

DEPOLITICIZING ADMINISTRATIVE LAW

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ABSTRACT

A large body of empirical evidence demonstrates that judicial review of agency action is highly politicized in the sense that Republican appointees are significantly more likely to invalidate liberal agency decisions than conservative ones, while Democratic appointees are significantly more likely to invalidate conservative agency decisions than liberal ones. These results hold for both (a) judicial review of agency interpretations of law and (b) judicial review of agency decisions for “arbitrariness” on questions of policy and fact. On the federal courts of appeals, the most highly politicized voting patterns are found on unified panels, that is, on panels consisting solely of either Democratic or Republican appointees. On the Supreme Court, politicized administrative law is also unmistakable, as the more conservative Justices show a distinctive willingness to vote to invalidate liberal agency decisions, and the more liberal Justices show a distinctive willingness to vote to invalidate conservative agency decisions. Indeed, it is possible to “rank” Justices in terms of the extent to which their voting patterns are politicized. The empirical results raise an obvious question: what might be done to depoliticize administrative law? Three sets of imaginable solutions have promise: (1) self-correction without formal doctrinal change, produced by a form of “debiasing” that might follow from a clearer judicial understanding of the current situation; (2) doctrinal innovations, as, for example, through rethinking existing deference principles and giving agencies more room to maneuver; and (3)

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institutional change, through novel voting rules and requirements of mixed panels. Each of these solutions runs into significant problems, though the evidence suggests that mixed panels would greatly reduce politicized voting. An investigation of these solutions has implications for other domains in which judges are divided along political lines, and indeed in which nonjudicial officials, including members of regulatory commissions, show some kind of politicized division or bias. In multiple areas, politicized voting might be reduced through disclosure of existing patterns, through doctrinal changes, or through institutional change.

INTRODUCTION

Imagine a parallel world, very much like our own. In this world, administrative law is radically politicized. If the question is the legality of an agency's interpretation of a statutory term, the court's answer can be predicted by asking about the political affiliation of the president who appointed the judges on the panel. If the question is whether an agency's decision is arbitrary or capricious, the court's answer can be predicted in the same way. In such a world, the crudest versions of legal realism would be vindicated: whatever the formal doctrine, the outcome of disputes in administrative law would be a product of the judges' political predilections. Administrative law would be purely a matter of judicial politics.

Fortunately, that world is not our own. Disputes about the legality of agency action cannot be predicted in so simple a fashion.¹ Unfortunately, however, that world has something in common with our own.² At least in the last three administrations—under Presidents George H.W. Bush, Bill Clinton, and George W. Bush—administrative law has been highly politicized in the sense that on the courts of appeals, the evidence reveals sharp divisions between Republican and Democratic appointees in a way that fits

1. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825 (2006) [hereinafter Miles & Sunstein, *Do Judges*]; Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (2008) [hereinafter Miles & Sunstein, *Real World*].

2. For a seminal study, see generally Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997). For a valuable study of the Supreme Court, see generally William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

uncomfortably well with ideological stereotypes.³ Under President George W. Bush, politicized voting was quite visible: a panel of Democratic appointees was especially likely to strike down conservative decisions from the Bush administration, and a panel consisting solely of Republican appointees was especially likely to uphold such decisions.⁴

On the Supreme Court, the situation has been similar not only under the Bush administration, but for the last decade and more.⁵ Some members of the Court—above all, Justices Clarence Thomas and John Paul Stevens—show highly ideological voting patterns in the sense that their willingness to vote to validate an agency’s interpretation of law can be predicted, much of the time, by asking whether the interpretation is conservative or liberal.⁶ In the last eight years, politicization of the administrative state and the judiciary has been a significant source of public concern, and recent judicial behavior, in administrative law, shows a high degree of politicized voting.

To say the least, this seems to be a disturbing and somewhat embarrassing state of affairs. Whatever one’s view of the foundational questions in administrative law, no one should approve of a situation in which judicial voting patterns are highly politicized.⁷ On the contrary, it is reasonable to read existing doctrines as an explicit

3. Eskridge & Baer, *supra* note 2, at 1147; Miles & Sunstein, *Do Judges*, *supra* note 1, at 851; Miles & Sunstein, *Real World*, *supra* note 1, at 767. These essays, focused on administrative law, should be seen as part of a large and growing area of empirical study. For a discussion and of this area and citations to relevant pieces, see generally Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

4. Miles & Sunstein, *Do Judges*, *supra* note 1, at 836.

5. See Eskridge & Baer, *supra* note 2, at 1153–57.

6. See Miles & Sunstein, *Do Judges*, *supra* note 1, at 851; see also Eskridge & Baer, *supra* note 2, at 1156–57 (detailing a somewhat different set of numbers spanning over a longer period of time).

7. If agency decisions have an ideological skew, of course, it might be desirable to have a high level of invalidations; and if the agency’s skew leads to a high level of unlawful “liberal” decisions, then a percentage of invalidation of such decisions would be nothing to deplore. The problem is that even if agency decisions are skewed in one or another direction, a large and predictable split between Republican and Democratic appointees would be hard to defend, and would justify a high level of concern.

Of course we are aware that one person’s skew is another person’s neutral principle; if, for example, the Environmental Protection Agency takes a proenvironmental turn, or the National Labor Relations Board becomes more sensitive to the interests of employers, there would be no “skew” from the right point of view. We do not mean to say anything controversial on this count; we use the term “skew” as a simple placeholder for agency departures from the correct approach to the relevant area of the law.

effort to prevent such patterns from emerging. Most prominently, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁸ establishes that courts must uphold agency interpretations of ambiguous statutory provisions so long as those interpretations are reasonable.⁹ *Chevron* is naturally read to say that resolution of statutory ambiguities calls for a policy judgment,¹⁰ with the suggestion that such judgments should be made by administrators, not judges.¹¹ It is disconcerting, to say the least, to find that when judges review agency interpretations of law, judicial policy judgments continue to be playing a significant role.

