or the circuit in which the party is located. 15 U.S.C. § 3416(a)(4) (2000). The Presidential Primary Matching Payment Account Act provides that decisions by the FEC as to funds are reviewed by the D.C. Circuit, 26 U.S.C. § 9041(a) (2000), as are other FEC decisions. Orders and decisions by the FCC are generally directly reviewed by the D.C. Circuit. *See* 47 U.S.C. § 402(b) (2000). Decisions of the SEC are appealed directly to the courts of appeals as well, 15 U.S.C. § 78y(a)(1) (2000), as are most decisions of the NLRB, 29 U.S.C. § 160(e) (2000). Certain statutes, of course, give exclusive jurisdiction to a specific court of appeals, as the Clean Air Act does with review of EPA rules in the D.C. Circuit. 42 U.S.C.

For the most part, review of agency action by single-member courts is of distinctly marginal importance in administrative law.

This is not to say to say that district courts never issue initial decisions reviewing agency action. For example, challenges to enforcement actions pursuant to existing regulations will typically be brought in the district courts. And for this subset of cases, *Chevron* as a voting rule could be implemented in one of two ways. First, the district court could engage in de novo review of the agency action, subject to supermajority review by the multi-member appellate court. Second, the district court could continue to apply doctrinal deference while the reviewing panel would apply voting-rule deference. The former rule would eliminate deference at the district court level but would reveal helpful information about the district judge's view of the statute. The district judge's view would then supply another data point for the court of appeals, along with the parties' appellate arguments. The second alternative is what we term a "mixed rule": voting-rule review of a doctrinal deference decision.[70]

We remain agnostic as to which alternative is preferable; either one is compatible with our proposal. As to the first alternative, district judges would not defer themselves, but that is of little significance because district court decisions are of little legal significance in administrative law (except as useful information for appellate courts). District court opinions have no precedential weight, and under current practice, reviewing courts tend to focus almost exclusively on the reasonableness of the agency's decision, rather than on whether the district court's evaluation of the agency's action was faulty. *Chevron* commands deference to agency views; doctrinally the lower court's decision is all but irrelevant.

If one cares about ensuring deference by district judges as well as appellate courts, a mixed rule would have to be used. Yet mixing hard and soft deference rules at different levels of review does not generally produce perverse results. To illustrate, suppose the district court judge applies a norm of deference and finds the agency's interpretation permissible. There are four possible scenarios on appeal.

(1) A supermajority of the reviewing panel concludes the agency's interpretation was incorrect. Here, the agency's decision is struck down, but there is no conceptual oddity. The appeals court and the district court disagreed, as upper and lower courts often do. The district court judge and the appeals court judges are, of course, asking slightly different legal questions. But the mere fact

§ 7607(b)(1) (2000). These examples are merely illustrative. The action in administrative law unquestionably takes place in the courts of appeals and the Supreme Court, even more so than in most areas of the law.

70. See *infra* Subsection III.F.3 for a more complete discussion of mixed rules.

that an appeals court rejects an agency action while a district court upholds it is not problematic.

(2) A supermajority of the panel thinks the agency chose the right interpretation. The agency's decision is upheld in both the district and circuit court; the hard and soft rules produce the same outcome.

(3) A bare majority of the circuit court finds the agency's interpretation incorrect, and therefore the agency's decision is upheld. Again the voting rule and doctrinal deference norms both produce the same result.

(4) A bare majority of the circuit court finds the agency's decision correct, which implies that a minority of the appellate court found the decision incorrect. The agency's decision is upheld because a supermajority did not disagree. Again, the lower court and the reviewing panel reach the same decision.

None of these scenarios is unseemly. To the extent that deference is desirable in district courts, our voting rule cannot provide it. A soft doctrinal rule is the only option available, its imperfections notwithstanding. However, this observation does not imply that we should choose an inferior solution in more important settings like the Supreme Court, where (we suggest) more effective alternatives exist.

C. Chevron *as a Voting Rule, Step Zero?*

When exactly would *Chevron* as a voting rule apply? Under *Mead* and its successors, the Court has rejected, for the time being, Justice Scalia's argument that *Chevron* applies whenever the agency decision is "authoritative."[71] Instead the Court has developed an elaborate body of law—*Chevron* Step Zero[72]—that determines whether *Chevron* will apply at all. Under *Chevron* Step Zero, the Court asks, roughly, whether there is an affirmative indication of congressional intent to delegate law-interpreting power to the agency, using various procedural indicators as defeasible proxies in this inquiry.[73]

Our proposal is neutral with respect to *Chevron* Step Zero. The voting rule we suggest would apply when, and only when, *Chevron* Steps One and Two would otherwise apply under the doctrinal *Chevron* framework. If Scalia's view were to prevail, then the *Chevron* voting rule would be triggered by any authoritative agency interpretation. Under the current approach, the *Chevron* voting rule would be triggered by an affirmative finding of congressional intent

71. United States v. Mead Corp., 533 U.S. 218, 237-38 (2001).

72. *See* Merrill & Hickman, *supra* note 25, at 873; Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

73. *Mead*, 533 U.S. 218.

to delegate interpretive authority to the agency. *Chevron* Step Zero has produced substantial uncertainty and ferment in the law of administrative deference.[74] Our proposal does not inevitably improve this situation, but it does not worsen it either. We simply adopt whatever triggering conditions doctrinal *Chevron* assumes.

