

HIERARCHICALLY VARIABLE DEFERENCE TO AGENCY INTERPRETATIONS

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ABSTRACT

When courts review agency action, they typically accord agency decisions a degree of deference. As many courts and commentators have recognized, the law in this area is complicated because it features numerous standards of review, including several distinct regimes for evaluating agencies' legal interpretations. There is, however, at least one important respect in which uniformity rather than variety prevails: the applicable standards of review do not vary depending on which court is reviewing the agency. Whichever standard governs a particular case—Chevron, Skidmore, or something else—all courts in the judicial hierarchy are supposed to apply that same standard.

This Article proposes instead that the law should take into account the varying institutional circumstances and competencies of courts at different positions in the judicial hierarchy. More specifically, lower courts should be more deferential to agencies than should higher courts. The argument divides into two parts. Part I, which presents the theoretical case, lays out a series of common rationales for judicial deference and explains how those rationales actually support a regime of hierarchically variable deference. Part II then turns to questions of institutional implementation. As it turns out, our system already manifests a few features of hierarchically variable deference, though it does not do so openly. Thus, this Article helps to explain and justify some current practices. Prescriptively, Part II suggests a number of ways in which the judicial system could more systematically implement a regime of hierarchically variable review. One possibility is that different courts should employ somewhat different doctrinal standards, but hierarchical variation can also manifest itself through non-doctrinal means, such as through decisions about how to allocate jurisdiction.

INTRODUCTION

The law of judicial review of agency action is marked by complexity and variety. Depending on the situation, federal courts will apply

one of several distinct standards of review. The multiplicity of standards reflects, in part, the fact that administrative agencies do several different things, such as make factual findings, exercise policymaking discretion, and interpret governing statutes and regulations. Yet the doctrinal complexity persists even when we narrow the field and consider only judicial review of agency interpretation. Prevailing doctrine requires, depending on the circumstances, that reviewing courts either defer strongly to the agency's interpretation ("Chevron deference"), defer a bit ("Skidmore deference"), employ some other deference regime, or defer not at all.¹ As the Supreme Court has admitted in describing its approach to fashioning these standards of review, the Court has often chosen "to tailor deference to variety" rather than "to limit and simplify."²

There is at least one respect, however, in which uniformity rather than variety prevails: the applicable standard of deference does not vary depending on *which court* is reviewing the agency. Rather, whatever the relevant standard happens to be, the *same* standard is supposed to be applied by all courts within the judicial hierarchy.³ For instance, if a particular agency interpretation merits "Skidmore deference" from the Supreme Court, it merits the same type of deference

1 See, e.g., *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (distinguishing between "full *Chevron* deference" and "the less deferential *Skidmore* standard" governing review of agency statutory interpretations); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (setting forth the standard governing review of an agency's interpretation of its own regulations); *Ala. Rivers Alliance v. Fed. Energy Regulatory Comm'n*, 325 F.3d 290, 296–97 (D.C. Cir. 2003) (stating that the court exercises *de novo* review when the agency is interpreting a statute the agency is not charged with administering); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098–1120 (2008) (listing still more deference regimes). The two leading deference regimes take their names from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), respectively; the various standards are described more fully in Section I.A, *infra*.

2 *United States v. Mead Corp.*, 533 U.S. 218, 236–37 (2001).

3 See, e.g., *id.* at 234–39 (holding that an agency ruling was entitled to *Skidmore* deference and remanding for the lower court to apply that standard); *United States v. Haggard Apparel Co.*, 526 U.S. 380, 394 (1999) ("Like other courts, the Court of International Trade must, when appropriate, give regulations *Chevron* deference."); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) ("[W]e apply the familiar standards of review enunciated by the Supreme Court in [*Chevron* and *Mead*]."); *Fishermen's Dock Coop., Inc. v. Brown*, 75 F.3d 164, 168 (4th Cir. 1996) ("[W]e generally review the agency's action from the same position as that of the district court . . ."); *White & Case LLP v. United States*, 89 Fed. Cl. 12, 22 (Fed. Cl. 2009) (modifying the court's prior law because "the Supreme Court has refined the approach to statutory construction and judicial deference that courts must follow").

from the federal courts of appeals and district courts. Put differently, the law of judicial deference is hierarchically uniform.

There is nothing inevitable about embracing this type of uniformity. Scholars of statutory interpretation have begun to suggest that interpretation need not be a homogeneous activity that all courts perform the same way.⁴ If one were to step back from current law's apparent insistence on homogeneity, doctrines of deference would seem like natural candidates for variation across courts. That is because doctrines of deference are based largely on institutional considerations, in particular the divergent roles and competencies of courts on the one hand and administrative agencies on the other.⁵ But "courts" are a diverse bunch, and within that category one finds important variations in institutional competencies, functions, and contexts. Because of these cross-court differences, the various rationales supporting deference apply with varying degrees of force depending on which court is at issue. More specifically, the rationales for deference are more persuasive as one moves lower down the judicial hierarchy. Cross-court differences thus provide a reason—to be weighed against countervailing considerations, of course—to tailor deference doctrines so that they track the institutional circumstances of various reviewing courts.

In highlighting the potential for variation within the judicial hierarchy, this Article contributes to the broader theoretical debate over the optimal tailoring of deference doctrine: which of the many dissimilarities across contexts—across different courts, different kinds of agencies,⁶ and individual cases—should the judicial system take into

4 See Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (exploring whether elected judges and appointed judges should use different methods); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (considering the relationship between a court's place in the judicial structure and interpretive methodology); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013) (examining statutory interpretation in local courts); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (examining whether state courts with general common law powers should diverge from federal courts with respect to interpretive method).

5 See William N. Eskridge Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 413–16, 444–46; Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 925–32 (2003).

6 Several Supreme Court Justices recently debated whether independent agencies should receive less deference than executive agencies. *Compare* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 547 (2009) (Breyer, J., dissenting) (stating that the FCC's status as an independent agency "makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the

account and which should be disregarded in the name of simplicity and uniformity? This Article contends that differences across courts are important enough that a well-designed system of judicial review should, in some form, take them into account.

Supposing that hierarchical variation were justified, what would the resulting system look like? To preview, there are several possibilities. One possibility is that the lower courts should defer more than they do under current practice, but another possibility is that the Supreme Court should defer less. Further, despite the judicial system's official embrace of uniformity, it could be that the system *already* displays hierarchical variation in practice, with lower courts deferring more than the Supreme Court. If so, all courts could be behaving roughly correctly already, and no adjustment to the status quo would be needed.

The Article's examination of hierarchically heterogeneous deference divides into two parts. Part I presents the theoretical case for hierarchical variation. It lays out the typical rationales for judicial deference and explains how each rationale, upon reflection, has a hierarchically variable character. Part II then turns to the matter of institutional implementation. That is, if the justification for deference is stronger in lower courts than in higher courts, how (if at all) might the judicial system actually implement a scheme of variable deference? As it turns out, our system already does manifest a few features of hierarchically variable deference, though it does not do so openly. Thus, this Article helps to explain and justify some current practices, perhaps even reconciling us to some features of current law that otherwise seem problematic. Further, in a more prescriptive mode, Part II suggests a number of ways in which the judicial system could more systematically implement a regime of hierarchically variable review. Impediments and countervailing values are acknowledged and considered. It is a mistake to assume that variable deference can be implemented only through doctrine—that is, requiring different courts to use different legal standards. Although doctrine is one means of implementation, deference can manifest itself in other ways too, such as through decisions about how to allocate jurisdiction. In fact, non-

law”), *and id.* at 540–41 (Stevens, J., dissenting) (apparently suggesting that the FCC’s status as an independent agency restricts its ability to change its views), *with id.* at 523–26 (Scalia, J.) (plurality opinion) (rejecting any relevant difference between independent and executive agencies); *see also* Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 451–53 (2006) (arguing that independent agencies should receive less deference from courts).

doctrinal implementations of deference have some advantages in terms of workability and, perhaps, efficacy.

Before proceeding, two notes regarding scope are in order. First, the subject is federal court review of federal agencies. Issues regarding state standards of review and interactions between the state and federal regulatory systems are interesting, especially considering that many state judges are elected, but those issues are not taken up here.⁷ Second, courts review a variety of agency activities, and the activity primarily at issue here is agency legal interpretation: e.g., What is a “stationary source” within the context of the Clean Air Act?; Does the Endangered Species Act prohibit private landowners from chopping down trees if doing so destroys the habitat of endangered animals?; Does a worker’s oral objection to workplace overtime violations count as a “complaint” for purposes of the Fair Labor Standards Act?; and so on.⁸ Courts and scholars have devoted a tremendous amount of intellectual energy to thinking about judicial review of agency interpretation,⁹ and so it makes sense to engage with that body of doctrine and scholarship. Nonetheless, various types of agency action blend into each other, such that it is often hard to maintain a strict separation between legal interpretation on the one hand and policy discretion or even fact-finding on the other. Therefore, review of agency discretion and fact-finding is discussed at several points below. The considerations that support hierarchical deference in the context of legal interpretation are mostly applicable to those other contexts as well.

I. THE THEORETICAL CASE FOR HIERARCHICALLY VARIABLE DEFERENCE

This Article takes as a given that some amount of judicial deference to agency views is appropriate, even on matters of law.¹⁰ The

7 See Bruhl & Leib, *supra* note 4, at 1277–82 (exploring the relationship between judicial elections and deference doctrines); D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373 (2009) (discussing state courts and *Chevron* deference); see also Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 574–622 (2011) (discussing state administrative implementation of federal statutory programs).

8 The examples just given are drawn, respectively, from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 839–40 (1984), *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690–92 (1995), and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1329–30, 1335 (2011).

9 As an illustration, searches of electronic databases show that over two hundred law review articles refer to *Chevron* in their titles alone.

10 To adopt this starting point is not to deny that one can challenge the propriety of judicial deference, or at least strong forms of it, at the level of first principles. See,

concern here is how best to calibrate deference, in particular whether deference should vary systematically from court to court. This part of the Article very briefly examines the existing law of deference, which is supposed to be uniform across courts, and then, more importantly, shows how the rationales supporting deference actually support a hierarchically variable regime. The aim is to provide a sort of *prima facie* theoretical case for hierarchical heterogeneity, which Part II can then translate into institutional form.

A. *Brief Summary of Deference Doctrines*

The law of deference to administrative agencies is complex and, in certain particulars, still uncertain and evolving. To set the stage for the argument that follows, a concise summary of a few of the leading deference regimes will suffice. Some additional details will be added where appropriate as the analysis proceeds.¹¹

The most famous and explicit deference regime comes from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹² which directs courts to defer to reasonable agency interpretations when con-

e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 476–99, 511–26 (1989) (criticizing deference on separation-of-powers grounds). One can also mount more particularized challenges to the legitimacy of specific deference doctrines. *E.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617–19, 631–80 (1996) (questioning the *Seminole Rock* doctrine of deference to agency interpretations of the agency's own rules on structural constitutional grounds).

11 For more detailed treatments of the doctrinal landscape, see A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES chs. 3–8 (John F. Duffy & Michael Herz eds., 2005); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 155–273, 523–55 (5th ed. 2010); and 2 *id.* at 975–1058. My summary of deference regimes requires a few caveats. An empirical study of the Supreme Court's deference cases published in 2008 by Eskridge and Baer reveals the following: (1) there are a number of distinct (though practically similar) deference doctrines besides the most famous ones, (2) courts often rely on agency views without citing a specific deference doctrine, and (3) independent judicial judgment is often exercised (at least in the Supreme Court) even when formal doctrine would call for some type of deference. Eskridge & Baer, *supra* note 1, at 1098–1100. In addition, despite the elaborate distinctions drawn by the formal doctrines, there is reason to believe that the standards tend to converge somewhat in practice. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 154, 168, 186–87 (2010) (showing that agencies tend to prevail about two-thirds of the time regardless of the standard of review). Those who are skeptical about whether formal doctrinal changes are very effective may prefer to implement hierarchical deference through other means, such as jurisdiction or voting rules. See *infra* subsection II.B.1.

12 467 U.S. 837 (1984).

fronted with statutory gaps or ambiguities. More precisely, *Chevron* prescribes a two-part inquiry. The court first asks, in what has come to be known as *Chevron* Step One, “whether Congress has directly spoken to the precise question at issue.”¹³ If Congress has done so, then courts and agencies alike must obey its directive. But if Congress has not directly resolved the question at issue, the analysis proceeds to Step Two, at which the courts will defer to the agency’s view as long as it is “reasonable”—which does not require that the agency’s interpretation match the one the court would adopt as a matter of independent judgment.¹⁴

Agency interpretations come in many formats, and not all of them are the sort of thing that can even qualify for *Chevron* deference. As the Supreme Court explained in *United States v. Mead Corp.*, an agency interpretation falls within the domain of *Chevron* “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁵ Although that is a rather uncertain test, in practice it tends to mean that relatively formal agency actions—such as notice-and-comment rulemaking or formal adjudication—are eligible for *Chevron* treatment, while lesser actions and materials—opinion letters, agency manuals, enforcement guidelines, and the like—are not.¹⁶

Agency materials that do not display the requisite formality to come within *Chevron*’s domain still get a measure of respect under the

13 *Id.* at 842.

14 *Id.* at 843–44. There is some disagreement regarding the nature of Step Two. On one view, Step Two addresses the substantive permissibility of the agency’s interpretation—that is, whether it falls within the bounds of the statutory ambiguity that was found to exist in Step One. On another view, Step Two is instead more process-based, scrutinizing the reasoning process that generated the interpretation. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997) (describing various approaches and advocating an approach similar to the second view just described); see also *infra* text accompanying note 158 (discussing the view that *Chevron* has only one step).

15 *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). The doctrine concerning the preconditions for entering *Chevron*’s domain has come to be known as *Chevron* “Step Zero.” See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

16 *Mead*, 533 U.S. at 229–31; *Christensen v. Harris Cnty.*, 529 U.S. 576, 586–87 (2000). To say that an agency action is eligible for *Chevron* treatment, or comes within *Chevron*’s domain, does not mean that it will pass *Chevron*’s two-step test and receive deference. Here we are merely discussing which deference test is applicable to a particular type of agency action.

separate deference regime of *Skidmore v. Swift & Co.*¹⁷ *Skidmore* recognized that agency views “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁸ The force of that guidance depends on the balance of a handful of pragmatic factors: “the thoroughness evident in [the agency’s] 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.”¹⁹

Another deference regime—*Seminole Rock* (or *Auer*) deference—concerns an agency’s interpretation of its own regulations. According to the standard formulation, the agency’s view prevails unless it is “plainly erroneous or inconsistent with the regulation.”²⁰

The foregoing doctrines of deference to agency interpretations are judicially crafted, and they are a bit hard to square with the Administrative Procedure Act (APA), which directs that the reviewing court “shall decide all relevant questions of law [and] interpret constitutional and statutory provisions.”²¹ Several of the APA’s standards of review governing other kinds of agency decisions more obviously contemplate deference. One such standard is the “arbitrary and capricious” standard, a sort of catch-all that applies to judicial review of various agency activities including the exercise of discretion and informal fact-finding.²² Although this standard requires agencies to

17 323 U.S. 134 (1944); see *Mead*, 533 U.S. at 234 (“*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form.”).

