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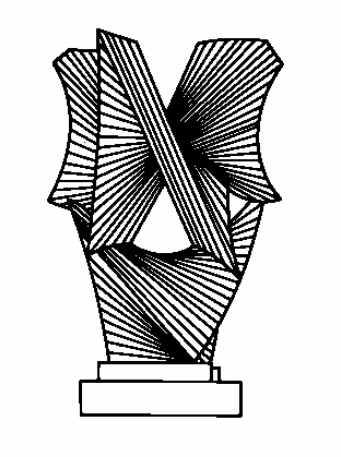

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Of central importance to administrative law and theory is the question whether, and when, courts will defer to agency interpretations of law. In *Chevron v. Natural Resources Defense Council*,[1] the Supreme Court replaced earlier answers to that question 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] more recently, the *Mead* decision[3] and its successors have produced added complexity, and some confusion, by requiring an elaborate legal inquiry to determine whether *Chevron* applies in the first place.[4] In practice, recent evidence suggests that *Chevron* has increased overall deference to agencies, but also that *Chevron*'s effect varies markedly with the ideological and political preferences of the judges who apply it.[5]

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 silent or ambiguous. We explore an alternative, which is to adopt an institutional solution to the institutional problem. The

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

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

[3] United States v. Mead, 533 U.S. 218 (2001).

[4] See Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. U. 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).

[5] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?*, U. CHI. L. REV. (forthcoming 2006); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 YALE L. J. 2155 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

institutional solution 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 where a litigant challenges agency action as inconsistent with an organic statute, the agency would 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. 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 law uses to force decisionmakers 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 multimember 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 the cost side. 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 decisionmaking; the possibility of strategic behavior; the loss of positive byproducts of the doctrinal solution; and on 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. A brief conclusion follows.

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 with a view to solving an institutional problem—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;[6] the "clear error" standard of review allocates fact-finding competence to trial courts;[7] and the legal norm of precedent or stare decisis allocates decision-making authority from present judges to past judges, whose views will control the judgment of the present on some questions.

Lawyers, however, frequently overlook the possibility that legal doctrine is rarely the only type of solution to an institutional problem, and may not always be the best solution. An alternative is to change the rules that govern the composition, powers, or voting rules of the relevant institutions. We call these "hard" solutions, in contrast to "soft" doctrinal solutions. The relative costs and benefits of soft solutions, on the one hand, and hard solutions, on the other, 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.

Consider some examples of legal problems where 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 constitutionality, was advocated by James Bradley Thayer and many later judges and commentators, including Holmes, Hand, and Frankfurter.[8] The strength of the 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.[9] A hard alternative periodically surfaces in the form of proposals that the Supreme Court, and perhaps lower courts, should (be required to) use a supermajority rule to invalidate statutes on constitutional grounds.[10] A voting rule of this sort builds Thayerian deference into judicial decision-making at the aggregate level of the whole court, rather than urging individual Justices or judges to internalize deference as a legal norm.

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[6] *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).

[7] 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).

[8] *See* Thayer, supra note; Fairbanks v. United States, 181 U.S. 283, 285 (1901); Coppage v. Kansas, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting); Adkins v. Children's Hospital, 261 U.S. 525, 567 (1923) (Holmes, J., dissenting); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 661-62 (1943) (Frankfurter, J., dissenting); LEARNED HAND, THE BILL OF RIGHTS 56-57 (1958); *see also* Gerald Gunther, LEARNED HAND: THE MAN AND THE JUDGE 118-19 (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).

[9] See Morrison v. Olson, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting).

[10] Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule*, 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).

2. *Precedent*.

Just as judges might defer to legislatures where there is reasonable doubt about the legal issues, so too judges might and do defer to past judges, where there is reasonable doubt about the 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."[11] 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 Justices of the Supreme Court are sufficient to grant certiorari for a full hearing on the merits of a case.[12] 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.[13] The content of the internalized norm 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 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 or articulate systems of precedent and more-or-less canonical verbal formulations of norms that are embodied in the institution's past decisions. Consider the view, advanced by many Senators of both parties at many times, that Senators should give some degree of deference to the President's appointments, especially for executive offices but for judges as well.[14] The level of deference is hard to capture in any single verbal formula, but many Senators say something to the effect that they will defer unless a nominee is "clearly" unsuitable. More recently, a decisive fraction of the Senate—the Gang of Fourteen—agreed to defeat

[11] *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (divergence from precedent justified where prior judgment was "egregiously incorrect.").
[12] *See generally* Richard L. Revesz & Parmela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 (1988).
[13] *Cf.* Margaret M. Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 418-20 (2004).
[14] *See generally* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L. J. 1491 (1992).

filibusters unless "extraordinary circumstances" exist.[15] 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 to have been confirmed. It is hardly clear that such a rule would be constitutional, because the best reading of the Advise 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.[16]

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 magnitudes of the relevant variables, however, will differ greatly across contexts, and in many contexts 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 why deference would be good or right in this situation; our focus is on the choice between means for attaining a posited goal, not on the theory that makes the goal desirable. We also assume that institution A is a multimember decisionmaking body, such as an appellate court. Single-

[15] 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; Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST. (May 24, 2005), at A1.

[16] 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 (1995); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987).

member bodies like district courts present distinct problems; in any event, single-member bodies rarely make final decisions in our legal system.[17]

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. Conceptually, it is not clear what "clear" means. Psychologically, it is difficult for judges and other decisionmakers 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 decisionmakers 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.[18] Of course legal doctrine requires judges to internalize norms in many settings; but the burden of internalization is especially heavy in those cases in which 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 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 decisionmaker 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 decisionmakers 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 decisionmaker 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 decisionmakers in institution A, because those agents have less room to maneuver in a supermajority voting rule system. Rather than concealing their 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 decisionmaker must now simply state his or

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

[18] *See* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000); Clayton P. Gillette, *The Path of Law Today: Lock-in Effects in Law and Norms*, 78 B.U.L. REV. 813, 825-26 (1998); Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 970-72 (1995); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 5-6 (1993).

her understanding of the correct legal answer. There is one less 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 the level of deference constant, 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 decisionmakers themselves and to other actors in the system.

