CHEVRON FOR JURIES

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Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. *rests on two now-familiar premises. First, for some statutes, the traditional tools of statutory interpretation more readily yield a range of plausible meanings than a single correct reading. Second, judges are not always the officials best positioned to select one interpretation of a statute from among the plausible options.* Chevron *relied on these premises to decide that when a court finds ambiguity in a statute administered by an agency, it must defer to the agency's interpretation of the statute, so long as it is reasonable. But while administrative law provided a doctrinal context for the Court's decision,* Chevron*'s interpretive premises were about statutes generally, not statutes administered by agencies.*

Commentators seldom recognize the general nature of Chevron*'s interpretive premises. This Article shines a spotlight on it by applying the premises to a class of statutes outside administrative law. Judges, it argues, are not the best-situated actors in our legal system to pick from among the legally plausible readings of statutes that govern the conduct of the general public. Indeed, they are not even the best-situated actors in the courtroom. Juries possess epistemic and political qualities that make them expert interpreters of conduct-regulating, generally-applicable statutes. This Article invokes that expertise to propose "*Chevron *for Juries," a series of procedural reforms that would transfer interpretive primacy for this class of statutes to juries.*

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INTRODUCTION

Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.[1] rests on two important premises about statutory interpretation: (i) for

1 467 U.S. 837 (1984).

many statutes, the traditional tools of interpretation more naturally yield a range of permissible meanings than a single "best" reading, and (ii) nonjudge interpreters sometimes possess epistemic and political advantages over judges in selecting from among the legally plausible options.[2] Applying these premises to statutes governing the administrative state, *Chevron* announced that judges must defer to reasonable agency interpretations of certain ambiguous statutes. The import of *Chevron*'s premises, however, is not limited to statutes that involve administrative agencies. Outside administrative law, just as inside it, many statutes have a range of permissible meanings. And for many statutes having nothing to do with agencies, judges may not be the optimal interpreters. Given the general nature of the Court's premises, one might have expected *Chevron* to prompt examination of other types of statutes in search of superior nonjudge interpreters. But with few exceptions, that examination has not come to pass, and *Chevron*'s interpretive premises have remained local to administrative law.[3]

This Article offers a partial remedy by applying *Chevron*'s premises to a class of statutes outside administrative law. My focus is on statutes that govern the conduct of the general public. The Article's central claim is that *juries* have epistemic and political advantages over judges in choosing from among the permissible meanings of such statutes. Juries, in other words, are to this class of statutes what agencies are to statutes within *Chevron*'s domain. I invoke the jury's epistemic and political advantages to propose "*Chevron* for Juries," a series of procedural reforms that would make juries the front-line interpreters of generally-applicable, conduct-regulating statutes. Having relinquished interpretive primacy over these statutes, judges in the *Chevron* for Juries framework would police the outer boundaries of permissible statutory meaning through procedural devices that mirror traditional *Chevron* analysis.

This Article develops its proposal in three parts. Part I contains the building blocks. It first defends the claim that *Chevron* rests on the

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2 *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 205–15 (2006); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589–98 (2006); *see also infra* notes 15–34 and accompanying text.

3 There are a few exceptions in the academic literature. Amanda Frost invoked *Chevron*-like reasoning to propose that courts certify difficult statutory interpretation problems to Congress. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007). A student note in the *Harvard Law Review* likewise proposed *Chevron*-like deference to congressional resolutions. Note, *A* Chevron *for the House and Senate: Deferring to Post-Enactment Congressional Resolutions That Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507 (2011). In a similar vein, Dan Kahan relied on *Chevron*'s interpretive premises to propose extending traditional *Chevron* deference to Department of Justice interpretations of criminal statutes. Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); *see also* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

generalizable interpretive premises suggested above. Part I then describes the mechanics of *Chevron* for Juries. The threshold mechanical task is to specify the class of jury-eligible statutes. After doing that, Part I identifies a set of modest procedural modifications that would make *Chevron* for Juries operational. Part I concludes with brief sections comparing *Chevron* for Juries to *Chevron* and placing the proposal in historical context.

Part II makes the case for *Chevron* for Juries by arguing that juries are better than judges at selecting from among the permissible meanings of statutes that govern the conduct of the general public. It first suggests that, for this class of statutes, juries are more epistemically capable than judges. Because there is reason to be confident in the average juror's ability to interpret these statutes, the Condorcet Jury Theorem offers preliminary support. Stronger epistemic support comes from examining the actual tasks required to do interpretation under the three major modern approaches: textualism, intentionalism, and purposivism. For statutes that govern the conduct of the general public, these tasks turn out to be suited to the jury's strengths, or so I will argue.

Part II also argues that jury interpretations of conduct-regulating, generally-applicable statutes have more political legitimacy than judicial interpretations, for two reasons. First, juries are made up of cognitively diverse jurors, and recent social science research indicates that diversity is more valuable to problem solving than ability. Second, jury decisions embody both majoritarian and deliberative democratic norms, while judicial decisions lack a comparable source of political legitimacy.

Part III considers several objections to *Chevron* for Juries. First, it tackles a series of related objections arising from the non-precedential nature of jury decisions. Next, it confronts the claim of modern jury critics that juries are biased and incompetent. Finally, it notes that while *Chevron* for Juries has predictable distributional consequences, they are likely minor.

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I must make clear at the outset that I harbor no illusion that this Article will prompt Congress or the courts to adopt *Chevron* for Juries. The proposal is thus in the nature of a thought experiment, and its payoffs are conceptual. One such payoff is the spotlight it shines on the generality of *Chevron*'s interpretive premises. A second, ultimately more significant, conceptual payoff has to do with judicial power in a democratic society. The lawmaking power of judges in interpreting the

Constitution is well ventilated.[4] So too is the "popular constitutionalism" alternative.[5] We pay less systematic attention to the allocation of subconstitutional interpretive power to judges and—with the notable exception of *Chevron* itself—almost none to possible alternatives.[6] But in order for our allocative choice in favor of judges to count as reasoned, we must know something about the alternatives we have implicitly rejected.[7] *Chevron* for Juries offers that. It would redistribute an important segment of the judiciary's current allotment of subconstitutional lawmaking power. Evaluating its strengths and weaknesses permits us to more fully assess our existing allocation of subconstitutional authority.

I. BUILDING BLOCKS

A. Chevron*: Doctrine and Theory*

Chevron for Juries begins with *Chevron*, so we start with a doctrinal précis. *Chevron* created a regime in which courts defer to agency interpretations of certain regulatory statutes. As originally formulated, *Chevron* is a "two-step" analysis.[8] At step one, a court evaluates whether Congress spoke directly to the question at hand. If it did, any agency interpretation that deviates from Congress's direct statement is impermissible. If the court can identify no clear statement, however, it proceeds to step two, where it considers whether the agency's interpretation is "reasonable," i.e., whether it is a plausible account of statutory meaning.[9] If so, the reviewing court defers to the agency's interpretation.

Courts, in practice, and scholars, conceptually, have added a step zero, where the reviewing court determines whether it will apply the

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4 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1–33 (1962).

5 *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 5–8 (2004); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048–49 (2010).

6 That is, we lack a theory of popular *sub*constitutionalism, at least in statutory interpretation. *But see* Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing,"* 40 CASE W. RES. L. REV. 1023, 1024–26 (1990).

7 *See* Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 453 (D.C. Cir. 1980) ("[R]easoned decision-making . . . . [requires] that the rejection of alternate theories or abandonment of alternate courses of action be explained . . . ." (footnotes omitted)).

8 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) ("*Chevron* prescribed a by now well known two-step inquiry.").

9 Matthew Stephenson and Adrian Vermeule have persuasively argued that *Chevron*'s two steps collapse into one. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

Chevron framework at all.[10] In *Chevron*, the Court indicated that the deference framework would apply to any statute that an agency "administers."[11] The Court walked that back in *United States v. Mead Corp.*,[12] holding that deference is appropriate only if circumstances indicate that Congress intended to delegate interpretive authority to the agency.[13]

Because *Chevron* for Juries seeks to export *Chevron*-like reasoning outside administrative law, the details of *Chevron*'s doctrinal structure are less important than its underlying logic. In (at least) two ways, *Chevron* made important general points—i.e., points that are not local to administrative law—about statutory interpretation. First, it introduced the "zone of ambiguity" into the practice and theory of statutory interpretation.[14] Second, it offered a powerful example of how interpretive doctrine can be sensitized to institutional considerations. Both points must be unpacked.

1. *Chevron* and the Zone of Ambiguity

Chevron's deference regime rests on the premise that when a statute is ambiguous, traditional legal tools are better at specifying a range of reasonable meanings than a single best meaning. In *Chevron* itself, the Court considered whether the term "stationary source" in the Clean Air Act referred to a single polluting device or an entire plant. President Reagan's EPA thought the latter. The Court looked to traditional legal tools to sort out the statutory meaning. It found no clarification, however, in the statute's text, explaining that the "terms are overlapping" and could not "reveal an actual intent of Congress."[15] The legislative history of the Clean Air Act proved no more useful.[16] Throwing up its hands, the Court declined to say which interpretation—device or plant—*it* thought best, concluding instead that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference."[17] In this move, the Court discarded, for cases in *Chevron*'s domain, the long-standing view that a court's job in statutory interpretation is to find the

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10 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

11 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

12 533 U.S. 218 (2001).

13 VERMEULE, *supra* note 2, at 216–17; *see also* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 688–89 (2007).

14 Stephenson & Vermeule, *supra* note 9, at 602.

15 *Chevron*, 467 U.S. at 861–62.

16 *Id.* at 862.

17 *Id.* at 862, 865 (agreeing with lower court that legislative history was "unilluminating").

best meaning of a statute.[18] The Court replaced that traditional notion with the "zone of ambiguity," i.e., the range of statutory readings that are legally plausible in light of the traditional tools of statutory interpretation.[19]

That *Chevron* depends on the concept of a zone of ambiguity is not a novel point.[20] Less prominent in the literature, however, is that the Court's conceptual move was not specific to administrative law.[21] The Clean Air Act's ambiguity did not exist in *Chevron* because of the EPA's presence. It existed, rather, because the traditional legal tools that the Court deployed did not lead to a single "best" reading of the Act. This is a point about statutory interpretation generally, not about administrative law. Statutes have zones of ambiguity because, as scholars have known since at least 1950,[22] the traditional tools of statutory interpretation (plain meaning, canons, legislative history, etc.) often fail to determine statutory meaning. The tools may reduce the zone's size—e.g., they may allow us to conclude that a golf cart is subject to a ban on "vehicles in the park" while a skateboard is not—but, in many cases, they cannot condense it to a single point.[23] This occurs in administrative law cases, but there is nothing special, on this front, about statutes administered by agencies.

2. *Chevron*'s Institutional Logic

Chevron's legal justification remains a subject of debate in the academy and the courts.[24] On one side are those who justify *Chevron* on the premise that Congress sometimes intentionally delegates interpretive authority to agencies. On this view, *Chevron* deference is appropriate only to the extent that Congress intended to delegate the job of resolving a particular statutory ambiguity to an agency. This view is

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18 Gersen & Vermeule, *supra* note 13, at 690–91; Sunstein, *supra* note 2, at 2598–602.

19 Stephenson & Vermeule, *supra* note 9, at 601.

20 *See, e.g.*, E. Donald Elliot, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 11 (2005); Stephenson & Vermeule, *supra* note 9, at 598–602.

21 *But see* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 429 (2008) ("Although *Chevron* was concerned with statutory implementation by administrative agencies, there is no good reason to think that courts are not cast into the same policymaking role when Congress chooses them as its delegates.").

22 *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Cannons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

23 This example is borrowed, of course, from H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958).

24 United States v. Mead Corp., 533 U.S. 218, 241–43 (2001) (Scalia, J., dissenting); Gersen & Vermeule, *supra* note 13, at 688 ("*Chevron*'s theoretical rationale is unclear.").

hard to derive from the Court's opinion in *Chevron* itself.[25] In *Mead*, however, Justice Souter's majority opinion appeared to embrace it.[26]

On the other side are those who believe that *Chevron* is best justified by the institutional advantages that agencies possess over courts in construing statutes within their policy domain. Justice Scalia took such an approach in his *Mead* dissent. *Chevron*, Scalia argued, was based on a "legal presumption" (i.e., a "legal fiction") that: "When . . . Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved."[27] He distinguished this legal fiction from the majority's approach, which requires "specific congressional intent" to depart from the "background rule" that statutory ambiguity should be resolved by judges.[28]

While the debate between those who emphasize delegation and those who emphasize institutional capability is historically and doctrinally important, we can bracket it here. This Article's claim—that juries are superior interpreters of statutes that govern the conduct of the general public—is necessarily institutional. It is no part of the claim that existing legislation evidences an intent that juries resolve interpretive questions.[29] In other words, this Article addresses whether *Chevron* for Juries is a good idea, leaving how it might be adopted for another day. The institutional approach to *Chevron* helps answer this question; the delegation approach does not.

Chevron identified two advantages that agencies hold over judges in interpreting statutes that they administer: subject-matter expertise and political accountability. Little need be said about the subject-matter expertise of agencies. Judges are generalists who must be prepared to rule on issues arising across the vast range of topics addressed by

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25 Gersen & Vermeule, *supra* note 13, at 689–90.

26 533 U.S. at 229–31. Many commentators argue that notwithstanding the Court's rhetoric of actual intent to delegate, *Mead* in fact rests on a fictive theory of congressional delegation. *See, e.g.*, Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009 (2011).

27 533 U.S. at 241 (Scalia, J., dissenting).

28 *Id.* at 243. Scalia's approach has supporters in the academy. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 205 ("[T]he Court's reliance on congressional intent should give way to a frankly policy-laden assessment of the appropriate allocation of power in the administrative state."); Gersen & Vermeule, *supra* note 13, at 689. Returning to *Chevron*'s text, Jacob Gersen and Adrian Vermeule argue that the Court disclaimed reliance on actual congressional intent to delegate. The basis for the decision, they contend, is instead the comparative institutional evaluation in the Court's assertion that: "Judges are not experts in the field, and are not part of either political branch of Government." Gersen & Vermeule, *supra* note 13, at 690 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 865 (1984) (internal quotation marks omitted)).

29 At least legislation enacted in the twentieth and twenty-first centuries evidences no such intent. *But see infra* Part I.D.

statutes. Agency officials are specialists in the discrete policy spheres implicated by the statutes they administer. They have both specialized knowledge and the tools to acquire more.[30] This expertise gives agencies an obvious epistemic advantage over judges in interpreting ambiguous regulatory statutes.

The political advantage of agencies over judges is less intuitive. Justice Stevens addressed it at length:

> Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making 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—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
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> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.[31]

Justice Stevens makes two important points in this passage. First, selecting an interpretation from the zone of ambiguity is necessarily a policy-making exercise, which judges should avoid where possible. Second, because of their greater accountability, agencies may, without similar apprehension, make the policy choices left open by statutory ambiguity. The principle driving both points is political legitimacy. Judges "have no constituency."[32] By virtue of their relationships with the President, agencies do.[33] That distinction, on *Chevron*'s logic, makes agency interpretations within the zone of ambiguity more politically legitimate than the interpretations of judges.

Chevron's institutional comparison of judges and agencies is

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30 *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 110–20 (2010).

31 *Chevron*, 467 U.S. at 865–66.

32 *Id.* at 866.