18 323 U.S. at 140.

19 *Id.*; see also *id.* at 139 (referring to the “specialized experience and broader investigations and information” available to the agency as a factor supporting deference).

20 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see also *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997) (applying the same standard even though the agency’s interpretation was presented in a brief rather than through preexisting regulatory guidance).

21 5 U.S.C. § 706 (2012). The usual way to reconcile judicial deference with the text of the APA—and with the judiciary’s broader duty to determine the law—has been to say that Congress has delegated some interstitial lawmaking power to agencies; the “question of law” for the court then becomes whether the agency has remained within the delegated territory, not whether the agency has found the single correct meaning of the statute. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6, 25–28 (1983) (justifying judicial deference along those lines).

22 See 5 U.S.C. § 706(2)(A) (requiring courts to set aside agency action found to be “arbitrary [or] capricious”); Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 11, at 177 (discussing the standard’s application to agency exercises of discretion);

engage in reasoned decision-making, it does not permit courts to substitute their views for the agency's expert judgments.²³ Similarly, agency factual determinations made in the context of formal hearings are reviewed only to see if they are supported by "substantial evidence," a standard more lenient than *de novo* review.²⁴ Although these statutory standards of review are not usually called deference regimes, forms of deference are in effect what they prescribe.

B. Rationales for Deference—and Their Court-Specific Features

No single argument for deference neatly explains all of the existing doctrine and satisfies all commentators. Various rationales for deference have been advanced, and it may be that the most successful defenses rely on a blend of several overlapping and mutually reinforcing considerations.²⁵ The interesting feature explored here is that the force of the various rationales varies from court to court. In some instances the force of a given rationale varies greatly across courts, though in other instances the variation is less marked. The discussion begins where the argument for hierarchically variable deference seems weakest, namely with rationales that locate deference in congressional intent. If the argument for variable deference can deal successfully with congressional intent, it will be off to a very promising start.

1. Legislative Intent to Delegate Authority

The legislature creates both the agencies and the statutes they administer, so one would suppose that the courts' method of supervising how the agencies implement the statutes ought to depend primarily on the legislature's desires as well. Indeed, the Supreme Court has often linked deference to congressional intent, notably in *Mead*,

Jim Rossi, *Judicial Review of Issues of Fact*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 11, at 159–63 (discussing application of the standard to agency fact-finding).

²³ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that "the agency must examine the relevant data and articulate a satisfactory explanation for its action," but "a court is not to substitute its judgment for that of the agency").

²⁴ 5 U.S.C. § 706(2)(E); see Rossi, *supra* note 22, at 163–64 (discussing this standard of review).

²⁵ See generally Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271 (2008) (arguing that *Chevron* rests on the confluence of various rationales for deference).

which stated that the *Chevron* deference regime applied where Congress contemplated that the agency would act with the force of law.²⁶

Admittedly, congressional intent does not seem to provide much support to a theory of hierarchically variable deference. If one is looking for a congressional statement that courts at different places in the judicial pyramid should employ different deference regimes, one will not find it, at least not stated in those terms. (As we will see below, however, one could read some of Congress's jurisdictional choices to indirectly express views supportive of hierarchically variable deference.)²⁷ The Administrative Procedure Act does not create hierarchically divergent standards of review but instead refers generically to "the reviewing court."²⁸ The organic statutes that empower agencies give them rulemaking power over certain fields of law, not rulemaking power vis-à-vis certain courts only.

The facts just mentioned need not unduly trouble us, however, for genuine congressional intent is probably not able to provide a satisfying account of contemporary deference doctrines, especially at the level of fine details. The type of congressional intent that is supposed to justify deference is typically an implicit or constructive intent. Even *Mead* recognized that the legislative delegation justifying *Chevron* deference need not be express but can be imputed to Congress based on the circumstances (in particular, the conferral on the agency of a general power to administer the statute coupled with ambiguous language in the operative provisions).²⁹ *Chevron* itself was even more candid about the limited role of intent, treating even inadvertent legislative ambiguity as "delegation" and justifying deference by appealing to functional considerations like expertise and political responsibility.³⁰ (Notably, *Chevron* did not even cite the APA's standards of review.) Genuine and particularized congressional intent plays even less of a role in the *Skidmore* regime, in which the agency's power to persuade depends on a balance of pragmatic considerations such as the degree of administrative expertise involved, the agency's thoroughness, and the persistence of the agency's view.³¹ Similarly

26 *United States v. Mead Corp.*, 533 U.S. 218, 229, 231 (2001); *see also* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (referring to "express" and "implicit" congressional delegations of authority to agencies).

27 *See infra* subsection II.A.2.

28 5 U.S.C. § 706.

29 533 U.S. at 229.

30 467 U.S. at 843–44, 865–66.

31 As the Court wrote in *Skidmore*:

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. . . . The weight of [the Administra-

instructive on the limited role of congressional intent in deference doctrine is the Supreme Court's recent decision holding that *Chevron* (rather than the less deferential *National Muffler* standard) governs judicial review of Treasury Regulations.³² Although the Court referred generally to congressional intent and cited *Mead*, the Court also relied on functional considerations like expertise and doctrinal consistency.³³

In short, to the extent that doctrines of judicial deference are justified by legislative intent, that intent is a highly generalized and implicit one.³⁴ Yet imputing to Congress the intent to have courts defer to agencies is defensible, for it is often sensible policy to defer.³⁵ And it is sensible because of various institutional features of agencies, such as the fact that agencies possess expertise, promote national uniformity, and are more politically responsive than courts. Because of those and other institutional advantages of agencies, it makes sense that Congress would generally want agencies—and not courts—to have the authority to elaborate the details of regulatory schemes. The upshot is that the intent-based rationale for deference, especially when it comes to matters of detail, is mostly just parasitic on other, more pragmatic rationales. And if *those* rationales apply in a hierarchically variable way, then so too would the (imputed) intent rationale. As the next several sections show, the most satisfying

tor's] judgment in a particular case will depend upon 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.

Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944); see also *supra* text accompanying notes 17–19 (discussing *Skidmore* deference).

³² *Mayo Found. for Med. Educ. and Research v. United States*, 131 S. Ct. 704, 714 (2011).

³³ *Id.* at 711–14.

³⁴ See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (“*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire”); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 369–70 (1986) (observing that explicit delegations of interpretive authority are rare and that courts employ “a kind of legal fiction” when they infer such intent); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (stating that any rule about legislative intent to delegate interpretive authority “represents merely a fictional, presumed intent”).

³⁵ See Barron & Kagan, *supra* note 34, at 212 (stating that “*Chevron* is a judicial construction, reflecting implicit policy judgments about what interpretive practices make for good government”); Breyer, *supra* note 34, at 370 (stating that courts “look[] to practical features of the particular circumstance to decide whether it ‘makes sense’ . . . to imply a congressional intent that courts defer to the agency’s interpretation”).

justifications for judicial deference do in fact have a hierarchically variable character.

2. Expertise

One of the leading justifications for judicial deference to administrative agencies has traditionally been that agencies have pertinent expertise. The Supreme Court observed in *Chevron* that the regulatory scheme at issue in that case was “technical and complex” and that “[j]udges are not experts in the field.”³⁶ Similarly, under the more flexible *Skidmore* regime, the proper degree of judicial deference depends in large part on how much agency expertise is on display in the particular agency determination at hand.³⁷

Agency expertise takes several forms. Probably most obvious is expertise of the technical sort: what level of benzene exposure poses a health hazard, what vehicle safety devices are most effective, etc.³⁸ Few would suppose that generalist judges—at any level of the hierarchy—are ideally situated to make such decisions. Less obviously, but more importantly for present purposes, agencies also have certain advantages over courts even in terms of the “lawfinding” aspects of statutory implementation. Agencies typically have a deeper appreciation of how different interpretive choices affect a complex regulatory scheme with many interrelated parts, understand more fully the original intentions and compromises that generated the statute, and are more cognizant of current political preferences, all of which might be

36 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). Although agency expertise is often taken for granted, it is worth pointing out that one cannot just assume that all agencies outperform generalist judges in all areas. See, e.g., Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82, 82 (2013) (arguing that the Federal Trade Commission “does not perform as well as generalist judges in its adjudicatory antitrust decision-making role”).

37 See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (observing that some degree of deference was appropriate under *Skidmore* because of the agency’s “specialized experience”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (referring to the “specialized experience and broader investigations and information” available to the agency); see also *Gonzales v. Oregon*, 546 U.S. 243, 268–69 (2006) (concluding that the Attorney General’s regulation merited little deference under *Skidmore* because the Attorney General lacked medical expertise).

38 To be sure, even seemingly “technical” questions implicate value judgments as well. To the extent that is so, agencies again have an advantage over courts, given agencies’ greater democratic accountability. See *infra* subsection I.B.3.

useful interpretive inputs.³⁹ The agency advantages derive in part from differences in personnel—federal agencies employ office buildings full of specialists, courts do not—but they also reflect institutional limitations of the judicial role. Agencies can synthesize information from many sources and take a comprehensive view, unlike a court that is limited to the adversarial adjudication of a discrete case.⁴⁰

The size of the agency advantage depends on which court is at issue. Generally speaking, the Supreme Court can approximate the expertise of an agency more closely than can lower courts. This is not so much because the Justices themselves have special talents but rather because they enjoy a more favorable decision-making environment than their colleagues below them. It is an environment rich in resources, both internal and external. Internally, the Justices have sizeable and highly competent staffs of law clerks and librarians. Perhaps more importantly, the Court's relatively small docket provides the luxury of time. Regarding external resources, Supreme Court advocacy is increasingly the preserve of highly competent specialists.⁴¹ These lawyers, whether in private firms, public interest organizations, or the Solicitor General's office, bring a high degree of effort and skill to each case and leave few stones unturned.⁴² To the extent that any important aspects of a case are neglected by the parties, amicus briefs

39 The scholarly literature has identified a wide variety of agency interpretive advantages over courts. *E.g.*, 1 PIERCE, *supra* note 11, at 170–71 (policy coherence); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2126–29 (2002) (current political preferences); Eskridge & Baer, *supra* note 1, at 1173, 1176 (statutory history and evolution); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 93–106 (legislative purpose); Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 124, 130–31 (background principles and policies specific to particular fields of law); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321–22 (1990) (legislative history and purpose); *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 208–11, 212–15 (2006) (canvassing a number of differences in the competencies of agencies and courts as interpreters); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 568–92 (1985) (same); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504–24 (2005) (same).

40 *See* Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 485–87 (1986).

41 *See* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1491–1502 (2008) (describing the recent rise of an elite, specialized Supreme Court bar).

42 The advocates' efforts are not limited by the client's willingness to pay. Attorneys will discount their rates and perform uncompensated work with the goal of enhancing their reputations and getting more work in the future. *See id.* at 1557.

fill the gap. Almost every Supreme Court case attracts them, often many of them.⁴³ Aside from conventional legal argument, these briefs can offer useful interpretive inputs such as information on policy context, interest group alignments, and relevant facts not contained in the formal record.⁴⁴ Even when the United States or one of its agencies is not a party to the case, the government usually files high-quality amicus curiae briefs that provide detailed information about the statutory context.⁴⁵

43 See PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT 47 fig.3.1 (2008) (showing an increase in amicus curiae participation); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 754–56 (2000) (same).

44 See, e.g., Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION-MAKING 215, 225–28 (Cornell W. Clayton & Howard Gillman eds., 1999) (explaining that amicus briefs often provide information about the preferences of the other branches and the public); Stephen Breyer, *The Interdependence of Science and Law*, 280 SCI. 537, 538 (1998) (stating that amicus briefs can educate the Court on technical matters and improve decisionmaking); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 21–37 (2011) (discussing the use of amicus briefs, especially in the Supreme Court, as sources of extra-record facts); cf. Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1248–49 (2011) (observing that the Court’s amicus practice in antitrust cases resembles administrative rulemaking, but arguing that creating an administrative agency would be better).

45 In recent years, the Solicitor General has filed amicus briefs in about 75% of the Supreme Court’s non-constitutional civil cases that arise from the lower federal courts and in which the government is not already a party. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1359 (2010). A complication should be noted here. Government briefs sometimes convey not just useful background information but also set forth what purport to be authoritative interpretations that the relevant federal agency has not previously announced through formal means, and the Supreme Court sometimes gives some deference to these newly announced interpretations. See Eskridge & Baer, *supra* note 1, at 1112–13, 1143; Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court* (Univ. of Cincinnati Coll. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-08, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129768; see also Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 Nw. U. L. REV. 997, 1034–47 (2007) (urging courts to solicit and give weight to agency amicus briefs). Assuming that it is proper to defer to views announced in this format at all, the argument of this Article suggests that lower courts should defer to them more heavily. The complication arises because the interpretation seeking deference might not have been formulated until the case reached the Supreme Court and the Solicitor General announced it in the brief. See Bruhl, *supra* note 4, at 463–65 (discussing the problem of newly announced administrative guidance). Thus, while the lower court should defer more where such interpretations are available, this particular form of interpretation is less available in the lower courts.

The decision-making environment is, on the whole, less favorable the lower one goes down the judicial pyramid. As one moves down, the caseloads generally grow while the resources shrink. Time is short; administrative records, long.⁴⁶ The quality and effort of the advocates is uneven.⁴⁷ Amicus briefs, which are ubiquitous at the Supreme Court, are quite rare in the courts of appeals and extremely rare in the district courts, thus depriving the courts of potentially useful information and perspectives.⁴⁸ District judges in particular lack the deliberative and debiasing advantages that colleagues can provide.⁴⁹ This is not to say that district courts lack any special competencies,⁵⁰ but it is to say that their expertise lies elsewhere than in directing national regulatory policy.

To be sure, the relationship between relevant expertise and hierarchical position is far from perfect. Some lower courts have particular familiarity with certain subjects, whether as a result of specialized jurisdiction or geographic accident: the D.C. Circuit in some aspects of regulatory law and the Southern District of New York in securities litigation, for example. And some individual judges possess subject-

46 Stephen Breyer, then serving as a judge on the First Circuit, described the predicament as follows:

How can [judges on the courts of appeals] analyze fully a record, for example, reflecting 10,000 comments made in response to a notice of proposed rulemaking? Can judges, when faced with such complexity and detail, do more than ask, somewhat superficially, whether the agency's result is reasonable? Can they do more than catch the grosser errors? Can they conduct the thorough, probing, in-depth review that they promise?

Breyer, *supra* note 34, at 390 (footnote omitted).

47 See Interview with Justice Stephen G. Breyer, 13 SCRIBES J. LEGAL WRITING 145, 160 (2010) (assessing briefing in the Supreme Court as "pretty uniformly good" and stating that "[y]ou'll get very good briefs in the circuits on a lesser number of occasions"). It bears noting that the D.C. Circuit, with a somewhat specialized bar, may differ in this respect. See *infra* subsection II.A.1.