2. *Calibration versus fuzziness.*

Suppose, in operation, 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. How can the level of deference be adjusted up or down? If a soft solution is in place, adjustment is difficult and imprecise. The problem is that 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 Posner suggests, "the cognitive limitations that judges share with mere mortals may constitute an insuperable obstacle to making distinctions any fine than that of plenary versus deferential review."[19] Legal language can capture the idea of the best legal answer, and can indicate the idea of deference where decisions under review are not clearly erroneous, subject to the problems we have discussed. More fine-grained standards of deference, however, are difficult to express; cognitive capacities are typically inadequate to sustain a fine-grained schema of deference standards.[20] Administrative law is replete with arguments about the possible differences between different standards of review, such as clear error, substantial evidence, and so on. Such arguments are interminable and, for the most part, unilluminating. These crude attempts at distinction often collapse in practice,[21] as we will 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 the voting rules are still 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 increase legal certainty. Suppose that a particular doctrinal formulation produces a particular level of deference, D. This level, D, 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

[19] School District of Wisconsin Dells v. Z.S. Littlegorge, 295 F.3d 671 (7th Cir. 2002).
[20] United States v. McKinney, 919 F.2d 405, 423 (7th Cir. 1990) (Posner, J., concurring).
[21] See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WILLIAM & MARY L. REV. 679 (2002).

in one period while falling short in another period. A voting rule will produce greater certainty about deference, holding the expected level of deference constant. To the extent that reducing variance is a benefit for actors in the legal system, a voting rule may well be preferable to a doctrinal solution.

In part, this is a result of the calibration point. If the category of deference is broad, individual judges will likely select different deference points within the broad category. 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, so long as a voting rule that builds in deference is more difficult for biased judges to thwart, there will be greater certainty that deference will be applied. For 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 the 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, in other words, it is silent or ambiguous on the relevant question—then judges are to proceed to Step Two, at which they ask whether the agency interpretation of the statute is "reasonable," or, in other words, whether the agency interpretation falls within the scope of the statute's ambiguity.[23]

Chevron's theoretical rationale is unclear. In the important *Mead* decision,[24] the Court, following preexisting commentary,[25] suggested that *Chevron* rests on Congress's

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[22] There are many subtle problems about 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 (American Bar Association 2005) (John F. Duffy & Michael Herz, eds.).

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

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

[25] Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833 (2001).

implicit delegation of law-interpreting authority to agencies. In 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 nearest 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 is itself among the legal rules that courts are to apply.[28] Even if true, that argument still provides no affirmative evidence whatsoever that Congress intended the APA as a general meta-instruction on the delegation of law-interpreting authority.[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; 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 gives), but it might not (as in the second or third scenarios), and the issue whether it does exist lacks the paramount 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

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

[29] The claim we critique in the text is made by Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983). We bracket here the claim that a well-understood legal convention, which later vanished from view, made a statutory grant of rulemaking authority 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*, 116 HARV. L. REV. 462 (2002).

[30] *Chevron*, 467 U.S. at 865 (emphasis added).

[31] See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833 (2001).

not part of either political branch of government."[32] Agencies' superior expertise and political accountability better position them to fill statutory gaps.

It is sometimes said that these two components of *Chevron*'s real rationale are in tension with each other, because political accountability distorts expertise, but this overlooks two points. First, where 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 are 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 individual judges to develop a theory of reasonable or permissible interpretation, distinct from the judge's theory of what interpretation is best. Under pre-*Chevron* doctrine, many decisions suggested that the judicial task is to identify the statute's "true meaning" or "best reading."[34] This is the standard conception of the judicial task where no agency is in the picture, or where 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 or prosecutorial 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 at least, 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 law-interpreting authority to be exercised by the court de novo. The judges 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 correct.

The point of this innovation is to open up space for discretionary policy judgments by agencies. *Chevron* doctrine does this by distinguishing between the judges' views about the 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

[32] *Chevron*, 467 U.S. at 865.
[33] Cass R. Sunstein, *Beyond Marbury: The Power of the President To Say What the Law Is*, 115 YALE L.J. (forthcoming 2006).
[34] See, e.g., NLRB v. Hearst Publications, 322 U.S. 111 (1944).
[35] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

"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, or so we will suggest below. 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 for a theory of permissible interpretation, as distinct from a theory of the best interpretation, implicates Step One of *Chevron* as well as at Step Two. At Step One, the logic of *Chevron* does not permit the judge simply to ask what the best interpretation of the statute is, by his or 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 both that (1) the best reading of the statute is X rather than Y, but 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; majority rule, on the one hand, versus a supermajority rule, on the other. Correlating these two distinctions, four deference regimes are possible.

(1) <u>De novo judicial interpretation with a majority rule</u>. 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 towards 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) <u>*Chevron* with a majority rule</u>. 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

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

[37] Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

[38] *Compare* NLRB v. Hearst Publications, 322 U.S. 111 (1944) (suggesting de novo judicial interpretation of "pure" questions of law), *with* Rochester Tel. Corp. v. United States, 307 U.S. 125, 146 (1939), *and* Gray v. Powell, 314 U.S. 402, 411 (1941) (suggesting judicial deference to agency interpretations).

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 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 are changed, the former by abolishing *Chevron* doctrine in favor of de novo judicial interpretation, the latter by adopting a supermajority 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 conceptual, psychological and motivational burdens that structure imposes upon judges; merely grafting a supermajority rule on to *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.

Against this background, we focus on comparing regimes (2) and (3). Our basic argument is that regime (3) captures the benefits of regime (2) at lower cost.

B. Aggregation: Solving *Chevron* Problems

We 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, and the costs of the extension would outweigh its marginal intellectual benefits.

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 hardly clear. Under *Chevron* doctrine, the hardest question is where, even in principle, the bounds of permissible interpretation should be taken to lie.

[39] As one of us has argued. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

Consider the following construal, which is quite artificial but useful 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 votes in favor of X. Under *Chevron*, however, another layer of decisionmaking is required. 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 strictly comparative — the judge simply decides which interpretation is better — while a theory of permissible interpretation must build in an absolute threshold above which interpretations 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, even in principle. 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 these cases, it is hardly clear what or where the relevant "level" is. With judges of reasonably diverse preferences and psychologies, thresholds may vary widely, and it will not be 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 multimember 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 Y reaches only the 35% level, and will vote to overturn its interpretation (no consideration of thresholds is here required). Other judges will decide, by contrast, that the agency's interpretation reaches the 65% level of likelihood. Unless a supermajority of the judges adopts the former view, 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 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. Where 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

absolute 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?"

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 will result in invalidations of agency interpretations that would not have occurred under doctrinal *Chevron*. Consider a case in which (1) a supermajority of judges believe 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 would win if judges have internalized the doctrinal norm, because a (super)majority would vote in the agency's favor, whereas under *Chevron* as a voting rule the agency will lose, because a supermajority will vote against.