33 Of course, not all agencies relate to the President in the same way. In *Presidential Administration*, then-Professor Elena Kagan argued that independent agencies should receive less deference than agencies fully within the executive branch. Kagan, *supra* note 8, at 2376–77.

specific to administrative law. But its underlying premise—that for some statutes, officials other than judges can be *better* interpreters than judges—is general. By offering the possibility of superior nonjudge statutory interpreters, *Chevron* prompts a question that extends far beyond administrative law: for what class or classes of statutes can nonjudges outperform judges?[34] *Chevron* for Juries seeks to answer that question for one particular class of statutes: those governing the conduct of the general public.

B. *Mechanics of* Chevron *for Juries*

This Article turns next to the mechanics of *Chevron* for Juries. This Section has straightforward goals: when a statute that governs the conduct of the general public is at issue in litigation, I aim to make the jury primarily responsible for interpreting it, while empowering judges to police the outer boundaries of statutory meaning. This Section sketches a plausible set of doctrinal modifications to achieve these goals. There are likely other routes to the same destination. My claim is that the reforms described here get there. Other routes may be more direct or elegant.

The mechanics of *Chevron* for Juries can be easily summarized. A court must first determine whether a statute is jury eligible. It is if it announces a "conduct rule," as opposed to a "decision rule," and if it is of general, rather than specialized, applicability. Once a statute is deemed jury eligible, simple procedural reforms effectuate the reassignment of interpretive leadership from judge to jury. First, when a statute is jury eligible, the jury's instruction (on that issue) must be the relevant statutory language, unadorned by clarifying or obfuscating judicial guidance. Second, when a dispositive motion raises an interpretive question regarding a jury-eligible statute, the court should treat the interpretive question as it would treat a question of fact. Third, courts must be able to prohibit lawyers from arguing for a statutory interpretation outside the zone of ambiguity. Fourth, depending on what interpretive methodology the jury is told to use, the rules of evidence must be modified to allow the jury access to the tools it needs. This Section unpacks these mechanics. To keep matters simple, this Section (and the Article generally) assumes federal courts and federal law.

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[34] Today, the "institutional turn" in statutory interpretation is well established. *See* VERMEULE, *supra* note 2 at 64–85; Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003); *see also* William N. Eskridge Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2044–51 (2006) (reviewing VERMEULE, *supra* note 2) (contending that institutional considerations have long lurked in the background of interpretative debate).

1. Determining Jury Eligibility

In traditional *Chevron*, "step zero" is the stage of analysis at which the court determines whether the *Chevron* framework applies. *Chevron* for Juries has an analogue: jury eligibility. A statute is "jury eligible" in *Chevron* for Juries if it contains a statutory conduct rule that is generally applicable.

a. Conduct and Decision Rules Distinguished

First, the bottom line: a statute is jury eligible only if it contains a conduct rule that does not substantively diverge from the relevant decision rule. Statutes of this sort contain what this Article calls "statutory conduct rules." This requires some explanation.

Legal rules can be divided into two classes: conduct rules and decision rules. This distinction is borrowed from Meir Dan-Cohen.[35] Though not original to him—Dan-Cohen traces it to Jeremy Bentham and earlier—Dan-Cohen provides the definitive modern formulation.[36] Conduct rules are "directed at the general public and provide[] guidelines for conduct."[37] Decision rules, by contrast, are directed at "officials [who] make decisions with respect to members of the general public. . . . and provide[] guidelines for their decisions."[38] Both conduct and decision rules contain sets of norms, but they are addressed to, and binding on, different "norm-subjects."[39]

Bentham offered a simple example of the distinction.[40] If a statute provides "[l]et no man steal," and "[l]et the judge cause whoever is convicted of stealing to be hanged," it contains both a conduct rule and a decision rule.[41] The first clause ("let no man steal") is a conduct rule directed to the general public. The second clause tells an official, in this case a judge, what to do when someone violates the conduct rule.

While conduct rules and decision rules are often substantively identical, they need not be. Dan-Cohen's important thesis is that, to achieve their normative ends, lawmakers sometimes create conduct rules and decision rules that diverge on the same subject. For example, a common conduct rule in criminal law (albeit not necessarily a statutory one) is the maxim "ignorance of the law is no excuse." An equally

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35 Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

36 *Id.* at 626 & n.1.

37 *Id.* at 630.

38 *Id.*

39 *Id.* at 628.

40 JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (C. H. Wilson & R. B. McCallum eds., Basil Blackwell Oxford 1823) (1789).

41 *Id.*

common decision rule for crimes with a "willfulness" *mens rea* requirement is that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."[42] Substantively, the conduct rule and the decision rule are irreconcilable. Dan-Cohen's point is that each serves an important normative function (disincentivizing legal ignorance for the conduct rule; capturing moral blameworthiness for the decision rule) and that achieving these normative ends outweighs the disadvantages of logical inconsistency.

With the distinction between conduct rules and decision rules in mind, we can further divide the statutory landscape into three kinds of statutes. First, there is a class of statutes addressed only to officials and containing only decision rules. This category probably makes up the bulk of congressional output. It includes the countless statutes allocating authority among governmental actors, prescribing rules of procedure for courts, and directing officials to spend money.

The second category contains statutes addressed to officials and the general public but, per Dan-Cohen, giving them different substantive messages.

The third category also includes statutes that are addressed both to officials and the general public but, unlike the second category, without disagreement between the messages. Most substantive criminal law falls into this category, owing to the prohibition on common law crimes.[43] Where substantive rules of private law are codified, they often fall into this category as well. Take, for example, the Uniform Commercial Code's specification of a buyer's rights upon delivery of improper goods:

> [I]f the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.[44]

The statute speaks both to members of the general public—telling buyers what they may do when they receive bad goods—and to officials—telling judges how to evaluate a buyer's reaction to such goods.[45]

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42 Ratzlaf v. United States, 510 U.S. 135, 137 (1994).

43 United States v. Hudson & Goodwin, 11 U.S. 32 (1812).

44 U.C.C. § 2-601(1) (2013).

45 A fourth category of statutes can be safely disregarded. Although rare, some statutes address only the general public. For instance, the Model Rules of Professional Conduct tell lawyers (who are, for this purpose, the "general public") that: "A lawyer should aspire to render at least [fifty] hours of pro bono publico legal services per year." MODEL RULES OF PROF'L CONDUCT R. 6.1 (2013). This aspirational statute does not control any official decisionmaking. To the extent it contains a "rule" at all, it contains a pure conduct rule.

Only statutes in the third category are "jury eligible" in *Chevron* for Juries. The portions of such statutes that announce conduct rules (e.g., "let no man steal") are what I mean by statutory conduct rules.

b. Statutes of General Applicability

The second prerequisite for jury eligibility is that the statutory conduct rule be of general, rather than specialized, applicability. "General applicability" here means that the statute governs (or potentially could govern) an ordinary person. This requirement excludes, for instance, statutes that presume scientific or other technical knowledge, as well as statutes governing licensed professionals.[46] For reasons that will become clear below, the limitation exists to ensure that a statute will be jury eligible only if its audience includes the general public.

For some statutes, the general applicability determination will be obvious. But not for all. Where general applicability is not obvious, courts operating under *Chevron* for Juries will have to engage in limited statutory interpretation. Consider, for instance, an anti-corruption statute that could be read as applying only to public officials, or that, alternatively, could be viewed as applying to everyone. In the *Chevron* for Juries framework, a court would decide what class of people the statute governs. If it found that the statute governs everyone, it would leave to the jury the task of interpreting the statute's substantive anti-corruption language.

2. Procedural Reforms

So far, this Article has examined how statutes will (or will not) be deemed jury eligible. Next, it considers what happens upon an eligibility determination. Importantly, nothing in the discussion that follows turns on whether a case is civil or criminal. *Chevron* for Juries applies the same way to both.[47]

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46 Difficult line-drawing cases could arise about whether a statute presumes technical knowledge. The Controlled Substances Act, for instance, refers to a great deal of chemistry. *See generally* 21 U.S.C. § 802 (2012). Courts operating under *Chevron* for Juries would have to determine whether those references make the Controlled Substances Act (or some portions of it) not jury eligible. There is no obvious reason why courts could not do so, even in difficult cases.

47 In the text, this Article will focus on the procedural reforms necessary to effectuate *Chevron* for Juries. Adoption of those reforms, however, would inevitably raise additional procedural questions beyond that discussion. I note two here. First, should jurisdictions permit litigants to probe potential jurors' legal views during voir dire? At least some probing seems appropriate. For instance, in a jurisdiction that adopted an intentionalist "interpretation instruction," it seems logical to permit litigants to identify potential jurors that take a strictly literal approach to interpretation. More difficult problems would arise if litigants posed hypotheticals previewing the ultimate interpretive question. As explained below, such questioning should probably be

a. Jury Instructions

The most important procedural reform of *Chevron* for Juries is that juries will be instructed—as to the issue purportedly controlled by the statute—with the unadorned text of the statutory conduct rule.

While this is a simple reform, it represents a significant shift from current practice. Trial courts operationalize judicial statutory interpretation through jury instructions. Consider the "honest services" variant of mail fraud, which criminalizes scheming to defraud a person out of his "intangible right of honest services."[48] After the Supreme Court ruled in *Skilling v. United States*[49] that "honest services" fraud encompasses only schemes involving kickbacks or bribes,[50] the Ninth Circuit promulgated a model jury instruction providing that an element of honest services fraud is that "the scheme or plan consists of a [bribe or kickback] in exchange for the defendant's services."[51] Thus, in future honest services cases in the Ninth Circuit—at least where the district court uses the model instruction—jury verdicts will necessarily reflect the Supreme Court's narrowing construction.

As Darryl Brown has explained, instructions that explain statutes constrain the jury's interpretive discretion.[52] *Chevron* for Juries does the opposite. Under *Chevron* for Juries, jury instructions cannot conform statutory language to judicial interpretations. In an honest services mail fraud case, for example, the judge would give the jury the relevant text of 18 U.S.C. §§ 1341 and 1346, but could offer no opinion about what those sections mean.[53]

Judges would, however, give a separate instruction explaining the *task* of interpretation. The content of this "interpretation instruction" will necessarily reflect a substantive theory of interpretation. Depending

disallowed. *See infra* note 187 and accompanying text. Second, when a judge adjudicates a legal claim without a jury—either because the proceeding is in equity or because the parties have not demanded a jury—should the legal system accord precedential status to statutory interpretations within the decision? My view is that this question should be resolved by analogy to *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, the Supreme Court ruled that if a court decides a question of statutory interpretation at *Chevron* step one—i.e., if it decides that Congress spoke clearly to the question—its decision is binding on agencies. *Id.* at 982–83. If the court decides the case at step two, however, agencies are free to subsequently amend their interpretation. *Id.* Likewise, in *Chevron* for Juries, if a judge sitting without a jury determines that only one reading of a statute is legally plausible, that decision should be precedential. If the judge recognizes that she is picking from among plausible readings of the statute, juries in future cases should be free to make their own selections.

48 18 U.S.C. § 1346; *id.* § 1341.

49 561 U.S. 358 (2010).

50 *Id.* at 405–11; *see also* Black v. United States, 561 U.S. 465, 467–71 (2010).

51 NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 8.123 (2012), *available at* http://www3.ce9.uscourts.gov/jury-instructions/node/582.

52 Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 ST. LOUIS U. PUB. L. REV. 25 (2002).

53 In making their arguments, however, the lawyers would not be so constrained. In fact, the lawyers would be expected to direct their interpretive arguments to the jury.

on the legal system's judgment, the instruction might say: "When interpreting a statute, your job is to identify and apply the literal meaning of the words." Or, at the other extreme, it might say, "When interpreting a statute, you must give effect to the subjective intentions of the members of the legislative majority that enacted the statute."

The "interpretation instruction" has no analogue in current interpretive practice, where judges are unconstrained in their choice of methodology.[54] Likewise, it is a departure from *Chevron* itself, as agencies are also free to choose from a range of interpretive methods. An interpretation instruction is necessary in *Chevron* for Juries, however, because selecting an interpretive methodology does not implicate a generally applicable conduct rule. That is, whether judges or juries (or agencies) should construe statutes according to the tenets of textualism, intentionalism, or something else poses a question of *official* decisionmaking. This Article's claim is that juries are better equipped than judges to interpret statutory conduct rules that govern ordinary citizens. Nothing in the structure of that claim, however, suggests that juries are in a superior position to choose among models of official decisionmaking. As such, judges should choose a methodology and instruct the jury on it.[55]

b. Dispositive Motions

When a jury is instructed with the language of statutory conduct rules, its verdict will reflect its interpretation of those rules. This reform will be for naught in cases where a judge does not permit the jury to return a verdict, or where a judge countermands a verdict already rendered. A modification to the law governing dispositive motions is required.

American procedural law contains a number of mechanisms that take a case, or an issue in a case, away from the jury, including motions to dismiss,[56] motions for summary judgment,[57] motions for judgment as a matter of law,[58] and, in criminal cases, motions for judgment of acquittal.[59] While these dispositive motions vary in what facts the judge may consider,[60] they share two important features. First, for each type of

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54 Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872–77 (2008).

55 This Article returns to the interpretation instruction below. *See infra* notes 94–100 and accompanying text.

56 FED. R. CIV. P. 12(b)(6); FED. R. CRIM. P. 12(b)(3)(B)(v).

57 FED. R. CIV. P. 56.

58 FED. R. CIV. P. 50.

59 FED. R. CRIM. P. 29.

60 When the motion is made on the pleadings, the judge takes the well-pleaded facts as true. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). When it is made after trial, as in a criminal motion for judgment of acquittal or a posttrial civil motion for judgment as a matter of law, the judge

motion, after determining the applicable facts, the judge evaluates whether those facts permit a reasonable jury to find for the nonmoving party. Second, to the extent disputed points of law—including disputed questions of statutory interpretation—are raised in dispositive motions, the judge may adjudicate them. In resolving legal disputes, however, the judge asks which side is actually right, not whether a reasonable jury could find for the nonmoving party.

The second feature common to dispositive motions renders the instructional change described above hollow. If a judge determines the "correct" interpretation of a jury-eligible statute on a dispositive motion, she makes the jury irrelevant. For juries to take the interpretive lead, judges ruling on dispositive motions must treat jury-eligible interpretive questions as they treat facts. Thus, rather than asking which interpretation is correct, the judge in a *Chevron* for Juries case would decide whether a reasonable jury could embrace the interpretation proposed by the nonmoving party. Dispositive motions raising disputed points about jury-eligible statutes could still be granted, but only if the moving party demonstrates that his opponent's interpretation is outside the zone of ambiguity. The judge thus retains a role in statutory interpretation—specifically, she retains the power to police the zone of ambiguity—while the jury's primacy is maintained.

c. Interpretive Motions in Limine

While dispositive motion practice will permit judges to monitor the outer bounds of reasonableness, it is an incomplete tool. Consider an implausible interpretation pressed by a criminal defendant. For instance, perhaps a defendant wishes to defend a charge of driving a vehicle in the park on the theory that his Jeep is not a vehicle. No dispositive motion is available to criminal prosecutors, so the prosecutor cannot dispense with the defendant's nonsensical argument. Dispositive motions practice in civil cases likewise has holes that would prevent judges from keeping some unreasonable statutory arguments away from juries.[61]

A second mechanism is thus necessary to ensure that only interpretations within the zone of ambiguity are presented to the jury. A form of motion in limine can serve this function: "[t]he purpose of an in limine motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence."[62] While

considers the evidence in the light most favorable to the nonmoving party. Scott v. Harris, 550 U.S. 372, 378 (2007).

61 This is because courts generally cannot grant dispositive motions that involve genuinely disputed questions of fact. When an issue simultaneously implicates a disputed factual question *and* a disputed point of statutory interpretation, a dispositive motion is not an effective tool for keeping unreasonable statutory interpretations away from the jury.