Or consider *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,¹² which specifies how judges are to evaluate agency decisions challenged as arbitrary or capricious under the Administrative Procedure Act.¹³ *State Farm* asks judges to invalidate agency failure to investigate reasonable alternatives or to provide an adequate justification for a particular course of action.¹⁴ It should go without saying that the *State Farm* framework is designed to discipline agency decisions, not to give free reign to judicial policy preferences. Agency decisions are supposed to be invalidated because they are not based on an adequate justification, not because judges disagree with them on the merits. In these circumstances, it is disturbing to find that whether a court of appeals is likely to find an agency decision to be “arbitrary” depends, in significant part, on whether the panel consists of Republican or Democratic appointees.¹⁵ The official doctrine opposes politicized judging; the practice plainly reveals what the doctrine explicitly opposes.

As we shall see, objections to the apparently politicized voting turn out to raise many questions, and it would be possible to wonder whether the current situation is as troublesome as it initially appears. But politicized voting patterns create an evident problem for the rule of law, if only because similarly situated people, including some of the nation’s most important institutions, are not being treated similarly.

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

9. *Id.* at 843–44.

10. See E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 8 (2005).

11. *Chevron*, 467 U.S. at 864.

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

13. *Id.* at 43; see also 5 U.S.C. § 706 (2006).

14. *State Farm*, 463 U.S. at 37–38.

15. See Miles & Sunstein, *Real World*, *supra* note 1, at 812.

After all, judges are randomly assigned to three-judge panels.¹⁶ If all-Republican panels are likely to strike down liberal regulations from the Environmental Protection Agency, and if all-Democratic panels are likely to uphold such regulations, the random assignment of judges is playing a significant role. And if Supreme Court review is unusual, it is troubling to find that the fate of an important domain of environmental law will turn on the composition of the appellate panel.

The current evidence also offers a warning for the future. Suppose that the federal judiciary consists in large part of appointees of George W. Bush, and that in its initial years, an Obama administration is issuing a large number of regulations that reflect the political commitments of that very president. If politicized voting occurs on the federal judiciary, those commitments will run into serious trouble before Republican appointees—and there will be many such appointees. At first glance, a set of invalidations would seem disturbing from the standpoint of democratic self-governance, whatever one’s views about George W. Bush and Barack Obama.

We have three purposes in this Article. The first is to set out in one place some of the most revealing evidence on politicized administrative law, with the hope that a brief overview of key findings will help to show what is wrong with the existing state of affairs. The second is to investigate a series of interpretive questions, which raises issues about how to construe the evidence, and about how seriously the current problem should be taken. The third is to explore several sets of potential remedies. One solution involves judicial self-correction without doctrinal change; another requires doctrinal innovations, for example through heightened deference requirements; another solution requires institutional change, for example through requiring mixed panels in certain cases; yet another calls for changes in the confirmation process.

One of the largest lessons is that while the problem of politicized administrative law is unmistakable, there are serious difficulties with each of the imaginable solutions. For example, a general increase in

16. See 28 U.S.C. § 46 (2006) (providing for panels consisting of three judges without specifying a method of assignment); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216–17 (1999) (explaining that random assignment has been widely adopted in the federal appellate system, by rule or practice, as it is thought to limit intracircuit judge shopping and ensure even caseload distribution among judges).

judicial deference to agency judgments would help to reduce politicized invalidations, but it would also remove some of the beneficial features of the current situation, in which a strong judicial hand disciplines arbitrariness at the agency level.¹⁷ Increased deference would increase politicized validations, which may well be a serious problem. The data suggest that mixed panels would be the most effective corrective,¹⁸ but an approach of that kind would present serious administrative challenges and also have potentially undesirable side effects. Fortunately, some of the potential solutions would provide significant help without compromising important values.

A clarification before we proceed: many people are concerned about the politicization of administrative law in a quite different sense from our understanding here. In their view, a serious problem lies in the role of “politics,” understood as interest-group power, over the administrative state, especially in domains in which technical expertise should prevail.¹⁹ On this view, the problem of “politicization” consists in insufficient regard for specialized knowledge. This is a legitimate and important concern, but it is an independent topic. Even if the judgments of administrative agencies sometimes reflect an excessive role for politics, in a pejorative sense, it remains important to ensure that judicial review of agency action does not radically differ depending on whether Republican appointees or Democratic appointees are on the panel.²⁰ Our goal here is to see how that task might be accomplished.

While our focus throughout is on administrative law, we hope that our elaboration of the problem, of the interpretive issues, and of the potential solutions will bear on many areas in which judicial voting is highly politicized²¹ or in which public officials or others are divided along some controversial dimension or show some kind of

17. See Peter L. Strauss, *Overseers or “The Deciders”—Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 823 (2008).

18. See *infra* notes 35–36, 46 and accompanying text.

19. See, e.g., THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* 2–7 (2008).

20. Recall the theoretical possibility that if agencies show a predictable skew (in the sense that they are biased in some objectionable way), then some sort of skew, on the part of courts, might be necessary to ensure neutrality. The problem is that it cannot be the case that *both* Republican and Democratic appointees are supplying a corrective to any skew—they disagree, and hence cannot both be right!

21. See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 11–38 (2007); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?* 87–106 (2006).

bias. In any domain, self-corrective, doctrinal innovation, or institutional change might provide significant help. In some domains, one or another of these solutions might have more promise than in the context of administrative law.

I. POLITICIZED ADMINISTRATIVE LAW: EVIDENCE

A. *Method*

For a number of years, we have been studying judicial judgments in the domain of administrative law, in an effort to see whether those judgments reflect policy choices on the part of federal judges.²² For present purposes, our method can be simply described.

Within the courts of appeals, our focus has been on judicial review of decisions by the Environmental Protection Agency (EPA) and the National Labor Relations Board (NLRB).²³ This approach has the advantage of investigating one important executive agency (the EPA) and one important independent agency (the NLRB); this approach also presents certain advantages in terms of ease of coding. There are of course real difficulties in deciding how to “code” agency decisions in political terms. It is hard to undertake such coding in the abstract; it is even harder to do so when the real question is not whether the agency has proceeded in a “liberal” fashion, but how the particular controversy, before a court, should be evaluated in political terms. Let us begin by describing our choice and then explaining it.

In brief, we attempted to categorize agency decisions as “liberal” or “conservative” by asking whether the challenge was made by a company or instead by a public interest group or a labor union.²⁴ If, for example, the Sierra Club objected to an EPA decision, the

22. See generally Miles & Sunstein, *Do Judges*, *supra* note 1 (outlining the studies and reporting the results); Miles & Sunstein, *Real World*, *supra* note 1 (same).