This is merely one possible case, however. Consider the opposite possibility: any case in which a bare majority of the multimember court 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 would 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. A requirement of unanimity on the Supreme Court to overturn agency decisions would either produce massively increased deference in decided cases, or would produce a selection effect such that litigants would challenge only the most egregious agency decisions.

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.[40] On our view, such canons would just be folded into the legal inquiry as reasons for individual judges to reject 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; where 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, Justice 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

[40] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

> 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."[41]

The post-history of *Chevron* provides some evidence for this view. Consider the decision in *MCI v. AT&T*.[42] The Court, per Justice 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. In part, Justice 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. Whether or not Justice Scalia had the better reading of "modify," it is implausible that the agency's reading was clearly impermissible. It is unclear whether, in fact, Justice Breyer's conjecture is systematically correct, but it is certainly plausible in light of decisions like *MCI*. If Breyer is correct, then the requirements of *Chevron* doctrine are unstable, because second-order interpretation is psychologically too demanding for judges.

Perhaps Justice 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. One possibility, however, is that the distinction between first-order judgments and second-order judgments is more likely to be stable with regard to questions of fact, not of law, as where trial judges ask whether a jury verdict is based on a permissible view of the facts, or where 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"[43] — is still alien to many judges trained in the pre-*Chevron* era.

More importantly, the point that judges make similar distinctions in other areas of law does not show that they do so successfully, or that Breyer is 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 decisionmaking distortions under *Chevron* might well be applied in other areas, with similar debunking effect. That judges 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 undermining it.

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[41] Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986).
[42] 512 U.S. 218 (1994).
[43] Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

Suppose Justice Breyer is 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.

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 vice-versa if they are conservative.[44] This is not to say that *Chevron* has made no difference; the best evidence is that it has compressed or dampened ideological disagreement and increased deference to agencies, compared to the pre-*Chevron* world.[45] These two findings are compatible. There is more deference to agencies after *Chevron*, but at the margins that are currently litigated, deference to agencies is in substantial part a function of judges' ideological and political commitments. The difference between this point and Justice Breyer's claim is clear, at least in principle. The problem here is not that judges' first-order legal views and their second-order legal views collapse into one another. It is 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.[46] The *Chevron* doctrine is not the cause of biased judging. Yet a plausible conjecture is that *Chevron* doctrine provides greater scope for the operation of biased judging than would *Chevron* as a voting rule. Under the former regime, judges acting in bad faith or in the grip of 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 interpretation is correct *or* that it is reasonable, whether or not correct. 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 may be made in the same fashion. 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 equal,

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[44] Miles & Sunstein, *Do Judges Make Regulatory Policy*, *supra* note __.

[45] *Id.*

[46] 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).

should lower the costs of monitoring by other judges, legislators, litigants and interested publics.

What about the opposite case, where 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 bias in *Chevron* cases.[47] Lower courts present additional issues, in light of a recent finding that ideological bias interacts with panel composition in *Chevron* cases. Where three judges of the same political party sit together, they are likely to show marked ideological bias; where two judges of one party sit with one judge of the other, the one is more likely to vote in line with the two's political predilections than she would be if she sat with two other judges of her own party.[48] 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 her dissenting vote will not change the outcome, and thus has an incentive to acquiesce in the majority's decision. 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 where 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 from the biased judges, *Chevron* as a voting rule makes it more difficult, at the margin, for the biased group to justify their preferred results. If the three judges are sufficiently determined, however, they may still rule as they please. But this should be no surprise. Where 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 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.

[47] *See* Miles & Sunstein, *Do Judges Make Regulatory Policy?*, *supra* note ---.
[48] *See* Miles & Sunstein, *Do Judges Make Regulatory Policy?*, *supra* note ---.

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 whose conceptual foundations are unclear, whose maintenance is psychologically burdensome, and which provides multiple degrees of freedom for the operation of bias. This demand for costly internalization is accompanied by none of the incentives for internalization that appear elsewhere in law. 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. *In general*.

A relatively obvious but nonetheless critical advantage of *Chevron* as a voting rule is the ability to better calibrate the level of deference given to agency decisions. In the doctrinal formulation, 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 dichotomous 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 norm 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 here assert that such a strong deference rule is the optimal one. Our point is merely that no matter what one's view of the optimal level of deference, be it strong, weak, or non-existent, the voting rule model allows for more fine-grained calibration to that goal.

Such graduation is, of course, possible with doctrine as well. A doctrine might command that agency action only be overturned if the decision is (a) unreasonable, (b) clearly unreasonable, or (c) implausible. There is no shortage of linguistic variants in theory, and as a result soft doctrinal rules are capable of calibration too. The trouble is that our historical experience 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 solution becomes. Two examples from administrative law underline the point.

One way to understand the *Mead* doctrine is as an attempt to generate categories or levels of deference. On this view, *Chevron* deference constitutes "strong" deference, whereas *Skidmore* deference constitutes "weak deference." To determine whether an action qualifies for *Chevron* deference at all, the Court now asks whether this type of

agency action or decision is of the sort on which Congress would want courts to defer to agencies. *Mead* suggests that a powerful indicator of this fictitious Congressional intent is the procedure used to generate the decision. If the interpretation was made via formal rulemaking, formal adjudication, or informal rulemaking, the requisite Congressional intent is (very probably) present.[49] If the interpretation was issued via informal adjudication, however, it might or might not qualify for *Chevron* deference, depending on whether Congress intended the agency decision to have the force of law, all things considered.[50] If the decision does not qualify for *Chevron* deference, it might still qualify for *Skidmore* (persuasive) deference. It remains unclear precisely what content will be given to the revitalized *Skidmore* doctrine. But one potential view is that *Skidmore* deference and *Chevron* deference represent two different *levels* of deference, perhaps corresponding to two different justifications or rationalizations for the respective deference doctrines. On this view, the innovation of *Mead* is not just to institute a case-specific test for the applicability of *Chevron*, but also to carve out different levels of deference for different sorts of agency decisions. In our terms, *Mead* is an attempt at calibration, an attempt to refine the crude defer-don't defer framework by adding more gradations.

This reading of *Mead* is not inevitable; but it is not implausible. If it is correct, it suggests a striking sympathy for the calibration intuition on the part of many Justices. In this setting, the benefits of the voting rule relative to the doctrinal rule are particularly vivid. *Mead* has engendered serious confusion in the lower courts.[51] A simple voting rule would provide for much greater calibration with much less confusion and chaos. If one concludes that agency decisions in informal adjudication should be given less deference than those in formal adjudications, all that need be done is to require a 5-4 vote to overturn the former and a 6-3 vote to overturn the latter, or (if more deference is desirable) a 6-3 vote to overturn the former and a 7-2 vote to overturn the latter, and so on. The point is that if calibration is the goal, a voting rule is a far more precise tool than legal doctrine.