62 Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir. 1996) (internal quotation marks omitted).

most commonly invoked to bar inadmissible evidence, in limine motions can also be used to block impermissible arguments, as when prosecutors move to exclude arguments for jury nullification.[63] In limine motions could likewise be used, in the *Chevron* for Juries framework, to exclude anticipated arguments for unreasonable statutory interpretations. Thus, in a *Chevron* for Juries case, the criminal prosecutor described above could move in limine to prevent the defense from arguing that a Jeep is not a kind of vehicle.

d. Sources of Evidence

If they are to interpret statutes, juries will need access to evidence of statutory meaning. As noted, jury instructions will contain the statutes themselves. Most interpretive methodologies, however, do not stop with statutory text. All forms of intentionalism and purposivism, and even some forms of textualism,[64] recognize extrinsic evidence of meaning in certain circumstances. Most importantly, for the purposes of this Article, they recognize legislative history. Unless a jurisdiction adopts a narrowly textual interpretation instruction, *Chevron* for Juries thus entails some modification to the rules of evidence to allow litigants to present legislative history to the jury.

How much and what kind of legislative history juries should consider depends on the details of a jurisdiction's interpretive methodology, but a few general comments are possible. Regardless of a jurisdiction's theory of statutory meaning, some limitations on legislative history will be necessary. No sensible rule, for instance, would permit litigants to subpoena legislators for testimony. It will probably be necessary to develop explicit rules specifying what forms of legislative history are permitted. Further rules could specify threshold showings that litigants must make before offering evidence of legislative history.[65] Such rules in themselves may constitute an improvement on the haphazard fashion in which judges often use legislative history in the current interpretive regime.[66]

As with many evidentiary choices, moreover, courts will have to trade the cost of legislative history against its probity. The probity of legislative history, however, is not fixed. Rather, legislative history has

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63 United States v. Thompson, No. 99-41007, 2001 WL 498430, at *16 (5th Cir. Apr. 9, 2001).

64 *See, e.g.*, *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood.").

65 This could take a similar form to judicial determinations of expert qualification under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

66 *See* Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 6 (1988) ("[I]n each case the Justices have engaged in an ad hoc examination of the circumstances and pronouncements that surrounded the legislative action.").

more relevance on some theories of interpretation than others. Jurisdictions adopting legislative history-intensive approaches to interpretation must be willing to bear more evidentiary costs than jurisdictions adopting text-intensive approaches. Notably, the same is true in the current system. That is, when judges use legislative history-intensive approaches, they impose costs on themselves and others.[67] The difference is that *Chevron* for Juries makes these costs explicit, permitting open discussion of whether they are worth incurring.

C. Chevron *and* Chevron *for Juries*

At this point, the reader may wish to know what the *Chevron* for Juries structure described above has to do with *Chevron*. They are linked in at least three respects.

First, as noted, *Chevron*'s opening premise is that traditional legal tools are often better at identifying a range of permissible statutory meanings than a single "best" meaning.[68] *Chevron* for Juries begins from the same premise. In *Chevron* for Juries, judges are relieved of the duty of finding the "best" reading of jury-eligible statutes. When deciding dispositive motions and motions in limine, courts will instead use traditional legal tools to evaluate whether an interpretation proposed by a party is reasonable. *Chevron* and *Chevron* for Juries thus share a "range," as distinguished from a "point," approach to judicial interpretation.[69] A very preliminary justification for adopting *Chevron* for Juries is that it achieves a measure of intellectual consistency between the interpretation of administrative statutes and the interpretation of conduct-regulating statutes of general applicability.

Second, both *Chevron* and *Chevron* for Juries are deference regimes, in that both call for judges to defer to the reasonable interpretations of others. To be sure, the chronology of the reasonableness check differs between the two regimes. In traditional *Chevron*, courts check for reasonableness after the agency interpretation, when an adversely impacted party seeks judicial review. In *Chevron* for Juries, judges ensure reasonableness before the jury interpretation, through resolution of dispositive motions and motions in limine. Thus, traditional *Chevron* deploys deference ex post while *Chevron* for Juries deploys it ex ante. Both regimes, however, combine a judicial check on reasonableness with deference to nonjudge interpreters.

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67 VERMEULE, *supra* note 2, at 192–97.

68 *See supra* notes 15–23 and accompanying text.

69 *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1046 (2011) (utilizing point/range terminology to describe the *Chevron* framework).

Third, *Chevron* and *Chevron* for Juries both find normative justification in comparing the institutional capabilities of judges to the institutional capabilities of other officials. This Article turns to that institutional analysis of juries shortly.

I should not, however, overstate the analogy. There are clear differences between deference to administrative agencies and the deference to juries proposed in this Article. Several will be discussed below. Most importantly, juries, unlike agencies, cannot announce binding prospective rules. Because agencies can clarify statutory ambiguities for the entire nation, a feat that only the Supreme Court can accomplish in the Article III setting, *Chevron* is sometimes celebrated for its ability to foster legal certainty.[70] *Chevron* for Juries, on the other hand, renders courts unable to resolve statutory ambiguities except on the margins, a reform that tends to reduce certainty. This Article returns to the question of certainty below.[71] While acknowledging it as a cost of the proposal, I will suggest that *Chevron* for Juries does not detract from legal certainty as much as one might initially suppose. At this point, it suffices to note the departure from *Chevron*.

D. Chevron *for Juries and the Historical Role of the Jury*

Before turning to substantive arguments for *Chevron* for Juries, one final introductory note is in order. *Chevron* for Juries may strike the reader as a stark departure from current practice. "Statutory interpretation," Lawrence Solan notes, "is traditionally seen as the business of the court."[72] The proposal, however, is less novel than it first appears. Statutory interpretation has not always belonged exclusively to judges. In the colonial period and into the nineteenth century, juries decided questions of fact *and law*. A brief foray into this history may ease concerns about the break from current interpretive practices.

The jury's control over law in the colonial era and immediately after the Revolution is well documented.[73] English juries of the

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70 *E.g.*, Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) ("By removing the responsibility for precision from the courts of appeals, the *Chevron* rule subdues this diversity, and thus enhances the probability of uniform national administration of the laws.").

71 *See infra* Part III.A.

72 LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 199 (2010).

73 *See* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 587 (1939) (noting that in congressional debate on the Sedition Law of 1798, "[n]either [side] questioned expressly the propriety of allowing the jury to determine the ultimate legal question of the substantive meaning of the statute"); *see also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in United States*, 61 U. CHI. L. REV. 867, 902–20 (1994); Matthew P.

eighteenth century lacked de jure authority to decide questions of law.[74] A different practice emerged in the colonies.[75] In the years leading up to the American Revolution, the jury's law-finding power came to symbolize resistance to British rule. Indeed, British statutes curtailing the power of American juries were among the causes of the Revolution. The Continental Congress complained in the Declaration of Independence that George III had combined with Parliament to deny colonists "in many cases, of the benefits of trial by jury."[76]

The law-finding function of American juries persisted in the immediate aftermath of the Revolution. In the early federal trial courts, judges offered their opinion of the law to the jury, but the jury had the prerogative to reject their views.[77] Over the course of the nineteenth century, however, the jury's law-finding authority came under attack, and was, eventually, discarded.[78] The change took hold first in civil cases. Judges developed procedural devices, such as new trials and special verdicts, to limit jury law-finding.[79] By the 1820s and 1830s, judges more straightforwardly denied that juries have a law-finding role in civil cases. The evolution was slower in criminal cases. As late as 1851, nine states still had statutory or constitutional provisions guaranteeing the law-finding power of criminal juries.[80] After 1850, however, the tide turned decisively in favor of judges.[81] In 1895, the Supreme Court settled the matter for purposes of the federal courts,

Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377; Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 324 (2003); Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111 (1998); Jonathan Lahn, *The Demise of the Law-Finding Jury in America and the Birth of American Legal Science: History and its Challenge for Contemporary Society*, 57 CLEV. ST. L. REV. 553 (2009); Stephan Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44 HASTINGS L.J. 579 (1993); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

74 Alschuler & Deiss, *supra* note 73, at 903.

75 By the 1734 trial of Peter Zenger for defaming the royal governor of New York, the jury's authority over law had developed to the point that Zenger's defense counsel could assert: "I know [that the jury] ha[s] the right beyond all dispute to determine both the law and fact, and where they do not doubt of the law, they ought to do so." Harrington, *supra* note 73, at 393. Zenger was acquitted.

76 THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

77 Harrington, *supra* note 73, at 401. In *Georgia v. Brailsford*, a jury trial conducted by the Supreme Court, Chief Justice Jay instructed the jury that while "on questions of law, it is the province of the court to decide," the jury nonetheless possessed a right "to determine the law as well as the fact in controversy." 3 U.S. (3 Dall.) 1 (1794).

78 Alschuler & Deiss, *supra* note 73, at 906–11; Harrington, *supra* note 73, at 405–15.

79 Iontcheva, *supra* note 73, at 324.

80 Alschuler & Deiss, *supra* note 73, at 910.

81 *Id.*

declaring in an opinion by Justice Harlan that absent contrary statutory direction, jurors are bound by the legal instructions of trial judges.[82]

There are several dimensions to the rejection of law-finding juries in the nineteenth century. The story is partly economic, as commercial interests in the early Republic feared the uncertainty of jury determinations of law.[83] It is partly about the institutional interests of judges.[84] And it is partly about the increased complexity and sophistication of American legal practice after the Revolution.[85] In an important sense, though, the rejection of the law-finding jury mirrored an ideological shift in American jurisprudence. The law-finding jury of the eighteenth century reflected a natural law orientation.[86] But the nineteenth century saw a turn away from natural law and toward "law as a set of positive rules leading to predictable results."[87] The plenary power of juries over law was inconsistent with that idea of law. As one commentator put the point: "[t]he concept of a natural law accessible to the common man was alien to lawyers and judges who distrusted the common man."[88] The demise of the jury's law-finding function thus in part reflects the larger shift from natural law to mechanical legal science.[89]

Mechanical legal science, however, has not survived in statutory interpretation, as discussed below.[90] Our practice of statutory interpretation as the exclusive (outside administrative law) realm of judges is thus based on a discarded jurisprudential theory. Just as the tradition of plenary jury law-finding did not survive the evolution from naturalism to mechanical legal science, the tradition of plenary judge statutory interpretation need not survive the demise of mechanical legal science.

To be clear, this Article's argument is not originalist. I do not claim that the founding-era history mandates assigning a lead role in statutory interpretation (for any class of statutes) to juries. The history does, however, evidence that such a role for juries is consistent with our

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82 Sparf v. United States, 156 U.S. 51, 105–07 (1895). As Harrington notes, at least three state constitutions still authorize juries to determine the law, but "judicial opinions have rendered these provisions a nullity." Harrington, *supra* note 73, at 432–33 n.260.

83 Harrington, *supra* note 73, at 397.

84 Alschuler & Deiss, *supra* note 73, at 916–17 (citing "members of the Critical Legal Studies movement, public choice theorists, and Marxists").

85 *Id.*

86 As a 1964 Yale Law Journal note explains, "[s]ince natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule was consonant with principles of higher law." Note, *supra* note 73, at 172.

87 *Id.* at 192.

88 *Id.*

89 *See* Lahn, *supra* note 73, at 567–72.

90 *See infra* notes 211–12 and accompanying text.

constitutional structure. If the substantive arguments for *Chevron* for Juries succeed, there is room for Congress or the courts to adopt it.

II. ARGUMENTS

In *Chevron*, the Supreme Court recognized that officials working at administrative agencies are better than judges at interpreting certain statutes.[91] *Chevron* for Juries is justified on the same kind of logic. Just as administrative agencies are epistemically and politically more capable than judges at interpreting regulatory statutes, juries are epistemically and politically better than judges at interpreting statutes that govern the conduct of the general public. Those advantages provide the central justification for *Chevron* for Juries.

A. *Epistemic Legitimacy*

Chevron assigns primary responsibility for interpreting regulatory statutes to agencies in part because of the subject-matter expertise of agency officials. This Section argues that juries are likewise subject-matter experts on statutes that govern the conduct of the general public, and thus that jury interpretations of these statutes are more likely to be accurate than judicial interpretations. To be sure, the technical and scientific "expertise" of agency officials differs from the kind of "expertise" juries possess. Agency officials are experts because of their training and professional experience in the subject-matter that they regulate. The jury's expertise, by contrast, emanates from its structure, not from any subject-specific training or experience.

This Section advances its epistemic claim via two approaches. The first is based on the Condorcet Jury Theorem, which provides plausible, but ultimately tentative, support.[92] For more robust support, the second approach examines the jury's institutional advantages vis-à-vis judges in completing the tasks required by the three leading schools of statutory interpretation.[93] Before developing these approaches, however, I must address what "accuracy" means in the context of statutory interpretation.

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91 *See supra* Part I.A.2.

92 *See infra* Part II.A.2.

93 *See infra* Part II.A.3.

1. "Accuracy" in Statutory Interpretation

It is unclear whether a court's interpretation of a statute can today be described as "accurate." Accuracy talk presupposes an external rubric against which a proposition can be verified or falsified. Statutory interpretation, however, has proven resilient to external rubrics. Despite a vigorous academic debate, especially during the last twenty years, no consensus has emerged about the goal of statutory interpretation.[94]

Consider the statutory methodologies found in the U.S. Reports. In one opinion, authored by Justice Scalia, the Court appears committed to the notion that the goal of statutory interpretation is to recover the ordinary meaning of the statutory text.[95] In another opinion, authored by Justice Breyer, the Court's apparent goal is to ascertain and apply the statute's purposes.[96] In yet another opinion, penned by Justice Stevens, the Court inquires into the subjective intentions of the statute's authors.[97] Critically, the Court does not consider itself or lower courts bound by methodology.[98] Each judge is thus free to apply her interpretive goal of choice, and each opinion sets its own standard of interpretative success. The lack of consensus among judges over interpretive goals means that there is no external way to evaluate whether any particular interpretation was "accurate."

Chevron for Juries permits meaningful talk of interpretative accuracy. As described in Part I, judges in a *Chevron* for Juries framework will give juries a general instruction explaining the task of interpretation. In the early days of *Chevron* for Juries, if the legislature has not imposed an interpretive goal, lower-court judges may disagree about what the instruction should say. Textualist-minded judges will instruct juries in accord with the principles of textualism, purposivists with the principles of purposivism, and so on. Eventually these cases—with their divergent instructions—will reach the appellate courts. But instead of dressing for a substantive result, interpretive methodology will arrive as the issue for decision. Once the top appellate court has

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94 At least not in federal court. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1765 (2010) ("Indeed, the Court does not give stare decisis effect to *any* statements of statutory interpretation methodology." (emphasis added)). Gluck's survey of state courts, however, suggests that some states have succeeded in subjecting interpretive methodology to the rule of stare decisis. *Id.* at 1771–75.

95 *E.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 (1991).

96 *E.g.*, Varity Corp. v. Howe, 516 U.S. 489, 513–15 (1996).

97 *E.g.*, Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529–30 (1983) ("But before we hold that the statute is as broad as its words suggest, we must consider whether Congress intended such an open-ended meaning.").

98 *See* Foster, *supra* note 54, at 1873–75; *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144–45 (2002) ("[T]he Justices do not seem to treat methodology as part of the holding . . . .").

spoken, statutory interpretations will be "accurate" to the extent that they achieve the goals articulated by that court, and "inaccurate" to the extent they depart. A preliminary advantage of *Chevron* for Juries is that it permits meaningful discussion of interpretive accuracy.