23. In the case of agency interpretations of law, we examined all cases citing *Chevron* between 1990 and 2004 (253 in total); in the case of arbitrariness review, we examined all arbitrariness and substantial evidence cases between 1996 and 2006 (653 in total).

24. We also studied whether the agency’s decision was issued in a Republican or Democratic administration. In some domains, we found that Republican appointees are more likely to vote to uphold decisions of a Republican administration than those of a Democratic administration, and that Democratic appointees show a similar kind of favoritism. In *Chevron* cases, for example, Democratic appointees show a 70 percent validation rate under Democratic administrations and 61 percent validation rate under Republican administrations, while Republican appointees show a 59 percent validation rate under Democratic administrations and a 68 percent validation rate under Republican administration. Miles & Sunstein, *Do Judges*, *supra* note 1, at 850. In general, however, the liberal-conservative coding is a more accurate way of exploring political voting on the courts of appeals, and so that division is our emphasis here.

decision was coded as conservative; if General Motors made the objection, the decision was coded as liberal. This method has several important advantages. It greatly simplifies the coding exercise, avoids controversial judgments that might divide reviewers, and thus improves administrability and replicability. It can also be defended in principle. What matters is not whether the agency's decision is liberal or conservative in the abstract, but the political valence of the particular challenge before the court. If, for example, the EPA has issued a ruling that some people consider "liberal," but that is challenged by a public interest group that is attempting to increase regulation, the ruling is relevantly conservative, in the sense that judges are being asked to hold that it is unlawfully weak.

Admittedly, however, our proxy is crude. For that reason, we read all of the cases ourselves. When our method produced what seemed to be an incorrect or contestable result, we adjusted the coding accordingly. Suppose, for example, that a public interest group challenged the agency's decision, but that the group was conservative, and sought to block regulatory action. If so, we reversed the categorization; such reversals occurred in a relatively small number of cases (under a dozen). If coding proved difficult, because of the range of issues and the number of parties, the case was dropped on the ground that no coding was reliable; we dropped only a few cases (about ten).

For purposes of evaluating our data, it is important to know the distribution of liberal and conservative decisions. In the domains that we studied, EPA decisions were evenly split between conservative and liberal rulings;²⁵ recall that this means that public interest groups challenged EPA decisions at about the same rate that companies did. NLRB decisions, by contrast, were disproportionately liberal—67 percent in *Chevron* cases, and 94 percent in arbitrariness cases.²⁶ The overwhelming majority of challenges to NLRB decisions, in the courts of appeals, are brought by employers rather than unions.²⁷

We also examined whether judicial votes were issued by Republican or Democratic appointees to the federal bench, with the hypothesis that the division should operate as a proxy for political predilections and with the further thought that the effect of the political affiliation of the appointing president is of considerable

25. Miles & Sunstein, *Real World*, *supra* note 1, at 777.

26. *Id.*

27. *Id.*

independent interest. With this method, we can investigate “liberal voting rates” for Democratic and Republican appointees in different domains. We can also compare the validation rate of both sets of appointees for conservative agency decisions and for liberal agency decisions. In addition to studying the effects of party, we can study the effects of panels by asking whether the votes of Democratic or Republican appointees are affected by the political affiliation of the president who appointed the two other judges on the panel. Do Democratic appointees show especially liberal voting patterns when they sit only with other Democratic appointees? How do the voting patterns of Republican appointees differ depending on whether they are sitting with no, one, or two Democratic appointees?

The baseline case, for purposes of studying neutrality and partisanship, would show no significant disparities between Republican and Democratic appointees. If no such disparities were shown, existing administrative law doctrines would be “working” in the sense that they would be serving to filter out any effect from the most obvious and salient difference among appointees to the federal bench. And indeed, there are important areas of federal law in which partisan differences are not observed.²⁸

For the Supreme Court, we took a similar approach. Here, however, we examined all decisions that cited *Chevron*; we did not restrict ourselves to the EPA or the NLRB. And instead of distinguishing between Republican and Democratic appointees, we assessed voting patterns for each of the individual Justices and (to obtain greater statistical power) for “blocks” of Justices corresponding to conventional judgments about ideological divisions. With this approach, we are able to see if political predilections affect the Justices’ voting in administrative law cases. Because only a small number of “arbitrariness” cases reach the Supreme Court, making statistical tests impossible, we did not investigate those cases.

B. Courts of Appeals: Chevron Cases

Within the courts of appeals, politicized voting is unmistakable in *Chevron* cases. Consider three different ways to demonstrate this point:

28. See SUNSTEIN ET AL., *supra* note 21, at 48–54 (finding no significant effects of political party in criminal appeals, federalism, takings, punitive damages, and standing).

1. When the agency's decision is liberal, the Democratic validation rate is 74 percent; when the agency's decision is conservative, the Democratic validation rate falls to 51 percent. The pattern is the opposite for Republican appointees—very close to the mirror image. When the agency's decision is liberal, the Republican validation rate is 59.5 percent. When the agency's decision is conservative, the Republican validation rate jumps to 70 percent.²⁹
2. When the agency's decision is liberal, Democratic appointees are 14 percent more likely to vote to validate it than are Republican appointees. When the agency's decision is conservative, Democratic appointees are 19 percent less likely to validate it than are Republican appointees.³⁰
3. The overall liberal voting rate is 67 percent for Democratic appointees; for Republican appointees, it is 50 percent.³¹

To be sure, differences of these magnitudes are inconsistent with the proposition that in administrative law cases judicial voting is thoroughly politicized. It remains true that Republican appointees vote to uphold liberal interpretations well over 50 percent of the time, and that Democratic appointees are more likely than not to uphold conservative interpretations. Nonetheless, the disparities are significant. What produces them?

Intriguingly, they are driven in large part by the radically different behavior of both sets of appointees on unified panels—that is, panels consisting solely of Democratic appointees (DDD panels) or solely of Republican appointees (RRR panel). When Democratic appointees are on DDD panels, the validation rate for liberal agency decisions is 86 percent; when Democratic appointees are on DDD panels, the validation rate for conservative agency decisions is 54 percent.³² (This 32 percent difference should be compared with the overall difference of 23 percent.³³) When Republican appointees are on RRR panels, the validation rate for liberal agency decisions is 51 percent; and on such panels, the validation rate for conservative agency decision is a remarkable 100 percent.³⁴

29. Miles & Sunstein, *Do Judges*, *supra* note 1, at 849.

30. *Id.* at 826–27.