For a second example, 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 arguably

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[49] Justice Breyer has suggested that the *Mead* framework provides no safe harbors. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2712–13 (2005) (Breyer, J., concurring).

[50] *Brand X*, 125 S. Ct. at 2712-13 (Breyer, J., concurring) (arguing that a formal rulemaking proceeding is neither necessary nor sufficient to qualify for *Chevron* deference). *Mead* does make clear, however, that the use of any procedural mode other than informal adjudication is a strong indicator of congressional intent to delegate law-interpreting authority to the agency.

[51] Adrian Vermeule, *Mead in the Trenches*, supra note __.

[52] 5 U.S.C. § 706(2)(A); Motor Vehicle Mfg. Assoc. v. State Farm Mut. Aut. 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); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1065 (1995). See also Am. Paper Institute, Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 412 n. 7 (1983).

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 with using relatively crude linguistic distinctions to calibrate different levels of deference to particular settings.

2. *Calibration in the lower courts.*

As a general matter, the larger the number of judges or Justices on a multi-member court, the greater the ability to calibrate, and therefore the calibration argument is strong for the Supreme Court, or en banc circuit courts, but weak to nonexistent for three judge panels. A three judge panel applying the *Chevron* framework must ask whether the agency's interpretation is permissible, and a two-judge majority of the panel can overturn the agency's decision. A majority rule vote on whether the agency's decision was correct reduces to de novo judicial review. Thus, to maintain the degree of deference to agency decisions, the simple majority rule must be replaced with a unanimity rule (3-0), which leaves no room for greater 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. That said, the calibration benefits do accrue for en banc decisions by the circuits. Indeed, on large circuits, en banc panels might provide even greater opportunity for calibration than does the Supreme Court.

The core observation might be taken to argue for increasing the size of panels to, perhaps, five judges in administrative law cases. While that transition would significantly increase the decisional burdens on individual judges by requiring them to sit in more cases, it is not altogether implausible in the Court of Appeals for the D.C. Circuit, where most agency actions are heard, and where the docket is significantly lighter than in many other circuits. This is a separate proposal, one we will not pursue here; the larger point is that some problems with or objections to *Chevron* as a voting rule might easily be remedied by changes on other margins of institutional design.

The en banc setting also suggests a parallel relationship between a hard voting rule and deference to prior judicial precedent. In the Court of Appeals for the D.C. Circuit, the standard rule is that a three judge panel may not overrule the decision of a prior panel.[56] Only the en banc court may do so. This is a voting rule, which states that no panel of three judges may overrule the decision of a prior panel of three judges. A majority of the sitting members of the en banc panel is required. The voting rule version of stare decisis defers to the decision of the prior panel unless and until a majority of the sitting en banc court indicates otherwise. True, the voting rule for the en banc court is

[55] Assoc. of Data Processing Service Orgs. v. Board of Governors, 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).

[56] LaShawn v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court."); United States v. Kolter, 71 F.3d 425, 431 (D.C. Cir. 1995) ("This panel would be bound by [a prior] decision even if we did not agree with it.").

majoritarian, not super-majoritarian, but in an important sense that is precisely the calibration point. The current hard regime of stare decisis gives level X of deference to prior decisions. An alternative regime could produce level X – Y by requiring a submajority vote of the en banc court (but presumably greater than a majority of the panel), or deference level X + Y by requiring a super-majority vote of the en banc court. Not all circuits use this rule; the Ninth Circuit, for example does not. Circuit-specific preferences about the strength of deference to precedent will vary. But voting rule stare decisis allows different circuits to better tailor the strength of deference to prior decisions.

We do not mean to over-emphasize the calibration point. But administrative law is centrally concerned with identifying the appropriate degree of deference courts should give agencies. The tools judges and legislators use to calibrate should be up to the task. The above examples suggest that linguistic distinctions are fragile and ineffective methods of calibrating deference levels, as compared to voting rules.

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 confidently predict judicial analysis 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 either the content of legal rules, the likelihood that a given rule will be applied in a specific case, or how such rules will translate into legal outcomes.[57] For example, Justice Scalia has long urged a strong and broad presumption of deference because a rule-like presumption reduces uncertainty about whether the deference framework will be applied.[58] *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. In any given setting, the case line the Court happened to select was unpredictable, which created confusion and uncertainty for agencies and litigants. *Chevron* was supposed to remedy all this, but 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 if not significantly reduce uncertainty about deference is that the framework makes deference an individual rather than aggregate property of the judicial system, and relies on underspecified 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 commands 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 before it is impermissible?

[57] For a general treatment of predictability and uncertainty in the context of precedent, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).
[58] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

Ninety percent unlikely? Forty-five percent unlikely? The Court has not said, and the views of individual judges will vary. This inter-judge variation 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. So 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 less discretion and more parsimonious decision processes 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. Justice 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 far more likely than not to find that Congress definitely resolved the issue.[59] Justice 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 is generally more likely to find statutory ambiguity at *Chevron* Step One.[60] Even just focusing on 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 Justices Scalia and Breyer. Each judge brings his own interpretive idiosyncrasies. The unfortunate result is marked heterogeneity of views about how doctrinal *Chevron* functions in each of these dimensions. 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 does not face these same dangers. 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 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 stage of the analysis as well — the determination whether the agency's interpretation is permissible.[61]

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[59] Merrill & Hickman, *Chevron's Domain*, supra note __, at 860.

[60] Merrill & Hickman, *Chevron's Domain*, supra note __, at 860.

[61] The change in predictability may vary somewhat with respect to certain subsets of cases. For example, take a statute that is vaguely or generally phrased. If each judge 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. The *Chevron* doctrine would constitute a tie-breaker for each judge. Under Chevron as a voting rule, given the same circumstances, the agency's decision will be rejected roughly 12 percent of the time on a three-judge panel, because there is a 1/8chance 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 upwards of 90 percent of the draws will the agency's decision be upheld. Even in a world where judges essentially flip coins, the voting rule produces predictable outcomes. The more important

2. *Stability*.