48 A recent survey of judges asked them to estimate the percentage of cases with amicus briefs. In the federal courts of appeals, the vast majority of responding judges said no more than five percent of cases had amicus briefs. In the district courts, the vast majority of responding judges said that amicus activity was minimal. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 686–87 (2008).

49 See generally Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (describing how collegial deliberation can produce better decisions). Even if deliberation is nonexistent or not beneficial, the likelihood of getting a correct answer should increase as the number of judges increases, given certain plausible assumptions. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 97–100 (1986).

50 See, e.g., *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (noting the institutional advantage of trial courts over appellate courts in finding facts).

matter expertise based on prior experience. If subject-matter expertise were the only consideration in fashioning standards of review, perhaps the Supreme Court should be more deferential than some of its supposed “inferiors” (though specialization and narrow expertise can lead to their own types of decision-making deficits).⁵¹ But clearly there are other considerations at stake besides perfectly tailoring judicial doctrine to expertise or other rationales for deference, and we will return to the matter of optimal variation later.⁵² Nonetheless, with those caveats noted, one can say, as a general matter, that the Supreme Court has relatively more expertise than the lower courts, particularly the generalist lower courts, in ways relevant to reviewing agency interpretations. If that is right, then one prominent argument for judicial deference has greater force as one moves down the judicial pyramid.

3. Democratic Pedigree

Deference has also been justified on democratic grounds—namely that agencies are politically accountable and courts are not. *Chevron* put it this way:

In contrast [to courts], an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.⁵³

This passage from *Chevron* locates agency accountability primarily in agencies’ link to the President. The President selects and can often remove high-ranking agency officials and, increasingly, exercises cen-

51 For treatments of the issue of judicial review of agency action by specialized courts, see, among others, David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 62–85 (1975); Sapna Kumar, *Expert Court, Expert Agency*, 44 U.C. DAVIS L. REV. 1547 (2011); Banks Miller & Brett Curry, *Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making*, 38 L. & SOC. INQUIRY 55 (2013); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

52 See *infra* subsections II.B.2.b–c; see also *infra* subsection II.A.1 (discussing the D.C. Circuit’s arguably special role).

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

tralized control over regulatory initiatives.⁵⁴ A more complete account would note that agencies are also subject to supervision by Congress—through oversight hearings, funding decisions, informal contacts, and the possibility of legislation overriding agency action—plus scrutiny from non-governmental groups and the media, whose complaints can then trigger further presidential or congressional action.⁵⁵

The federal judiciary, by contrast, is designed not to be politically accountable to either of the political branches, at least not in the most direct ways. The judges' tenure in office and salary are exceedingly secure.⁵⁶ Impeaching judges based on their decisions is nearly unthinkable. Given the lack of political controls, and because federal judges' terms of service often stretch into the decades, the judges' views can depart significantly from current executive or legislative

54 See, e.g., U.S. CONST. art. II, § 2, cl. 2 (empowering the President to appoint principal officers, with the Senate's consent); *Myers v. United States*, 272 U.S. 52 (1926) (upholding the President's power to remove executive officials); Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. (2012) (providing for centralized review of regulatory action in the Office of Management and Budget); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–2319 (2001) (summarizing the growth of presidentially directed administration). The so-called independent agencies (such as the SEC and FCC) are less subject to presidential control than executive agencies and departments. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–32 (1935) (allowing Congress to limit the President's power to remove heads of independent agencies); Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Indep. Regulatory Agencies, M-11-28 (July 22, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf> (providing non-binding guidance to independent agencies requesting that they follow certain review procedures required of executive agencies).

55 See, e.g., 5 U.S.C. §§ 801–08 (2012) (creating procedures for congressional disapproval of regulations); JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE* (1990) (discussing oversight hearings and other mechanisms); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (explaining how agency structure facilitates legislative control). See generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69–138 (2006) (describing various formal and informal methods of congressional control); Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2101–13 (2010) (describing how agencies face accountability from a range of sources even when agencies act through informal mechanisms).

56 See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

preferences.⁵⁷ There is much less reason to suppose that independent judicial judgment, as compared to agency decisions, will tend to reflect prevailing political views. According to Elhauge, the relatively greater tendency of agency action to track political preferences provides the single best rationale for the *Chevron* doctrine.⁵⁸

As with other rationales for deference, the force of the political rationale depends to some degree on which court is at issue. That different courts have different democratic pedigrees is most obvious if one compares federal judges to their state colleagues, many of whom face the voters in some type of election.⁵⁹ But even within the federal judiciary, which is our focus here, not all courts stand on the same footing, democratically speaking. Although all Article III federal judges are quite insulated from after-the-fact accountability, there are nonetheless important hierarchical differences when one instead considers democratic pedigrees from the *ex ante* point of view. Judges at different levels of the federal judiciary differ in the extent to which they have been democratically authorized to make national policy. More specifically, Supreme Court Justices have a stronger claim in that regard than do judges lower down in the hierarchy. This is not necessarily a claim that the Supreme Court will in fact tend to issue decisions that align more closely with public opinion (or congressional preferences or whatever other aggregation one prefers).⁶⁰ It is instead a normative claim about what different judges are entitled to do.

The difference in policymaking entitlements arises because judges at different levels of the federal hierarchy are chosen through

57 See L.A. Powe, Jr., *Old People and Good Behavior*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 77, 77–78 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067, 1076 (2001).

58 Elhauge, *supra* note 39, at 2126–59. Needless to say, the correspondence is not perfect. Perhaps the agency is captured by a narrow but powerful interest group. (Though, it is worth pointing out that the same group could also exert outsized influence in Congress or with the White House too; all of the actors' preferences could be shifted away from an idealized "public interest.") For a recent treatment of regulatory capture, see PREVENTING REGULATORY CAPTURE (Daniel Carpenter & David A. Moss eds., 2013).

59 See generally Bruhl & Leib, *supra* note 4 (discussing whether judicial elections should influence methods of statutory interpretation).

60 The empirical question of how closely the Supreme Court's decisions match public sentiment (somehow construed) continues to generate debate. Compare BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009) (emphasizing the correspondence between public sentiment and the Court's rulings), with Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103 (expressing skepticism about strong versions of the majoritarian view).

what are in fact quite different processes. The process for selecting modern Supreme Court Justices is typically exhaustive and fully nationalized. The President makes selections based, in large part, on nominees' ability to satisfy the ideological requirements and other demands of his political coalition and the nominees' apparent inclination to sustain key aspects of his agenda.⁶¹ The Senate may withhold consent unless the nominee's ideology is at least minimally acceptable to pivotal members. It is understood on all sides that the Justices will make momentous decisions of national scope that rest, in no small part, on their views of wise policy.

The selection process is different for the lower courts, especially if we look at the other end of the Article III hierarchy, the federal district courts. Although the day has passed when appointments to the district courts reflected concerns no grander than patronage, the demands of local constituencies and home-state officials (especially Senators armed with blue-slip vetoes) still play a significant role.⁶² And district judges, unlike officials in some other national bureaucracies, usually spend their entire tenure in one location. These state and regional ties may well give district judges greater sensitivity to, and perceived legitimacy regarding, matters of particular concern in the locality where they reside.⁶³ But judicial review of federal administrative action primarily implicates matters of national, not local, policy.

61 The political nature of the selection process for the Supreme Court is widely acknowledged. See, e.g., HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* 3 (5th ed. 2008) (stating that ideological compatibility is usually the controlling factor in Supreme Court nominations); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 84–132 (1999) (documenting the political nature of the Supreme Court appointments process and arguing that the Court is politically representative); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957) (“Presidents are not famous for appointing justices hostile to their own views on public policy nor could they expect to secure confirmation of a man whose stance on key questions was flagrantly at odds with that of the dominant majority in the Senate.”). To be sure, not all of the factors bearing on the President’s decision concern the nominee’s own policy views and broader ideology. For Democratic Presidents in particular, demographic diversity is an important consideration.

62 See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* 13–14 (1997) (discussing influences on the selection of judges); NANCY SCHERER, *SCORING POINTS* 1–46 (2005) (elaborating on changes in the process for selecting lower-court judges).

63 Cf. Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 1013 (2010) (“[T]rial judges are generally understood to be cognizant of, and often expected to be responsive to, local sensibilities.”). District judges’ local rooting can have a dark side. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (discussing the hostility of some Southern federal judges to school desegregation).

Regarding *those* matters, Senate scrutiny of district court nominees' ideological predispositions remains less intense.⁶⁴ This makes sense given that there are many district judges and most of the cases they hear lack political importance. For nominees to the courts of appeals, the process occupies an intermediate position between the process for the Supreme Court and the process for the district court in the relevant respects.⁶⁵

In light of these differences in the selection process, Supreme Court Justices have a stronger claim, as compared to lower-court judges, to have been democratically authorized to make national policy. Because policymaking discretion is frequently at issue when judges review agency interpretations,⁶⁶ such cases frequently have a strongly political aspect. Indeed, there is by now much evidence that judges' ideological predispositions, while not determinative, have substantial power in predicting votes in administrative cases.⁶⁷ That may

64 See Balkin & Levinson, *supra* note 57, at 1074 ("It is usually easier to appoint strongly ideological lower court judges than Justices because there is less scrutiny by the Senate. Indeed, one interesting fact about both Robert Bork and Clarence Thomas is that each had easily won confirmation to the Court of Appeals."). Again, the process has changed over time, such that there is more scrutiny today than there used to be. Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 276–78 (2002). The point is just that the level of scrutiny varies by court.

65 See GOLDMAN, *supra* note 62, at 13; Sheldon Goldman, *Judicial Appointments and the Presidential Agenda*, in THE PRESIDENCY IN AMERICAN POLITICS 19, 22 (Paul Brace et al. eds., 1989). Appointments to the courts of appeals are sometimes highly contentious, such as when the nominee is suspected of being a future candidate for the Supreme Court. D.C. Circuit appointments are frequently difficult. See *infra* subsection II.A.1 (discussing the D.C. Circuit's arguably special role).

66 The Supreme Court itself acknowledges this, which shows it is not a particularly radical realist insight. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("[T]he resolution of ambiguity in a statutory text is often more a question of policy than of law.").

67 E.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2169–71 (1998) (D.C. Circuit cases involving *Chevron*); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 793–95 (2008) (courts of appeals environmental cases involving *Chevron*); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (Supreme Court cases involving *Chevron* and courts of appeals environmental and labor cases involving *Chevron*); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1784–91 (2010) (Supreme Court cases involving agency interpretations); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (environmental cases in the D.C. Circuit); Mark J. Richards et al., *Does Chevron Matter?*, 28 L. & POL'Y 444, 461–62, 464

be a problem from the point of view of judicial impartiality and (if one wants to be dramatic about it) the Rule of Law, but it is a less serious problem when the judges have at least been chosen—as our Supreme Court Justices have—to be national policymakers.

There are, to be sure, some difficulties with treating the Justices as democratically authorized policymakers. Given that the Justices hold lifetime appointments (and now tend to stay on the Court longer than in the past), they will outlast the particular elected officials who democratically blessed them. The legal issues at the forefront of the Court's agenda change over time, such that a Justice who was selected because of (say) his views on national power in the economic sphere can end up, thirty years later, on a Court focused on criminal procedure and racial justice. When there has been a sustained transition between political regimes (as opposed to a period of flux and rapid alternations between the parties), a majority of incumbent Justices may continue for some time to represent the views of the departed regime that appointed them, not the preferences of the new regime.⁶⁸ Of course, lower-court judges—who are also serving increasingly long terms⁶⁹—can do the same things. And it is even more problematic for them to do so, given the nature of their appointment process. Further, the relatively large membership of the Supreme Court will tend to dilute the influence of ideological outliers and holdovers, in contrast to a district court where an outlier could be a majority of one. Again, the crucial question is not how the Supreme Court compares to the agencies in terms of democratic pedigree; what matters is the difference across courts.

(2006) (Supreme Court administrative cases). To be clear, the evidence on this point is not unequivocal. See, e.g., William S. Jordan, III, *Judges, Ideology, and Policy in the Administrative State: Lessons from A Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 98–101 (2001) (finding that principled decisionmaking best explains a decade of D.C. Circuit environmental cases); cf. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 48–52, 59 (1998) (reporting that political factors had only “mixed success” in predicting outcomes in the courts of appeals, though they were better predictors than several other factors).

68 See sources cited *supra* note 57. Indeed, the old Justices might actively resist the new regime's initiatives, in a sort of rear-guard defense of the old order. Cf. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 488 (2002) (“When a rising political movement sharply questions established legal principles, the Supreme Court often defends the old order by launching a preemptive strike to defeat the constitutional insurgents . . .”).

69 See Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 617–19 (2005) (charting the increasing average length of tenure).

4. Nationally Uniform Regulatory Policy

Still another rationale for deference—and the rationale that has the strongest hierarchical slant of all—is the argument from national uniformity. This argument, which is probably most closely identified with Peter Strauss,⁷⁰ begins with the premise that there are good reasons to want federal law to be uniform throughout the country and then adds the observation that the Supreme Court’s limited docket renders it unable to ensure such uniformity. Congressional creation of an administrative agency with rulemaking powers can help achieve nationwide uniformity, of course, but the agency might fail in its task if lower courts across the land review the agency’s interpretations *de novo*, thus substituting their own (predictably disuniform) preferred readings. If, by contrast, courts are required to *defer* to the agency’s single nationwide interpretation, then uniformity can be achieved without (as much) Supreme Court appellate intervention. A doctrine of deference therefore secures national uniformity where Supreme Court review cannot.⁷¹

When one thinks carefully about this rationale for deference, it turns out that the rationale justifies deference only by lower courts. They, after all, are the potential source of the disuniformity problem. The Supreme Court, like the administrative agency, has a nationwide jurisdiction, so whatever interpretation it chooses will be nationally uniform. Uniformity, therefore, does not provide a reason for the Supreme Court itself to defer.⁷²

5. Flexibility and Statutory Updating

Statutes tend to be long-lived, and a statute that works well when enacted risks becoming ill-fitting or counterproductive as the years go by. Congress certainly has the authority to update legislation in light

⁷⁰ Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105, 1121–22 (1987).

⁷¹ One can certainly question whether any particular matter needs to be governed by nationally uniform law or, more broadly, whether uniformity is as compelling a judicial systemic value as it is often made out to be. See generally Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (critically assessing arguments for uniformity). But few would deny (and Frost does not deny) that some things ought to be nationally uniform. Given that objective, deference to a national administrative agency is a sensible way to attain it.

⁷² Other scholars have noted this point as well. See 1 PIERCE, *supra* note 11, at 223 (observing that the uniformity advantage stemming from *Chevron* is inapplicable to the Supreme Court itself); Elhauge, *supra* note 39, at 2134 (“[U]niformity [does not] explain why the U.S. Supreme Court itself defers to agency interpretations . . .”).

of changes in the social and legal landscape. But given that Congress often does not do so, the question then becomes which other institution—courts or agencies—will take primary responsibility for updating. Many commentators have thought that agencies are better suited for guiding statutory evolution over time.⁷³ The agencies' comparative advantage in this regard provides another rationale for judicial deference to agency interpretations, including new and shifting interpretations.