31. *Id.* at 859.

32. *Id.* at 855.

33. *Id.*

34. *Id.*

Because of the relatively small sample size, the particular numbers here should be taken with a grain of salt, but they should be sufficient to show that unified panels are playing a large role in driving the results. The following point is sufficiently important to deserve italics: *On mixed panels, politicized voting is greatly reduced; the behavior of Democratic appointees, on such panels, is very close to that of Republican appointees.*³⁵ In *Chevron* cases, the voting patterns of Republican appointees on RRD panels is close to the voting patterns of Republican appointees on RDD panels, and the voting patterns of Democratic appointees on DRR panels is close to that of Democratic appointees on DDR panels—and more remarkably still, all four voting patterns are close to one another.³⁶ This finding suggests that on mixed panels, *Chevron* is essentially working, in the sense that politicized voting is modest at best.

The dramatic difference between all-Republican and all-Democratic panels presents an obvious puzzle. Why are judicial voting patterns relatively extreme on such panels and so much more moderate on mixed panels? We lack a complete answer, but judges appear to be influenced by the process of *group polarization*, which occurs when group members end up in a more extreme position in line with their predeliberation tendencies.³⁷ Group polarization is the typical pattern within deliberating groups, and it occurs in a wide range of settings.³⁸ If Democratic appointees show especially liberal voting patterns on panels consisting solely of Democratic appointees, it is likely because the judges' initial inclinations are amplified, rather than moderated, by learning about the conclusions and arguments of other judges. On mixed panels, by contrast, a whistleblower effect may occur, in the form of presentation of counterarguments based (for example) on the principle of *Chevron* deference.³⁹ Because the initial "argument pool" is different on a DDD panel from what it is on a DDR panel, it should not be entirely surprising that Democratic

35. *Id.* at 863.

36. *Id.*

37. ROGER BROWN, *SOCIAL PSYCHOLOGY* 200–45 (2d ed. 1995); CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 111–44 (2003).

38. See BROWN, *supra* note 37, at 244.

39. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2173–74 (1998).

appointees, on the latter kinds of panels, show relatively greater moderation.⁴⁰

C. *Courts of Appeals: Arbitrariness Cases*

The pattern is strikingly similar in arbitrariness cases. Here the question is not whether the agency's decision conforms to the governing statute, but whether its judgments of policy or fact are arbitrary on the merits (or unsupported by substantial evidence). Return to our three key tests for politicized voting, and notice the closely analogous pattern in *Chevron* cases:

1. When the agency's decision is liberal, the Democratic validation rate is 72 percent; when the agency's decision is conservative, the rate falls to 55 percent. The pattern is the opposite for Republican appointees—very close to the mirror image. When the agency's decision is liberal, the validation rate is 58 percent; when the agency's decision is conservative, the validation rate jumps to 72 percent.⁴¹
2. When the agency's decision is liberal, Democratic appointees are 14 percent more likely to vote to validate it than are Republican appointees. When the agency's decision is conservative, Democratic appointees are 17 percent less likely to validate it than are Republican appointees.⁴²
3. The overall liberal voting rate is 69 percent for Democratic appointees; for Republican appointees, it is 56 percent.⁴³

One of the most striking features of these findings is their similarity to those under *Chevron*; different areas of administrative law have produced parallel voting patterns. And here too, unified panels explain a significant part of these disparities. On politically unified panels of Democratic appointees, the average validation rate is 43 percentage points higher when the agency decision is liberal than when it is conservative.⁴⁴ And on politically unified panels of

40. There are other possible explanations. It may be, for example, that Republican and Democratic appointees vote as they would as individuals on unified panels, and that what needs explanation is the absence of politicized voting on mixed panels. On this view, group polarization is not involved; mixed panels serve to moderate judges' tendencies, and that is the key mechanism. For our purposes, it does not seem necessary to settle on a final explanation.

41. Miles & Sunstein, *Real World*, *supra* note 1, at 767.

42. *Id.* at 777.

43. *Id.* at 791.

44. *Id.* at 788.

Republican appointees, the average validation rate is 29 percentage points lower when the agency decision is liberal than when it is conservative.⁴⁵ A form of group polarization seems to be at work in this domain. On mixed panels, by contrast, the partisan differences are greatly muted,⁴⁶ perhaps because of a moderating or whistleblower effect. In those panels, existing doctrine is again “working,” in the sense that judges’ arbitrariness judgments do not greatly differ depending on the political affiliation of the appointing president.

*D. The Supreme Court*⁴⁷

1. *The Least and Most Partisan Justices.* The data on the Supreme Court allows individual comparisons among the Court’s members.⁴⁸ Indeed, it is even possible to rank the Justices in terms of partisanship in *Chevron* cases.⁴⁹ In this domain, it would seem reasonable to define the least partisan Justices as those who show the most similar validation rates for liberal and conservative agency decisions. By contrast, the most partisan might be defined as those who show the largest spreads between the two validation rates.

Under this test, Justice Kennedy emerges as the least partisan of the sitting Justices; he is equally likely to vote to invalidate conservative and liberal agency decisions.⁵⁰ Justice Thomas emerges as the most partisan; remarkably, he is 46 percent more likely to vote to invalidate liberal agency decisions than conservative agency decisions.⁵¹ Justice John Paul Stevens is not far behind, with a

45. *Id.*

46. *Id.*

47. Seven of the Justices were appointed by Republican presidents: Justice David H. Souter, Justice John Paul Stevens, Justice Sandra Day O’Connor, Justice Anthony M. Kennedy, Justice William H. Rehnquist, Justice Clarence Thomas, and Justice Antonin Scalia. Justices Ruth Bader Ginsburg and Steven Breyer were appointed by Democratic President Clinton.

48. For an illuminating treatment, covering a large time period, see Eskridge & Baer, *supra* note 2, at 1153–57.

49. Miles & Sunstein, *Do Judges*, *supra* note 1, at 872–80 tbl.1. The data set extends from 1989 to 2005, and hence Chief Justice John Roberts and Justice Samuel Alito are not included. An effort to extend the study to the present would of course include a number of their votes, but the sample size, for those Justices, would remain too small to permit reliable comparisons.