A closely related but analytically distinct question is whether voting rule deference produces greater stability in the law. The intuition here is closely tied to conventional discussions of stare decisis.[62] Strong norms of stare decisis are supposedly desirable because they support reliance interests and reduce uncertainty in the legal system.[63] Here, both courts and commentators are really focused on stability, where stability quickly reduces to the actual probability of legal change. A low probability corresponds to a strong norm of stare decisis; a high probability to a weak or non-existent norm. Debates about the optimal level of change or stickiness in the law are staid, and we have little to add to the debate on its own terms.[64] As a side issue, however, all the arguments we have made about voting rules apply with equal force to stare decisis. Stare decisis is a crude mechanism for ensuring stability of precedents. Supermajority voting rules would accomplish the identical goals, with greater calibration and fewer costs.

Others have urged that *Chevron* produces too much or too little legal change — too high or too low a probability of overturning final agency decisions.[65] But rather than advancing any particular theory about the optimal level of stickiness in administrative law, we have suggested that *Chevron* as a voting rule is a more effective way to achieve any given rate of change, for the reasons noted above. The flexibility afforded by the voting rule allows one to better tailor the degree of stability in the law. In the stare decisis example, it avoids the inevitable uncertainty of lumpy linguistic formulations of "strong" and "super-strong" levels of deference accorded to prior judicial decisions.[66] A voting rule that requires a supermajority or unanimity to overturn precedent might or

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point is that the voting rule produces greater predictability in the legal system, on balance, because it is extremely costly (and perhaps impossible) to identify judicial beliefs with precision ex ante. Individual-level heterogeneity with respect to interpretive methods, and disagreement about clarity or precision in the underlying statute itself combine to produce uncertainty about whether agency views will receive deference.

[62] *See generally* 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); Lawrence E. Blume and Daniel L. Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405, 408-10, 428 (2982).

[63] Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 871, 823 (2002).

[64] Much of this literature also relates closely to the notion of transition costs in law. *See generally* Louis Kaplow, *Legal Transitions: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161 (2003); Frederick Schauer, *Legal Transitions: Is There a Way To Deal with the Non-ideal World of Legal Change?*, 13 J. CONTEMP. LEGAL ISSUES 261, 264 (2003) (comparing costs of small scale legal transition to large scale legal transition).

[65] *Compare* 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), Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990), *and* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989), *with* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992), Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 308-14 (1988), *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).

[66] *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988). *See also Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989); Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 427 (1988).

might not create stronger presumptions that initial decisions will remain. However, the voting rule model allows for more fine-grained distinctions. As a result, for any given level of desired stability, a voting rule reduces subjective uncertainty about the probability of legal change.

3. *Subjective Uncertainty*.

The predictability and stability issues are relevant to the effects of voting, but our central claim is that *Chevron* as a voting rule reduces subjective uncertainty. What matters is not only the actual content of the law, or 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. Can potential litigants accurately predict these dynamics? If so, how costly is it for them to do so? What informational burdens do the respective deference frameworks force potential litigants to bear?

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, they may not promulgate it at all. More likely, the agency will revise the rule so as 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=.25. This estimate carries with it a variance, which can be understood as the degree of subjective uncertainty about the point estimate.

Imagine a simple bell curve with the probability or point estimate as the mean.[67] As the variance of the estimate falls, the slope over the curve becomes steeper and the curve more compressed around the point estimate. As the variance increases, the slope becomes more gradual and number of points covered grows. In Bayesian terms, the precision of the estimate changes. The Administrator may be extremely confident that p=.25, in which case the curve, representing her subjective uncertainty, will be quite compact. For example, perhaps the Administrator thinks p=.25, that there is some reasonable chance p actually equals .30 or .20, but that there is virtually no chance it is higher or lower than that. We characterize this is a low uncertainty case. Alternatively, the Administrator may hold the same point estimate, p=.25, that the courts will strike down the final rule, but have more 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 .85. We characterize this as the high uncertainty case. Our core claim is that voting rule deference 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.

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. This phrasing may be opaque, but the idea is straightforward. EPA must decide how a randomly selected judge will vote in a given case. To calculate that

[67] The technically proper probability distribution function would not be normal, but a distribution bounded by 0 and 1, like the Beta distribution.

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 EPA takes the statute to be clear and estimates the judge will agree. Here, there is uncertainty about that judgment, but there is no additional uncertainty from *Chevron* Step Two. If, however, EPA takes the statute to be ambiguous and estimates the judge will agree, EPA must also estimate the probability that the judge will find its interpretation reasonable. There is a variance associated with the estimates required at both Steps One and Two of *Chevron*. Because voting rule *Chevron* requires only one stage of estimation, the variance will be lower. The simple claim is that the fewer stages of judicial decision that EPA must guess about, the less subjective uncertainty that will characterize the administrator's judgment.

The other source of a reduction in subjective uncertainty stems from 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 or a majority of judges will fully internalize the norm of deference. Figuring out whether deference will result no longer requires a potential litigant to guess whether or how individual judges will defer. Rather, deference is an unavoidable characteristic of the voting procedure. Thus, while a potential litigant may still face uncertainty about how a given judge will vote in a case, she will not face the additional uncertainty about whether deference will be applied in practice. Holding constant the actual probability of overruling the agency view, our suggestion is that the precision of the point estimate is greater; there is less uncertainty about the deference regime. As a result, external observers can have greater confidence in their judgments.

We have discussed a variety of certainty-related ideas: predictability, stability, and subjective uncertainty. In none of these 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 relative 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 multimember 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, where 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.[68] 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. [69]

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 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.[70] 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

[68] Kenneth O. May, *A Set of Independent, Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952).

[69] We bracket here recent extensions of May's Theorem to multiple options. See Robert Goodin & Christian List, *Special Majorities Rationalized*, BRITISH J. POL. SCI. (forthcoming). 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.

[70] 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, see Goodin & List, *Special Majorities Rationalized*, supra note __.

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.[71]

3. *The Jury Theorem*.

The Condorcet Jury Theorem says that where right answers exist, and where the average competence of the voting group exceeds .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.[72] Perhaps the Jury Theorem suggests 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 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.

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 not at all clear that 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. These are deep waters, which we will skim across. But it is not obvious that the Jury Theorem even gets purchase in settings like these.

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 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 a deliberately artificial example, for clarity. Suppose a multimember administrative commission, like the Federal Communications Commission, votes 4-1 in favor of an interpretation, on which (we are supposing) there is a right answer within the

[71] Motor Vehicle Mfg. Assoc. v. State Farm Mut. Aut. Ins. Co., 463 U.S. 29 (1983).

[72] The Jury Theorem can be extended to multiple options, in which it 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).