To say that courts have been unable to agree on the goal of interpretation, however, does not mean that such consensus is impossible.[99] For purposes of comparing the institutional capacities of judges and jurors, this Article assumes that Congress or the Supreme Court *could* impose a binding theory of statutory meaning, thus providing a framework by which to evaluate the accuracy of judicial statutory interpretation. The (epistemic) question for *Chevron* for Juries becomes whether judges or juries are more capable of accurately interpreting statutes that govern the conduct of the general public according to the methods and goals of a specified approach.

This is, of course, an empirical question. The best answer would be based in falsifiable empirical research comparing the accuracy rates of judges and juries. Such research does not appear to exist. Although jury scholars have extensively studied how juries decide fact questions and apply instructions generally, there is very little data on statutory interpretation by juries.[100]

Notwithstanding the lack of data, reasonable inferences can be made from known properties of the institutions. The next two Sections seek to get at the epistemic comparison of judges and juries in two ways. The first, which is agnostic to theories of statutory meaning, invokes the numerosity of juries to apply the Condorcet Jury Theorem. The second relaxes the theory agnosticism slightly to consider the jury's institutional characteristics as applied to the three most prominent modern interpretive schools: textualism, purposivism, and intentionalism.

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99 *See* Foster, *supra* note 54, at 1865–70.

100 *See* Brown, *supra* note 52, at 38–39 nn.43–45 (collecting sources on research into jury's ability to apply instructions). Professor Brown is an exception. *See* Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998). He examined videotaped jury deliberations from an actual criminal case. *Id.* at 1239–49. The defendant, a man of "substantially sub-average intelligence," was charged with being a felon in possession of a firearm. *Id.* at 1239 (internal quotation marks omitted). The trial evidence revealed unambiguously that the defendant was a felon and that he possessed a gun, ostensibly all the facts necessary for conviction. The jury nonetheless acquitted. Brown explained that the jurors seized on the statutory requirement (incorporated into their instructions) that the defendant "knowingly" possessed the gun. They resisted a literal construction of "knowingly," reasoning that a man of the defendant's intelligence did not "know" of his possession in the way an ordinary person would. Brown found that the reasoning deployed by the jurors was substantially similar to that found in judicial statutory interpretation, particularly of the non-textualist vein. *Id.* at 1250–54; *see also* Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT L. REV. 1281 (2003) (describing interpretive function of juries).

2. The Jury Theorem

The epistemic version of the Condorcet Jury Theorem provides that when a group considers a question with a right answer and a wrong one, the group's collective judgment will exceed that of its individual members so long as (i) the average member of the group has a better-than-random chance of getting the right answer, and (ii) voting is statistically independent and abides majority rule.[101] One important implication of the Theorem is that "a large enough number of fairly poor (but better than random) guessers can easily prove more competent than a small panel of highly competent experts."[102] Supermajority voting requirements speed the rate at which juries converge on right answers, provided that they do not preclude decision altogether.[103]

It would strain credulity to suggest that the average juror's capacity for statutory interpretation exceeds that of the average judge. But if jury interpretations of conduct-regulating statutes of general applicability satisfy the Theorem's empirical conditions, we nonetheless have a basis on which to prefer juries to judges. There are two potential problems: the assumption of statistical independence of votes and the assumption of voter competence.[104] Because jury statutory interpretation has not been subjected to empirical study, there is no basis to firmly conclude that these assumptions hold. Nonetheless, there are reasons to believe that they might.

The first hurdle is the requirement that Condorcetian jurors vote independently. Actual jury decisions are the product of deliberation, not

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101 Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 4–5 (2009).

102 *Id.* at 5; *see also* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1462 (2011) ("[A] group of lay jurors who decide by majority rule can arrive at the correct answer more often than can a single expert.").

103 Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723, 743–44 (2001). It is not the case, however, that unanimous or supermajority voting requirements always enhance group judgment. When group choice is structured such that a unanimous vote is required for one course of action, but not for its alternative, such requirements can detract from group judgment. In that setting, these voting rules tend to reduce the chance that any particular voter will be necessary to the outcome. That may prompt voters to (1) vote strategically, and/or (2) fail to optimally invest in information gathering. *See* Timothy Feddersen & Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts Under Strategic Voting*, 92 AM. POL. SCI. REV. 23 (1998); Stephenson, *supra* note 102, at 1468–71. Trial juries, however, require a supermajority vote to find for either side. In that circumstance, each voter is necessary to *every* decision—provided that a decision is actually made—and the strategic voting and information gathering problems are avoided. *See generally* Peter J. Coughlan, *In Defense of Unanimous Jury Verdicts: Mistrials, Communication, and Strategic Voting*, 94 AM. POL. SCI. REV. 375 (2000).

104 *See supra* note 101 and accompanying text.

the silent aggregation of votes.[105] Although deliberation poses a challenge to voter independence, it does not, without more, defeat it.[106] In fact, by increasing the information available to jurors, deliberation can enhance group accuracy on Condorcetian terms.[107] A more difficult problem arises if, in addition to deliberating, jurors defer to opinion leaders within the jury. Deference, however, is not necessarily fatal to the Jury Theorem either.[108] Moderate deference, especially to jurors with real expertise, can even bolster Condorcetian logic.[109]

Whether jurors would delegate—i.e., defer strongly—their interpretive votes to other jurors is obviously an empirical question. But there is no a priori reason to believe that jury dynamics in this regard would differ materially from jury dynamics in the factfinding domain. The empirical findings from a study of jury factfinding lends some—albeit not conclusive—support to the proposition that jurors do not abdicate their votes. In a mock jury experiment, Shari Diamond and Jonathan Casper polled jurors, prior to deliberation, about their preferred damages verdict.[110] They found that predeliberation verdicts of jury forepersons correlated more strongly to postdeliberation verdicts than predeliberation verdicts of all jurors. Importantly, however, the correlation of forepersons was 0.44, compared to a correlation of 0.22 for all jurors. This suggests that while forepersons have substantial influence, it may not be overwhelming. While the dynamics of deliberation likely detract from a pure Condorcetian logic, this data does appear to show some independence.

Moreover, Diamond and Casper also found that when a juror had an expertise useful to the subject being deliberated—specifically, when a juror in a statistically complex antitrust case had taken a statistics course—the juror was both more likely to be selected as foreperson and

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105 Social science research from the factfinding context shows that deliberation does impact jury outcomes. Iontcheva, *supra* note 73, at 347–48.

106 Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1595 (2007) ("The Theorem requires that independent votes cannot be predicted just by knowing how some other vote was cast, but voters can deliberate together and influence each others' views without undermining the Theorem's logic."); *see also* David M. Estlund, *Opinion Leaders, Independence, and Condorcet's Jury Theorem*, 36 THEORY & DECISION 131, 131–32, 148–49 (1994). *But see* Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1362 (2012) ("But of course, the jurors' final votes are not at all independent, having been reached after discussion with one another.").

107 David M. Estlund et al., *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1327–28 (1989) (Waldron section).

108 *Id.*; *see also* Vermeule, *supra* note 106, at 1608–09.

109 Vermeule, *supra* note 106, at 1609 ("A small number of (effectively independent) voters of very high average competence can do better than a large number of voters of lower average competence.").

110 Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 544–48 (1992).

more likely to be influential in that role.[111] This suggests that jurors may defer based on expertise, potentially increasing the accuracy of their outcomes. It does not, of course, prove it, as the dynamic could be the result of an information cascade rather than moderate deference to expertise.[112] While more empirical data is needed to determine whether jury dynamics comport with the independence condition of the Jury Theorem, it seems plausible that they do.

The second Jury Theorem hurdle requires that the average juror's competence exceed that of a random guesser. That level of competence is required for the Jury Theorem to apply at all. Because judges are concededly experts at statutory interpretation, moreover, preferring juries requires more than formal compliance with the Jury Theorem's requirements. The Jury Theorem predicts that juries will reach the correct answer more quickly—i.e., with fewer voters—as average competency rises. Thus, Saul Levmore notes that if a jury of twelve barely competent members is required to render its verdict with nine votes, the chance of a correct verdict is only fifty-seven percent. But if individual members get the right answer six times out of ten, group accuracy shoots to ninety-four percent.[113] For the Jury Theorem to plausibly lead to a preference for juries over judges, jurors must bring more than the bare minimum of interpretive competence to the jury room.

In one sense, whether they do is another empirical question.[114] Below, this Article will consider whether the jury's skills match the requirements of leading interpretative theories. Even in the abstract, however, there is good reason to think that, as to many statutes that are jury eligible in *Chevron* for Juries, jurors possess the requisite capacity for a strong application of the Jury Theorem.

Statutes are jury eligible only if they directly regulate the conduct of ordinary people, i.e., the sort of people that populate juries. The void-for-vagueness doctrine, an aspect of the Due Process Clauses of the Fifth and Fourteenth Amendments, requires that many of these statutes be comprehensible to ordinary people. The doctrine ensures that statutory

111 *Id.* at 552–53.

112 *See* Stephenson, *supra* note 102, at 1475 (describing information cascades, also known as herding).

113 *See* Levmore, *supra* note 103, at 735 n.23. To be clear, I do not mean to suggest that *Chevron* for Juries would entail relaxing jury unanimity rules. Levmore's numbers merely provide a mathematical point of reference. Moreover, as he notes, because real juries deliberate and may sometimes compromise, the numbers must be taken with a grain of salt. *Id.* ("In reality, when supermajority or unanimity rules are in place, and especially when they are symmetrical as between the parties, the voters are encouraged to deliberate and to reach a verdict.").

114 Actually it is two questions. First, what is the interpretive capability of juries? Second, what is the interpretive capability of judges?

readers receive "fair notice" of what is and what is not legally permissible.[115]

"Fair notice" can be conceptualized as requiring a minimum probability that an ordinary person, given the opportunity to consider relevant sources of statutory meaning, will accurately apply a statute to a particular fact setting.[116] So understood, juror competence becomes a kind of existence condition for many statutes that govern the conduct of the general public. For present purposes, it is not important to precisely fix the constitutionally required probability.[117] At a minimum, it seems obvious that if the probability does not exceed fifty percent, the statute does not give fair notice. That intuitive minimal probability is all that is needed to say that a weak form of voter competency affixes to these statutes.

It does not seem much of a stretch, moreover, to posit that the constitutionally required probability threshold meaningfully exceeds fifty percent. Only a slight increase is needed for a stronger form of Jury Theorem to hold, as Levmore's numbers show. In the context of criminal statutes especially, it is reasonable to believe that due process requires at least a sixty percent chance that an ordinary person can determine whether a particular action violates a prohibition. Such a probability threshold lends significant credence to a strong version of the Jury Theorem.[118]

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115 Dan-Cohen, *supra* note 35, at 658–64; *see also* United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011) (noting that the doctrine "protects persons by providing 'fair notice' of a statute's applicability and by preventing 'arbitrary and discriminatory prosecutions' of a statute's enforcement" (quoting Skilling v. United States, 561 U.S. 358, 412 (2010))), *cert. denied*, 133 S. Ct. 107 (2012).

116 The "fair notice" rationale underlying the vagueness doctrine has been attacked on the grounds that, in a world in which people do not actually consult statutes to plan conduct, it is "entirely formal." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207 (1985). But, as Paul Robinson points out, the hallmark of fair notice is not actual notice, but the opportunity for it. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 364 (2005) ("Fairness requires that an actor have at least an opportunity to find out what the criminal law prohibits."). So conceived, "fair notice" justifies the vagueness doctrine. When statutory language is so indeterminate that a reasonable person cannot get at its true meaning, no opportunity for notice exists. Such an opportunity does, by contrast, exist when clear statutory language goes unread.

117 Although the vagueness prohibition is strongest in the criminal context, it applies to some civil statutes as well. In *A. B. Small Co. v. American Sugar Refining Co.*, the Court indicated that the doctrine applies to statutory questions of private law:

> It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as to really be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases.

267 U.S. 233, 239 (1925).

118 A third Jury Theorem hurdle arises from the collective action problem nested in the Theorem's logic. *See* Stephenson, *supra* note 102, at 1464–68. As Stephenson notes, the Condorcetian framework "assumes that each agent gets some 'signal' of the correct answer to the

3. Juries and the Major Models of Interpretation

Pure Condorcetian logic lends tentative support to *Chevron* for Juries. For stronger support, we must more closely examine the particular institutional capabilities of judges and juries. This examination begins with the old saw that judges decide the law and juries decide the facts. Because statutory interpretation is conventionally viewed as "law,"[119] it poses a seeming obstacle to the claim that juries could be superior interpreters of *any* statutes. I must deal with this obstacle before proceeding further.

It is an open question in legal theory whether law and fact are ontologically, logically, or even analytically distinct. Ronald Allen and Michael Pardo have argued that they are not.[120] On their account, law is a species within the larger genus of fact. If Allen and Pardo are right, then the law-fact obstacle to *Chevron* for Juries is easily set aside. So we assume that Allen and Pardo are wrong, and that law and fact really are different.

Doctrinally, the division of "questions of law" from "questions of fact" is messy, even incoherent.[121] Consider negligence determinations. To the uninitiated, the determination of whether a given set of facts fits within the rubric of *legal* negligence would seem straightforwardly a question of law. Yet "it is a firmly entrenched rule that juries shall decide both the underlying facts and whether those facts constitute negligence."[122] What gives?

Henry Monaghan has shown that the incoherence of the law-fact distinction stems from a failure to recognize that the binary categories of law and fact actually describe three functions: "law declaration, fact identification, and law application."[123] Two of the functions categorize easily: law declaration involves questions of law and fact identification questions of fact. Law application, however, does not fit neatly into

question at issue." *Id.* at 1465. If a costly investigation is required to obtain a quality signal, then "the more agents that are involved . . . the stronger is the incentive to free ride." *Id.* Thus, if the signal is expensive and there are a large number of agents, the group is likely to underinvest in information acquisition. *Id.* Nonetheless, it seems unlikely that trial juries are significantly impacted by this collective action problem. The cost of obtaining quality signals in the trial setting derives from attending to the evidence and arguments of the parties. Courts compel juror attendance at trial, thus relieving jurors of the decision whether to expend resources on signal gathering. They arrive at the jury room having been forced to engage in the costly information acquisition necessary to obtain good signals.

119 *See* Solan, *supra* note 72, at 199.

120 Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

121 *Id.* at 1770–71; *see also* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

122 Allen & Pardo, *supra* note 120, at 1781.

123 Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985).

either camp. It is situation specific, and thus factlike. Yet it involves judgments about governing norms, and is thus lawlike.[124]

The doctrinal incoherence of the law-fact distinction rears its head on questions of law application, which cannot be categorized as law or fact based on analytical considerations. Rather, as Monaghan argues, categorization of law application poses an allocative question: "what decisionmaker should decide the issue?"[125] For negligence determinations, application of the reasonableness standard is categorized as fact (and thus assigned to juries) on the logic that:

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.[126]

The task of determining whether a particular statute applies to a particular fact setting is law application. That is, "[i]t involves relating the legal standard of conduct"—i.e., a statute—"to the facts established by the evidence."[127] Following Monaghan, that means that the conventional view of statutory interpretation as "law," rendered without consideration of institutional competencies, is too quick.

I should now take a cut at describing the kinds of activities for which judges are well suited and the kinds of activities that favor juries. Judges and juries bring different tools to the interpretive table. Judges bring formal legal education, years of legal practice (usually), and a perspective that extends across multiple cases. This background equips judges to decide issues that depend on legal evidence, e.g., constitutional principles and the common law background. It also equips judges to perform well in tasks requiring analogical reasoning, that most distinctive form of common law analysis.[128] Juries bring numerosity, which was the basis for the Condorcetian approach, as well as the perspective of the ordinary or average citizen, what Justice Hunt called knowledge of the "common affairs of life" in *Stout*.[129] This "common

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124 *Id.* at 236.