50. *Id.* at 877 tbl.1.

51. *Id.* at 880 tbl.1.

stunning 40 percent difference in favor of liberal decisions.⁵² Consider the following table.⁵³

Table 1. Partisan Voting in Chevron Cases on the Supreme Court.

Justice	Gap (in percentage points)	Type of Agency Decision Favored
Thomas	46	Conservative
Stevens	40	Liberal
Scalia	27	Conservative
Breyer	26	Liberal
Ginsburg	23	Liberal
Rehnquist	21	Conservative
O'Connor	14	Conservative
Souter	14	Liberal
Kennedy	1	—

To be sure, this table should be taken with many grains of salt. The sample size is small, and for Justices O'Connor, Souter, and Kennedy, the gap is not statistically significant (and hence they could plausibly be said to share the prize for nonpartisan voting). Moreover, it is important to examine not only the size of the gap, but also the rate of invalidation; if a Justice shows a large gap, but is also willing to uphold both liberal and conservative decisions at a high rate, then the problem of partisanship is diminished.

It turns out that Justice Breyer shows the highest validation rate (82 percent),⁵⁴ while Justice Scalia shows the lowest (52 percent).⁵⁵ The point greatly matters because Justice Breyer's validation rate remains reasonably high for conservative decisions (64 percent),⁵⁶ as does that of Justice Ginsburg (58 percent).⁵⁷ By contrast, Justice Scalia's validation rate for liberal decisions is a meager 42 percent.⁵⁸ It emerges that the existence of a significant partisan gap may coexist

52. *Id.* at 872 tbl.1.

53. *Id.* at 872–80 tbl.1.

54. *Id.* at 874 tbl.1.

55. *Id.* at 879 tbl.1.

56. *Id.* at 874 tbl.1.

57. *Id.* at 875 tbl.1.

58. *Id.* at 879 tbl.1.

with a relatively high validation rate for the “other side.” Consider the following table.⁵⁹

Table 2. Validation Rates in Chevron Cases on the Supreme Court.

Justice	Rate (percentage points)
Breyer	82
Souter	77
Ginsburg	74
Stevens	71
O’Connor	68
Kennedy	67
Rehnquist	64
Thomas	54
Scalia	52

Here too, however, the individual rankings must be taken with many grains of salt. The sample size is too small to make most of the individual differences statistically significant. But it is both intriguing and suggestive to find that the four most liberal Justices have the highest validation rates, while the three most conservative Justices have the lowest.

2. *Conservative Partisans, Liberal Partisans.* The individual rankings may be entertaining, but for purposes of understanding of operation of existing doctrine, it is more instructive to place the Court’s members into groups and to examine the differences between them.

Let us compare the Rehnquist-Scalia-Thomas group with the Breyer-Ginsburg-Souter-Stevens group. The former group, consisting of the most conservative Justices, shows a validation rate of 76 percent when the agency’s decision is conservative—but a corresponding rate of just 45.5 percent when the agency’s decision is liberal.⁶⁰ This difference of 30.5 percent shows a remarkable effect of judicial policy preferences. The picture is not fundamentally different for the Breyer-Ginsburg-Souter-Stevens group. When the agency decision is liberal, the validation rate is 85 percent—but when it is conservative, the rate falls to 58 percent.⁶¹ The disparity here is 27 percent, very close to that on the Rehnquist-Scalia-Thomas side. In

59. *Id.* at 872–80 tbl.1.

60. *Id.* at 835.

61. *Id.*

contrast, for the two more centrist members of the Court, Justices Kennedy and O'Connor, the partisan gap is small, with a 65 percent validation rate for liberal agency decisions and a 72 percent validation rate for conservative agency decisions; that 7 percent difference is not statistically significant.⁶²

Partisan voting is readily apparent in the Supreme Court in Chevron cases, but as with individual measures, it is important to look at overall validation rates, not merely at gaps. Notably, the overall validation rate for Stevens, Souter, Breyer, and Ginsburg is 75 percent, significantly higher than the 57 percent rate for Rehnquist, Scalia, and Thomas.⁶³ The former group votes to validate conservative agency decisions at a 58 percent rate, which is significantly higher than the 45.5 percent validation rate for liberal agency decisions from the latter group.⁶⁴

3. A Brief Note on Politics, Judicial Review, and the Future In light of the existing data, we can venture some predictions about the future. Suppose that a future administration issues a range of liberal decisions (in the sense that they are challenged by regulated industries). Such an administration will be highly vulnerable before RRR panels, and will be likely to do far better before DDD panels. To the extent that the federal courts of appeals consist of a strong majority of Republican appointees, an administration that issues many liberal decisions will have special difficulty in prevailing. This is a purely predictive point; of course people will differ about whether and to what extent it would be a cause for concern.

Within the Supreme Court, it is also simple to predict the nature of the internal divisions. We lack sufficient data to offer predictions for Chief Justice John Roberts and Justice Samuel Alito, but at least in administrative law, it is more than mere guesswork to suggest that both liberal and conservative agency decisions from a new administration will produce the same kind of politicized voting, within the Court, as has been observed under recent administrations. It would not be at all surprising to find, for example, that a new Democratic administration would suffer a number of losses in the Court, at least if Chief Justice Roberts and Justice Alito show the

62. *Id.*

63. *Id.*

64. *Id.*

anticipated voting patterns, and if Justice Kennedy joins them a significant percentage of the time.

II. FIVE MATTERS OF INTERPRETATION

At first glance, the most important lesson is plain: judicial review of administrative action shows a strong effect from the political inclinations of federal judges. In the abstract, this lesson is not exactly stunning. The problem is that existing administrative law principles are best understood as a self-conscious effort to prevent this state of affairs. Under *Chevron*, courts are supposed to invalidate agency interpretations of law only if the governing statute is clear or if the interpretation is unreasonable.⁶⁵ The doctrine and the practice sharply diverge because the doctrine is an effort to prevent the kinds of disparities now observed on both the Supreme Court and the courts of appeals. And as the Court understands the “arbitrary or capricious” standard, agency judgments of policy and fact are to be invalidated if they are unreasonable or senseless, not because they run afoul of judicial policy preferences.⁶⁶ Here too the doctrine and the practice sharply diverge, at least on the courts of appeals, where statistical tests are possible. In an especially important domain, we seem to have vindicated certain claims about judicial policy preferences associated with the legal realist movement.⁶⁷

The partisan voting patterns seem to call out for some kind of remedy. But of course the evidence is not simple to interpret. Consider five difficulties.