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 judges have higher average competence, including the agency voters can only improve the group's aggregate accuracy, so long as the agency voters' competence exceeds 50%. At a minimum, even if courts should not look behind the agency decision to count the votes cast inside the agency, the agency should at least be counted as having cast one vote.[73]

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 court judges, that would surely limit the significance of our proposal. However, most agency rules and many orders are appealed directly to the courts of appeals.[74] Statutes providing authority to a diverse universe of agencies provide for direct review of agency actions in the courts of appeals.[75] 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

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[73] Caminker makes similar points in discussing courts, legislatures and supermajority voting in the constitutional setting. *See* Caminker, *Thayerian Deference*, supra note __.

[74] See Currie & Goodman, supra note __.

[75] See, e.g., The Federal Trade Commission Act of 1914 was a model for many subsequent statutes on this front. 38 Stat. 717, 719 (current version at 15 U.S.C. § 45(c). The Natural Gas Act provides that a party aggrieved by an order of the Federal Energy Regulatory Commission petitions for review directly to the courts of appeals. 15 U.S.C. 717(r)(b). The Federal Power Act provides that adjudicative order 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)(1)(4). The Presidential Primary Matching Payment Account Act provides that decisions by the FEC as to funds are reviewed by the court of appeals for the D.C. Circuit, 26 U.S.C. § 9041, as are other FEC decisions. Orders and decisions by the Federal Communications Commission are generally directly reviewed by the D.C. Circuit. See 47 U.S.C. 402. Decisions of the SEC are appealed directly to courts of appeals as well, 15 U.S.C. 78y, as are most decisions of the NLRB, 29 U.S.C. § 160(e). 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. 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.

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 multimember 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.[76]

We remain agnostic as to which alternative is preferable; either one is compatible with out 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. It simply means the appeals court and the district court disagreed, as upper and lower courts often do. (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 certainly does not imply that we should choose an inferior solution in far more important settings, such as the Supreme Court, where (we suggest) more effective alternatives exist.

[76] See section III.F infra for a more complete discussion of mixed rules.

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

What exactly is the voting rule that would prevail under *Chevron* as a voting rule? Under the *Mead* decision and its successors, the Court has rejected, for the time being, Justice Scalia's argument that *Chevron* applies whenever the agency decision is "authoritative." Instead the Court has developed an elaborate body of law — *Chevron* Step Zero[77] — that determines whether *Chevron* will even apply at all. Under *Chevron* Step Zero, the Court asks, roughly, whether there is an affirmative indication of a congressional intention to delegate law-interpreting power to the agency – using various procedural indicators as defeasible proxies in this inquiry.[78]

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 Justice 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 to delegate interpretive authority to the agency. *Chevron* Step Zero has produced substantial uncertainty and ferment in the law of administrative deference.[79] Our proposal does not inevitably improve this situation, but does not worsen it either. We simply adopt whatever triggering conditions doctrinal *Chevron* assumes anyway.

However, our approach could also be extended to Step Zero. A supermajority voting rule would also 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, we could easily require a supermajority vote to remove an agency action from the *Chevron* framework and send it to either de novo review or *Skidmore* style deference. That voting rule would reduce uncertainty at Step Zero, and could also be calibrated to produce a pro-deference bias if desirable. On the other hand, if it were desirable 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. v. Brand X Internet Serv.*,[80] the Court clarified the interaction between a prior judicial interpretation of a statute and

[77] Merrill & Hickman, *Chevron's Domain*, supra note __; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).
[78] United States v. Mead, 533 U.S. 218 (2001).
[79] *See* Vermeule, *Mead in the Trenches*, supra note __.
[80] 125 S.Ct. 2688 (2005).

an agency's subsequent and different interpretation of the same term.[81] 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.[82]

Put differently, when a court rejects an agency position because the statute unambiguously demands the interpretation the court adopted, the agency may not later adopt a different position. When a court acknowledges statutory ambiguity, the agency maintains the flexibility to pick new interpretations in the future[83]--in effect picking an interpretation different than the one the prior court thought best.[84] 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, not.

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*. That might be good, or bad, but it would be an important difference.

However, there is in fact no reason to think that any such reduction in flexibility will occur. So 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 (so long as its changes in position are sufficiently explained, a requirement that obtains under doctrinal *Chevron* as well)[85] When an agency receives institutional deference, all agency flexibility is preserved. Indeed, our contention is that agency flexibility will be more cheaply and predictably preserved in these cases.

On the other hand, if a supermajority of a panel rejects the agency's interpretation as incorrect, the agency may not re-adopt its old position. But that is true when a court rejects an agency's interpretation of an ambiguous statute as clearly wrong or unreasonable in the doctrinal *Chevron* framework as well, as *Brand X* makes clear.[86] No greater reduction in agency flexibility inheres in the hard voting rule than 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 decisionmaking, at least for

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[81] For a proposal to address sequencing problems like this, see Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002).
[82] Brand X, 125 S.Ct. at 2700.
[83] Id. at 2700-01.
[84] See id. at 2519 (Scalia, J., dissenting).
[85] State Farm, 463 U.S. at 46.
[86] Brand X, 125 S.Ct. at 2700.

judges. Suppose that under doctrinal *Chevron*, judges 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 have avoided a further inquiry that is required under *Chevron* as a voting rule, and thus economized on the burdens of decision. Judges can use the reasonableness inquiry to avoid the harder problem about what the statute, correctly interpreted, should best be taken to say.

The argument fails. 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). And we suggest that the question whether an agency interpretation is reasonable is indeed harder, on average, than the question which party has the better interpretation. The former requires an absolute judgment for which the metric is obscure, and thus imposes psychological burdens on judges. The latter requires a relative judgment which is often easier.

Moreover, 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 (1) reasonable because it is the only permissible answer or is (2) reasonable 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 Case 1; it can be postponed to Case 2, or Case N. 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 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.

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. So 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 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 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 his 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.[87] A pocket of literature has focused on insincere or strategic voting on multi-member courts.[88] The generic issues are numerous, but for our purposes, the question is only a comparative one. 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.[89] But that manipulation is made harder, not easier, by a supermajority voting rule so 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 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 towards 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.

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[87] *Cf.* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1375-76 (1995) (discussing interaction between strategic voting, stare decisis, and insincere voting).

[88] *See generally* 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 Stearns, *Standing and Social Choice: Historical Evidence*,144 U. PA. L. REV. 309 (1995); Maxwell Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994).