Our approach, however, could also be extended to Step Zero. A supermajority voting rule would produce benefits and reduce uncertainty at *Chevron* Step Zero, although it would complicate the core analysis somewhat. If some extrinsic theory suggests that most agency actions should qualify for *Chevron* deference, it would be easy to require a supermajority vote to remove an agency action from the *Chevron* framework and send it to either de novo review or *Skidmore* deference. That voting rule would reduce uncertainty at Step Zero and could also be calibrated to produce a pro-deference bias if desirable. If instead it were decided that agency actions should rarely qualify for deference, a supermajority rule cutting against deference could just as easily be implemented. Regardless, the point is that a voting-rule formulation of *Mead* produces virtually the same benefits vis-à-vis the doctrinal formulation of *Mead* as the voting-rule version of *Chevron* produces vis-à-vis its doctrinal cousin.

D. Agency Flexibility

Might using a voting rule to generate institutional deference undermine an agency's ability to change course and adopt new interpretations in light of new information? In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[75] the Court clarified the interaction between a prior judicial interpretation of statutory language and an agency's subsequent and different interpretation of the same language.[76] The *Brand X* majority held that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[77] Put differently, when a court

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74. *See* Adrian Vermeule, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003); *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457 (2005).

75. 125 S. Ct. 2688 (2005).

76. For a proposal to address sequencing problems of this sort, see Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002).

77. 125 S. Ct. at 2700.

rejects an agency position because the statute unambiguously commands the interpretation the court adopts, the agency may not later adopt a different position. When a court acknowledges statutory ambiguity, the agency retains the flexibility to pick new interpretations in the future[78]—including an interpretation different from the one the prior court thought best.[79] When a court finds that a statute requires a given interpretation, the agency is bound; when a court finds merely that an agency position is permitted, the agency is not bound.

How would the *Brand X* framework interact with the regime we suggest? Because *Chevron* as a voting rule dispenses with the secondary reasonableness inquiry of doctrinal *Chevron*, perhaps the voting rule would reduce agency flexibility more frequently than does doctrinal *Chevron*. This might be good, or bad, but it would be an important difference.

However, there is no particularly good reason to think that any such reduction in flexibility will occur. As long as a supermajority of the reviewing court does not reject the agency's interpretation, the agency remains free to adjust its position in the future (as long as its changes in position are sufficiently explained, a requirement that obtains under doctrinal *Chevron* as well[80]). For example, if, in the first case, the agency wins because a bare majority of Justices votes against the agency (5-4), then, in the second case challenging the agency's change in position, the agency can again win by obtaining four votes in its favor. Institutional deference preserves all agency flexibility.

If, by contrast, a supermajority of a panel rejects the agency's interpretation as incorrect, the agency may not readopt its old position. But that is also true when a court rejects an agency's interpretation of a statute as clearly wrong or unreasonable in the doctrinal *Chevron* framework, as *Brand X* makes clear.[81] No greater reduction in agency flexibility inheres in the hard voting rule than in the soft doctrinal rule.

E. Decision Costs

Perhaps the switch from doctrinal *Chevron* to *Chevron* as a voting rule (what we have called regimes (2) and (3)) would increase the costs of decision-making, at least for judges. Suppose that under doctrinal *Chevron*, judges

78. *Id*. at 2700-01.

79. *See id*. at 2719-20 (Scalia, J., dissenting).

80. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

81. 125 S. Ct. at 2700.

sometimes decide that the agency's proffered interpretation is reasonable, in the absolute sense required by *Chevron*, without deciding which party's interpretation is better (the comparative judgment required by de novo interpretation). In those cases, the judges avoid a further inquiry that is required under *Chevron* as a voting rule and thus economize on the burdens of decision. Judges can use the reasonableness inquiry to avoid the harder question of what the statute, correctly interpreted, should best be taken to say.

The argument fails on several grounds. First, it is not the case that regime (3) requires judges to decide everything they must decide in regime (2) and then adds more. Rather, regime (3) replaces the reasonableness question with the question of the better interpretation. If the latter question is less costly to answer than the former, then the decision costs of regime (3) are lower, not higher, than the decision costs of regime (2). We suggested above that the particular question of whether an agency interpretation is reasonable is indeed harder, on average, than the question of which party has the better interpretation. The former requires an absolute judgment that must be made without any theory of what counts as reasonable and without any clear metric. The latter requires a relative judgment, which is often easier.