A. *Who Is Partisan?*

Begin with voting patterns on the Supreme Court. Is it altogether clear that Justices Thomas and Stevens are the most partisan or that the two opposing “blocks” show high (and nearly equivalent) levels of

65. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (explaining that a reviewing court must ask “[f]irst . . . whether Congress has directly spoken to the precise question at issue,” and if it has not, whether the agency’s interpretation is “reasonable”).

66. *See Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”).

67. *See Miles & Sunstein*, *supra* note 3, at 846–50 (providing empirical support for the contention that judicial policy preferences play a role in judges’ decisions about whether agencies have behaved unreasonably).

partisan voting? A skeptic would insist that in order to answer that question, we cannot simply stare at the numbers.⁶⁸ We also need to know something about the merits—about whether agencies are actually interpreting statutes correctly. If, for example, liberal agency decisions are more likely to be inconsistent with the statutory text, then Justice Scalia and Thomas, who seem to show a significant partisan “skew” in their voting patterns, might be neutral in their practice, whatever the numbers suggest. Or if conservative agency decisions are more typically inconsistent with the law, then Justice Stevens might be the nonpartisan one notwithstanding the 40 percent gap reflected in his voting pattern. The various rankings assume that liberal agency decisions and conservative agency decisions are equally likely to be inconsistent with the law. Why should we believe that this assumption is correct?

The same point holds for the courts of appeals. It is true that Republican appointees are more likely to vote to uphold conservative agency decisions than liberal ones and that Democratic appointees show the opposite pattern. But to evaluate this finding, it would be important to learn about the nature of the EPA and NLRB decisions in the relevant period. Perhaps one set of decisions is systematically likely to be unreasonable or arbitrary. Perhaps partisan voting is limited to one or another side; perhaps Republican appointees or Democratic appointees are simply applying the law.

Even if this objection turns out to be valid, the problem of partisan voting remains; the only qualification would be that such voting would be limited to one or another set of judges. Moreover, it is unlikely that the objection is valid, at least in its most ambitious forms. Neither the Supreme Court nor the courts of appeals reviews all EPA and NLRB decisions, or even a majority of them. Within the Court, the sample is generally limited to cases that are both important and difficult, and to be seen as worth litigating by both sides; in such cases, a consistent error rate, from one or another side, would be a surprise. Within the lower courts, reasonable arguments are usually made on behalf of the competing views. From our own reading of the cases, it does not seem that liberal agency decisions or conservative

68. This point is put in a broader context in a highly instructive essay by Professor Posner. Eric Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Political and Constitutional Reform*, 75 U. CHI. L. REV. 853, 870 (2008) (“[I]t should now be clear that evaluating justices is more complicated than counting up their liberal and conservative votes.”).

ones are systematically more likely to be in violation of the governing statute (or the clear text) or arbitrary as a matter of fact or policy. To be sure, a careful investigation of the merits might require some amendments of the basic account we are offering, but the significant differences in voting patterns are most unlikely to be understandable in terms that neglect the political predictions of federal judges.

B. How Large a Problem?

It is legitimate to wonder about the magnitude of the problem. If Republican appointees showed a 10 percent liberal voting rate and Democratic appointees a 90 percent liberal voting rate, there would be good reason for alarm. But the overall partisan difference is far smaller than that—17 percent in the *Chevron* cases⁶⁹ and 12 percent in the arbitrariness cases.⁷⁰ Is that difference large enough to justify reforms or even substantial concern? It is clear that Democratic appointees are voting in favor of companies and against public interest groups in a large percentage of cases (about one-third of the time in the entire data set)—and that Republican appointees are often voting in favor of public interest groups and against companies (over two-fifths of the time in the entire data set).⁷¹ Far more often than not, the two sets of judges are in accord. Is there a serious problem to be solved?

This question might be pressed with special concern by those who emphasize the selection of cases for litigation.⁷² People (and their lawyers) are unlikely to challenge agency action unless they have a significant chance of success. Agencies are unlikely to proceed in the first instance unless they have a plausible legal basis for doing so. The cases studied here are a small sliver or band of imaginable disputes, consisting only of those agency decisions that litigants are prepared to challenge and that agencies are prepared to defend. In such cases, even a significant disparity between Republican and Democratic voting patterns should not be taken as politics run rampant.

The point is correct. But it should not be overstated. In one sense, our estimates understate the actual influence of ideology, for the reason that we have just identified. When an agency must defend

69. See *supra* note 31 and accompanying text.

70. See *supra* note 43 and accompanying text.

71. See Miles & Sunstein, *Do Judges*, *supra* note 1, at 849 tbl.7.

72. For a discussion, see *infra* note 92 and accompanying text.

a liberal decision before a conservative court, it is more likely to settle, and when an agency must defend a conservative decision before a liberal court, it is more likely to settle. The observed court decisions are therefore drawn from cases in which settlement is less likely, and the set of observed decisions does not encompass these cases (we do not know exactly how many there are) in which the judicial outcome would likely be predictably ideological. Were we to observe a counterfactual world in which these settling cases proceeded, the observed decisions would include a larger share of (and thus a higher rate of) predictably ideological judicial decisions.

Moreover, it remains true that notwithstanding the evident aspiration of both *Chevron* and *State Farm*, politicized voting patterns are both significant and unmistakable in the federal courts, at least on unified panels. Recall that in *Chevron* cases, a Democratic appointee on a unified panel is 32 percent more likely to vote in favor of liberal agency decisions (86 percent validation rate) than conservative agency decisions (54 percent validation rate)—and that a Republican appointee on a unified panel is 49 percent more likely to vote in favor of conservative agency decisions (100 percent validation rate) than liberal agency decisions (51 percent validation rate).⁷³ In a system committed to the rule of law, and to similar treatment of the similarly situated, this is a serious problem.

C. *Ex Ante Versus Ex Post*

Empirical tests can easily study decisions ex post, to see what kinds of voting patterns are displayed by federal judges. But an important question, and perhaps an even more important one, involves the ex ante incentives imposed on federal agencies. On an optimistic account, the situation is far better ex ante than ex post.