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

As to intentional manipulation, *Chevron* as a voting rule is relatively easy to intentionally manipulate towards more deference, but much harder to manipulate towards less deference. A dishonest judge who favors deference can intentionally continue to apply internal deference to agencies, which result is somewhat more deference than *Chevron* as a voting rule with sincere voting would produce. And a dishonest judge who opposes deference can always vote against the agency in either the doctrinal framework or the voting rule framework. However, the aggregate property of deference remains in the voting rule world, whereas it is 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 voting rule *Chevron*, 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 pitfall 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. To illustrate the first concern, consider that a supermajority rule might govern whether an agency interpretation of a statute is lawful, but 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.[90]) Alternatively, a simple majority rule might determine the *Chevron* Step Zero inquiry, while a 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, 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 they thought it likely their preferred outcome would not be supported by a supermajority. To be a bit more precise, if a majority of justices prefer to overturn the agency action, but a supermajority does not, then the simple majority can avoid the deference framework entirely at *Chevron* Step Zero.

Two points mitigate this effect. 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, 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. 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 fails to use one of the procedural

[90] *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).

mechanisms favored by *Mead*, then it is admittedly far easier for a strategic majority to manipulate away from the deference framework. But this is also precisely the regime we face now. The voting rule does no better against this subtle form of manipulation, but it does not fare worse either.

The sequence of supermajority *Chevron* voting followed by simple majority voting on arbitrariness review might produce similar anomalies. We start with 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 those justices also concludes that the agency's action was not arbitrary and capricious, no anomaly results. What if a supermajority agrees with the agency's statutory interpretation, but a simple majority also views the agency's action as arbitrary and capricious? A supermajority would think that agency's action X authorized by statute, but a majority would think that the agency had not given adequate reasons for doing X, as opposed to Y or Z. It is not obvious that there is any problem or anomaly here; the two views are perfectly consistent.

(3) Suppose a simple majority concludes 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. Since the two questions are conceptually distinct — one is about authority to take a given action, 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. So 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 avoid reaching the arbitrariness question. Again, the *Chevron* voting rule does not better this situation, but it does not make it worse, and should not be solely charged with 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). Although we find scenario (4) unobjectionable, 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

instead 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. Voting rule *Chevron* 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 court of appeals panels. Suppose the Court of Appeals for 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. Were reviewing courts to use voting rule deference while lower courts use doctrinal deference, the resulting analytic puzzles would be troublesome.

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 any observed effects are likely to be modest, and, on net, beneficial.

First, we are not advocating a shift from a no deference regime to a deference regime. 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 debate is about shifting from one deference regime to another that is less costly and more effective, and in which the level of deference can be calibrated to be the same as in the doctrinal framework, if that is desirable. For that 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 equal, we would expect a reduction in the number of challenges brought (initially) and an increase in the rate of settlement. In and of itself, 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 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 able to better 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 policy making 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 re-calibrate that the shift to voting rules produces, the incentive effects on litigants do not seem worrisome.

G. Deference and Politics

Even if it is correct that voting rule deference performs better than doctrinal deference in the various ways we have emphasized, might doctrinal deference create other positive externalities that voting rule deference 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 normatively desirable, doctrinal deference seems an expensive way to accomplish the stated goal. Moreover, it is far from obvious that voting rule *Chevron* 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 wrong; this state of affairs could just as easily generate inter-branch hostility as mutual respect.

Above, we noted some mixed evidence suggesting that *Chevron* has increased deference overall, relative to the prexisting law, but that a large degree of ideological bias persists in the litigated cases.[91] If limiting the effect of politics on case outcomes is the goal, then *Chevron* doctrine seems a blunt instrument for accomplishing that task. We have suggested that *Chevron* as a voting rule will also constrain ideological and political bias in the law of deference, just at lower cost. If this is 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 ventilate ideological disagreements. All versions of

[91] *See* Miles & Sunstein, *Do Judges Make Regulatory Policy?*, supra note __.

Chevron assume away such a view, however, so such views do 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. Is a transition from doctrine to voting rule simply infeasible, reducing our claim to a theoretically novel but practically irrelevant suggestion? In short, our view is that while obstacles to implementation are non-trivial, they are not at all insurmountable. Contemporaneous practice and historical evidence demonstrate that voting rule solutions have been both proposed and adopted, sometimes by congressional mandate and sometimes by judicial fiat. No feature of the *Chevron* context suggests implementation would be harder here than elsewhere, and there are significant reasons to think implementation would be far 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. There is therefore good reason to think judges would be less resistant to the imposition of *Chevron* as a voting rule by statute; perhaps judges might even adopt voting rule *Chevron* without a Congressional dictate.

Before turning to these political concerns, however, we begin with the potential legal obstacles to supply of voting rule *Chevron* by either Congress or the courts. What of the constitutional, statutory, or doctrinal obstacles to the supply of the voting rule? Other scholars have addressed the parallel question whether courts or Congress could create a rule of deference to legislatures in constitutional adjudication.[92] By comparison with that setting, there are few 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 voting rule *Chevron* 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. The Supreme Court already relies on nonmajority voting rules to grant certiorari and to hold cases.[93] The 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] And given that doctrinal *Chevron* is a doctrine of Supreme Court creation, it would clearly be preferable for the Supreme Court to spur the transition.

Without Supreme Court intervention, the current doctrine likely prevents an individual circuit from shifting to voting rule deference. The adoption of our proposed framework would be facially inconsistent with the current *Chevron* model. Any hope for

[92] *Compare* Shugerman, *A Six-Three Rule*, supra note __, *with* Caminker, *Thayerian Deference*, *supra* note __.

[93] *See generally* Revesz & Karlan, 136 U. PA. L. REV. 1067; Corday & Corday, 82 WASH. U.L.Q. 389 (2004); Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643 (2002); Lewis Kornhauser & Lawrence Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

[94] Shugerman, *A Six-Three Rule*, supra note __, at 954-55.

judicial supply then rests primarily with the Supreme 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*. A second obvious answer is that the courts are simply hostile to voting rules or hold some deep belief that voting rules are not a permissible part of the judicial tool set. But this claim cannot be sustained against evidence of current judicial use of hard voting rules to address issues of internal judicial governance, such as en banc review and certiorari. Moreover, the preference for simple majority voting rules is far from uniform in either Congress or the judiciary. Without probing the judicial mind, we merely underline the inconsistency between a complete acceptance of hard solutions to deference questions for internal judicial matters and the apparent hostility to voting rule solutions when it comes to what might be called external deference. On our view, whether the question is deference to precedent, deference to colleagues, deference to Congress, or deference to agencies, the underlying problems are the same. 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 , could Congress mandate the transition? We think the answer is clearly yes. 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 like federalism.[95] Various scholars have suggested that the Necessary and Proper Clause and Article III 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, while Article III, sec. 2, cl. 2 gives the Supreme Court jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." The academic literature diverges sharply on the precise powers these clauses provide to Congress.[97] 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 rule of deference to agencies on questions of statutory interpretation. Enabling legislation has established quorum rules for the Supreme Court and lower courts, and has codified rules of evidence and procedure

[95] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For more recent discussions, see Thomas C. Grey, 88 NW. U. L. REV. 28 (1993); Presser, 88 Nw. U. L. Rev. 42 (1993); Mark Tushnet, 88 NW. U. L. REV. 9 (1993). For recent discussions of the supermajority rule specifically see Caminker, *supra* note ____; Shugerman, *supra* note __.