Second, it is erroneous to say that under regime (2) the judge need only decide reasonableness. Given the current law, particularly the *Brand X* decision, regime (2) requires the judge to go further, sooner or later, and decide whether the agency interpretation is reasonable because it is the only permissible answer or because it is permissible but not required. Under *Brand X*, as we have seen above, the two types of "reasonable" agency interpretations have very different legal consequences, so the determination whether the agency has offered one type of reasonable interpretation or the other cannot be postponed forever.

Of course that further determination need not be made in the first case; it can be postponed to the second case, or the *n*th. But the only sensible question from the perspective of institutional design is which regime produces higher decision costs across the complete array of cases. The objection rests on the erroneous premise that reasonableness is, under the current law, all that judges have to decide. Because the law requires them to go further, doctrinal *Chevron* has no advantage over the regime we suggest as far as decision costs are concerned.

Third, the objection focuses too narrowly on the decision costs incurred by the individual judge, as opposed to the net decision costs of the overall system of litigation. Suppose, contrary to our earlier suggestion, that it is easiest—perhaps all too easy—for individual judges to say that one agency interpretation is reasonable, another is not, and so on, without making relative judgments about better answers. Still, we have emphasized that different

judges will have different thresholds of reasonableness and will reach different conclusions in ways that agencies, litigants, and others will find difficult to predict. In that case, deciding on the basis of ungrounded judgments of "reasonableness" may minimize decision costs for individual judges but inflict larger decision costs on others, who will find it difficult to decide what to do when the aggregate behavior of a set of judges is unpredictable. We might even object that under the reasonableness approach, judges are exporting decision costs to other actors in the legal system, simplifying their own task while creating net systemic harms. To the extent that judges are self-interested, we should worry that they will be too receptive to any approach that reduces their decision costs.

If these matters are unclear, provoking different intuitions in different observers, the fair-minded conclusion is that the issue of aggregate decision costs probably does not cut strongly in one direction or the other. In an individual case, decision costs might increase or decrease, but any net shift is likely a secondary consideration.[82] The definite advantages of switching to *Chevron* as a voting rule are unlikely to be swamped by ambiguous, and probably minor, considerations of this sort.

F. Strategic Behavior

Might *Chevron* as a voting rule create the opportunity for strategic voting or allow for judicial manipulation of outcomes in a way that doctrinal *Chevron* does not? On balance, we think not, but there are several potential issues to consider.

1. Circumvention Through Bargaining

A crass objection is that the voting rule might be easy to circumvent if judges are willing to trade votes across cases. As long as judicial preferences in one case are more intense than in another case, the judge could implicitly or explicitly agree to change her vote in the low-intensity case in exchange for someone else's vote in her high-intensity case. This is a bargain across cases, or a logroll.

This claim is of course true, but it is no more true of supermajority voting rules than of majority voting rules. If judges are willing to trade votes across

82. *Cf.* Adrian Vermeule, *The Delegation Lottery*, 119 HARV. L. REV. F. 105, 109-11 (2006), http://www.harvardlawreview.org/forum/issues/119/feb06/vermeule.pdf (discussing "second-decimal arguments").

cases, there is little that either hard or soft deference doctrines can do about the matter. Indeed, by raising the number of votes needed to change the status quo, the supermajority voting rule makes such trades somewhat more difficult, though not impossible. Additionally, if we are correct that interpretive questions under *Chevron* as a voting rule are less fuzzy than under the doctrinal inquiry, the costs of monitoring judges will be lower for the voting rule than the doctrine. The voting-rule framework demands that each judge state her beliefs as to the correct statutory interpretation. Lies and deception remain possible. But the cloaks of statutory ambiguity and second-order judgments about clarity and reasonableness are no longer available, in contrast to doctrinal *Chevron*.

2. *Insincere Voting*

The question of explicit bargains is closely related to a more interesting objection, based on the possibility of insincere voting.[83] A pocket of literature has focused on insincere or strategic voting on multi-member courts.[84] The generic issues are numerous, but for our purposes, the question is strictly comparative: does voting-rule deference create opportunities for strategic or insincere voting in a way that the doctrinal deference framework does not?

It is certainly possible that judges might manipulate their votes on sub-issues in a case to garner or avoid a majority on the outcome. For example, a judge who hopes to avoid a change in the law from one substantive rule to another could vote (insincerely) with another minority voting bloc to hold that the parties do not have standing, thereby avoiding a decision on the merits.[85] But that manipulation is made harder, not easier, by a supermajority voting rule, as long as the costs of assembling a supermajority on any given issue in a case are higher than the costs of assembling a simple majority.

That point is subject to an important caveat, however. We must distinguish unintentional or unconscious bias from intentional manipulation. As to the

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83. *Cf.* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1375-77 (1995) (discussing the interaction between strategic voting, stare decisis, and insincere voting).

84. *See, e.g.*, Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); Colloquium, *Appellate Court Voting Rules*, 49 VAND. L. REV. 993 (1996); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995).