The agencies' advantage in updating derives in part from their expertise and accountability, both of which were discussed above, but another important factor is cross-institutional variation in norms of consistency.⁷⁴ Within the judiciary, lower courts are absolutely bound by the prior decisions of higher courts,⁷⁵ and although the doctrine of *stare decisis* does not absolutely forbid a court from overruling its own precedents, a court will not overrule itself without a strong justification.⁷⁶ Indeed, the doctrine of *stare decisis* is supposed to have “special force” when it comes to prior decisions interpreting statutes.⁷⁷ Thus, whatever their other virtues, institutions governed by norms of *stare decisis* are not well suited to adapting to changing circumstances.

The norm of *stare decisis* does not govern agencies, at least not in the strong way it governs courts. Subject to the usual duties to follow

73 E.g., Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, ISSUES IN LEGAL SCHOLARSHIP art. 2 (2002); Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 292 (2001); Cass R. Sunstein, *Is Tobacco A Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1058–63 (1998).

74 Cf. *Neal v. United States*, 516 U.S. 284, 295–96 (1996) (contrasting agencies and courts with respect to *stare decisis*).

75 See *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (“[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”).

76 See *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201–02 (2006) (statement of Stevens, J., respecting the denial of the petition for writ of certiorari) (stating that *stare decisis* controls even when the Justice thinks the case was wrongly decided); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (“[E]very successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.”). In the federal courts of appeals, the special justification required for overruling circuit precedent is implemented not just through doctrinal formulations but through institutional mechanisms, such as requiring formal or informal en banc proceedings in order to overrule. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–800 (2012) (discussing circuit court practices of *stare decisis*). District court decisions lack binding force even in the rendering court, though courts have occasionally made statements suggesting the contrary. *Id.* at 789, 800–04.

77 *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

certain procedures and reach a reasonable position (non-trivial requirements, to be sure), agencies are allowed to change their legal interpretations and enforcement priorities.⁷⁸ “[C]hange is not invalidating,” the Supreme Court has said, “since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”⁷⁹ Further, in recognition of the need to prevent regulatory policy from becoming frozen in place after initial encounters with the judiciary, the Supreme Court has held that agencies can effectively displace prior *judicial* statutory decisions, so long as the prior decision did not purport to discern the statute’s unique meaning. As the Court explained in the *Brand X* case, “Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”⁸⁰

As with other rationales for deference, considerations surrounding statutory updating apply differently to different courts. If all federal courts throughout the hierarchy construed statutes authoritatively, agency flexibility would be seriously and quickly curtailed.⁸¹ Absent congressional action or judicial overruling—both of which are difficult⁸²—initial judicial interpretations would remain in force despite changes in the broader legal landscape or new notions

78 See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009) (concluding that an agency’s shift in enforcement policy did not violate the Administrative Procedure Act’s “arbitrary [or] capricious” standard of review). *Chevron* itself involved a change in the agency’s position. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 857–58, 863–64 (1984).

79 *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996). This is not to say that agency inconsistency is irrelevant. Inconsistency explicitly counts against the persuasiveness of the agency’s position according to the less deferential regime of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (referring to the value of “consistency with earlier and later [agency] pronouncements”), and inconsistency reduces the agency’s actual prospects for judicial validation even when *Chevron* applies. See Eskridge & Baer, *supra* note 1, at 1148–51. See generally Anita S. Krishnakumar, *Longstanding Agency Interpretations* 7–8 (St. John’s Sch. of Law Legal Studies Research Paper Series, Paper No. 13-0002, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224066 (arguing that longstanding agency interpretations merit heightened judicial deference).

80 *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

81 See Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1275–76, 1302–06 (2002).

82 It is true that district court decisions typically lack binding precedential effect, and in that sense district courts could be dynamic updaters. But even when administrative cases begin in the district court (which many do not, see *infra* subsection II.A.2), the legal issues in major administrative cases are particularly likely to be appealed to the courts of appeals, where *stare decisis* does apply.

of wise policy. Agencies could respond with an aggressive practice of non-acquiescence,⁸³ but this raises its own difficulties and would provide only a partial solution. The ossification problem would not be nearly as serious if only Supreme Court interpretations authoritatively fixed statutory meaning. The Court's decisions are few and often very slow in coming, so agencies would not be so hemmed in by precedents. The interpretations the Court did issue might be few enough and salient enough that Congress could fit them on its agenda for possible legislative override—or at least this is much more plausible than it would be for lower-court decisions. Without going so far as to conclude that *Brand X* and associated doctrines should not apply to the Supreme Court at all,⁸⁴ one can at least say that the argument for allowing agencies to trump courts applies more forcefully in the lower courts.

6. Application to Judicial Review of Other Agency Activities

Agencies engage in many different activities, of which issuing legal interpretations is just one. They also make, among other things, factual determinations and various sorts of discretionary policy judgments. The theoretical case for hierarchically variable deference applies, in its essentials, to these activities too.

Consider first the matter of agency policymaking discretion, which is typically reviewed under the catchall “arbitrary and capricious” standard.⁸⁵ To some extent, an agency's exercise of discretion shades into statutory interpretation, for an agency's discretion is constrained by the statutory background. Thus, an agency's exercise of discretion can be set aside if (among other things) it relies on factors that the statute forbids or lacks a reasonable relationship to the statutory objectives.⁸⁶ To the extent that discretion is an exercise in statu-

83 See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (describing and evaluating the practice of nonacquiescence by administrative agencies).

84 Cf. *Brand X*, 545 U.S. at 1003 (Stevens, J., concurring) (suggesting that the Court's reasoning would not necessarily apply in a case in which the prior judicial precedent came from the Supreme Court rather than from a lower court); Jennifer J. McGruther, Note, *Chevron vs. Stare Decisis: Should Circuit Courts Follow Judicial Precedent or Defer to Agencies as Mandated in Chevron U.S.A., Inc. v. NRDC?*, 81 WASH. U. L.Q. 611, 629–30 (2003) (arguing for treating Supreme Court and lower court precedents differently, in a pre-*Brand X* analysis). I return to issues surrounding the *Brand X* doctrine in *infra* subsection II.B.2.a.

85 5 U.S.C. § 706(2)(A) (2012); see Bressman, *supra* note 22, at 177.

86 See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); Bressman, *supra* note 22, at 181–83.

tory interpretation, the arguments adduced above show that lower courts should be especially solicitous of the agency's understanding of its statute. At the same time, to the extent that the exercise of agency discretion is instead just a matter of policy choice, no court has much warrant to set it aside, but higher courts at least have somewhat greater policymaking competence on both technical and democratic grounds.

Judicial review of agency factual determinations is, at least at first glance, harder to fit into an account requiring greater deference in lower courts. Indeed, if there were to be any hierarchical variation, it might seem that lower courts—trial courts in particular—should be *less* deferential than higher courts in this domain. That view seems to follow from trial courts' comparative institutional advantage over appellate courts in dealing with facts. But that thinking moves too fast. It is true that trial courts have an institutional advantage in fact-finding.⁸⁷ But fact-finding is not actually at issue here; *review of fact-finding* is.⁸⁸ With rare exceptions, review of agency factual determinations does not involve hearing witnesses or taking fresh evidence, which are the kinds of activities for which trial courts are better situated than appellate courts.⁸⁹ Rather, what is usually involved is the *appellate* activity of *reviewing* a cold record to determine if a previous decision maker's findings are sustainable in light of the record that decision maker compiled.⁹⁰ Moreover, the kinds of factual disputes at issue in administrative cases are frequently not simple historical facts—e.g., was the stoplight red?—but instead concern complicated technical or predictive judgments embodied in documentary evidence. Thus, when it comes to reviewing agency factual determina-

87 See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (referring to the “superiority of the district court’s factfinding ability”); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759 (1982) (“The most notable exception to full appellate review is deference to the trial court’s determination of the facts. The trial court’s direct contact with the witnesses places it in a superior position to perform this task.”).

88 See, e.g., *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (“Generally speaking, district courts reviewing agency action under the APA’s arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.”).

89 See Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 444–66 (2004) (emphasizing the limited range of factual issues regarding which trial courts have institutional advantages).

90 That is, judicial review of agency action typically occurs in the context of a closed record compiled by the agency. See *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); see also 2 PIERCE, *supra* note 11, § 11.6, at 1047 (discussing the record rule).

tions on an administrative record, we should expect competence to increase as one moves higher in a judicial system because trial courts' core competencies are not implicated and because appellate courts have the benefit of more internal and external resources, time, and deliberation.

Despite the somewhat greater competence of higher courts when it comes to reviewing agency factual findings, there is a countervailing systemic consideration that cuts against frequently conducting review of factual findings in a high court like the Supreme Court. Factual findings, or at least most of them, are just *less important* in the grand scheme of things. The question whether, as a matter of historical fact, a certain person dumped pesticides into a river is important to the people involved but not very important from the point of view of the legal system as a whole. It is not the sort of question to which one would expect or desire the Supreme Court to devote much effort.⁹¹ Of course, it is occasionally true that factual or quasi-factual determinations have broad importance—such as with the question whether greenhouse gas emissions endanger public health through their climate-changing effects.⁹² The best way to deal with the tension between the greater competence of a high court to review factual determinations and the typically low systemic value of having high courts conduct such review is not to attempt to calibrate the standards of review to the importance of the decision, however. Rather, the better approach works through the mechanism of case selection. That is, the Supreme Court would not and should not take many cases involving merely factual disputes⁹³—though in the rare instances it does, it could properly exhibit less deference to the agency than could a lower court.

91 *Cf.* SUP. CT. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

92 *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009); *see also* Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 116 (D.C. Cir. 2012) (upholding the EPA’s endangerment finding).

93 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490–91 (1951) (“Our power to review the correctness of application of the [substantial evidence] standard ought seldom to be called into action. . . . This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.”).

C. *Some Initial Objections to Heterogeneity*

The discussion so far has shown that the various rationales for judicial deference apply differently to different courts. There are a number of steps that one has to take to get from that insight to a prescription about what to do. The strongest objections to a regime of hierarchically variable deference are likely to involve the practicalities and the consequences of implementation. Implementation is discussed below, and pertinent objections and countervailing values (like workability and simplicity) are considered there.⁹⁴ Nonetheless, the theoretical case for variable deference should acknowledge some more abstract jurisprudential objections here.

The first such objection can take a few forms, and it can derive from quite disparate jurisprudential foundations (or, for many people, deep intuitions about the essential sameness of all judicial power), but the basic idea is that there is a single right answer regarding the proper level of deference. This objection does not focus on the contents of any particular regime of heterogeneous interpretation but rather assails the idea of heterogeneity *per se*.

This sort of objection would have quite a bit of appeal if doctrines of deference were primarily derived from, say, the Administrative Procedure Act. That statute, as noted, does not distinguish between courts when it sets forth its standards of review.⁹⁵ But our doctrines of deference do not primarily spring from the APA or like sources. *Chevron* did not even cite the APA standards.⁹⁶ *Skidmore* could not cite the APA, because *Skidmore* predated the statute by a few years.⁹⁷ Rather, the law in this area is (for better or worse) largely judicially crafted, reflecting judicial assessments of policy and prudence.⁹⁸

94 See *infra* Section II.B.

95 See *supra* note 28 and accompanying text.

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

97 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

98 *Supra* subsection I.B.1. Commentators disagree over whether this is a good or a bad thing. Compare Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1293-94 (2012) (describing the common law nature of administrative law as generally legitimate and anyway inevitable), with Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 34 (1996) (sharply criticizing the Supreme Court for neglecting the APA), and John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 114-20, 189-99 (1998) (decrying the fact that standards of review have departed so far from the text of the APA and lauding some tentative signs of greater adherence to the text).

To be clear, it is not the mere fact that doctrines of deference are judicially created that defeats the single-right-answer objection to heterogeneity. After all, much law is judge-made, and yet we generally think that the common law announced by a high court is the law for the courts below it too. (A supreme court would not tell lower courts to apply contributory negligence while it applies comparative negligence, for instance.) The key feature of the judicially crafted law of deference that sets it apart from most other judge-made law (of contracts, torts, or whatever subject) is that the considerations informing the creation of the law of deference are essentially and distinctively judicial-institutional in nature. If the factors shaping standards of deference are rooted in the institutional characteristics of courts (especially as compared to agencies), then it is altogether sensible that the doctrine could vary as courts themselves vary.

Indeed, heterogeneity in standards of deference is not outlandish. Outside of the context of review of agency action, there are already instances in which standards of judicial scrutiny self-consciously vary as one moves up the judicial hierarchy. To pick an example hiding in plain sight, consider the doctrine of precedent. The Supreme Court's holdings are conclusive in lower courts.⁹⁹ In the Supreme Court itself, by contrast, its precedents receive a measure of deference but are not absolutely binding.¹⁰⁰ The binding law from the point of view of a lower court can thus differ from the law as viewed and applied by the Supreme Court—and thus the Supreme Court can reverse even when the lower court did not err. Perhaps something similar can be true of the judiciary's treatment of agency "precedents": great deference in lower courts but just some degree of respect from the Supreme Court. Consider as well an example from federal habeas corpus: all federal courts apply the same deferential standard in reviewing state convictions, but the Supreme Court is the sole creator of the definitive federal law that can invalidate a conviction.¹⁰¹

99 See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.”); *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

100 See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command”); *Patterson v. McLean Credit Union*, 485 U.S. 617, 618–19 (1988) (listing instances in which the Court overruled previous decisions). Similarly, the Supreme Court gives its summary dispositions little precedential value, but they are nonetheless binding on the lower courts. See *Colo. Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 913 (1976) (Brennan, J., dissenting from the denial of certiorari).

101 See 28 U.S.C. § 2254(d)(1) (2006 & Supp. V 2012) (stating that a state decision can be overturned on habeas only if it is “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” (emphasis added)).

A second objection to hierarchical variation would charge that it causes unequal treatment across litigants and cases, and, worse, that it does so intentionally. But this objection is not sound for a few reasons. Norms of equal treatment apply to litigants who are similarly situated, and they demand that like cases be treated alike. Under a regime of variable deference, no litigant would be marked with an unfavorable standard of review wherever he moves through the judicial system. It is true that different standards would apply to litigants at different levels of the system, but the bare claim of inequality begs the question whether cases at different places in the system are in fact alike. The argument of this Article is that the cases are not relevantly alike, given differences in the institutional contexts and roles of different courts. Further, similar forms of unequal treatment are pervasive in the judicial system, including by design. The same conduct may be innocent under the law of one state but tortious or criminal under the law of another state; a litigant may lose because a lower court is bound by precedent that a high court would overrule if it considered the matter. Finally, it is worth observing that the introduction of hierarchical variation in standards of review could—depending on how it is implemented—actually reduce arbitrary disparities in substantive law, such as by reducing circuit splits on matters of federal law.¹⁰² In other words, hierarchical heterogeneity could promote geographic equality.

None of the above is to say that there are no limits on the variations that a regime of deference could contain. Certain cross-court variations in deference could threaten the practical workability of the appellate system. Moreover, setting aside objections to heterogeneity *per se*, any particular regime of hierarchically variable deference would be objectionable if it called upon certain courts to employ a standard of deference that was itself objectionable. For example, extreme deference by lower courts could threaten due process and Article III values or stretch the language of the APA past the breaking point. But whether a system of hierarchically variable deference is vulnerable to all of these objections depends on what exactly the system looks like. It is therefore time to consider how, if at all, to implement hierarchically variable deference.