125 *Id.* at 237.

126 Sioux City & Pac. R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873).

127 Monaghan, *supra* note 123, at 236.

128 *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning.").

129 *Stout*, 84 U.S. (17 Wall.) at 664; *see* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 205 (1989) ("The jury's competence, unlike that of the

sense" not only empowers juries to determine questions of "reasonableness,"[130] but further equips them to make credibility determinations and reconcile inconsistent evidence to resolve disputed historical records.[131]

The project of statutory interpretation can take many forms, each of which requires a different set of capabilities. One can conjure interpretive regimes in which judges will handily outperform jurors. For instance, if one adopts as an interpretive rule that: "Statutory ambiguity should be construed to make the law consistent with the English common law during the reign of Henry VIII," judges will do vastly better than juries. (We might also expect legal historians to outperform judges, but that is another matter.) Such an interpretive decision-rule, however, seems unlikely. The relevant question is whether juries or judges are better situated with respect to the interpretive theories that lawmakers might plausibly adopt.

For decades, three schools of interpretation have vied for preeminence: textualism, intentionalism, and purposivism.[132] It is reasonable to presume that if forced to choose (by the need to approve an interpretation jury instruction), lawmakers, whether legislative or judicial, would settle on one of these candidates. Although the details of the interpretive claims of each school are contestable, the basic shape of the debate is clear. For textualists, "[s]tatutes are law, not evidence of law."[133] The search for statutory meaning is the search for the best semantic reading of the text. For intentionalists, the subjective intention of the enacting legislature (or legislators) is paramount. Statutory text is a guide to those intentions, but only a guide. Finally, for purposivists, interpretation is about finding and applying the reading that best achieves the legislative purposes underlying a statute.[134]

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judge, rests partly on its ability to reflect the perspectives, experiences, and values of the ordinary people in the community—not just the most common or typical community perspective, but the whole range of viewpoints."); Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 503 (2005) ("Jurors, on the one hand, have the benefit of being able to decide in groups and are expected to bring to the process values that reflect the conscience of the community.").

130 *See* Monaghan, *supra* at note 123, at 232–33.

131 RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 41–63 (2003).

132 Andrei Marmor, *Textualism in Context* 2 (Univ. S. Cal. Sch. of Law Legal Studies Research Paper Series, No. 12–13, 2012), *available at* http://ssrn.com/abstract=2112384; *see also* VERMEULE, *supra* note 2, at 208–10.

133 *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.).

134 Some scholars claim that the distinctions between textualists, intentionalists, and purposivists have narrowed or disappeared. This is primarily a claim about the methodological tools deployed by adherents of the different models. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) ("Given that nonadherents and adherents of textualism alike place great weight on statutory text and look beyond text to content, it is hard to tell what remains of the textualism-purposivism debate."). At the level of theories of meaning, the distinctions between textualism, intentionalism, and purposivism remain sharp. *See, e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

The Subsections below argue that, in the limited context of statutes that govern the conduct of the general public, juries would be better than judges at using the tools of and answering the interpretive questions posed by these three schools of interpretation.

a. Textualism

The epistemic case for juries is strongest on textualist premises. As John Manning noted in a recent historical review, the defining characteristic of textualism is a commitment to the primacy of statutory text.[135] Notwithstanding theoretical differences between successive generations of textualist scholars, textualists agree on the goal of assigning statutes the meaning that "a reasonable person, conversant with the relevant social and linguistic conventions," would give the language.[136] As Manning puts it, textualists look for what "one would ordinarily be understood as saying, given the circumstances in which one said it."[137]

Textualists thus adopt, as their theory of meaning, that statutes mean what ordinary members of the relevant linguistic community, reading the statutes in context, understand them to mean. The question is which courtroom actor—judge or jury—can best find such meaning for jury-eligible statutes.

Because *Chevron* for Juries is limited to conduct-regulating statutes of general applicability, the relevant linguistic community is the general public. Judges are members of this community, but they are not *ordinary* members. Judges are (usually) elite lawyers and, as Vermeule explains,

> [t]here is a crucial sense in which lawyers are not just like ordinary people. They are part of an elite professional class, and their legal training gives them distinctive professional biases, or is at least correlated with such biases, which arise from self-selection into the legal career by certain types.[138]

At best, judges' legal training might make them good predictors of ordinary meaning.

Jurors, by contrast, are drawn directly from the linguistic community of the statutes with which *Chevron* for Juries is concerned. They are a (mostly) random sample of the ordinary-language users whose meaning textualism prioritizes.[139] When asked to identify the

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135 John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1293–98, 1303–07 (2010).

136 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003).

137 *Id.* at 2397–98.

138 Vermeule, *supra* note 106, at 1588–89 (footnotes omitted).

139 This Article will return below to the question of whether the method by which juries are selected is meaningfully random. *See infra* notes 181–83 and accompanying text.

ordinary meaning of a jury-eligible statutory phrase, jurors need not predict anything. Rather, they must merely identify how they personally understand the statutory language, and they are given the opportunity to examine and develop their understanding through deliberation. On textualist premises, juries are like focus groups.[140] Their innate understanding of ordinary meaning offers compelling epistemic advantages.[141]

b. Intentionalism

To intentionalists, the meaning of a statute in any particular context is what the enacting legislature (or enacting legislators) intended.[142] To discover intent, intentionalists look to the statutory text and beyond it to legislative history of various forms, such as committee reports and floor statements. If intentionalism was operationalized into a *Chevron* for Juries "interpretation instruction," it might go something like this:

> You have been asked to decide whether a statute applies in this case. To decide whether the statute applies, you must determine whether

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140 Indeed, a committed textualist might go further, in two ways. First, the logic here might support a much more radical proposal to submit interpretive questions that arise in litigation to large-scale polls. Whether "interpretation by Gallup" makes logical sense depends on the importance of deliberation. Even if deliberation is dispensable, however, such a system would be procedurally unwieldy. It would also be quite expensive to submit every jury-eligible interpretive question arising in litigation to a large-scale poll. Second, for statutes that are not "generally applicable" because they apply only to a sub-set of the public—e.g., merchants—the "focus group" logic cuts in favor of empanelling specialist juries. Of course, non-generalist juries raise serious problems of their own. *See infra* note 180 and accompanying text.

141 Two categories of statutes raise problems for textualists. First, statutes that incorporate technical terms pose a potential difficulty. As Manning notes, "[a] given statutory phrase may reflect the often elaborate (but textually unspecified) connotations of a technical term of art." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 81 (2006). Such technical meanings can, but need not, be legal in origin. When statutes contain terms beyond the jury's ken, the jury must rely on evidence and argument submitted by the parties. Second, some statutes contain words whose meaning has shifted over time. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 201 (2010). Might judges do better than juries when interpretation involves technical or antiquated terms? They might, but before an interpreter can decide what a technical or antiquated term means, he must determine that a particular phrase *is* a technical or antiquated term. That, on the textualist view, is a question for an ordinary user of the statutory text. Lawrence Solum has argued that technical terms in legal texts require a form of deference to specialists. Lawrence B. Solum, *Semantic Originalism* 54–55 (Ill. Pub. Law Research Paper No. 07–24, 2008), *available at* http://ssrn.com/abstract=1120244. But the decision to defer is necessarily premised on the decision that the words in a statute lack, or are not best read as using, ordinary terminology. Just as jurors are uniquely situated to sniff out ordinary meaning on the textualist view, so too are they well positioned to determine when statutory text includes terms of art and antiquated terms. Even if judges might be marginally better at interpreting such terms, this advantage is, on textualist premises, likely to be outweighed by the jury's ability to differentiate between technical and antiquated meanings, on the one hand, and ordinary meanings on the other.

142 WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 213–18 (2000) (collecting sources); Marmor, *supra* note 132, at 2.

> the drafters of that statute intended or would have intended it to apply to cases like this. In making this decision, you may consider the text of the statute and evidence of legislative intent supplied to you by the parties.

Our inquiry is whether juries are better equipped than judges to answer the top-line interpretative question posed by intentionalism—what did the drafters of this statute intend or what would they have intended?—and to use the methodological tools that the theory endorses. In the context of statutes that govern the conduct of the general public, there are good reasons to think that they are.

Juries are persistently asked to render decisions about the intentions of historical actors.[143] Nearly all criminal statutes have elements that oblige juries to decide what a defendant intended or knew at a particular historical moment. So (by definition) do intentional torts. Even more analogously, when a contract dispute turns on an unintegrated or ambiguous written contract, juries are often asked to "interpret" the contract by considering parol evidence.[144] The forms of evidence admissible to prove a legislator's intent—her statements and omissions—are not obviously different from the statements and omissions a lawyer might offer to prove the criminal or contractual intentions of her client or opponent. This is true, moreover, regardless whether the interpretive question is framed as demanding actual intent or "imaginative reconstruction."[145] When there is no evidence of actual intent on a question, intentionalists fall back on imaginative reconstruction. The intentionalist's goal in such cases is to determine, given what she knows about the intentions of the enacting legislature on related issues, how the legislature would have resolved the open question.[146] Thus, even when an intentionalist searches for hypothetical intent, she is guided by evidence of historical intentions.

In the mine-run of cases, moreover, neither answering the top-line question nor evaluating the permissible evidence depends on application of a specifically "legal" body of knowledge. Legislators are not usually legal experts, so legal knowledge is not generally pre-

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143 JONAKAIT, *supra* note 131, at 41–63.

144 William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 939 ("Once it is determined that there is an ambiguity or incompleteness, the question of how to resolve the ambiguity or what terms were intended to supplement the written contract is commonly sent to the jury, because the determination is based in part on contested extrinsic evidence.").

145 Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 46–47 (2008) (describing imaginative reconstruction).

146 *Id.* at 52.

requisite to understanding their statements.[147] This is particularly the case for the statutes that *Chevron* for Juries would make jury eligible, a class that excludes statutes on legal topics addressed solely to official decisionmakers or that assume technical or scientific knowledge.[148]

An oft-invoked critique of intentionalism is that for many interpretive questions, both sides can point to supportive evidence in the legislative history.[149] Juries are specialists in making the credibility determinations required to resolve evidentiary inconsistencies.[150] Where such credibility determinations depend on largely non-legal evidence, we have good reason to expect juries to outperform judges.

c. Purposivism

"Purposivism" here refers to the legal process method of Hart and Sacks,[151] which remains the dominant contemporary form of purposivism.[152] For purposivists, statutory meaning is intertwined with a statute's policy and political purposes. As Hart and Sacks explained, one interprets according to purpose by assuming that the legislature is made up of "reasonable men pursuing reasonable purposes reasonably," and proceeding from there.[153]

"Reasonableness" is the core of legal process purposivism. Hart and Sacks's six-word interpretive rubric invokes reasonableness three times, telling the purposivist (i) what sort of person is in the legislature, (ii) what sort of goals she has, and (iii) how she pursues them. As noted, juries are assigned the task of animating the reasonable person in negligence law because of their collective knowledge of the "ordinary affairs of life." Having committed to the view that juries outperform judges in determining how the reasonable person drives a car or constructs a house, what basis is there to believe that judges prevail in

147 Committee reports, on the other hand, are often written by legally trained staff. To the extent that such reports are indecipherable to lay jurors, it is fair to question whether they meaningfully express the intent of lay legislators.

148 For instance, background legal knowledge probably is necessary to understand a discussion on the Senate floor about diversity jurisdiction. Conduct-regulating statutes of general applicability, on the other hand, are more typically directed to subject matters within the ordinary person's grasp. *See supra* Part I.B.1.

149 Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983). To paraphrase Judge Harold Leventhal, this leaves the interpreter free to look over the crowd and select her friends. Redish & Murashko, *supra* note 145, at 48 (quoting Judge Leventhal).

150 JONAKAIT, *supra* note 131, at 41–63.

151 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

152 Manning, *supra* note 141, at 86 ("First, for many, [Hart and Sacks'] materials have come to represent the canonical statement of purposivism."); Siegel, *supra* note 134, at 132 (calling Hart and Sacks the "canonical expositors of purposivism").

153 HART & SACKS, *supra* note 151, at 1125.

determining how a reasonable legislator legislates reasonable goals reasonably?

An opponent of *Chevron* for Juries might respond that the legislator, unlike the driver or the house-builder, is self-consciously acting in a legal context. That answer privileges law over politics. Legislators are political, not legal, actors. The question is whether a judge is better equipped than a group of ordinary citizens to understand and evaluate *political* action. Neither legal education nor the practice of law orients judges to understand politics.[154] Because juries possess the trait—reasonableness—that purposivists ascribe (three times over) to legislators, they are so oriented.

The opponent might respond that legislative *staff* is legally expert, and members legislate with staff help. Perhaps because legal experts are part of the legislative process, purposivists include among their methodological tools "well-settled background legal assumptions," and "any relevant [legal] canons of clear statement."[155] The case for *Chevron* for Juries is harder for purposivism than for textualism or intentionalism because these methodological tools yield "legal" evidence of meaning on which judges will obviously outperform juries. While the jury-eligibility threshold addresses this concern by excluding technical subject matters, it does not fully answer it. Purposivism's legal-context tools, however, are the means to the end of applying the three layers of reasonableness that determine meaning. Many of the background legal concepts can be transmitted by lawyers and judges to juries.[156] The crucial task is deciding, in a given case, which tool best yields the meaning of the reasonable legislator acting reasonably in pursuit of reasonable goals. The judge's deeper knowledge of background legal principles will not aid much in that project, but the jury's collective knowledge of the "common affairs of life" will. Thus, even on

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154 This is the premise underlying Christopher Eisgruber's suggestion that the Supreme Court would be improved if it included lawyers with deep political experience. Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115, 157 (2002).

155 Manning, *supra* note 141, at 90. *But 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, 927 (2013) (demonstrating that congressional staffers are generally aware of some interpretive canons by name, but not others).

156 For instance, if a litigant believes that the canon of *noscitur a sociis*—which holds that when statutory terms "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar"—helps determine the meaning of a reasonable legislator pursing reasonable goals reasonably, he can argue that to the jury and seek an instruction on the canon. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) (describing the *noscitur a sociis* canon). If the other party believes that the principle that each word in a statute must be given independent meaning better approximates a reasonable legislative meaning, he can argue for that and seek a corresponding instruction. *See id.* at 174 (describing the "surplusage" canon).

purposivist assumptions, there is good reason to believe that juries have an epistemic edge in the interpretation of statutes that govern the conduct of the general public.

B. *Political Legitimacy*

Chevron's institutional logic is political as well as epistemic. *Chevron* assigns interpretive primacy to administrative agencies in part because the interpretations of agency officials command greater political legitimacy than those of judges.[157] This Section advances two sets of arguments in support of the claim that, for statutes that govern the conduct of the general public, jury interpretations likewise possess more political legitimacy than judicial interpretations.

First, if we assume that people generally agree on the broad political goals of statutory interpretation within the zone of ambiguity (whether the goal is to do "justice," maximize welfare, or something else), and disagree only on how best to achieve it, interpretation becomes a species of problem solving. Recent social science research suggests that diverse groups of reasonably competent individuals (like juries) solve problems better than homogenous groups of people with superior individual ability (like judges). Thus, to the extent that the interpretation of jury-eligible statutes can be characterized as a problem solving exercise, juries have a political advantage based on their superior ability to achieve good results.

Second, juries can claim political legitimacy by virtue of their mode of selection and deliberative processes. In the context of statutes that govern the conduct of the general public, these processes gives the jury's output a comparative advantage over that of judges.