85. The issue has parallel application to questions of strategic voting and stare decisis. *See* Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1918-19 (2001).

former, the shift from soft individual deference to hard aggregate deference entails risks that individual judges will continue to internalize deference norms. If so, the system could produce *double deference*, whereby individual-level deference would be amplified by the aggregate voting procedures. The possibility cannot be conceptually eliminated, but we think it relatively unlikely. The case for aggregate-level deference supposes that judges tend more naturally toward correct interpretation than permissive interpretation. Rather than fight this judicial tendency, our theory takes advantage of it. Thus, while intentional manipulation is possible, unintentional manipulation that results from ordinary interpretive tendencies is less likely.

As to intentional manipulation, *Chevron* as a voting rule is relatively easy to manipulate toward more deference but much harder to manipulate toward less deference. A dishonest judge who favors deference can intentionally continue to apply internal deference to agencies' views, resulting in somewhat more deference than *Chevron* as a voting rule with sincere de novo voting would produce. A dishonest judge who opposes deference can always vote against the agency in either the doctrinal framework or the voting-rule framework; but whereas deference endures in the aggregate voting-rule world, it may be lost entirely in the doctrinal world. While injecting more deference is possible, undermining deference is much harder. In general, while manipulation is of course possible under *Chevron* as a voting rule, there is no particular reason to think that it is systematically easier than under doctrinal *Chevron* with majority rule.

3. *Mixing Voting Rules*

One additional hazard relates to the mixing of supermajority rules and simple majority rules—either horizontally, within a given case, or vertically, when lower court decisions are reviewed by higher courts. We have illustrated the second concern with the case of single-member district courts above.[86] To illustrate the first concern, consider that a supermajority rule might govern whether an agency interpretation of a statute is lawful, but a simple majority rule might govern the subsequent question of whether the agency's action was arbitrary and capricious. (We set aside the view that Step Two of *Chevron* and arbitrariness review are functionally identical.[87]) Alternatively, a simple majority rule might determine the *Chevron* Step Zero inquiry, while a

86. *See supra* Section III.B.

87. *See, e.g.*, Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

supermajority rule would determine whether to uphold the agency's interpretation. A perfectly sensible concern is that these sequencing issues allow for gaming in a way that doctrinal *Chevron* does not.

If a simple majority rule determines whether to apply the *Chevron* framework at Step Zero and a supermajority rule determines the outcome of the *Chevron* analysis, then it is possible for a simple majority to vote against applying the deference framework if the same majority predicts that its preferred outcome will not win supermajority support. If a majority of Justices prefers to overturn the agency action, but a supermajority does not, then the simple majority can avoid the deference framework entirely at *Chevron* Step Zero, making an agency loss more likely.

Two points mitigate this concern. First, this type of strategic behavior is not a problem if a simple majority wants to uphold the agency action. In that case, a simple majority votes to apply the deference framework at Step Zero, and the agency action will be upheld because a supermajority of Justices will not vote against the agency. Second, if we take the question of whether to apply the deference framework to be guided by *Mead*, then avoiding the deference framework is not as easy as it first appears. If the agency used formal rulemaking, formal adjudication, or informal rulemaking to produce its judgment, the action will usually qualify for *Chevron* deference.[88] A majority could nonetheless vote against applying the deference framework, but in many cases that would be hard to square with the doctrinal framework. If the agency failed to use one of the procedural mechanisms favored by *Mead*, then it is admittedly far easier for a strategic majority to manipulate away from the deference framework. But importantly, this is also the case under the current *Chevron* regime. A simple majority can vote against applying the *Chevron* framework at Step Zero, thereby applying a less deferential standard of review. The voting rule does no better against this subtle form of manipulation, but it does not fare worse either.[89]

The sequence of supermajority *Chevron* voting followed by simple majority voting on arbitrariness review might produce similar anomalies. We start with

88. United States v. Mead Corp., 533 U.S. 218 (2001). Justice Breyer has suggested that the *Mead* framework provides no safe harbors. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2712-13 (2005) (Breyer, J., concurring).

89. A related sequencing issue could arise at the intersection of the grant of certiorari and the voting rule on the merits. For example, with a Rule of Four and a 6-3 version of *Chevron* as a voting rule, four Justices could grant certiorari and then uphold the agency action. Again, asymmetry supports the deference regime. A sufficient minority could grant certiorari and uphold the agency action, but it could not grant certiorari and strike down the agency action in our proposal.

straightforward scenarios and turn to increasingly difficult ones for our framework.

(1) Suppose a supermajority of Justices finds that the agency's interpretation was wrong. That is the end of the matter; the party challenging the agency's action has ruled it out altogether as precluded by statute, a greater victory than an arbitrariness holding that would allow the agency a second chance to justify its decision. No conflict with arbitrariness review results because arbitrariness review is unnecessary.

(2) Suppose a supermajority of Justices agrees with the agency's interpretation. If a majority of the Justices also concludes that the agency's action was not arbitrary and capricious, no anomaly results. If a simple majority nonetheless concludes the action was arbitrary and capricious, there is still no unique problem or anomaly; the two views are perfectly consistent.