II. POSSIBILITIES FOR INSTITUTIONAL IMPLEMENTATION

If the case for hierarchically variable deference is appealing in principle, could our judicial system implement it in practice? This Part presents some structural and doctrinal possibilities for realizing a

102 See *infra* subsection II.B.2.

hierarchically variable regime. First, however, it describes some ways in which our judicial system manifests hierarchical variation even now. The analysis of this Article helps to explain and justify these existing patterns of variation.

A. *Ways in Which Our System Already Displays
Hierarchically Variable Deference*

I. Unofficial Doctrinal Divergences?

As stated at the outset, official doctrines of deference do not openly embrace hierarchical heterogeneity.¹⁰³ Nonetheless, standards of review may be hierarchically variable in practice. Specifically, the Supreme Court may already give agencies less deference than the lower courts typically do. Admittedly, it is hard to be sure: despite the significant and still growing body of empirical literature on deference,¹⁰⁴ the existing research does not allow firm conclusions about differences across courts. Simply comparing agency win rates in different courts will not suffice. For one thing, the Supreme Court's docket is small and highly unrepresentative, reflecting the strategic choices of litigants to seek certiorari and the Justices to grant it. Moreover, it is hard to calculate true levels of deference in any court, for courts might cite a deference regime (or mention facts that would trigger deference) *because* they plan to defer, rather than the other way around. (Thus, a 100% agency win rate in cases citing *Chevron* would not necessarily reveal great deference if *Chevron* went ignored in similar cases that the agency lost.) Nonetheless, despite these complications, there is at least some reason to believe that the Supreme Court is not as deferential as a faithful application of current doctrine would direct. Eskridge and Baer present evidence that the Court does not invoke *any* deference regime in the majority of cases that involve agency interpretations; this frequently happens even in cases that are, according to prevailing doctrine, *Chevron*-eligible.¹⁰⁵ The failure to invoke a deference regime is, in turn, associated with lower agency win rates.¹⁰⁶ Further empirical analysis by Raso and Eskridge leads them to the conclusion that the Justices invoke deference regimes episodically and inconsistently, which is not what one would expect if the

103 *Supra* note 3 and accompanying text.

104 For a recent summary of the research, see Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77 (2011); *see also* sources cited *supra* note 67 (citing various empirical analyses of judicial decision-making in agency cases).

105 *See* Eskridge & Baer, *supra* note 1, at 1090, 1120–21, 1124–25.

106 *Id.* at 1142–44.

Court regarded deference regimes as having true *stare decisis* effect.¹⁰⁷ By way of contrast, there is at least some evidence that the Supreme Court's deference doctrines do have a substantial effect in the lower courts, though to be sure the findings are hardly definitive.¹⁰⁸

107 Raso & Eskridge, *supra* note 67, at 1733–34, 1817. Richards and his co-authors report that the Court is less likely to defer in rulemaking cases than in non-rulemaking cases, which suggests to them that *Chevron* exerts less influence when the stakes are high. Richards et al., *supra* note 67, at 456.

108 See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1238, 1271, 1280 (2007) (finding that “most judges [on the courts of appeals] perceive *Skidmore* as an actual restraint” and that “*Skidmore* review is highly deferential”); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1029–42, 1057–59 (finding that lower courts other than the D.C. Circuit significantly increased the rate at which they affirmed agencies in the wake of *Chevron*, though the effect dissipated somewhat in 1988, the last period in their dataset); see also Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 749 (1995) (reporting his impression that “[t]he *Chevron* test has largely realized its potential at the circuit court level”); cf. Revesz, *supra* note 67, at 1729–30, 1747–50, 1767 (finding that ideological effects in the D.C. Circuit were much less pronounced in statutory interpretation cases governed by *Chevron* than in process-based challenges to agency action, and attributing the difference to the greater risk of Supreme Court review in the former context compared to the latter). Although Miles and Sunstein found that overall agency validation rates in the courts of appeals were similar to the rates in the Supreme Court, Miles & Sunstein, *supra* note 67, at 849, that does not mean that the two kinds of courts are similarly deferential, and Miles and Sunstein do not make such a claim. Their dataset for the courts of appeals (but *not* the Supreme Court) was limited to two subject areas that were expected to be especially ideologically contentious, which probably reduced the level of deference the courts of appeals displayed. See *id.* at 843, 848.

As noted, the evidence on whether deference doctrines actually affect judicial decisions is complex and not wholly conclusive. Because *Chevron* is regarded as such a landmark precedent, it presents an attractive target for an event study that compares outcomes in lower courts immediately before and after, which was the approach taken in Schuck & Elliott, *supra*. But this strategy is complicated by the fact that what we now know as the *Chevron* doctrine did not immediately take shape but rather developed gradually in fits and starts, in substantial part through the work of lower courts. See generally Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 4–5 (2013) (tracing the early history of the *Chevron* doctrine). Yet if one looks over a longer time horizon, one confronts more confounding variables (such as changes in the composition of the judiciary) and the possibility of dynamic effects of *Chevron* itself. Regarding the latter possibility, a steady affirmation rate over time is consistent with increasing judicial deference if agencies become more aggressive in their interpretive positions in response to *Chevron*. See E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 3, 11–12 (2005) (suggesting that agencies did just that).

Eskridge and Baer float the possibility that the Court regards deference regimes as guides for lower courts but does not regard them as binding or necessary in the Court itself.¹⁰⁹

Even in the absence of definitive statistical evidence, there are some circumstantial and structural reasons to suspect that the Supreme Court is less deferential than lower courts. First, because the Supreme Court has no reviewing court above it, it need not fear reversal for ignoring or misapplying deference regimes in order to reach particular favored outcomes. Second, the Justices might feel (with some justification) that their relatively favorable decision-making environment—their advantages in resources, time, perceived expertise, and so forth¹¹⁰—makes deference less necessary for them than for their more “limited” colleagues in the lower courts. Third, it is easier to write an opinion affirming an agency than an opinion reversing it, and so one imagines that deference is an especially appealing path of least resistance for a busy lower court that lacks the luxury of a discretionary docket.¹¹¹

If it is true that the Court flouts its own deference doctrines, one response is to lament the Court’s disobedience. Yet the analysis of this Article suggests another possibility: that the Court’s vice is actually a virtue, because deference is not as appropriate for the Supreme Court. That is, this Article can help reconcile us to a feature of existing practice that might otherwise trouble us. And were the Court candidly to announce that it follows different rules, that might reduce the extent to which the Court’s non-deferential decisions in administrative cases can mislead the lower courts about how the lower courts should behave.

Similar comments could be made about the United States Court of Appeals for the District of Columbia Circuit. There is evidence that the D.C. Circuit tends to be less deferential than other courts of appeals.¹¹² Perhaps that court’s posture reflects overconfidence or

109 Eskridge & Baer, *supra* note 1, at 1119–20; *see also* Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824–25 (1990) (stating that, from his position as an appellate judge, he “would not be surprised” if the Supreme Court showed itself “less willing to apply *Chevron* deference rigorously to itself if it is uncomfortable with a policy result on an issue of particular interest”).

110 *See supra* subsections I.B.2–5 (describing these advantages).

111 *See* Pierce, *supra* note 104, at 90–93; *see also* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1115, 1130 (2011) (finding evidence that courts of appeals deferred to district courts more when caseloads increased).

112 *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 794–802 (2008); Pierce, *supra* note 104, at 90–93.

undue activism,¹¹³ but there may be something to say for a relatively assertive stance when one considers the justifications for judicial deference. The D.C. Circuit's semi-specialized docket and lower caseload¹¹⁴ arguably confer expertise and technical competence in comparison to the regional circuits. The politicized and nationalized nature of the selection process for the D.C. Circuit approximates the process for the Supreme Court, to which the D.C. Circuit is often regarded as a stepping stone.¹¹⁵ When the D.C. Circuit is the exclusive venue for a certain kind of case, as it sometimes is,¹¹⁶ there are no problems of uniformity. To the extent the D.C. Circuit is a "junior varsity" Supreme Court in terms of its institutional context and competencies,¹¹⁷ reduced deference vis-à-vis other lower courts is defensible. (One could generalize these points beyond the context of administrative review, of course, by considering other (semi-)specialized or expert courts like bankruptcy courts and the Federal Circuit.)¹¹⁸

113 Cf. Revesz, *supra* note 67, at 1771 (suggesting the possibility of reducing the D.C. Circuit's role in administrative review).

114 See Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y (forthcoming 2013) (manuscript at 10–13), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238049 (noting these features of the D.C. Circuit).

115 See, e.g., *The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary*, 107th Cong. 1–4 (2002) [hereinafter *Hearing*] (Statement of Hon. Charles E. Schumer, Chairman of the Subcommittee) (noting that many Supreme Court Justices have formerly served on the D.C. Circuit and that many cases of national import are considered by the D.C. Circuit, including administrative agency review cases, which Congress sometimes mandates must be heard by the D.C. Circuit).

116 E.g., 42 U.S.C. § 7607(b) (2006 & Supp. V 2012) (various EPA actions under the Clean Air Act); 47 U.S.C. § 402(b) (2006 & Supp. V 2012) (certain FCC actions); see Fraser et al., *supra* note 114, at 19.

117 See *Hearing*, *supra* note 115, at 1–4.

118 Cf. Ted L. Field, *Hyperactive Judges: An Empirical Study of Judge-Dependent "Judicial Hyperactivity" in the Federal Circuit*, 38 VT. L. REV. (forthcoming 2014) (manuscript at 66–71), available at <http://ssrn.com/abstract=2245093> (finding that Federal Circuit judges with prior patent law experience are more "judicially hyperactive" in patent cases than judges without such prior experience); Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1784–86, 1804 (2008) (finding that courts of appeals affirm bankruptcy appellate panels at higher rates than they affirm district courts in bankruptcy cases); see also *supra* notes 51–52 and accompanying text (discussing variations in judicial expertise).

2. Current Patterns of Jurisdictional Allocation

A second way in which our system already displays hierarchical variation comes in the form of congressional decisions about allocating jurisdiction. The law governing jurisdiction to review agency action is complex.¹¹⁹ It could hardly be otherwise, given that administrative action is itself ubiquitous and multifarious. The pertinent feature of the jurisdictional pattern for present purposes is that Congress has arranged the jurisdictional statutes so that many cases reviewing agency action bypass the district courts and begin in the courts of appeals.¹²⁰ The usual explanation for this arrangement is that proceedings to review agency action have an appellate character.¹²¹ A court typically reviews agency action based on the record compiled by the agency, much as an appellate court reviews the findings and conclusions of a trial court.¹²² The distinctive capacity of trial courts to take evidence and adjudicate facts is unneeded in most administrative cases, and so beginning there merely causes duplication and delay.¹²³

This Article illuminates an additional set of justifications for Congress's frequent (though not universal) decision to bypass the district courts. To begin, it is not just that review of agency action often has an appellate character but, as explained above, it also often has a *political* character; to that extent, district judges have less business setting aside the choices of national administrators.¹²⁴ In addition, cases reviewing agency interpretations are legally and technically complex in ways that may tax the resources of busy trial judges.¹²⁵ Further, the sheer numerosity and heterogeneity of district courts threatens a particularly problematic form of geographic disuniformity.¹²⁶ These factors weigh in favor of strong deference, and so the value of having

119 For a summary, see generally 2 PIERCE, *supra* note 11, chs. 11, 15 (discussing various procedural aspects of judicial review of adjudications and rulemaking proceedings); 3 *id.* chs. 16, 18 (discussing judicial standing and remedies).

120 *E.g.*, 15 U.S.C. § 78y(a)-(b) (2006) (certain orders and rules of the SEC); 28 U.S.C. § 2342 (2006) (certain orders of the FCC and several other agencies); 42 U.S.C. § 7607(b) (various EPA actions under the Clean Air Act).

121 *See, e.g.*, Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744-45 (1985); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 794-95 (7th ed. 2011); 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 71-72 (3d ed. 2010); Curtie & Goodman, *supra* note 51, at 5-6.

122 *See supra* notes 87-90 and accompanying text.

123 *See Fla. Power & Light*, 470 U.S. at 744-45; 3 KOCH, *supra* note 121, at 71-73.

124 *See supra* subsection I.B.3.

125 *See supra* subsection I.B.2.

126 *See supra* subsection I.B.4.

judicial review begin in those courts decreases. Thus, Congress is right to bypass the district courts in many administrative cases.¹²⁷

B. Potential Changes to Current Law

One could stop there, treating hierarchical heterogeneity as a theory that helps to justify and to explain certain aspects of current practice. But we can also ask whether it would be desirable to change the law in a (more) hierarchically variable direction, and if so, how?

Translating the theoretical case for variable deference into a concrete implementation plan involves several complexities. For one, some variables are continuous (e.g., how much weight to give an agency interpretation), while others are lumpy or dichotomous (e.g., which deference regime applies or whether a court has jurisdiction). In the latter situation, one cannot make adjustments with perfectly calibrated smoothness; instead, one has to decide whether the case for variable deference is strong enough to take a certain step or not. And because each court is part of a larger system, one cannot necessarily assume that changes at the court level will have corresponding, easily predictable effects at the system level.

In addition, the decision to embrace hierarchical variation does not by itself specify the ideal end state of the system and how it should differ from the status quo. If one begins with a baseline in which all courts display basically the same level of deference (which, as just discussed, might not actually describe the current reality), one could implement hierarchical variation from either end: by getting lower courts to defer more or instead by having higher courts defer less or indeed not at all. The choice between those two approaches—ratcheting deference up in some places versus ratcheting it down in others—implicates both normative and empirical questions. On the normative side, we would need to decide how much deference is ideal. Does judicial oversight usefully contribute to balanced government and the formulation of rational policy? Or does judicial review hamper the regulatory system by inviting meddling from inexperienced generalists, or worse, agenda-driven partisans? Both views have forceful advocates.¹²⁸ On the empirical side, we would need to know how

¹²⁷ I return to the topic of jurisdiction—and recommend further reforms—in *infra* subsection II.B.1.a.

¹²⁸ The literature is large. For a sample of generally pro-agency perspectives, see 3 PIERCE, *supra* note 120, at 1568–82; VERMEULE, *supra* note 39, at 205–15; Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992). For some views emphasizing the

the levels of deference currently exhibited by various courts measure up against the ideal level the normative analysis specifies.

Those are all very hard questions, indeed some of the most difficult in administrative law. Certainly they cannot be resolved within the scope of this Article. (To state my own view for the sake of candor: I believe that regulatory activity already faces serious non-judicial checks—stalling by the Office of Management and Budget, de-funding by appropriations riders, intense lobbying and litigation threats by regulated industries, and so on—such that the comparatively greater risk comes from judicial review that is too tough rather than too lenient.) Recognizing that different readers will have different views on whether it would be desirable to increase or instead to decrease the overall amount of deference in the system (and if so, by how much), the following subsections will provide a menu of options. Some of the options contemplate changes in governing doctrine, while others operate on the structure of judicial system. Most of them involve increasing overall deference, though some of the mechanisms can be used to achieve the opposite result. And if judicial review already tends to display hierarchically variable impulses whether we like it or not, the mechanisms below could function as more transparent ways to channel those existing tendencies.