As things now stand, agencies can be seen to face a kind of lottery. Within a certain range, their decisions will certainly be upheld, no matter the composition of the panel; and if the agency plainly violates the statutory text or acts in a patently arbitrary way, its decision will be invalidated, regardless of who sits on the reviewing court. And across a certain space of alternatives, there will be some uncertainty, with a range of probabilities of invalidation, depending on the composition of the panel. In that range, the agency's lawyers might be prepared to conclude that the relevant decision can be

73. See *supra* notes 33–34 and accompanying text.

plausibly defended. Within a certain domain of that range, the lawyers will add that the decision is more likely than not, or less likely than not, to be upheld in court. But they might be prepared to acknowledge, if pressed, that the likelihood of validation is well above 50 percent before a panel consisting solely of Republican appointees and well below 50 percent before a panel consisting solely of Democratic appointees.

In these circumstances, how will the agency proceed? To answer that question, we need to know something about the weight given to the prospect of invalidation and about the agency's attitude toward risk. Exactly how much does the agency care about surviving judicial review? Is the agency risk averse or risk inclined? The agency will face a probability distribution, and it will act in accordance with the perceived risks. Suppose that for various reasons, the agency cares a great deal about ensuring validation and also that the agency is risk neutral. If the risk of invalidation is 60 percent before an all-Democratic panel, but 35 percent before an all-Republican panel, an agency can make the relevant calculations and proceed accordingly. The overall likelihood of invalidation, given all the possible panel compositions, might be 40 percent; and the agency might proceed as it would, in the face of that risk, even if every possible panel was 40 percent likely to invalidate its decision. The key point is that *whatever the disparities across panels, there is an overall likelihood of invalidation, and the agency can act with that figure in mind, just as it would without such disparities*. From the *ex ante* point of view, then, what is the problem with politicized voting?

Here is another way to put the point. While we are unaware of any empirical evidence on the question, agencies are likely to be aware of the distribution of views on the federal judiciary, and if the judiciary takes a sharp turn in one or another direction, agencies will be affected. If, for example, a Democratic administration faced a judiciary consisting mostly of Republican appointees, it would behave differently from how it would behave if the judiciary consisted mostly of Democratic appointees. And if politicized voting exists on a judiciary within a specified distribution among Republican and Democratic appointees, agencies will adjust accordingly. Without politicized voting, there will be a certain likelihood of invalidation, which agency lawyers might be able to specify; the same is true with politicized voting. So long as agencies are attuned to the relevant problems, there does not seem to be a great deal of difficulty *ex ante*.

Three potential problems remain. A first concern is the possibility that the panel lottery agencies face may not be a fair game. If the composition of the federal courts were disproportionately Republican (or Democratic), an agency would not have an equal probability of facing a DDD and an RRR panel. A politically unbalanced judiciary, as distinguished from a politically unbalanced panel, implies shifts in the range of decisions that an agency can expect will be validated. To continue the example above, if the risks of invalidation before all-Democratic and all-Republican panels remain unchanged, but the incidence of all-Democratic and all-Republican panels change, the expected likelihood of invalidation might rise from 40 percent to 60 percent. Or it might fall to 20 percent. It would remain true that agencies could know, *ex ante*, about their probability of success. And it might be responded that shifts in the composition of the federal judiciary are a legitimate response to shifts in public opinion, as reflected in the inclinations of the occupant of the White House. But movements in the expected chance of invalidation are troubling to the extent that the agency's *ex ante* prediction of its likelihood of success will shift with the expected composition of the reviewing court.

Second, politicized voting by panels will influence the amount of resources an agency invests in rendering decisions and defending them in court. If the agency is risk averse, or if the risk of partisan invalidation is high, an agency may double its efforts to demonstrate the validity of its action. The additional resources spent bolstering its decision exceed the investment the agency would have had it anticipated facing a nonpoliticized panel. This sort of additional expenditure seems more likely to occur in rulemaking rather than adjudication. But the primary point is that a risk of politicized voting will likely increase the effort devoted to showing reasonableness beyond what would be spent in its absence. These additional resources of course have an opportunity cost. They are drawn away from other activities that the agency would otherwise pursue. Defense of a clean-air regulation may come at the expense of creating a clean-water regulation. For resource-constrained agencies—as all agencies are—the possibility of a politicized panel could distort an agency's allocation decisions.⁷⁴

74. Naturally, the argument works the other way for politicized voting that favors an agency. An increase in the chance that an agency faces a friendly reviewer may reduce the

Third, politicized voting by panels may affect the content of agency decisions. An agency may decide in good faith that a particular policy would improve social welfare. But if the risk of a politicized invalidation is high, the agency may decide that the resources required to establish the validity of the policy before a potentially hostile court are too great. The agency may then modify the decision to make it more palatable to the expected panel but at the cost of a reduced improvement in social welfare. Or the agency may choose to forgo the decision altogether. In either case, politicized review would result in the agency's curbing a socially beneficial decision. There is ample evidence that effects of this sort do in fact occur.⁷⁵

In addition to these *ex ante* consequences, the *ex post* perspective matters as well. If important EPA rules are invalidated by all-Democratic panels, while they would be upheld by all-Republican panels, similarly situated litigants will be treated differently in a way that ensures that the meaning of federal statutes turns on a kind of lottery. If NLRB decisions are won by unions before DDD panels, but by companies before RRR panels, something is seriously amiss. Even if the current regime does not have significantly different incentive effects from one with less politicized voting, it does serious violence to the rule of law, and it has a significant effect on ultimate outcomes.

D. Invalidations or Validations?

An independent question is whether the best reading of the evidence emphasizes politicized *invalidations*. We have seen that the Republican invalidation rate jumps when the agency decision is liberal, and the Democratic invalidation rate jumps when the agency decision is conservative. These points suggest that agencies are probably losing many cases that they ought to win. But it is possible that what has been uncovered are politically motivated *validations*. Perhaps the real story is the relatively low invalidation rate when

resources an agency spends in establishing the validity of its decision, and this may be undesirable when closer inquiry is warranted.

75. The best discussion remains the book by Professors Mashaw and Harfst. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225 (1990) (discussing the effects of aggressive judicial review on agency rulemaking, and noting that “[t]he result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules”).