(3) Suppose a simple majority concludes that the agency adopted the correct interpretation. The agency decision would be authorized; again, it is a separate question whether a simple majority would also find that the agency adequately justified its decision in reasoned terms. Whatever the simple majority concludes on that point, there is no inconsistency with the holding on statutory authorization.

(4) Lastly, suppose a simple majority concludes that the agency's interpretation of the statute was incorrect. The agency's decision would stand because of the supermajority deference rule. But in this case, it is possible that the same majority would also find the agency action arbitrary and capricious. Given that the two questions are conceptually distinct—one is about authority to take a certain action and the other is about adequate justification for that action—here too it is not obvious that there is any problem. To be sure, a strategic majority that loses on the statutory question by virtue of the supermajority rule might bend its views about arbitrariness to compensate. As long as the analysis is sequential, a simple majority could undermine the aggregate deference rule. However, under the current framework there is no limit on strategic or insincere voting during arbitrariness review either. On a split panel, a single judge might vote insincerely on the statutory interpretation question to reach or to avoid reaching the arbitrariness question. Again, the *Chevron* voting rule does not better this situation, but it does not make it worse, and it should not be charged with sole responsibility for a bad scenario that can arise under either the hard or the soft framework. Furthermore, the bad scenario arises only in a limited subset of cases. Hard and soft rules produce equivalent outcomes in scenarios (2) and (3). We find scenario (4) unobjectionable, but in any event, we see no particular reason to think that (4) constitutes the dominant scenario in the ordinary run of cases. Even if it did, that might be a reason, not to oppose *Chevron* as a voting rule, but to advocate a similar shift to

a supermajority voting rule in the arbitrary and capricious setting, which itself is supposed to operationalize a deferential standard of review of agency policy judgments.

All this could create incentives for administrative agencies as well. As best we can discern, however, any incentive effects would simply mirror the existing incentive effects created by *Mead*. If an agency wants to maximize the chance that *Chevron* deference will apply, *Mead* counsels the agency to use formal or informal rulemaking or formal adjudication—any process other than informal adjudication. *Chevron* as a voting rule does so as well because (as explained above) our proposal does not affect the law of *Chevron* Step Zero. The agency might be even more likely to use the procedures favored by *Mead* under the voting-rule version of *Chevron* than under doctrinal *Chevron*, but only to the extent that there is greater certainty that deference will in fact result.

Similar dynamics could arise if reviewing courts utilize a simple majority rule while lower courts use a supermajority rule, or vice versa. The issue can be cast in any number of ways, but perhaps the cleanest is to focus on Supreme Court review of three-judge appellate panels. Suppose the D.C. Circuit adopted a rule requiring a 3-0 vote to overturn an agency's interpretation of a statute, but the Supreme Court used a simple majority rule to review the decision. In this world, a simple majority of the Supreme Court could undermine the supermajority voting rule of the lower court. Given the relatively low number of circuit judgments that are reviewed by the Court, this seems unlikely to be a major obstacle to implementation. Alternatively, if the circuit adopted a supermajority rule and the Supreme Court adopted a supermajority rule, would we return to the double deference problem noted above? No; the issue for the Supreme Court's review is whether the Court should uphold or invalidate the agency's action, not whether the circuit court properly deferred. The Court owes no deference to lower courts on legal questions and can apply the *Chevron* voting rule de novo. That said, we do endorse the wholesale rather than piecemeal adoption of voting-rule deference, at all levels of the judicial system.

4. Litigant Effects

Would voting-rule deference change the incentives of regulated parties to seek judicial review? Specifically, would certain challenges to agency action currently being brought not be filed in a voting-rule deference regime, or is there a class of challenges currently not being filed that would suddenly end up in court? Ultimately, these are thorny empirical questions, but some rough speculation suggests that any observed effects are likely to be modest and beneficial overall.

First, we are not advocating a shift from a legal regime without deference to a regime with deference. That transition would have significant effects, no doubt producing fewer challenges to agency actions or at least changing the mix of litigated cases. The current concern involves a shift from one partial deference regime to another. For this reason, although some incentive effects on litigants are likely, it would be surprising if they were of enormous magnitude.

Second, to the extent that incentive effects would be produced, they are largely beneficial and derive from the calibration and certainty analysis above. If voting-rule deference results in more agency decisions being upheld, all else being equal, we would expect a reduction in the number of challenges brought (initially) and an increase in the rate of settlement. This effect is either neutral or positive. If voting-rule deference reduces uncertainty in the litigation lottery, then that also should encourage more settlement. Agencies and regulated parties should be able to better predict judicial outcomes and therefore to settle the case in anticipation of those outcomes. If the actual underlying probability of victory is held constant, then this reduction of uncertainty or noise in the judicial process should economize on litigation costs and potentially save both litigant and agency resources.