1. Jurors as Diverse Problem Solvers

Research by economists Lu Hong and Scott Page shows that under specified conditions, diversity is more valuable to problem solving than ability.[158] This finding must be unpacked before we can use it to evaluate the political legitimacy of jury versus judge statutory interpretation. But first, some readers may question classifying cognitive diversity's virtues

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157 *See supra* Part I.A.2.

158 SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007) [hereinafter THE DIFFERENCE]; Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCI. 16385 (2004) [hereinafter *Groups of Diverse Problem Solvers*]; Lu Hong & Scott E. Page, *Problem Solving by Heterogeneous Agents*, 97 J. ECON. THEORY 123 (2001) [hereinafter *Heterogeneous Agents*].

as political, rather than epistemic. The footnote below explains the thinking behind that choice.[159] The more important point, however, is that nothing of substance turns on it. If the reader believes that the jury's cognitive diversity adds to its epistemic, but not its political, legitimacy, then by all means count it on that side of the ledger.

Hong and Page developed a computational model in which groups of diverse computer agents competed with groups of homogenous but smarter agents to solve problems.[160] They found that the diverse agents consistently outperformed the smarter agents. A formal mathematical theorem confirmed the result that, on certain conditions, cognitive diversity matters more to group performance than ability.[161] While the mathematics are beyond the scope of this Article, the conditions can be stated plainly.[162] First, the problem must be difficult enough that no individual will always locate the optimal solution. Second, the problem solvers must be reasonably intelligent. Third, the problem solvers must be diverse. By diverse, Hong and Page refer not to identity diversity—i.e., diversity of race, gender, class, or other demographic indicators—but to cognitive diversity. Cognitive diversity is a function of two variables: perspectives—how people "represent problems"—and heuristics—how they "go about solving them."[163] People are cognitively diverse if, and to the extent that, they have different perspectives and apply different heuristics. Fourth, there must be a sufficient number of problem solvers.[164]

These conditions intuitively apply to jury interpretations of statutes that govern the conduct of the general public. As I argued above, for many jury-eligible statutes, jurors must be reasonably intelligent interpreters for the statute to survive constitutional scrutiny.[165] When such statutes are so complex that an ordinary citizen cannot achieve the reasonably intelligent interpreter threshold, they cannot, consistent with due process, govern his conduct. Juries, moreover, are diverse. In their

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159 Hong and Page's thesis is that diverse groups can better maximize a "common value" than non-diverse groups. *Heterogeneous Agents*, *supra* note 158, at 127; *see also infra* notes 169–70 and accompanying text. This Article classifies the diversity argument for *Chevron* for Juries as political because the pragmatic common values that juries would (I will suggest) maximize in statutory interpretation need not match the formal epistemic criteria of any interpretive model. On some interpretive models, to be sure, they will match, and when they do, the jury's diversity offers an epistemic argument. In an effort to make the epistemic case for *Chevron* for Juries relatively neutral between competing interpretive models, however, this Article treats diversity as serving a political end.

160 *Groups of Diverse Problem Solvers*, *supra* note 158, at 16386.

161 *Id.* at 16387–89.

162 The mathematical proof in *Groups of Diverse Problem Solvers*, *supra* note 158, is aimed at technical readers. Page's treatment of the diversity-trumps-ability theorem in THE DIFFERENCE, *supra* note 158, however, is geared towards a broader audience.

163 *Groups of Diverse Problem Solvers*, *supra* note 158, at 16385.

164 THE DIFFERENCE, *supra* note 158, at 159–62.

165 *See supra* note 116 and accompanying text.

computational model, Hong and Page assured diversity of agents by selecting them at random. Juries are picked in largely the same way. It is reasonable to presume that the varied backgrounds of jurors result in diverse perspectives and heuristics. The remaining conditions of Hong and Page's theorem—difficulty and numerosity—are likely satisfied or unimportant.[166]

Judges, of course, are also "reasonably intelligent" statutory interpreters. In fact, we should assume that individual judges are better interpreters than individual jurors. Judges are not, however, especially diverse. They share (at least) common educational backgrounds, high social standing, and economic security.[167] These common attributes likely dampen differences in perspectives and heuristics. Hong and Page's diversity-trumps-ability thesis thus provides grounds to believe that the diversity of juries will yield better problem solving outcomes than the individual ability of judges.

Before we assign political legitimacy to the jury on this basis, however, we must consider whether statutory interpretation is a form of "problem solving," as Hong and Page's model is limited to that activity. Hong and Page define problem solving as "the process by which economic actors find solutions to problems that generate revenues."[168] Revenue is a broad concept that includes "searching for cures to diseases, developing software, handling legal cases, and constructing social policies."[169] In light of this expansive understanding of revenue, problem solving for Hong and Page can be understood as the task of maximizing value. For groups to "problem solve," this means that group members must share a "common value function."[170]

Statutory interpretation is thus "problem solving" only if interpreters approach the lawmaking aspect of their task with a common value function. At one level, it is obvious that lawmakers of any sort do not approach lawmaking with unified ends. Different political and philosophical programs prioritize different values.[171] But we are not talking here of lawmaking generally, but about the particular

166 The difficulty condition is important to Hong and Page's model, but not to this Article. When statutory interpretation questions are easy, we need not worry much about who does the interpreting. Juries also appear to be sufficiently numerous to take advantage of the diversity-trumps-ability thesis. Hong and Page found diversity advantages in their computational models in groups as small as ten. *Groups of Diverse Problem Solvers*, *supra* note 158, at 16387.

167 *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 270 (2007) (noting that jurors "differ from the judge, who is likely to be a member of a socioeconomic elite and whose views might become jaded from hearing case after case"); Vermeule, *supra* note 106, at 1578.

168 *Heterogeneous Agents*, *supra* note 158, at 123.

169 *Id.* at 123–24.

170 *Id.* at 127.

171 *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734–35 (1995).

task of selecting, for the purpose of a concrete case, from among plausible interpretations of statutes that govern the conduct of the general public. This is a political task, to be sure, but one more likely to be approached pragmatically than by reference to broad political or philosophical agendas. Statutory interpretation in practice is the stuff of "low-level principles," not high theory.[172] When juries set out to determine how or if a conduct-regulating statute applies to a particular fact setting, one value function or another will, at least sometimes, emerge as the obvious choice.

It suffices for present purposes that to some extent and in some instances, common value functions do emerge on the limited political task that *Chevron* for Juries would assign to juries. Where they do, juries, by virtue of their diversity, offer meaningful political advantages over judges.

2. Jury Decisions as Democratic

Cognitive diversity provides some support for this Article's claim that juries have greater political legitimacy than judges in interpreting statutes that govern the conduct of the general public. More robust support emerges from comparing the democratic pedigree of jury and judicial decisions.

Associating the jury with democracy is far from novel.[173] Indeed, the jury's democratic status is the opening premise for much commentary about juries. The "juries and democracy" linkage, however, consists of at least three sorts of claims that should be disentangled. One claim is that the jury system promotes democratic values outside the courtroom.[174] A second claim, most commonly associated with the criminal jury, posits the jury as a popular check against the exercise of state power.[175] The third claim—and the only one that concerns us here—is that the decisions juries make are themselves democratic.

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172 *Id.* at 1753 ("Most judicial activity does not involve constitutional interpretation, and the ordinary work of common law decision and statutory interpretation calls for low-level principles.").

173 *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 6 (1994) ("The whole point [of juries] is to subject law to a democratic interpretation . . . ."); JAMES GOBERT, JUSTICE, DEMOCRACY AND THE JURY 99–133 (1997) (arguing for jury's democratic status); Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1286–87 n.18–20 (1984) (collecting sources).

174 *See, e.g.*, JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010).

175 *See* Solomon, *supra* note 106, at 1337 n.26 (collecting sources).

The connection between jury output and democracy is curious.[176] Juries do not look much like typical modern democratic institutions. Jurors are selected randomly, not by election or appointment. Once selected, moreover, jurors are shielded from unsupervised contact with those interested in their decisions. (Consider the uproar that would ensue if members of Congress were barred from meeting with constituents outside the presence of a judge.) Nonetheless, jury decisions have both majoritarian and deliberative democratic provenance, while the decisions of judges have no comparable source of political legitimacy. This comparative political advantage of juries puts a thumb on the scale for juries and, as this Section will argue, there is no countervailing political reason offsetting it for statutes that govern the conduct of the general public.

a. The Democratic Legitimacy of Jury Decisions

The political legitimacy of jury decisions rests on two democratic norms: majoritarianism and deliberation.

Majoritarianism. Because (and to the extent that) jurors are drawn randomly from the general population, juries embody what political philosophers call "descriptive representation."[177] A person represents another "descriptively" if he is "sufficiently like [his] fellows for someone to be reasonably safe in drawing conclusions about the other members of [his] generation from what they know about [him]."[178] A descriptively representative body resembles the larger public demographically and ideologically. Due to this resemblance, descriptive representation has long been associated with majoritarian democracy.[179]

Descriptive representation is written into the constitutional law of criminal juries and prescribed by statute for civil juries. Once conflicts of interest are eliminated, modern jury practice presumes that any citizen is as competent as any other citizen to serve as a juror.[180] In criminal cases, "the selection of a petit jury from a representative cross

176 *Id.* at 1339 ("Though the jury is used as a model or jumping-off point for many other ideas in democratic theory, the place of the jury itself in democratic theory and practice has received relatively little scrutiny.").

177 A. Phillips Griffiths, *How Can One Person Represent Another?*, *in* REPRESENTATION 133 (Hanna Fenichel Pitkin ed., 1969); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–91 (1967).

178 Griffiths, *supra* note 177, at 135–36.

179 John Adams, for instance, linked descriptive representation to democracy when he announced that a representative assembly should be "a miniature exact portrait of the people at large." John Adams, *Thoughts on Government*, *in* 4 THE WORKS OF JOHN ADAMS 189, 195 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1851); *see also* PITKIN, *supra* note 177, at 86 (noting that descriptive representation need not, as a logical proposition, be linked to democracy, but recognizing the historical association).

180 Or at least it has since the elimination of "blue ribbon" juries of experts. *See* ABRAMSON, *supra* note 173, at 99–100 (explaining "key man" system of jury selection abandoned in the 1960s and 1970s); Amar, *supra* note 173, at 1287 (same).

section of the community is an essential component of the Sixth Amendment right to a jury trial."[181] While the Sixth Amendment does not apply to civil cases, Congress requires that civil juries in federal cases be drawn from a fair cross section of the community.[182] The representative cross-section requirement ensures, in the aggregate, that jury pools contain the same mix of demographic characteristics, interests, and political perspectives as the demos. As Justice Black explained in 1940, "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[183]

To be sure, the fair cross-section requirement applies to jury pools, not seated juries.[184] Both legally and statistically, we can thus expect that particular juries will not perfectly represent a cross section of the community. This limitation cuts somewhat against the claim that the jury system achieves descriptive representation. We are concerned less, however, with the democratic pedigree of a particular jury than with that of the jury system as a whole. If the jury selection system is not systematically biased against particular kinds of jurors,[185] then juries in the aggregate are broadly (descriptively) representative.[186]

Because *Chevron* for Juries works better if the jury selection process is as random as possible, moreover, it might be coupled with randomness-enhancing doctrinal modifications. For instance, American jurisdictions are split about whether lawyers may pose hypothetical questions in voire dire "in order to identify potentially problematic attitudes towards legal issues that are likely to arise during the trial."[187] *Chevron* for Juries raises the stakes of this split. If lawyers can select

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181 Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

182 *See* 28 U.S.C. § 1861 (2012) ("[A]ll litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."). Even without the statute, the Supreme Court would likely require that federal civil jury panels be drawn from a fair cross section. Thiel v. S. Pac. Co., 328 U.S. 217, 221, 225 (1946).

183 Smith v. Texas, 311 U.S. 128, 130 (1940); *see also Taylor*, 419 U.S. at 527 ("[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.").

184 Holland v. Illinois, 493 U.S. 474, 477–78 (1990).

185 Some argue that it is. *E.g.*, Sanjay K. Chhablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 U. PA. J. CONST. L. 931 (2011); David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776 (1977); Solomon, *supra* note 106, at 1357–59. Their objections are generally not to the fair cross-section requirement in principle, but to the legal doctrines established to implement it.

186 To put this point more squarely into context, the question analyzed here is whether juries have the democratic pedigree to make the political choices that are implicit in statutory interpretation within the zone of ambiguity. As a matter of social policy, we are more concerned about patterns of jury statutory interpretations than individual decisions. *See* Gary J. Jacobsohn, *Citizen Participation in Policy-Making: The Role of the Jury*, 39 J. POL. 73 (1977). Thus, so long as the jury system in the aggregate is descriptively representative—as the cross-section requirement demands—the democratic legitimacy point holds.

187 NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES § 3.17 (2d ed. 2009).

jurors who take a view of the law favorable to their side, the resulting panels will be distinctly *not* a random sample. A jurisdiction adopting *Chevron* for Juries would thus want to side with those jurisdictions that disallow such questions.

Deliberative Democracy. For deliberative democrats, political legitimacy is accorded outcomes that result from deliberation, i.e., "the serious consideration of arguments and counter-arguments for and against policy alternatives."[188] Deliberation is a defining and constitutionally required aspect of the jury decisionmaking process.[189] To deliberative democrats, the jury is "the quintessential deliberative democratic body."[190] Jenia Iontcheva has explained the jury's appeal to deliberative democrats.[191] The public sphere does not offer ordinary citizens many opportunities to deliberate with each other directly, without mediation from professional elites. The jury, Iontcheva explains, "stands out as a precious exception."[192] Institutional features of the jury—including the random selection of jury panels, the prohibition on certain forms of discrimination, and the jury's small size—enhance deliberation.[193] Most importantly, the requirement of unanimity is the ultimate deliberation-forcing rule.[194] Empirical research confirms not only that deliberation affects outcomes, but that it improves jurors' comprehension of the evidence.[195] Thus, both theoretically and empirically, the jury system embraces the principles of deliberative democracy.[196]

The jury system's majoritorian and deliberative bona fides reflect that it is the preeminent modern example of "sortive" democracy.[197] Sortition is the idea, classical in origin, that some government officials

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188 James S. Fishkin & Robert C. Luskin, *The Quest for Deliberative Democracy*, 9 GOOD SOC'Y 3 (1999).

189 Ballew v. Georgia, 435 U.S. 223, 226–28 (1978); Nancy S. Marder, *Cyberjuries: A Model of Deliberative Democracy?*, *in* DEMOCRACY ONLINE: THE PROSPECTS OF POLITICAL RENEWAL THROUGH THE INTERNET 35, 36 (Peter M. Shane ed., 2004) ("The jury is a truly deliberative institution in that after seeing the evidence and hearing the testimony and arguments, the jurors meet behind closed doors to exchange ideas until they reach a verdict.").

190 Iontcheva, *supra* note 73, at 346; *see also* Marder, *supra* note 189, at 36 ("The American jury, in both civil and criminal cases, is an institution that embodies the deliberative democratic ideal.").

191 Iontcheva, *supra* note 73, at 345–50.

192 *Id.* at 346.

193 *Id.* at 346–47.

194 *Id.* at 347.

195 *Id.* at 347–48.

196 *But see* Solomon, *supra* note 106, at 1365–67 (arguing that juries deviate from the principles of deliberative democracy because they do not give reasons for their decisions and because their rulings are not "ongoing and provisional").

197 *See* Richard G. Mulgan, *Lot as a Democratic Device of Selection*, *in* LOTTERIES IN PUBLIC LIFE: A READER 126 (Peter Stone ed., 2011) [hereinafter LOTTERIES IN PUBLIC LIFE].

can be "chosen by lot."[198] Long neglected by political theorists, sortition has lately enjoyed a resurgence of interest,[199] and both descriptive representation[200] and deliberation[201] are in its DNA.