1. Non-Doctrinal Approaches

Probably the most obvious way to implement hierarchically variable deference is just to change the formal doctrines such that they call for varying degrees of deference in different courts. But of course each court is merely part of a system, and doctrinal variation can come into conflict with other values, such as the need for workable appellate review. As an illustration, imagine a judicial system with just two courts, where the lower court applies a more deferential (i.e. agency-friendly) standard than does the higher court. When a party challenging an agency regulation loses in the lower court, that party has a strong incentive to appeal to the higher court to get the benefit of its less agency-friendly standard. (In addition to the costs involved, there may be distributional concerns lurking here too, as some litigants and interests can afford multiple rounds of litigation better than others.)

value of judicial review, see William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2058–60 (2006); Farina, *supra* note 10, at 511–26; Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002).

If the agency flunks the higher court's tougher standard, then it seems the higher court should reverse, even though the lower court may have properly applied its (different, more agency-friendly) standard. That does not seem like a good system of appellate review. In such a system, the proceedings in the lower court are not only unnecessary, but also rather perverse. Why bother with them?

That question—*Why bother with the lower court?*—is a very good one. And one answer is, *Don't bother*. That is, we could simply eliminate review in the lower court. The more general point is that one can implement hierarchical variation not just doctrinally but jurisdictionally. To be clear, the difficulties confronting doctrinal implementation are not insuperable, and later we will explore some ways to realize doctrinal variation.¹²⁹ Nonetheless, structural fixes—altering jurisdiction for one but also changing the timing of review, changing voting rules, and the like—can avoid some of the difficulties that beset doctrinal implementation. Therefore, let us begin with some non-doctrinal means of implementing hierarchical variation. These non-doctrinal measures can represent solutions in and of themselves, and they can also work together with doctrinal solutions to make the latter more workable.

a. Implementing Deference by Curtailing Jurisdiction

Agency interpretations come before the courts in a variety of settings. These include suits by interested parties challenging the facial validity of new regulations in advance of any particular agency enforcement of the regulations, suits in which the target of a particular enforcement action or agency adjudication contests the agency's determination that it has violated a statute as construed by the agency, and private litigation that does not directly seek review of agency action but in which agency interpretations of a governing statute may affect the outcome of the suit. Common examples of the last category include, among many other things, employment discrimination cases that implicate EEOC interpretations of antidiscrimination statutes¹³⁰ and product liability suits that implicate whether a drug or device manufacturer complied with FDA requirements.¹³¹ Given the fre-

129 See *infra* subsection II.B.2.

130 *E.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395, 397 (2008); *Smith v. City of Jackson*, 544 U.S. 228, 243–45 (2005) (Scalia, J., concurring in part and concurring in the judgment); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430–31 (1975).

131 *E.g.*, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2574–76 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326–30 (2008).

quency and variety of judicial encounters with agency interpretations, it will be difficult to devise simple prescriptions for reform.

As a way to make some progress, let us set aside the ordinary private litigation in which agency interpretations are relevant sources of law and consider instead the problem of jurisdiction over suits that seek review of agency action. As noted already, under current law many proceedings for review of agency action already skip the district courts and begin directly in the courts of appeals.¹³² Not all of them do, however, and there is often good reason to lodge jurisdiction initially in the district courts, such as when a particular administrative scheme generates a vast number of low-stakes appeals that typically turn on retail-level factual particularities rather than matters of national policy. Lawsuits challenging Social Security eligibility determinations are an obvious example.¹³³ Nonetheless, there are plenty of instances in which current law allows suit in the district court even when a case challenges the wholesale legal validity of a newly promulgated agency regulation or policy.¹³⁴ Thus, the challenge to the Obama Administration's new rule on embryonic stem-cell research was initially heard in a district court, which preliminarily enjoined the rule before being reversed by the court of appeals.¹³⁵ District courts across the country are hearing many of the challenges to various regulations implementing the Affordable Care Act.¹³⁶ Similarly, the Securities and Exchange Commission's recent "resource curse" regulation, which requires companies in extractive industries to disclose payments to foreign governments, was reviewed in (and recently vacated

132 *Supra* subsection II.A.2.

133 *See* 42 U.S.C. § 405(g) (2006) (vesting jurisdiction in the district courts); *see also* 3 PIERCE, *supra* note 11, at 1681–82 (explaining that the jurisdictional decision is sensible because the cases are numerous and fact-specific and the administrative record is not necessarily closed to further development). *See generally id.* at 1680–98 (discussing the choice between district court and circuit court jurisdiction).

134 Even when no subject-specific statute vests jurisdiction in the district courts, those courts have jurisdiction to review agency action by virtue of 28 U.S.C. § 1331, the general federal-question jurisdiction statute. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). Review in the district court is therefore the default result unless Congress affirmatively lodges jurisdiction directly in the court of appeals. *See Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007); *Dillard v. HUD*, 548 F.2d 1142, 1143 (4th Cir. 1977) (*per curiam*).

135 *See Sherley v. Sebelius*, 689 F.3d 776, 778–79 (D.C. Cir. 2012) (summarizing the case's procedural history).

136 *E.g.*, *Oklahoma ex rel. Pruitt v. Sebelius*, No. CIV-11-30-RAW, 2013 WL 4052610 at *2 (E.D. Okla. Aug. 12, 2013) (reviewing the IRS rule on tax credits for participants in insurance exchanges).

by) a district court.¹³⁷ District court review in these types of cases is problematic. As the Supreme Court itself has recognized, such proceedings typically have an appellate character and to that extent do not take advantage of the district court's special competency in factual development; indeed, the district court proceedings seem positively wasteful in light of the duplication of effort that will occur when the district court's decision is appealed (as it likely will be, given the stakes).¹³⁸

But that is not all. The arguments adduced in this Article provide additional grounds for criticism of district court jurisdiction. As Part I argued, the various considerations that support deference have particular force as one moves lower in the judicial system. District courts have lesser access to the resources, time, and information that would facilitate sound regulatory review. They have a weaker claim to have been democratically authorized to make national policy. And their numerosity exposes the regulatory system to idiosyncrasy and conflict.¹³⁹ True, a district court's judgment need not be, and often will

137 *Am. Petroleum Inst. v. SEC*, No. 12-1668 (JDB), 2013 WL 3307114 (D.D.C. July 2, 2013). For a sample of other recent or prominent examples, see *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–48 (1967) (allowing pre-enforcement review of FDA labeling regulation in district court); *Chamber of Commerce of the U.S. v. NLRB*, 856 F. Supp. 2d 778, 785–86 (D.S.C. 2012) (reviewing NLRB rule requiring employers to post notices of employee rights), *aff'd*, 721 F.3d 152 (4th Cir. 2013); *Koretoff v. Vilsack*, 841 F. Supp. 2d 1, 3–5 (D.D.C. 2012) (reviewing USDA rule), *aff'd*, 707 F.3d 394 (D.C. Cir. 2013); *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 633 (E.D. La. 2010) (reviewing moratorium on offshore drilling following Deepwater Horizon disaster); *Emily's List v. FEC*, 362 F. Supp. 2d 43 (D.D.C. 2005) (reviewing FEC rule), *aff'd*, 170 F. App'x 719 (D.C. Cir. 2005); *Defenders of the Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989) (reviewing Interior regulation pursuant to the Endangered Species Act's citizen suit provision), *aff'd sub nom. Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, 504 U.S. 555 (1992).

138 As the Supreme Court has explained:

The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking. Placing initial review in the district court does have the negative effect, however, of requiring duplication of the identical task in the district court and in the court of appeals; both courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.

Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); *see also Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (stating that a district court reviewing agency action “sits as an appellate tribunal,” measuring the agency record against the relevant legal standards); *Currie & Goodman*, *supra* note 51, at 17.

139 *Cf. 2 PIERCE*, *supra* note 11, at 1363–64 (noting the risks of vesting numerous district judges with the power to enjoin agency rules). The worry about a single district judge wreaking havoc on important national programs is not new. For a time, Congress provided that challenges to federal statutes should be heard before a three-

not be, the final word on the subject, but the district court's institutional limitations render it unlikely to add substantial value to the subsequent review to be conducted by the court of appeals (which will be *de novo* vis-à-vis the district court). Rather than lodging initial review in an inappropriate forum, it would make more sense simply to curtail district court jurisdiction, further shifting cases toward appellate courts.¹⁴⁰

Although Congress is ultimately responsible for allocating jurisdiction and could make some beneficial statutory adjustments, courts can play a role at the margins. When the law is unclear, courts should inform their jurisdictional decisions by considering the normative grounds disfavoring district court review. Such opportunities arise, for instance, in disputes over whether ambiguous jurisdictional statutes contemplate review in the district court or court of appeals for some type of administrative action.¹⁴¹ Less obviously, choices about the allocation of jurisdiction sometimes arise in cases involving ripeness and related doctrines surrounding the availability of pre-enforcement review. In *Abbott Laboratories v. Gardner*, the Supreme Court endorsed a generous version of reviewability, allowing regulated entities to seek review of new agency regulations before they were applied in an enforcement action.¹⁴² Some later cases take a narrower view of the availability of pre-enforcement review.¹⁴³ The Court's decisions about the availability of pre-enforcement review do not involve only the question of timing (though timing is certainly important). More

judge district court, and that legislation was largely triggered by what Congress perceived as hostility to the New Deal by some injunction-wielding district judges. See Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 610–19 (1938).

140 This recommendation is not limited to cases that present themselves purely as challenges to agency statutory interpretation. In the wild, suits challenging agency action often mix together various grounds of complaint: the agency violated the statute's clear terms under *Chevron* Step One, the agency did not interpret the statute reasonably at Step Two, the agency shifted course without adequate justification, the agency was arbitrary and capricious in its weighing of the facts and alternative approaches, etc. As noted above, competence to address all of those claims is typically lowest at the bottom of the judicial hierarchy. See *supra* subsection I.B.6.

141 See, e.g., *Natural Res. Def. Council, Inc. v. EPA*, 673 F.2d 400, 405 & n.15 (D.C. Cir. 1982) (citing functional considerations such as uniformity and comparative expertise in construing a statute so as to vest jurisdiction in the court of appeals); cf. *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1195 n.20 (D.C. Cir. 1995) (noting functional arguments for lodging jurisdiction in the court of appeals but explaining that the jurisdictional statute clearly provided for review in the district court).

142 387 U.S. 136 (1967).

143 E.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993).

pertinently for our purposes, these decisions are also sometimes choices about forum, such as where post-enforcement review is statutorily channeled to the court of appeals but a pre-enforcement challenge, if permitted, would be filed in the district court.¹⁴⁴ This Article's arguments against district court jurisdiction thus provide some qualified and indirect support to decisions narrowing pre-enforcement review, at least in those cases with forum implications.¹⁴⁵

Were Congress to further reduce the role of district courts in reviewing agency action, such legislation should not encounter constitutional objections. As discussed, Congress has already bypassed the district courts in many administrative cases,¹⁴⁶ and its constitutional authority over the lower courts empowers it to curtail their jurisdiction still further.¹⁴⁷

To be clear, the recommendation to curtail district court jurisdiction does not apply to every type of case. Some cases should stay in the district court. The fact-finding and case-development functions of a trial court would be needed, for instance, in ordinary civil suits between private parties that implicate agency interpretations, as well as in other cases in which there is no prior administrative record.¹⁴⁸

144 See, e.g., *Thunder Basin Coal*, 510 U.S. at 205–09 (concluding that provisions for challenging agency enforcement actions in the court of appeals precluded suits seeking pre-enforcement review in the district court).

145 Perhaps better still, given that pre-enforcement review is often valuable, would be for Congress to modify the jurisdictional statutes so as to more reliably provide for pre-enforcement review in the court of appeals (as opposed to the status quo in which statutory interactions and gaps sometimes leave the cases in the district court). See *supra* notes 133–38 and accompanying text.

146 See *supra* subsection II.A.2.

147 See *Sheldon v. Sill*, 49 U.S. (1 How.) 441, 448–49 (1850) (setting forth a broad statement of congressional power over the jurisdiction of the lower courts). A decision to divest both district courts and the courts of appeals of jurisdiction would present more serious difficulties. Divesting all the lower federal courts of jurisdiction to review agency action might mean the absence of *all* judicial review. First, the state courts, the availability of which one can usually assume, would be unattractive agents for supervising federal officials. See *Webster v. Doe*, 486 U.S. 592, 612 (1988) (Scalia, J., dissenting); see also RICHARD H. FALLON ET AL., *HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM* 402–08 (6th ed. 2009) (discussing limits on state court authority over federal officials). Second, the U.S. Supreme Court's original jurisdiction does not appear to encompass suits seeking initial review of administrative action. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–76 (1803) (holding that the Supreme Court's original jurisdiction did not extend to mandamus action against Secretary of State); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 742 n.472 (2004).

148 A difficult case is presented by the "citizen suit" provisions found, among other places, in some environmental laws. These provisions, which allow private parties to enforce the statutes against private parties or the government, lodge jurisdiction in

b. Implementing Deference Through Voting Rules and Related Structures

Another non-doctrinal method of implementing hierarchically variable deference is to change the voting rules in lower courts in cases challenging agency action. This idea builds on and modifies a proposal by Gersen and Vermeule.¹⁴⁹ Instead of asking whether the agency's view represents a reasonable reading of an ambiguous statute (as under current deference doctrine), Gersen and Vermeule would have judges ask whether the agency's reading is correct—but the agency would be upheld unless a supermajority of the judges found the agency's view incorrect (e.g., 6–3 on the Supreme Court, 3–0 in the courts of appeals).¹⁵⁰ That is, hardwired voting rules can operate as a (possibly more efficacious) substitute for doctrines of deference.¹⁵¹

Gersen and Vermeule's idea can be adapted so as to achieve hierarchically variable deference. Although they support the use of supermajority rules on all multi-member courts, an alternative is to apply the supermajority rule only to the courts of appeals—requiring

the district courts. *E.g.*, 16 U.S.C. § 1540(g) (2006) (Endangered Species Act); 42 U.S.C. § 7604(a) (2006) (Clean Air Act). In some instances, the district court forum is necessary in order to produce a factual record, such as when the plaintiff accuses a private party of violating the law in the absence of agency proceedings. In other instances, however, jurisdiction in the district court seems superfluous and arguably inappropriate, as when a suit challenges the validity of an agency regulation or other on-the-record action. *See, e.g., In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 68 (D.D.C. 2011) (reviewing a rule listing polar bears as a threatened species), *aff'd*, 709 F.3d 1 (D.C. Cir. 2013); *Defenders of the Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989) (reviewing a regulation concerning territorial scope of Endangered Species Act), *aff'd sub nom. Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, 504 U.S. 555 (1992).

149 Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007).