We take these effects to be virtually unqualified goods in and of themselves. But there are potential negative side effects. For example, if regulated parties are better able to predict that they will lose a challenge to agency actions, they will be less likely to litigate, which might mean the agency would (ex ante) enact a more pro-agency rule. That is, we might observe a different realization of the underlying distribution of potential agency actions. Given that the goal of *Chevron* deference is to give more policymaking authority to agencies, this should not raise hackles; if it is undesirable, the voting rule can itself be adjusted. In light of the greater ability to calibrate and recalibrate that the shift to voting rules produces, the incentive effects on litigants do not seem especially worrisome.

G. Deference and Politics

Even if *Chevron* as a voting rule performs better than doctrinal deference in the ways we have emphasized, might doctrinal deference create other positive externalities that a voting rule would not? To take a straightforward illustration, doctrinal *Chevron* asks judges to take seriously the views of coordinate branches. In the process, maybe doctrinal deference generates positive norms of respect and appreciation for the views of other governmental units. Even if such norms are desirable, doctrinal deference seems an expensive way to accomplish the stated goal. Moreover, it is far from obvious that

Chevron as a voting rule would not produce more respect for coordinate branches. *Chevron*'s theory of reasonable or permissible interpretation asks judges to vote to uphold agency interpretations that they believe to be wrong; this state of affairs could just as easily generate interbranch hostility as mutual respect.

Above, we noted some mixed evidence suggesting that even after *Chevron* a large degree of ideological bias persists in the litigated cases.[90] If limiting the effect of politics on case outcomes is the goal, then the *Chevron* doctrine seems a blunt instrument for accomplishing that task. We have suggested that *Chevron* as a voting rule will constrain ideological and political bias in the law of deference, and at lower cost. If so, then a concern about the political character of judging in administrative law supports the switch to *Chevron* as a voting rule. Perhaps, on some normative views about political theory, it would be good if administrative law decisions ventilated ideological disagreements. But because all versions of *Chevron* assume away such a view, it does not supply a unique objection to our proposal.

H. Supply-Side Issues

Even if one accepts all the foregoing, there is a separate issue about which institution(s) can or will supply the change we propose. If a transition from doctrine to voting rule is simply infeasible, our claim reduces to a theoretically novel but practically irrelevant suggestion. While the obstacles to implementation are nontrivial, they are not at all insurmountable. Contemporaneous practice and historical evidence demonstrate that voting-rule solutions have been both proposed and adopted, sometimes by legislative mandate and sometimes by judicial fiat. No feature of the *Chevron* context suggests implementation would be harder here than elsewhere, and there are real reasons to think implementation would be easier. Whereas other proposals for supermajority voting rules have been associated with efforts to demand judicial deference *against* judicial wishes, Congress and the courts apparently agree that deference to agencies is a desirable goal. Judges, therefore, might be less resistant to the imposition of *Chevron* as a voting rule by statute; perhaps judges might even adopt a voting rule without a congressional dictate.

Before turning to these political concerns, however, we begin with the potential constitutional, statutory, and doctrinal obstacles to supply of *Chevron* as a voting rule by either Congress or the courts. Other scholars have addressed the parallel question whether Congress or the courts could create a rule of

90. *See supra* note 48 and accompanying text.

deference to legislatures in constitutional adjudication.[91] Compared to that setting, there are fewer legal obstacles to the adoption of a supermajority voting rule for the merely statutory cases that *Chevron* governs.

1. *Judicial Supply*

The least controversial means for a transition to *Chevron* as a voting rule would be for the judiciary to adopt the voting rule itself. Whether or not a simple majority rule is a default for judicial institutions, there is nothing to prevent the Supreme Court from adopting an alternative rule.[92] The Court already relies on nonmajority voting rules to grant certiorari and to hold cases.[93] Lower courts routinely utilize variants of majority rule in decisions to grant en banc hearings. Several state supreme courts use supermajority votes to determine outcomes of state constitutional challenges to legislation, and the sky has apparently not fallen.[94] Given that *Chevron* is a doctrine of the Court's creation, it would clearly be preferable for the Court to spur the transition. Without Supreme Court intervention, current doctrine likely prevents an individual circuit from shifting to *Chevron* as a voting rule. The adoption of our proposed framework would be facially inconsistent with the current *Chevron* model. Any hope for judicial supply thus rests with the Court.

We know of no case in which the Court has adopted a voting-rule approach to deference for itself or mandated that lower courts utilize one, although we have also emphasized that the Court does use voting-rule solutions, such as the Rule of Four, in other contexts. Why does the Court generally eschew hard solutions to the deference problem? The answer cannot turn on the voting rule's lack of feasibility, efficiency, or efficacy. On all these fronts, *Chevron* as a voting rule performs at least as well, and generally better, than doctrinal *Chevron*. Perhaps courts are simply hostile to nonmajority voting rules or hold some deep belief that voting rules are not a permissible part of the judicial tool set. But this claim wilts in the face of current judicial use of nonmajority voting rules to address issues of internal judicial governance, such as en banc review

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91. *See, e.g.*, Caminker, *supra* note 8; Shugerman, *supra* note 8.