The jury's sortive credentials confer democratic legitimacy on its decisions. It is a different sort of legitimacy, of course, than what the Supreme Court approved in *Chevron* itself. Administrative agencies are politically legitimate because—and to the extent that—they are politically accountable. When agencies go astray, they can be checked by the people's representatives in Congress and the White House.[202] Not so juries, whose exercise of power is unaccountable. Accountability, however, is merely one form of political legitimacy. This Article's claim

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198 *Id.* at 126–27. As a political practice, sortition reached its high-water mark in ancient Greece. Athenians filled their Council and large juries by lottery. *Id.* at 127–28. The Council was a body that prepared the agenda for, and implemented the decisions of, the popular assembly of citizens. They also used sortition to fill a variety of public offices, but excluded offices requiring particular skill or expertise, such as positions of military and financial leadership. *Id.* Aristotle endorsed the practice, arguing that all offices, or all that do not require experience or skill, should be filled by lot. Aristotle, POLITICS, Book VI, Ch. 2.

199 Aside from a high-profile endorsement by Jean Jacques Rousseau and sporadic experimentation, sortition had little significance in democratic theory until the twentieth century. *See* Fredrik Engelstad, *The Assignment of Political Office by Lot*, *in* LOTTERIES IN PUBLIC LIFE, *supra* note 197, at 219; Jean Jacques Rousseau, THE SOCIAL CONTRACT, Book IV, Ch. 3. This dormancy gave way when a Swedish sociologist, Vilhelm Aubert, published a paper on randomness in social decisionmaking in 1959. Vilhelm Aubert, *Chance in Social Affairs*, *in* LOTTERIES IN PUBLIC LIFE, *supra* note 197. A recent literature review found more than 350 post-Aubert writings on sortition. Antoine Vergne, *A Brief Survey of the Literature of Sortition: Is the Age of Sortition Upon Us?*, *in* SORTITION: THEORY AND PRACTICE 84 (Gil Dalonnoi & Oliver Dowlen eds. 2010) [hereinafter SORTITION: THEORY AND PRACTICE].

200 *E.g.*, Engelstad, *supra* note 199, at 221–22; Mulgan, *supra* note 197, at 143–44; Yves Sintomer, *Random Selection and Deliberative Democracy: Note for an Historical Comparison*, *in* SORTITION: THEORY AND PRACTICE, *supra* note 199, at 40–51; Joel Matthew Parker, *Randomness and Legitimacy in Selecting Democratic Representatives* (Dec. 2011) (unpublished Ph.D. dissertation, University of Texas), *available at* https://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2011-12-4923/PARKER-DISSERTATION.pdf?sequence=1.

201 The relationship between sortition and deliberative democracy is, however, complex. One could randomly pick political officials who act without deliberating. Deliberation and sortition often travel together because sortition solves a basic problem in the deliberative model. For deliberation to be effective, James Fishkin and Robert Luskin explain, deliberators must be immersed in "policy-relevant arguments and counter-arguments." Fishkin & Luskin, *supra* note 188, at 3. The general public (the demos) is not so immersed. Indeed, according to an influential account, it is irrational for ordinary citizens to immerse themselves in the details of public policies that they have no realistic chance of impacting. Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 147 (1957). Sortition yields assemblies that resemble the demos. Because of the small size of sortive decisionmaking bodies, however, the "rational ignorance" logic no longer holds. Fishkin & Luskin, *supra* note 188, at 4.

202 *See* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1294 (1999) ("Congress also serves as a significant check on both the individual agencies and on the executive branch generally."); Kagan, *supra* note 8, at 2383 (describing the "most important development in the last two decades in administrative process" as the "presidentialization of administration—the emergence of enhanced methods of presidential control over the regulatory state").

is that the jury's majoritarian and deliberative mechanisms bestow a substitute form.

b. Juries Versus Judges

The democratic legitimacy of jury decisions is one side of the comparative equation. We must also examine the political legitimacy of judges. Specifically, we must compare the democratic legitimacy of juries interpreting conduct-regulating, generally-applicable statutes to the legitimacy of judges interpreting the same statutes.

The democratic pedigree of federal judges is controversial. Federal judges are nominated by a democratic official—the President—and confirmed by a democratic body—the Senate. This selection process confers a form of democratic pedigree.[203] Indeed, the selection of judges looks a lot like that of senior executive branch officials whose statutory judgments are afforded *Chevron* deference partly because of their political legitimacy. The guaranty of lifetime tenure, however, changes the calculus dramatically. Administrative officials garner democratic legitimacy both ex ante, from their selection, and ex post, by virtue of their relationship with the President. By design, judges lack ex post accountability. Their political legitimacy thus depends entirely on the moment of appointment, which becomes more historically than politically salient with the passage of time.[204] For instance, as of this writing, appointees of President Johnson remain seated as federal judges. The political circumstances of the 1960s that produced their appointments are surely of historical interest, but they bear little political connection to the contemporary polity. The general point is that judicial tenure and democratic pedigree are inversely related. As the temporal distance from appointment grows longer, a judge's claim to a democratic pedigree shrinks.[205]

In constitutional law, the judiciary's democratic deficit comes under the header of the "countermajoritarian difficulty."[206] Adherents of the difficulty question the democratic legitimacy of constitutional judicial review on the grounds that it gives unelected, unaccountable officials power to trump the judgments of elected, accountable ones.[207] The "countermajoritarian difficulty" plays a less prominent role in

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203 Eisgruber, *supra* note 154, at 125.

204 Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 9 (2004).

205 To be clear, there are important reasons why judges serve for life. *Id.* As Judge Easterbrook notes, however, tenure has a "dark side." *Id.* at 9–10. Its dark side should not be disregarded when allocating authority within legal systems.

206 *E.g.*, BICKEL, *supra* note 4.

207 *See, e.g.*, KRAMER, *supra* note 5; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

debates about statutory interpretation.[208] The reason for the difficulty's omission from commentary about statutory interpretation is the continuing pull of "legislative supremacy," the principle that judges deciding questions of statutory interpretation should stay out of the way of legislative policymaking.[209] But while "legislative supremacy" is a worthy aspiration,[210] it is inadequate as a democratic justification for the practice of statutory interpretation by judges.

William Eskridge noted more than twenty-five years ago that "the emerging view among historians, literary theorists, and legal scholars is that interpretation itself inevitably involves the 'creation' of meaning."[211] Once we recognize that to interpret law is to make law, we must pay close attention to the democratic pedigree of our interpreters. Because statutory interpretation unavoidably implies lawmaking, statutory interpretation by judges implies lawmaking by unelected, unaccountable officials. Statutory interpretation by judges thus presents similar concerns to the countermajoritarian difficulty in constitutional law.[212]

Judicial decisions cannot match the political legitimacy of jury decisions. While comparing the democratic pedigree of sortive

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208 There are exceptions. *See* Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 6–7 (2007) ("Scholars of statutory interpretation and constitutional theory grapple with the same core problem, even if they often fail to acknowledge the overlap. Both bodies of scholarship struggle to define and defend judicial power in a democracy."); Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 687 (2007) ("The problem of judges as lawmakers in a democratic society is a familiar one. Judges are not readily answerable to the electorate. Hence, judicial lawmaking is in tension with democratic legitimacy, if not at odds with it."); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1120 (1992) ("As in constitutional interpretation, scholars in the statutory field are confronted with the so-called countermajoritarian difficulty—the problem of life-tenured, unelected judges making policy decisions. If all or most statutory cases turn on policy factors left to the judge's choice, how can that exercise of power be considered legitimate?" (footnote omitted)).

209 Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995).

210 Indeed, a central axis of the "war" over statutory interpretation has been about which methodological approach best constrains judges and empowers Congress. To say, as this Article does in the text, that legislative supremacy is an inadequate political justification is not to say that we should be indifferent to the constraints imposed on statutory interpreters. Put differently, while the *Chevron* for Juries proposal advanced in this Article is (mostly) indifferent to interpretive methodology, it is not nihilistic. Methodological choices matter a great deal.

211 William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1498 (1987); *see also* Lemos, *supra* note 21, at 431 ("The notion that statutory interpretation by courts does not require resort to the sort of policymaking discretion that agencies enjoy has overtimes of legal formalism, under which judges 'found' the law rather than creating it. As such, it is subject to many of the same critiques.").

212 To be sure, the countermajoritarian difficulties are not exactly the same. Judicial review in constitutional cases poses the judiciary as Congress's antagonist. No defensible theory of statutory interpretation makes enemies of courts and Congress. Rather, when courts interpret ambiguity in statutes, they are filling Congress's gaps, be they intentional delegations, legislative oversights, or the byproducts of loose language. While gap filling requires law creation (and thus implicates questions of democracy) it need not be law creation *at odds* with Congress.

institutions to electoral ones involves difficult tradeoffs, it is much easier to compare a sortive institution, the jury, to an institution, the federal judiciary, that is neither sortive nor electoral. This comparative political advantage of juries provides a general reason—i.e., a reason unconnected to a specific subject matter—for a democratically committed polity to prefer allocating decisionmaking power to juries.[213]

This Article's analysis, moreover, is not general but specific to statutes that govern the conduct of the general public. The question is whether, with respect to the interpretation of those statutes, a political rationale exists to overcome a general democratic preference for juries. There is not. The most plausible candidates come from theories of constitutional judicial review. Proponents of judicial review have advanced several political rationales to explain why constitutional decisionmaking should be allocated to unelected judges rather than democratic legislatures. Thus, judicial review has been justified as protecting, as against short-sighted majorities, the democratic process,[214] constitutionally-enshrined political values,[215] and moments of "higher" lawmaking.[216] Generally-applicable, conduct-regulating statutes, however, do not ordinarily implicate high-level problems about the democratic process, constitutionally-enshrined political values, or higher lawmaking.[217] Whether the arguments for judicial review succeed in the constitutional arena or not, they offer no political support to the practice of judicial interpretation of these statutes. Put differently, while there may be good reasons—even democratic reasons—to keep constitutional interpretation away from majorities, they do not apply to the interpretation of statutes that govern the conduct of the general public.

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213 For a contrary view, see Solomon, *supra* note 106, at 1361 ("I aim merely to complicate the picture of the civil jury's claim to normative legitimacy on [the democratic legitimacy] score.").

214 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 116–18 (1980).

215 BICKEL, *supra* note 4, at 24–26.

216 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 9–13 (1991).

217 *Cf.* Sunstein, *supra* note 171, at 1753.

III. OBJECTIONS

This Article next considers several likely objections to *Chevron* for Juries.

A. *(Absence of) Precedent*

Under *Chevron* for Juries, judges would not issue opinions that prospectively establish statutory meaning. Juries, moreover, lack any forward-looking mechanism to fix the meaning of statutes. The *Chevron* for Juries interpretive framework is thus, to a significant degree, non-precedential.[218] This leads to several potential objections, as described in the Subsections that follow.

1. Predictability of Legal Outcomes

First, an opponent might object that *Chevron* for Juries makes the law less predictable. Judicial interpretations allow those subject to ambiguous statutes to arrange their affairs to be on the right side of the law. If we eliminate judicial interpretations, the objector would argue, the opportunity of citizens to ensure compliance goes too. While legal uncertainty imposes economic costs in civil matters, the objector would likely emphasize the criminal context, where the "fair notice" principle has the most pull.[219]

The objection has clear intuitive force. But on closer inspection, the relationship between *Chevron* for Juries and legal predictability is more complex than the objection suggests. The overall predictability of a legal system is a function of two variables: (i) the precision of its prediction tools, and (ii) the accessibility of those tools.[220] The objection under consideration goes to the first variable. That is, the objection is based on

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218 To a significant degree, but not entirely. As with traditional *Chevron*, courts in a *Chevron* for Juries framework would issue precedential decisions defining the boundaries of permissible statutory meaning. Part I.B describes two procedural mechanisms—dispositive motions and motions in limine—through which courts can police the limits of statutory ambiguity. For instance, if a defendant convinces an appellate court that a skateboard cannot reasonably be understood as subject to the ban on vehicles in the park, it will be established with certainty that skateboards are not vehicles. It is only within the zone of ambiguity that *Chevron* for Juries lacks interpretive precedents.

219 *See supra* notes 116–17 and accompanying text. On one influential account, the uncertainty inherent in *Chevron* for Juries might be a feature, not a bug, of the proposal. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 578 (2001) (arguing that statutory "specificity," in the criminal law context, "is perverse").

220 *Cf.* Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 747 (2014) ("[L]aw, in a democracy, must be easily accessible to citizens.").

the fact that *Chevron* for Juries would (in one context) remove from circulation a relatively precise predictive tool, the judicial opinion. But if *Chevron* for Juries offsets that reduction, it could still be net-positive for legal predictability. There are reasons to think it might, or that it would come close.

Both clear statutes and clear cases enhance legal predictability. But from the perspective of someone seeking to predict legal outcomes, clear statutes are "cheaper" than clear cases, holding the level of clarity constant.[221] The statutes for any given jurisdiction can generally be found in a single codified source.[222] Court rulings, by contrast, are scattered. Federal caselaw is made by judges across ninety-four districts, thirteen circuits, and one Supreme Court, *all* of whose decisions must be consulted to fully "predict" the meaning of an ambiguous federal statute. Statutes, moreover, are (largely) organized topically, again unlike judicial opinions. Whether a person tries to find the law on his own or hires a lawyer to help, his search costs are lower if he can find a clear statute to guide his conduct than if he must consult caselaw. Clarity from statutes thus increases the accessibility of prediction tools—the second variable of overall predictability—more than clarity from cases.

While *Chevron* for Juries prevents clear caselaw for interpretive questions within its domain, there are two reasons to think that it could lead to clearer statutes. First, genuine uncertainty over statutory meaning generates political pressure for legislative clarification. For instance, if moped lovers and moped opponents are uncertain whether a ban on vehicles in the park applies to mopeds, they will join together to pressure politicians to clarify the law. This political pressure will lead, in many cases, to democratically imposed certainty, either in the form of clearer legislation or a delegation to an administrative agency. The current system releases the pressure by settling the question in a relatively non-democratic forum. Once settled by the courts, moreover, the winning side (either the riders or the anti-moped interest group) has every incentive to block legislative action. *Chevron* for Juries obstructs the release valve. In this sense, it is both clarity-forcing and democracy-forcing.[223]

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221 This is not necessarily the case if the level of clarity is not held constant. That is, if opinions are clearer than statutes, it does not make legal research less expensive to take them away. In that circumstance, legal research becomes probabilistic. To determine "statutory meaning," legal researchers have to identify the frequency of interpretive outcomes. That is obviously more expensive than researching cases.

222 To be sure, this was not the case in the days before codification. *See* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2d 283, 287–90 (2007) (lamenting this development).

223 Moreover, *Chevron* for Juries avoids a common problem with democracy-forcing tools. Adrian Vermeule has criticized democracy-forcing interpretive tools, such as clear statement rules and legislative factfinding requirements, on the grounds that they require coordination that the

The second reason *Chevron* for Juries could promote statutory clarity is that it would revitalize the void-for-vagueness doctrine. As noted above, in theory the vagueness doctrine "protects persons by providing 'fair notice' of a statute's applicability and by preventing 'arbitrary and discriminatory prosecutions' of a statute's enforcement."[224] As a practical matter, however, courts rarely invalidate statutes as void-for-vagueness.[225] In part, this is because current law allows courts to look to judicial interpretations of statutes to cure vagueness that appears on the face of a statute.[226] In a *Chevron* for Juries framework that denies judges the opportunity to interpret certain vague statutes, such cures would be impossible. The likely result would be an increase in the frequency of vagueness findings.[227] In some instances, Congress might respond by enacting clearer legislation on the subject.[228] More generally, invigorated enforcement of the vagueness doctrine would discourage the strategic legislative use of ambiguity.[229] Both legislative responses tend toward clearer statutes.