150 *Id.* My brief comments in this subsection are not meant as a comprehensive defense of converting deference into a voting rule. Rather, the point is to show how such a proposal could be adapted so as to implement hierarchical variation. For criticisms of Gersen and Vermeule's proposal, see Richard J. Pierce, Jr., *Chevron Should Not Be Converted into a Voting Rule: A Response to Gersen and Vermeule's Proposal*, 116 YALE L.J. POCKET PART 248 (2007); Matthew C. Stephenson, *The Costs of Voting Rule Chevron: A Comment on Gersen and Vermeule's Proposal*, 116 YALE L.J. POCKET PART 238 (2007).

151 Gersen & Vermeule, *supra* note 149, at 679, 684–86; *cf.* Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 98 (2003) (observing, in the context of constitutional review by the Supreme Court, that “one can calibrate judicial review's degree of deference either through internalized norms operating on individual Justices, or through external rules governing the corporate aggregation of individual votes, or through both”).

unanimous panels to overturn an agency interpretation—while leaving majority voting in place in the Supreme Court.¹⁵² Variations on this approach would manipulate other structural features of the reviewing court, such as panel size (e.g., requiring a 4-1 vote on an expanded court of appeals panel).¹⁵³ One could also combine approaches, requiring the court of appeals to employ both doctrinal deference (as today) *and* a supermajority voting rule.¹⁵⁴ In other words, the court of appeals could overturn an agency interpretation only if all the judges on the panel determined that the agency's view conflicted with the clear text (or otherwise failed the relevant deference test).

2. Doctrinal Approaches

In addition to implementing deference through structure, one could modify doctrine in a hierarchically variable way. This subsection describes several doctrinal options and then addresses how to reconcile doctrinal variation with competing values like simplicity and workability.

a. Specific Doctrinal Modifications

Doctrinal implementation is probably not as simple as just telling a particular court to defer more (or less). Consider the *Chevron* doctrine. That doctrine, or at least important parts of it, does not appear to lend itself to easy calibration. Under *Chevron*, the Step One inquiry is whether Congress has directly resolved the question at issue.¹⁵⁵ If Congress has done so, there is no room to defer to an agency view that contradicts Congress's determination. If we understand Step One as an independent judicial inquiry into statutory meaning that precedes consideration of the agency's position,¹⁵⁶ then it would seem difficult

152 Cf. Gersen & Vermeule, *supra* note 149, at 723 (noting the possibility of "mixed voting rules" but endorsing supermajority rules for all courts).

153 Aside from effects on the level of deference, enlarging panels increases ideological diversity and might thereby suppress the politicized decisionmaking that one can find on homogenous panels. See Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 355–61 (2012).

154 Cf. Gersen & Vermeule, *supra* note 149, at 693 (noting the possibility of such a combined approach).

155 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *supra* text accompanying notes 12–14 (describing the *Chevron* framework).

156 That does seem to be the most common way to understand it. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 998–99 (1992) (interpreting *Chevron* in this manner, and criticizing this sequential aspect of the doctrine).

to implement heightened deference at that stage. Heightened deference could come into play only if the court reaches Step Two, in which the court considers whether the agency's position is a reasonable response to the statutory ambiguity or gap identified at Step One.¹⁵⁷ But if the inquiry reaches Step Two, the agency is already likely to win.

Of course, one could try to reformulate or reconceptualize *Chevron* in a way that makes it easier to calibrate levels of deference. For example, we could jettison the two-step framework and understand *Chevron* as asking just one question about the degree of fit between the agency's interpretation and the court's own assessment of the best reading.¹⁵⁸ This conceptualization treats *Chevron* as a matter of degrees rather than as an on-off switch of statutory ambiguity. A highly deferential version of this conceptualization of *Chevron* would correspond to accepting a looser degree of fit: the agency can stray farther from the court's preferred reading without being reversed. Such a reformulation of *Chevron* would make it structurally similar to the *Skidmore* doctrine, which already appears to be a doctrine of degrees: the respect accorded the agency's views under *Skidmore* can, at least in theory, be continuously adjusted upward or downward as the circumstances warrant.¹⁵⁹

The basic limitation of implementing hierarchical variation in the ways discussed in the preceding paragraph, whether under *Chevron* or *Skidmore*, is that such efforts rely on verbal formulations that are inherently vague, perhaps ineffable.¹⁶⁰ What would it mean, as a prac-

But cf. Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1164–65 (2012) (arguing that the scope of the agency's room to maneuver under the governing statute—i.e., its "Chevron space"—might itself be influenced by agency views).

157 *Chevron*, 467 U.S. at 843–44.

158 This approach is proposed in Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 602 (2009).

159 *Supra* Section I.A (summarizing *Skidmore* doctrine).

160 *Cf.* Sch. Dist. of Wis. Dells v. Z.S. *ex rel.* Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) ("[T]he cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review."); Gersen & Vermeule, *supra* note 149, at 702 ("[T]he more linguistic variants [on deference] one uses, the greater a morass the doctrinal approach becomes."). In its broadest form, the worry about the power of mere verbal formulations would challenge the efficacy of doctrinal modifications more generally. Indeed, Zaring presents evidence showing that courts tend to reverse agencies at similar rates regardless of which official standard of review is employed. Zaring, *supra* note 11, at 169. Those who are skeptical of doctrine may prefer to implement hierarchical deference through other means, such as jurisdiction or voting rules. *See supra* subsection II.B.1.

tical matter, to tell judges applying *Chevron* to give agencies “more slack” or to let agency interpretations stand unless they are not just unreasonable but “clearly unreasonable”? Likewise, although the *Skidmore* doctrine feels like a doctrine of degrees, it is hard to say how a judge is supposed to operationalize an instruction to give an agency’s view more weight rather than less. An instruction to “be more persuaded” (or the opposite) is not very helpful. Nor would it be easy to tell if a court were complying with such a directive, which would make it harder for the Supreme Court to monitor the lower courts.¹⁶¹ (At the same time, the difficulty of assessing compliance does have a benefit of a sort in that it allows the Supreme Court itself to be non-deferential without officially announcing a departure from the lower courts’ standards.)

There are, however, certain points in the doctrinal structure that seem to provide a firmer toehold for hierarchical variation. One example of such an opening is *Chevron* “Step Zero,” the doctrine governing whether *Chevron* is the appropriate regime for a particular case or whether some lesser deference regime like *Skidmore* applies.¹⁶² Speaking very generally, agency actions such as notice-and-comment regulations or formal adjudications are usually eligible for *Chevron*, while less formal types of agency guidance, such as interpretive guidelines or agency manuals, are not.¹⁶³ Under a hierarchically variable version of Step Zero, *Chevron*’s domain could be larger or smaller depending on the court. If one wished to ratchet up deference in the lower courts, one could have Justice Scalia’s expansive view of *Chevron*’s domain govern in the lower courts even as the *Mead* majority opinion would govern in the Supreme Court.¹⁶⁴ Or, instead, one

161 Like other bureaucratic managers, the Supreme Court has sought to adopt policies that facilitate its ability to monitor its subordinates’ compliance. See Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2047–49 (2008); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 339 (2007).

162 See *supra* notes 15–19 and accompanying text; see also *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (stating that an agency interpretation falls within the domain of *Chevron* “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”).

163 *Mead*, 533 U.S. at 229–31, 234; *Christensen v. Harris Cnty.*, 529 U.S. 576, 586–87 (2000).

164 See *Mead*, 533 U.S. at 239, 241, 250–53 (Scalia, J., dissenting) (arguing that *Chevron* applies to all “official” agency positions regardless of their format). The material in the text obviously does not provide a complete description of how broadly to cast the net at Step Zero. Agency materials are varied and diverse. Regarding the situation presented in *Mead*, one might hesitate to direct courts to defer to all tariff

could ratchet down deference in the Supreme Court by eliminating *Chevron* at the Supreme Court level in favor of universal *Skidmore* review. That might sound radical, though it is arguably not far from what the Supreme Court covertly does already.

Another channel for implementing hierarchical variation concerns the interaction between judicial precedents and subsequent agency interpretations. Under the *Brand X* doctrine, agencies can deviate from a prior judicial interpretation of the statute they administer, so long as the prior judicial decision gave content to an ambiguous statute or filled a gap rather than discerned the statute's only valid meaning.¹⁶⁵ That is, if a court is merely choosing one point within a zone of indeterminacy, the agency charged with implementing the statute can choose a different point later, the judicial precedent notwithstanding.¹⁶⁶ As a matter of official doctrine, it seems that the *Brand X* rule is supposed to apply regardless of which court issued the precedent.¹⁶⁷ Yet although *Brand X* is hard to assail when it comes to lower court interpretations—making them binding would seriously restrict agency flexibility¹⁶⁸—the argument for *Brand X* is less compelling when it comes to prior Supreme Court decisions. In the relatively few instances in which the prior judicial interpretation comes from the Supreme Court, the decision is nationally uniform and, as compared to lower-court decisions, represents the result of an expert and politically legitimate national policymaking process. If that judicial interpretation is to be displaced, it can and should be Congress that does it—or at least one could plausibly so argue. Indeed, the Supreme Court itself might find this line of reasoning persuasive, for it seems less eager to apply *Brand X* to trump its own precedents as opposed to lower court precedents.¹⁶⁹ Thus, the argument offered

classification rulings, given that such rulings were issued from offices all over the country and in huge numbers. *See id.* at 233 (majority opinion). However, on the facts of *Mead* itself, there was a Headquarters ruling (and later, the Solicitor General's brief), which fares better in terms of expertise, national scope, and deliberation. *Id.* at 224–25; *id.* at 258 (Scalia, J., dissenting).

165 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

166 *See id.*

167 The concurrence by Justice Stevens can be read to mean that the *Brand X* rule would not necessarily apply in the case of a prior Supreme Court precedent, *id.* at 1003 (Stevens, J., concurring), but the majority opinion spoke generally of “courts” and did not draw any such distinction. *Id.* at 982–83 (majority opinion).

168 *See supra* notes 81–83 and accompanying text.

169 *See, e.g., United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1842–44 (2012) (plurality opinion) (distinguishing *Brand X*); *id.* at 1847 (Scalia, J., concurring in part and concurring in the judgment) (accusing the plurality of

here might operate as a justification for actual unacknowledged practices as much as a call for reform. In any event, the more general point is that we need not adopt a one-court-fits-all approach to the constraining force of judicial precedent. Agencies could retain greater room for dynamic interpretation as against the lower courts than as against the Supreme Court.

As a final example of a point of entry for variable deference, consider the “order of operations” that courts follow when interpreting regulatory statutes. There is a vigorous debate over how various judicial interpretive tools ought to interact with deference to agencies. Of particular interest is the question whether *Chevron* takes precedence over the policy-based or “substantive” canons, such as the presumption against preemption or the rule that statutes ought to be interpreted to avoid serious constitutional difficulties.¹⁷⁰ For instance, if an agency interprets a statutory ambiguity in a way that seems textually plausible, such that the interpretation would ordinarily prevail under *Chevron*, will the agency’s interpretation nonetheless fail if it would bring the statute-as-construed closer to the constitutional line than a court would prefer to venture were it interpreting independently?¹⁷¹ Although the courts have mostly (though not unswervingly) held that the avoidance canon trumps *Chevron*,¹⁷² some commentators criticize that position.¹⁷³ Merrill and Hickman, for example, believe that the avoidance canon is problematic in administrative cases because it shifts subconstitutional policymaking away from agencies (Congress’s

“evad[ing] *Brand X*”); see also Robin Kundis Craig, *Administrative Law in the Roberts Court: The First Four Years*, 62 ADMIN. L. REV. 69, 174, 186 (2010) (noting the Court’s apparent reluctance to apply *Brand X* to its own precedents).

170 See generally Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66–84 (2008) (discussing the problem of how to integrate substantive canons and agency deference).

171 If the agency interpretation is actually unconstitutional, then of course it is invalid. The canon of constitutional avoidance, as it is usually now understood, requires only doubts about an interpretation’s constitutionality. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1495–97 (1997) (distinguishing between different versions of the avoidance canon).

172 See, e.g., *Edward J. DeBartolo Corp.*, 485 U.S. at 574–88 (applying the avoidance canon and rejecting the agency’s interpretation).

173 See generally Jonathan D. Urick, Note, *Chevron and Constitutional Doubt*, 99 VA. L. REV. 375 (2013) (summarizing judicial precedents and scholarly views on this matter).

preferred delegate) toward unaccountable courts.¹⁷⁴ Whether or not Merrill and Hickman are right for all courts, their argument is certainly stronger when it comes to lower courts. The debate over the order of interpretive operations need not yield a single answer for every court.

b. Doctrinal Heterogeneity and Complexity Tradeoffs

The rationales supporting deference have greater force as one moves down the judicial pyramid, and thus a regime of variable deference would better align judicial practice with the rationales for deference. Still, no rule perfectly fits its underlying justifications, and one cannot implement a regime of doctrinal variation without weighing countervailing systemic considerations that militate in favor of homogeneity, such as the value of simplicity and the need to maintain a workable system of appellate review.

Although the Supreme Court has by its own account not treated simplicity as the overriding goal in this field,¹⁷⁵ it is true that, were all else equal, simple doctrine would be preferable to complex doctrine. The theory of hierarchical variation would seem to take us in the wrong direction in that regard, but that impression is at most only partly true. Depending on the precise mode of implementation, lower courts might use *Chevron* more and *Skidmore* less, the Supreme Court might not follow *Brand X*, and so forth. But that simply changes which standards apply rather than multiplying the number of standards any given court applies. Further, any particular court's task could actually become simpler under a heterogeneous regime if the tests it applied in the new regime were themselves simpler.¹⁷⁶ That is, court-level complexity could decrease even if system-level complexity increases.

As to system-level complexity, if one were *really* serious about “tailor[ing] deference to variety,”¹⁷⁷ one could imagine a dauntingly complex world in which every court, even every judge, had a distinct standard of review. Yet perfect tailoring is obviously not the only consideration, just as simplicity is not the sole aim either; the goal is to

174 Merrill & Hickman, *supra* note 15, at 915; see also William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 867–98 (2001) (arguing that the avoidance canon interferes with executive power).

175 *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001) (observing that the Court has chosen “to tailor deference to variety” rather than “to limit and simplify”).

176 Cf. Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 355–58 (2003) (advocating global *Chevron* review and criticizing *Mead* as too complex and costly for lower courts to administer).

177 *Mead*, 533 U.S. at 236.

achieve an optimal balance of the relevant values. It is hard to know where exactly to strike the balance, but it seems pretty clear that optimal tailoring would stop short of specifying a different rule for every judge. Indeed, to preview a conclusion below, the optimal number of distinct doctrinal regimes of administrative review might be just two: one for the Supreme Court and one for everyone else.