92. It is possible, but implausible, to think that the Article III grant of "judicial Power," U.S. CONST. art. III, § 1, contains an implicit mandate for majority voting among Justices or judges. There is no reason to think that the historical use of majority voting rules in federal courts (for most matters, but not all) is frozen into a constitutional mandate, so that judges cannot change those rules when they wish to do so. The bare constitutional references to "courts" and to "judicial Power" are compatible with many different voting rules.

93. *See* Cordray & Cordray, *supra* note 11; Revesz & Karlan, *supra* note 10.

94. *See* Shugerman, *supra* note 8, at 954-55.

and certiorari. These too are deference problems, involving deference to panels and to colleagues rather than to agencies. On our view, whether the question is deference to precedent, deference to colleagues, deference to Congress, or deference to agencies, the underlying problems are similar. Although the right solution will vary across settings, there is no categorical reason to disfavor hard solutions in general.

2. *Congressional Supply*

If the courts elect not to adopt *Chevron* as a voting rule, Congress could likely mandate the transition without running afoul of the Constitution. Congressional authority to mandate supermajority voting rules has been analyzed most prominently in the context of Thayerian deference to legislative judgments of constitutionality, either generally or in a specific context such as federalism.[95] Various scholars have suggested that the Necessary and Proper Clause and the Article III Exceptions Clause provide Congress adequate means to require that statutes be overturned only by a supermajority.[96] The Necessary and Proper Clause gives Congress the power to enact legislation for carrying into execution the judicial power,[97] while the Exceptions Clause gives the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[98] The academic literature diverges sharply on the precise powers these Clauses provide to Congress.[99] Yet short of a congressional attempt to direct the outcome of a specific case via voting rule, there is no strong argument that Congress could not mandate a supermajority

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95. *See* Thayer, *supra* note 4. For more recent discussions, see Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993); Stephen B. Presser, *On Tushnet the Burkean and in Defense of Nostalgia*, 88 NW. U. L. REV. 42 (1993); and Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993). For recent discussions of the supermajority rule in particular, see Caminker, *supra* note 8; and Shugerman, *supra* note 8.

96. *See, e.g.*, Shugerman, *supra* note 8, at 971-72.

97. U.S. CONST. art. I, § 8, cl. 18.

98. *Id.* art. III, § 2, cl. 2.

99. *Compare* Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (suggesting that under the Exceptions Clause, Congress possesses broad authority to regulate the jurisdiction of the Supreme Court, subject to the limitation that it must not destroy the essential role of the Court), *with* Martin H. Redish, *Congressional Power To Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 907 (1982) (concluding that the Exceptions Clause establishes virtually no limitations on Congress's power to regulate the jurisdiction of the Supreme Court, but admitting the possibility of limitations flowing from other constitutional provisions).

rule of deference to agencies on questions of statutory interpretation. Congress generally may not lawfully direct the outcome of a specific case,[100] or reopen a specific judgment,[101] but it is not controversial that (as is necessary and proper) Congress may determine the number of Justices and judges, set quorum rules for the courts, or mandate the use of certain rules of evidence and procedure.[102] A voting-rule statute would be similar in form and function to rules of evidence, procedure, or other potential interpretive statutes. Recent legislation has even precluded specific interpretations of statutes in live litigation, albeit with a general interpretive directive.[103] As long as the regulation does not undermine the essential functions of the judiciary, Article III provides no constitutional bar.[104]

Perhaps the simplest argument is that congressional power to mandate *Chevron* as a voting rule is necessary and proper to the execution of other legislative powers because a better deference framework could allow Congress to delegate to agencies at lower cost and with greater precision and confidence.[105] Either a global deference statute—requiring *Chevron* as a voting rule in all cases of agency decisions—or a specific voting rule in an agency's organic statute would comport with separation of powers principles.[106] A *Chevron* voting rule would be akin to other interpretive directives that Congress might lawfully generate,[107] or indeed to the APA itself, and there is no inherent constitutional problem with such statutes.

Whatever Congress's general powers to direct voting rules for the federal judiciary—and we think they are substantial—the argument is all the stronger

100. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

101. *See* Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995).

102. *See* Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (2000); *see also* Miller v. French, 530 U.S. 327 (2000) (upholding automatic stay provisions of the Prison Litigation Reform Act); Shugerman, *supra* note 8.

103. *See, e.g.*, Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 108-108, 117 Stat. 1241, 1263 (2004) (providing that "nothing in . . . any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust" until certain conditions had been met, despite a previously issued injunction to compel such an accounting); Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004) (interpreting and applying the Appropriations Act).

104. *Cf.* Hart, *supra* note 99, at 1365 (describing "the essential role of the Supreme Court in the constitutional plan").

105. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2102-03 (2002).

106. *See id.* at 2103-09 (discussing constitutional objections to legislating interpretive rules).