The overall effect of *Chevron* for Juries on legal predictability in both the criminal and civil contexts depends on the relationship

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judiciary cannot achieve. VERMEULE, *supra* note 2, at 119. *Chevron* for Juries requires no coordination because it structurally precludes the formation of binding precedent within the zone of ambiguity of jury-eligible statutes.

224 United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011) (quoting Skilling v. United States, 561 U.S. 358, 411 (2010)), *cert. denied*, 133 S. Ct. 107 (2012).

225 *Cf.* Robert Batey, *The Vagueness Doctrine in the Roberts Court: Constitutional Orphan*, 80 UMKC L. REV. 113, 113–14 (2011) ("The conclusion one draws is that with the death of Chief Justice Rehnquist and the retirements of Justices O'Connor and Stevens, there may well be no one on the Court who cares enough about the vagueness doctrine to think deeply about it." (footnotes omitted)).

226 *See* Dan-Cohen, *supra* note 35, at 658–64; Jeffries, *supra* note 116, at 207–08.

227 Some might count this as a cost of *Chevron* for Juries. The normative status of judicial cures to statutory vagueness is an important question that this Article cannot hope to adequately address. It is similar, however, to the democracy-forcing logic presented in the text. A reader who rejects the claim that *Chevron* for Juries is democracy forcing, or one who rejects that this is a point in its favor, is unlikely to accept the claim that reinvigorated vagueness enforcement is a good thing.

228 Of course, Congress might not reenact invalidated legislation. In many contexts, that too promotes predictability. The principle *nulla poena sine lege*—"[n]o punishment without a law authorizing it"—applies to many areas governed by conduct-regulating generally-applicable statutes. *See* BLACK'S LAW DICTIONARY 1173 (9th ed. 2009); *see also* Rogers v. Tennessee, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (noting that the maxim *nulla poena sine lege* "has been described as one of the most 'widely held value-judgment[s] in the entire history of human thought'" (alteration in original) (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960))). That principle obviously has a high degree of predictability. Statutory disruptions of it thus tend to increase unpredictability. Where Congress does not reenact invalidated legislation that operated against this background principle, the overall predictability of the legal system increases.

229 *See* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1128–34 (2011) (describing the strategic use of ambiguity). Not all statutory ambiguity is strategic, of course. Some is the product of legislative inadvertence. *See* Foster, *supra* note 54, at 1906.

between the two variables described above: (i) the reduction in predictability generated by the loss of judicial interpretations, and (ii) the increase in predictably resulting from clearer statutes, compounded by the relative accessibility of statutes as compared to cases. While I lack empirical data to claim that *Chevron* for Juries is net-positive to legal predictability, that result is plausible. Perhaps more importantly, given the offsetting effects on predictability in play, it seems unlikely that *Chevron* for Juries is substantially negative.

2. Consistency

The opponent might also object that *Chevron* for Juries yields inconsistency—and thus inequality—across cases. We can return again to honest services fraud to illustrate the point. It seems inevitable that juries would disagree about the meaning of "honest services." Such disagreement could easily result in inconsistent adjudications for identical conduct. One jury might conclude that an employee's failure to disclose a conflict of interest deprived his employer of his honest services and send the employee to prison. Another jury might disagree and let the employee walk.[230]

Virtually all legal reform proposals have costs, and inconsistency is a real cost of *Chevron* for Juries. That said, the "consistency gap" between the existing interpretive framework and *Chevron* for Juries is smaller than it initially appears. While this is especially true if *Chevron* for Juries would lead to clearer and more easily applied statutes, as the previous Subsection suggested, the point holds even if that prediction fails.

Inconsistency is inevitable in the face of ambiguous statutes.[231] Ambiguity necessitates interpretive discretion, which leads to inconsistency across decision-makers. Different systems for resolving statutory ambiguities deal with the inconsistency in different ways. The central distinction between *Chevron* for Juries and the existing interpretive framework (on this issue) is that the inconsistency of *Chevron* for Juries would be more persistent.[232] But persistence is not

230 I am indebted to Al Alschuler for suggesting this example. The example assumes, of course, that "honest services" fraud would survive vagueness scrutiny under *Chevron* for Juries.

231 *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1585–86 (2008).

232 Another distinction between the existing framework and *Chevron* for Juries has to do with the kinds of inconsistency the framework permits. Matthew Stephenson has explained that when deciding whether to delegate interpretive authority to the courts or an agency, Congress faces a tradeoff between two kinds of inconsistency: inter-issue inconsistency—which courts tend to produce—and intertemporal inconsistency—which agencies tend to produce. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–38 (2006). Juries are inconsistent in both dimensions.

the only normatively relevant measure of inconsistency. The existing framework permits inconsistent results up to the point at which the highest relevant appellate court resolves an interpretive question. In at least one important respect, the inconsistency of that regime is more perverse than the inconsistency of *Chevron* for Juries.

Under the existing framework, a person can rely on a lower court's statutory interpretation only to find, after his conduct is complete, that the interpretation has been reversed by a higher court. This is not merely a theoretical concern. In *United States v. Rodgers*,[233] the Supreme Court reversed the dismissal of an indictment against a man who lied to the FBI and Secret Service to induce the agencies to open investigations.[234] At the time, well-established law in the defendant's federal circuit provided explicitly that such lies were outside the scope of the charged statute, 18 U.S.C. § 1001. Nonetheless, the Supreme Court ruled that its contrary interpretation would apply to him retroactively.[235] While such extreme cases of judicial inconsistency are likely rare, where they occur the damage to consistency and equality values seems far worse than the predictably persistent inconsistency of *Chevron* for Juries.[236]

3. Litigation Costs

Finally, the opponent could object that *Chevron* for Juries raises litigation costs, as it forces litigants to argue repeatedly about statutory meaning. This objection also hits upon a real cost of *Chevron* for Juries. For example, under the existing regime, litigants in honest services fraud cases need not, after *Skilling*, expend any resources arguing about what "honest services" means.[237] Instead they can take as given that

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233 466 U.S. 475 (1984).

234 *Id.* at 479.

235 *Id.* at 484. The Court held the defendant to a high standard of prescience:

> [A]ny argument by respondent against retroactive application to him of our present decision, even if he could establish reliance upon the earlier [circuit] decision, would be unavailing since the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable.

Id.; *see also* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455 (2001) (criticizing *Rodgers*' retroactivity analysis).

236 To be clear, the argument here is not purely consequentialist. *Chevron* for Juries can lead to the same sort of unexpected results as the existing framework. If juries divide on an interpretive question 99% to 1%, those litigants who find themselves in the 1% will surely be surprised at the result, just as litigants are surprised in cases where an appellate court revises statutory meaning. The point is about the reasonableness of the litigants' expectations. When a court has blessed an interpretation, reliance on that interpretation seems eminently justified. Jury results do not lead to a similar expectation of consistency.

237 *See supra* notes 50–51 and accompanying text.

"honest services" means bribes and kickbacks, and focus their arguments around those concepts. In a *Chevron* for Juries framework, by contrast, assuming the honest services statute survived vagueness scrutiny, the litigants would have to develop a theory of the meaning of "honest services" and gather supporting evidence. The expense of that effort would vary depending on what sources of interpretive evidence a jurisdiction permits. In a jurisdiction endorsing an intentionalist theory of interpretation, for instance, the work would likely include gathering legislative history, but some cost will be associated with the project no matter what interpretive theory a jurisdiction selects. That cost makes litigation more expensive in a world with *Chevron* for Juries than in the world without it.

Chevron for Juries also reduces law-related costs, however, which may offset the increased cost of litigation, at least in part. Specifically, *Chevron* for Juries would reduce legal research costs for both official and nonofficial actors. As argued above, legal research of statutes is cheaper than legal research of caselaw.[238] Because *Chevron* for Juries would displace judicial opinions (for interpretive questions in its domain) and because, if this Article's above claims are correct, it would lead to clearer statutes, *Chevron* for Juries would make legal research cheaper for everyone. These cost reductions may or may not entirely offset the increased cost of litigation in a *Chevron* for Juries framework, but they do take the wind out of the objection's sail.

B. *Jury Incompetence and Bias*

Another objection to *Chevron* for Juries might be couched as a protest to any expansion of the jury system. An account of juries in the popular press and, to a lesser extent, the academic legal literature paints a dismal picture of the institution. Jurors, on this account, are predisposed toward certain interests (especially plaintiffs in civil cases) incompetent, and subject to disabling cognitive biases.[239] Drawing on this account, some have proposed taking existing powers away from the jury.[240] Advocates of such proposals would presumably object to assigning juries *new* interpretive powers.

This is not the place for an extended review of the empirical literature on jury behavior. A brief foray into that extensive literature, however, may dampen the objection. Empirical researchers have, in the main, failed to confirm the suspicions of jury critics. Leading jury

238 *See supra* note 222 and accompanying text.

239 Robbennolt, *supra* note 129, at 470 n.3 (collecting sources).

240 *E.g.*, Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2127 (1998).

scholars Neil Vidmar and Valerie Hans recently published a book-length review of empirical work on juries.[241] Their ultimate conclusion was unequivocal: "our verdict is strongly in favor of the American jury."[242]

To interrogate the allegation that juries are systematically predisposed in favor of certain interests (e.g., civil plaintiffs), Vidmar and Hans looked to studies of agreement rates between juries and the judges presiding over them.[243] The studies revealed "substantial" agreement between the bench and the jury box, undercutting claims of jury bias.[244] In civil cases, moreover, the studies showed that when judges and juries disagreed, the disagreements were "evenly balanced," confirming that the "alleged bias of juries towards injured plaintiffs seems not to have existed."[245]

While jury predisposition can be studied through agreement analysis, the overall competence of juries may be better assessed through case studies. Perhaps the most prominent study in this methodological vein is Richard Lempert's analysis of juries in twelve complex civil claims, which led him to conclude that "the jury often appears to do surprisingly well in the face of complexity."[246] In a 2005 article, Jennifer K. Robbennolt reviewed the extant empirical literature comparing judge and jury decisionmaking.[247] Her conclusion bears emphasis:

> The most notable conclusion to be drawn from this emerging literature is that the decisionmaking of judges and jurors is strikingly similar. While there is evidence of some differences . . . they appear to decide real cases quite similarly, and they show a great deal of

241 VIDMAR & HANS, *supra* note 167.

242 *Id.* at 346.

243 *Id.* at 148–51. Modern empirical work on the jury began with such a study. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

244 VIDMAR & HANS, *supra* note 167, at 149. Some empirical work suggests that judges and juries differ substantially in damages awards, though this view is contested. *Compare, e.g.*, Reid Hastie et al., *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 L. & HUM. BEHAV. 597 (1999), *with* Neil Vidmar, *Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. on Punitive Damages*, 23 L. & HUM. BEHAV. 705 (1999). This important debate can be bracketed here, as the sort of decisions that *Chevron* for Juries would reallocate to juries resemble liability, rather than damages, determinations.

245 VIDMAR & HANS, *supra* note 167, at 149. In criminal cases, by contrast, the studies found that where judge and jury disagreed, the jury was more likely than the judge to acquit. *Id.* at 148. In an intriguing statistical analysis using some of the same data that Vidmar and Hans describe, statistician Bruce Spencer suggests that while judges may be more "accurate" than juries overall, in criminal cases juries are less likely than judges to convict an innocent defendant. Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305 (2007).

246 Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181 (Robert E. Litan ed., 1993).

247 Robbennolt, *supra* note 129, at 500–02.

> similarity in responding to simulated cases designed to examine a variety of legal decisionmaking processes.[248]

The attacks on juries as biased and incompetent thus appear unsupported by the empirical evidence. But on another front, the jury critics are surely right. Empirical research reveals that jurors, like everyone else, suffer cognitive illusions.[249] The problem for jury critics is that empirical research confirms that judges are people too.[250] The empirical reality that judges are not immune from cognitive illusions further blunts the jury critics' objection.

C. *Distributional Consequences*

Before concluding, it merits mention that *Chevron* for Juries has predictable, albeit likely modest, distributional consequences. *Chevron* for Juries would make dispositive motions—i.e., motions that terminate a case without trial—less likely to be granted. Though this effect is possible in both criminal and civil matters, it has greater impact in civil cases, where dispositive motions are a more important part of practice.[251] The effect is marginal, however, as *Chevron* for Juries would make successful dispositive motions somewhat less common, not eliminate them. The likely impact of this effect would be to (1) increase the number of trials, (2) increase the settlement value of claims, or (3) a combination of points 1 and 2. In civil cases, at least, *Chevron* for Juries

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248 *Id.* at 502. To be sure, Robbennolt identified areas where jury performance appears problematic. Most significantly, for the purposes of this Article, Robbennolt expresses doubt about the ability of juries to follow legal instructions. *Id.* at 470. An important new study of actual jury deliberations suggests that juries may be much more competent in processing and applying jury instructions than previously thought. Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. Rev. 1537 (2012).

249 *E.g.*, Hastie et al., *supra* note 244.

250 *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821 (2001) ("Judges, it seems, are human."). One empirical study comparing cognitive bias in judges and juries found that while judges do make the sort of cognitive errors predicted by behavioralists, the errors are less severe than those made by jurors. *See* W. Kip Viscusi, *Do Judges Do Better?*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 186 (Cass R. Sunstein et al. eds., 2002); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. LAW & ECON. REV. 26, 36–58 (1999). Guthrie and his coauthors criticize this study on the grounds that it relied on data about judges gathered through a survey distributed to trial and appellate judges participating in a law and economics conference. Guthrie et al., *supra*, at 818 n.201. They note that they "suspect that the sample of judges in these studies (those who chose to attend a conference on law and economics) and the context within which the study took place (a law and economics conference) may have induced somewhat more calculated reasoning processes that dampened the effect." *Id.* Richard Lempert offers a similar critique. *See* Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 884 (1999).

251 This is largely because there is no criminal law analogue to the civil motion for summary judgment. *See generally* Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661 (2011).

will thus likely have a somewhat pro-plaintiff distributional consequence. This is not the place to analyze the normative desirability of a pro-trial or a plaintiff-friendly shift in the law. Suffice it to say, readers hostile to such shifts may be disinclined towards *Chevron* for Juries.

CONCLUSION

I conclude by returning to *Chevron* itself. Cass Sunstein describes *Chevron* as a "counter-*Marbury* for the administrative state."[252] Sunstein's portrayal of *Chevron*'s importance to statutes administered by agencies is apt. But as an overall account of *Chevron*'s significance, Sunstein has understated matters. *Chevron* is less a case about administrative agencies than it is about the limits of law and of judges. Its interpretive premises—that statutes often yield ranges of plausible interpretations and that nonjudges are sometimes better than judges at making the final selection—reorient what it means to interpret according to law.

This Article attempted to demonstrate that it is neither necessary nor desirable to confine that reorientation to statutes that involve administrative agencies. *Chevron*'s interpretive premises, and the institutional analysis that follows from them, this Article has argued, support taking interpretive primacy for at least one more class of statutes away from judges, this time giving it to juries. If these arguments have succeeded, *Chevron* for Juries offers a "better"—i.e., more epistemically and politically justified—way to resolve ambiguities in statutes that govern the conduct of the general public, as well as a data point in the project of extending *Chevron*'s interpretive insights beyond administrative law.

252 Sunstein, *supra* note 2, at 2589.