A final point about complexity is that the added “procedural” complexity of creating multiple standards of review could reduce the “substantive” complexity of the law, if the new regime tends to reduce circuit splits and the like. Hierarchical heterogeneity thus involves tradeoffs among different types of complexity.

c. Workability Revisited: Discretionary Jurisdiction and Optimal Differentiation

As discussed earlier, one difficulty with having courts at different levels in the hierarchy employ divergent standards of review is that doing so threatens to create excessive appeals and wasteful litigation.¹⁷⁸ One promising way to ameliorate that problem is to curtail jurisdiction, but even if we were to reconfigure jurisdiction to some degree, such as along the lines suggested above,¹⁷⁹ it is safe to assume that we are not going to see *all* the lower courts divested of jurisdiction to review agency action, leaving the matter totally to the Supreme Court. Therefore, we are still confronted with the workability objection to hierarchical variation: if a reviewing court uses a standard of review that differs from the standard applied in the court below it, lower-court losers will appeal; many reversals will ensue.

This is a significant objection to doctrinal variation in a multi-level judicial system, but there is a solution to it. Suppose that we have only two distinct standards: the Supreme Court employs a doctrine of “low deference,” while the courts of appeals and the district courts (to the extent the district courts still have jurisdiction) employ a doctrine of “high deference.” (The difference between the two standards could be large or small, depending on one’s preferred doctrinal implementation.) *Within* the lower courts, where district-court losers typically have the right to have the court of appeals review their cases on the merits, there would be no workability problem: even when a case could be heard initially in the district court and then appealed to the court of appeals, both courts would, as today, apply the same stan-

178 See *supra* subsection II.B.1.

179 *Supra* subsection II.B.1.a.

dard of review.¹⁸⁰ Within the lower courts, that is, the compelling institutional need for workable review outweighs the argument for doctrinal variation. Hierarchical variation would, within the lower courts, be implemented through jurisdiction rather than through doctrine.

But wouldn't the workability problem resurface higher up in the system, because the lower courts' "high deference" standard of review would diverge from the Supreme Court's "low deference" standard? No, at least not in a serious way. The Supreme Court's docket is discretionary; it does not have to review every case, and in fact it reviews very few.¹⁸¹ The Court's ability to keep its docket small derives, in part, from deference doctrines that lead lower courts to converge on the nationally uniform interpretations issued by administrative agencies rather than reach their own conflicting interpretations.¹⁸² If lower courts maintained or increased their level of deference from the status quo, there would be few instances in which the Supreme Court would have to intervene in order to maintain the uniformity of national regulatory law.¹⁸³ Thus, there would not be much of a workability problem stemming from differing standards, for cases will ordinarily not be reviewed by courts applying differing standards: the deference regime of the lower courts would be the only standard the vast majority of cases would ever see. In other words, discretionary Supreme Court jurisdiction and doctrinal variation can complement each other: the non-mandatory nature of the Supreme Court's jurisdiction makes variation more workable, and the deferential standard applied by the lower courts reduces the necessity (though not the opportunity) for Supreme Court review.

In those rather few cases the Court does hear on the merits, it would apply its own standards, which means that the Court would

180 See, e.g., *St. Elizabeth's Med. Ctr. of Bos., Inc. v. Thompson*, 396 F.3d 1228, 1233 (D.C. Cir. 2005) (stating that the circuit court "appl[ies] the same standard of review as the district court"); *Fishermen's Dock Coop., Inc. v. Brown*, 75 F.3d 164, 168 (4th Cir. 1996) ("[W]e generally review the agency's action from the same position as that of the district court . . .").

181 See 28 U.S.C. § 1254 (2006); SUP. CT. R. 10. There are only a few remnants of mandatory appellate jurisdiction. See EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 75–76, 89–117, 146–47 (9th ed. 2007).

182 See *supra* subsection I.B.4 (explaining how deference facilitates uniformity without requiring constant Supreme Court intervention).

183 Other features of current law besides deference also reduce the risk of circuit splits in administrative review cases. Some statutes lodge jurisdiction to challenge agency action exclusively in one court, often the D.C. Circuit. See *supra* note 116 and accompanying text. In other instances, cases filed in multiple courts can be transferred and consolidated in one court. 28 U.S.C. § 2112(a).

sometimes reverse even though the lower court showed proper deference (for that court) or affirm even though the lower court acted improperly. Those decisions need not be unduly awkward, and in fact one can find existing models for those scenarios in cases in which the Supreme Court overrules precedent that bound the lower court. Because only the Supreme Court is authorized to overrule its precedents, there are cases in which it reverses a lower court that had followed (that is, showed the proper deference to) one of the Court's precedents.¹⁸⁴ Likewise, the Court sometimes affirms a lower court that had anticipated the overruling of the Supreme Court's decision, even if the lower court had exceeded its authority in doing so.¹⁸⁵ Agency interpretations are just another sort of precedent, and these cases show that the rationale that justifies the Court's decision need not be a rationale that is equally appropriate in the courts below.

One might wonder whether the courts, Congress, and other institutional players would be happy with such a system. The question whether various institutions have incentives to create a system like this is discussed next.

3. Implementing Hierarchically Variable Deference

The argument of this Article, if it is found persuasive, shows that there are good reasons for deference to vary hierarchically (Part I) and that such a regime would be institutionally feasible and indeed already to some degree exists (Part II). How might further movement in the direction of hierarchical variation come about? Answering that question requires us to consider the abilities of various institutions of government to implement such changes, as well as whether they would want to do so. This is a complex topic, but some preliminary points are in order.

To change the jurisdiction of the lower courts, such as by further curtailing district court involvement, congressional action would be needed.¹⁸⁶ The fact that Congress has already removed the district

184 See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20–22 (1997) (praising the lower court for following precedent, then overruling that precedent and vacating and remanding).

185 See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 486 (1989) (criticizing the lower court for renouncing Supreme Court precedent but overruling that precedent and affirming).

186 See *Sheldon v. Sill*, 49 U.S. (1 How.) 441, 448–49 (1850) (discussing broad congressional authority to define the jurisdiction of the lower federal courts); see also *supra* subsection II.A.2 (discussing current patterns of jurisdictional allocation). Although Congress defines jurisdiction by statute, the courts influence the allocation of jurisdiction through their interpretations of unclear jurisdictional statutes and

courts from many aspects of the administrative system suggests it could be convinced to go further, especially where district court jurisdiction today is not the product of specific statutes selecting the district court but instead arises, perhaps without any particular congressional design, from the general federal-question statute.¹⁸⁷ Curtailing district court jurisdiction would support values like uniformity and coherence by reducing the role of those entities whose decisions are most likely to imperil those values. In addition, it would shift authority away from the courts with the least (pertinent) expertise, the weakest claims to national policymaking authority, and, thus, the least to contribute to the overall system of review.

Regarding modifications to doctrinal standards of review, two institutions have the requisite power.¹⁸⁸ Congress could prescribe deference rules by statute,¹⁸⁹ or the Supreme Court, which is largely responsible for the current deference doctrines, could simply announce new doctrines.¹⁹⁰ As for Congress, its desires concerning deference are complex.¹⁹¹ As regards hierarchical deference in particular, Congress probably has little in the way of actual preferences

their decisions on various reviewability doctrines. *See supra* text accompanying notes 141–45.

187 *See supra* note 134.

188 If hierarchical deference were implemented through voting rules, it is a bit unclear which institution(s) could make that change. Gersen and Vermeule argue that both courts and Congress have the authority to impose supermajority voting rules. Gersen & Vermeule, *supra* note 149, at 725–30.

189 *See* Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2639 (2003) (noting broad agreement that *Chevron* can be modified by statute). *See generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (discussing legislative power to modify canons of interpretation). To be sure, Congress's power to mandate judicial deference could run up against limits imposed by the nature of the Article III "judicial power" or by the nondelegation principle. *Id.* at 2129–31. Neither the jurisdictional restrictions nor the fairly modest doctrinal adjustments discussed here should come very close to those boundaries.

190 One might question, from a formalist point of view, whether the Supreme Court has the power to prescribe binding interpretive rules for the lower courts, especially if those rules vary from the rules the Court itself follows. *See* Bruhl, *supra* note 4, at 485 n.162 (noting this objection and providing a response).

191 For discussions of the factors that should influence Congress's preferences for agency implementation versus judicial implementation of statutes, see, for example, Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 368–80 (2010); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1042–49 (2006). For an empirical study of the expectations of congressional drafters, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 990–1015 (2013).

about such detailed questions of judicial administration (though its jurisdictional choices do reveal some awareness of the issue). Perhaps the most we can say about congressional desires regarding deference is that the Supreme Court develops standards of review based on notions of sound institutional design, creating a set of baseline presumptions that Congress is free to alter if it wishes.¹⁹² As Part I shows, the various arguments supporting judicial deference apply with particular force to lower courts. If existing deference doctrine is satisfactory to Congress—in the sense that Congress leaves it alone—hierarchically heterogeneous doctrine would probably be satisfactory too.

Given that Congress is unlikely to play an active role, we should consider whether the Supreme Court would implement a hierarchically heterogeneous regime. Such a regime would have a number of attractions (which is why, again, the system may display some unofficial doctrinal heterogeneity already). To the extent that the Supreme Court would be (more) nondeferential, the Court would presumably enjoy its freedom to exercise independent judgment and to do so openly. To the extent that lower courts would defer more, that should both increase the rate at which agency interpretations are sustained and reduce circuit splits. These results would advance the Court's institutional interest in maintaining the uniformity of federal regulatory law,¹⁹³ as well as the Court's more parochial interest in increasing its control over its docket.¹⁹⁴ Of course, the Court wants some agency actions to be invalidated, either for neutral rule-of-law reasons (e.g., the agency has strayed too far from the statute) or because of ideological disagreement with the substance of the agency's policy. Increased deference in the lower courts would mean that more of those invalidations would have to come from the Supreme Court itself. That would be fine as long as the Court wished

192 See, e.g., Barron & Kagan, *supra* note 34, at 212 (“*Chevron* is a congressional doctrine only in the sense that Congress can overturn it; in all other respects, *Chevron* is a judicial construction, reflecting implicit policy judgments about what interpretive practices make for good government.”).

193 See, e.g., SUP. CT. R. 10 (listing cases involving conflicts on important matters of federal law as candidates for review); *Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152, 156 (1996) (noting interest in uniform administration of regulatory scheme as a factor motivating grant of certiorari).

194 See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669, 679 (2012) (remarking on the Court's “powerful drive” to control its agenda and exercise “as much freedom as possible over what is to be finally and authoritatively decided”); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000) (documenting the Supreme Court's drive to establish discretionary control over its docket—and expressing misgivings concerning the same).

to invalidate relatively few agency actions, but it could be a problem for the Court if it lacked the docket capacity to strike down as many as it would like. It is possible that the Court would respond to its capacity constraints by modulating the required degree of lower-court deference in light of the shifting ideological positions of the lower courts and the administration. For example, the Court might want lower courts to engage in more searching review when the lower courts are ideologically aligned with the Supreme Court but the administration is not; conversely, the Court might demand more deference when the Court is aligned with the agencies but the lower courts are not. Perhaps the Court already modifies its doctrine over time in response to such considerations.¹⁹⁵

An increase in the degree to which lower courts converge on pro-agency decisions would admittedly impair the process of “percolation,” which process the Court sometimes professes to find helpful.¹⁹⁶ But percolation—which is essentially a period of uncertainty or conflict in the lower courts—is less valuable in the administrative context than in others. Here, values like uniformity and certainty have more force, as Congress has recognized by creating agencies and the Court has reinforced by requiring deference to their interpretations.¹⁹⁷ Current jurisdictional statutes likewise aim at reducing, to a degree, the potential for conflicting decisions in the judicial review of agency action.¹⁹⁸

Finally, what of the lower courts’ preferences? One might suppose that they would oppose a regime of hierarchical deference if that meant reducing their authority to overturn agency interpretations. (Recall again that hierarchical variation need not take that form; one

195 This theory is most closely associated with Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 *LAW & CONTEMP. PROBS.* 65 (1994). For subsequent empirical tests, see Raso & Eskridge, *supra* note 67, at 1793–94 (finding support for the theory), and Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 *ADMIN. L. REV.* 657, 659–60 (2004) (casting doubt on the theory).

196 See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“[The Court has] in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

197 See Strauss, *supra* note 70, at 1105, 1121–22; see also *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012) (referring to the risk that permitting multiple lawsuits to proceed under non-deferential standards would “defeat the uniformity that Congress intended by centralizing administration of the federal program in the agency”).

198 See *supra* note 183 (discussing consolidation and exclusive jurisdiction).

could leave the lower courts alone and change the Supreme Court's practices.) Most people like wielding power, and this proposal could take some of the lower courts' power away. Nonetheless, the calculation facing the lower courts is not quite that simple. Remember that they do not have the luxury of the Supreme Court's discretionary docket. Complex administrative cases are, for the lower courts, a burden as well as a policymaking opportunity; certainly the cases are not hand-picked opportunities. If more deference makes for less work, as it plausibly does,¹⁹⁹ the lower courts might welcome the relief. The freed-up time and resources could be allocated to other cases, to leisure, or to whatever the judges most prefer. If lower courts would not resist, the Supreme Court would not need to invest much effort in ensuring compliance.²⁰⁰

CONCLUSION: DIFFERENT COURTS, DIFFERENT ROLES

Despite the complexity that characterizes the law of judicial review of agency action, uniformity and simplicity have prevailed in at least one respect: whatever standard of review governs a particular case, all courts are supposed to apply the same one. Yet there is nothing inevitable about having a homogeneous judicial system in which all courts follow the same rules. Courts vary in their institutional competencies and circumstances. Because the justification for deference derives largely from institutional considerations, deference doctrine should heed institutional differences between various courts. Generally speaking, lower courts should defer to agencies *more* strongly than should higher courts. Sometimes that means different courts should employ somewhat different doctrines, though, as we have seen, hierarchical differences can also be expressed through non-doctrinal means such as jurisdictional allocations.

The theory of hierarchical deference contemplates a system of judicial review that is composed of two types of courts with somewhat differentiated roles: the one Supreme Court and then everyone else (to the extent that district courts remain involved at all). It thus recognizes, and further reinforces, the fact that the Supreme Court is not

199 See *supra* note 111 and accompanying text.

200 When lower courts fail to follow the proper standards or methodologies, but the case does not otherwise merit plenary Supreme Court review, the Court could summarily vacate and remand for application of the correct standard. Cf. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456, 458 (2006) (vacating and remanding where the court of appeals misstated the law, even though the judgment below "may be correct in the final analysis"); *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 633 N.W.2d 824, 824 (Mich. 2001) (vacating and remanding where the lower court considered legislative history without first finding the statute ambiguous).

just another court. As Robert Dahl put it, emphasizing one aspect of the Court's distinctive character, the Supreme Court is not only a legal institution but "also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy."²⁰¹ Some commentators have expressed misgivings concerning the development of an Olympian Supreme Court that stands far removed from the more ordinary courts it supervises,²⁰² and those worries should not lightly be dismissed. My proposal admittedly envisions functional differentiation and separation, but I regard that as appropriate given that various courts in fact have quite distinct competencies. In any event, it seems unlikely that the Supreme Court is poised—in administrative law or elsewhere—to descend from its peak and rejoin its non-supreme peers. It is time for the law to catch up.

201 Dahl, *supra* note 61, at 279.

202 See, e.g., Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 992–1015 (2000); Hartnett, *supra* note 194, at 1644, 1713–30; Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 432–38.