[96] Shugerman, *supra* note ___, at 971-72.

[97] *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, *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.

for the federal courts;[98] recent legislation has even precluded specific interpretations of statutes in live litigation, albeit with a general interpretive directive.[99] So long as the regulation does not undermine the "essential functions" of the judiciary, Article III provides no constitutional bar.[100] Does the supermajority rule run afoul of some unspecified simple majority rule default in the Constitution?[101] The Constitution, Congress, and the courts themselves utilize a range of submajority and supermajority rules. No voting rule has obvious default status, especially for judicial voting

Perhaps the simplest argument is that congressional power to mandate voting rule *Chevron* is "necessary and proper"[102] 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.[103] Either a global deference statute—requiring voting rule *Chevron* in all cases of agency decisions—or a specific voting rule in an agency's organic statute would comport with separation of powers principles.[104] A *Chevron* voting rule would be akin to other interpretive directives that Congress might lawfully generate,[105] and the important point is that there is no inherent constitutional problem with such statutes. Congress not only has the power to enact legislation necessary and proper to executing other legislative powers, but also judicial powers. Congress generally may not lawfully direct the outcome of a specific case,[106] or reopen a specific judgment,[107] but it is not controversial that (as necessary and proper) Congress may determine the number of Justices and judges, set quorum rules for the courts, mandate the use of certain rules of evidence and procedure.[108] A voting rule statute would be similar in form and function to rules of evidence, procedure, or other potential interpretive 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 in the context of statutory and administrative law. With respect to judicial review of agency actions, Congress may preclude agency actions from judicial review altogether,[109] at least to the extent that the challenge does not raise constitutional claims,[110] 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

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[98] Shugerman, *A Six-Three Rule*, supra note __.
[99] *See, e.g.*, Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Department of the Interior and Related Agencies Appropriations Act, 2004, 117 Stat. 1263.
[100] Hart, *Power of Congress*, supra note __.
[101] *See generally* Shugerman, *A Six-Three Rule*, *supra* note ___, at 988.
[102] U.S. Const., art. 1, sec. 8, cl. 18.
[103] *See* Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2102-03 (2002).
[104] *See* Rosenkrantz, *Federal Rules of Statutory Interpretation*, supra note __, (discussing constitutional objections to legislating interpretive rules).
[105] Id.
[106] Consider United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
[107] See Plaut v. Spendthrift Farms, 514 U.S. 211 (1995).
[108] See Fed. Rules Evid.; Fed Rules Civ. Pro. See also Miller v. French, 530 U.S. 327 (2000) (upholding automatic stay provisions of the Prison Litigation Reform Act).
[109] 5 U.S.C. § 704 (2000).
[110] See, e.g., Johnson v. Robison, 415 U.S. 361 (1974); Czerkies v. Dept. Of Labor, 73 F.3d 1435 (7th Cir. 1995) (en banc).

argue that Congress is constitutionally prohibited from directing a specific voting rule be used in review of agency actions. If *Chevron* were a constitutional doctrine, then there might be a sensible argument that Congress does not have plenary control. Yet so long as the court adheres to the view that *Chevron*'s foundation is congressional intent, it is all but inevitable that Congress is free to modify or eliminate *Chevron* deference via a general statute.[111] The Supreme Court has given absolutely no indication that a statute could not rebut the presumption of deference, mandating, for example, that courts review agency decisions de novo. We have already voiced our skepticism about this foundation for *Chevron*, but so long as the legal fiction is taken seriously, Congress is free to modify the scope, nature, intensity, and as we argue, operative methods of the *Chevron* deference framework. If *Chevron* is a creation of fictitious implicit Congressional intent, we are hard pressed to see why it may not be modified by express Congressional directive.

This is just to say that congressional supply is legally permissible; it is a separate question whether it is likely. In general, Congress has proven almost completely mute about 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. Of course, congressional silence pre-*Chevron* could just as convincingly be taken to have signaled support for the rather different pre-1984 deference regime. Current congressional silence no more demonstrates satisfaction with the *Chevron* doctrine than did congressional silence before 1984 demonstrate congressional satisfaction with the lack of a *Chevron* doctrine. One possibility is that the issue of deference simply lacks political salience with constituents and therefore also lacks payoffs for legislators.[112] If so, Congress is unlikely to adopt 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 one of the principal defects 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.[113] 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 particular, hotly controversial areas.[114] While the *Chevron* doctrine has received its fair share of criticism in the commentary, and peripheral questions about 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 those who, say, urge that Congress foist a supermajority

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[111] Garrett, *Legislating Chevron*, supra note __.

[112] 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 generally* David EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS (1999).

[113] Compare the Progressive Era proposals discussed in Caminker, *Thayerian Deference*, *supra* note ___, at 77-79.

[114] The supermajority review proposals by Shugerman and Caminker each seek to impose a supermajority requirement to create deference in a setting where external observers of the judiciary found alleged deference inadequate or non-existent. See supra note .

voting rule on the Supreme Court in any case involving federalism doctrine. We do not pretend that the proposal would face no judicial resistance, but we think the nature of resistance would be fundamentally different, and its intensity much lower, simply because the judiciary already holds the view that deference is appropriate.

CONCLUSION

The *Chevron* doctrine is a pillar of modern administrative law, and we embrace the doctrine's fundamental premises. 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, most everyone agrees that deference to administrative agencies is desirable. Given that goal, a voting rule deference framework is either as good as or better than a doctrinal deference framework on virtually every dimension of comparison.

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 do best: identify the best interpretation of a statute. This shift reduces the conceptual, psychological and motivational burdens that the *Chevron* doctrine places on judges. Such burdens are not just benign academic quandaries. They result in confusion and uncertainty about the manner in which deference will be applied. Such confusion 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. Combined with the far more powerful ability to calibrate deference levels, our analysis suggests the hard voting rule is a superior solution to the problem of 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.

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