107. *See id.*

in the context of administrative law. With respect to judicial review of agency actions, Congress may preclude agency actions from judicial review altogether[108] (at least to the extent that the challenge does not raise constitutional claims);[109] restrict the venue and timing of judicial review of agency action; and specify the legal standard by which courts will review agency action. Against this backdrop, it would be extremely awkward to insist that Congress is constitutionally prohibited from directing courts to use a specific voting rule in review of agency actions. If *Chevron* were a constitutional doctrine, then there might be a plausible argument that Congress does not have plenary control. Yet as long as the Court adheres to the view that *Chevron*'s foundation is congressional intent, Congress is free to modify or even eliminate *Chevron* deference via statute.[110] The Court has given absolutely no indication that a statute could not rebut the presumption of deference—for example, by mandating that courts review agency decisions de novo. We have already voiced our skepticism about this foundation for *Chevron*, but as long as the legal fiction is taken seriously, Congress is free to modify the scope, nature, intensity, and, as we argue, operative mechanism of the *Chevron* deference framework. If *Chevron* is a creation of fictitious and implicit congressional intent, we are hard-pressed to see why it may not be modified by real and express congressional directive.

This is just to say that congressional supply is legally permissible; it is a separate question whether it is likely. Congress has proven almost mute on the subject of when courts should defer to administrative agencies. This may show that the Supreme Court accurately selected the majoritarian default rule in *Chevron*: statutory silence evidences congressional satisfaction with the current soft deference framework. But on this view, congressional silence before 1984 could just as convincingly have signaled support for the rather different pre-*Chevron* deference regime. Current congressional silence no more demonstrates satisfaction with *Chevron* doctrine than congressional silence before 1984 demonstrated satisfaction with the lack of *Chevron* doctrine. One possibility is that the issue of deference simply lacks political salience with constituents and therefore also lacks payoffs for legislators.[111] If so, Congress is unlikely to adopt

108. 5 U.S.C. § 704 (2000).

109. *See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974); Czerkies v. Dep't of Labor, 73 F.3d 1435 (7th Cir. 1996) (en banc).

110. *See* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637 (2003).

111. If true, this fact is disquieting for public choice scholars of the bureaucracy and Congress. The existence and nature of judicial review should make delegation to agencies significantly more or less attractive to legislators and regulated private parties. *See* DAVID EPSTEIN &

our proposal. But the judicial route remains, and congressional passivity means that a legislative override of a judicially adopted change would itself be unlikely.

Additionally, it is worth emphasizing that our proposal does not suffer from a principal defect of other proposals to implement supermajority voting rules in the courts. Our proposal is not tied to any congressional efforts to reduce judicial power or strip jurisdiction.[112] Nor is it related to a contested institutional fight about if and when courts should show deference to executive or legislative judgments on any particular policy or in hotly controversial areas.[113] While *Chevron* doctrine has received its fair share of criticism in the commentary, and peripheral questions about the scope and intensity of review remain, the core doctrine of *Chevron* deference is now almost universally embraced by Congress, courts, and agencies. In this sense, our task is quite different from that of scholars who urge Congress to foist a supermajority voting rule on the Supreme Court in any federalism case. Surely the proposal would face some judicial resistance, but we think the nature of the resistance would be fundamentally different, and its intensity much lower, simply because the judiciary already holds the view that deference is appropriate.

CONCLUSION

On most questions of law, policy, and fact, Article III courts should defer to the judgment of administrative agencies. Although we believe the best rationale for the *Chevron* doctrine is different from the rationale favored by the current Court, our proposal is agnostic on this front. Independent of one's view of *Chevron*'s proper foundation, if deference to administrative agencies is desirable, then a framework that institutionalizes deference through voting rules is at least as good as doctrinal deference on virtually every dimension of comparison and is clearly better on some dimensions.

Rather than impose upon judges the awkward task of developing and executing a second-order theory of permissible interpretation, the voting-rule approach asks judges to do what they are trained to do: identify the best interpretation of a statute. This shift reduces the conceptual, psychological, and

SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

112. Compare the Progressive Era proposals discussed in Caminker, *supra* note 8, at 75.

113. The supermajority review proposals by Jed Shugerman and Evan Caminker each seek to impose a supermajority requirement to create deference in a setting where external observers of the judiciary have found its supposed deference to be inadequate. *See* sources cited *supra* note 8.

motivational burdens that the *Chevron* doctrine places on judges. These burdens are not just benign academic quandaries. They result in confusion and uncertainty about the manner in which deference will be applied. Confusion of this sort not only is costly in its own right, but it also helps mask other potential biases in judicial decisions.

Chevron as a voting rule avoids these problems by making deference an aggregate rather than individual feature of judicial review. Our analysis suggests that the hard voting rule is a superior solution to the problem of partial institutional deference. Although we do not minimize the challenges of implementation, none seems sufficiently powerful that we should ignore the benefits from switching to *Chevron* as a voting rule.