Republican appointees review conservative regulations and when Democratic appointees review liberal ones. Perhaps conservative decisions are being wrongly validated before all-Republican panels; perhaps liberal agency decisions are being wrongly validated before all-Democratic panels. Indeed, it is possible, in light of the data, that the more serious problem consists of excessive numbers of validations.

This point is indeed consistent with the evidence, and it has important implications for possible responses. We will return to the question in Part III.B.2.

E. Second-Order Diversity

Sometimes it is desirable to have diversity *within* institutions—as, for example, in the context of national legislatures. But sometimes it is desirable to have diversity *across* institutions—as, for example, in a situation in which Massachusetts attempts some educational reforms and Utah ventures others, or different law schools or economics departments develop different “schools.” Professor Heather Gerken has written illuminatingly of the idea of “second-order diversity,”⁷⁶ which exists when different institutions, with a degree of internal unity, produce a kind of diversity from which society as a whole might benefit. In some cases, second-order diversity should be the goal, not first order. If, for example, society is able to learn a great deal from institutions that are internally unified but different from one another, and if those institutions do not do much damage to anyone, then second-order diversity might be better than its first-order cousin.

In administrative law, we can find a high degree of second-order diversity, made possible by unified panels. Might this be desirable? Consider the following account. With unified panels, a large number of ideas will inevitably make their way onto the pages of federal court opinions. RRR panels will offer distinctive interpretations of the Clean Air Act and the National Labor Relations Act; DDD panels will offer distinctive interpretations of their own. Perhaps the legal system benefits from this level of diversity. When courts of appeals are divided, the Supreme Court will ultimately decide, with the

76. See Heather K. Gerken, *Second-Order Diversity and Disaggregated Democracy*, 118 HARV. L. REV. 1099, 1102–03 (2005) (explaining “first-order diversity” as “the normative vision associated with statistical integration, the hope that democratic bodies will someday mirror the polity” and “second-order diversity” as “involv[ing] variation among decisionmaking bodies, not within them . . . [and] foster[ing] diversity without mandating uniformity”).

benefit of the additional information provided by a wide array of views within the lower courts.

In some domains, this defense of second-order diversity within the federal courts has a great deal of plausibility. In constitutional law, for example, the system as a whole probably benefits from RRR and DDD panels, which produce a range of disparate analyses of issues involving the Second Amendment, abortion, affirmative action, campaign finance regulation, and much more. The Supreme Court and the culture as a whole benefit from such analyses. But the defense is far less plausible in the context of administrative law. In almost all of the relevant cases, the decision of the court of appeals is effectively final, because the Supreme Court hears only an exceedingly small percentage of them, and most turn on complex issues of fact or policy or on relatively technical issues of statutory construction. If an RRR panel concludes that the NLRB improperly found the facts and rules in favor of a company challenging a finding of an unfair labor practice, or if a DDD panel rejects the EPA's interpretation of the Clean Air Act in favor of that offered by the Sierra Club, the likelihood of some social benefit from a hypothetical increase in "diversity" is very low. In these circumstances, it is not easy to defend the status quo by reference to the interest in second-order diversity.

III. SOLUTIONS

Let us now turn to sets of solutions. The first involves self-correction without doctrinal change, brought about by judges' own understanding of the problem of politicized administrative law. The second set includes doctrinal responses, taking the form of new developments involving the governing legal principles. The third and most ambitious set involves institutional innovation, as, for example, through voting rules or requirements of mixed panels. The fourth set focuses on the confirmation process.

An important point before we begin: evaluation of any solutions must be based not only on their content, but also on an understanding of who, exactly, is implementing those solutions. Self-correction would of course be possible without legislative change or any kind of direction from the Supreme Court. Doctrinal changes would require the Court to reformulate or at least to clarify the underlying principles. Voting rules, or requirements of mixed panels, might well require congressional action. Solutions that call for large-scale

institutional change might run into objections from the standpoint of feasibility, if only because such change is difficult to produce.

A. *Self-Correction*

1. *Knowledge as Corrective, Sunlight as Disinfectant.* Some of the evidence catalogued here should be taken as highly embarrassing to the federal judiciary. Most federal judges would not like to think that in reviewing agency action, their voting patterns show a significant influence from the party affiliation of the president who appointed them. Perhaps a better understanding of the situation could provide a safeguard against politicized voting. On an optimistic view, judicial awareness of the underlying patterns might provide a degree of help; it might even produce a form of “debiasing.” Justice Louis Brandeis famously said that “sunlight is said to be the best of disinfectants.”⁷⁷ Perhaps a little sunlight, with respect to voting patterns, might induce a degree of self-consciousness and self-scrutiny, thus reducing politicized voting. At the very least, the data suggest that judges on unified panels should be cautious about behaving in a way that fits with partisan predictions.

Here is the basic idea. There are many demonstrations of politicized voting, undertaken by those who have studied judicial voting patterns, and they continue to be undertaken. These demonstrations might become generally known, as the key findings are found in scholarly outlets or the popular media. To the extent that RRR and DDD panels are pervasively found to show an ideological skew, judges might be made aware of that fact. And if that occurs, the relevant behavior might change.

This is certainly possible, but there is no reason for confidence in this prospect. It is an understatement to say that most judges do not spend a great deal of time reading academic work, and studies of judicial behavior are not likely to come to their attention. And even if some judges become aware of relevant studies, perhaps through more popular outlets, a significant effect on their behavior would be surprising. No one should doubt that judges act in good faith, and when they vote to strike down or to uphold agency action, they are behaving in accordance with the law as they understand it. Note that Supreme Court Justices are the judges subject to the most persistent

77. See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

scrutiny by both the public and by a professional class of experts. Yet they remain consistently ideological in their voting. Perhaps an improved understanding of the degree of politicized voting could produce some good, but it is unlikely to make a significant contribution to solving the problem.

2. *Warning Flags and Reviewing the Reviewers.* A mildly more aggressive response would be to suggest that when a DDD panel or an RRR panel goes in the expected direction, a warning flag has been raised, one that justifies some form of oversight and review. Suppose, for example, that a RRR panel has struck down some regulation from the EPA, accepting a company's claim that the regulation is arbitrary or in violation of statute. If the EPA seeks en banc or Supreme Court review, there is special reason to take the request seriously. Or if a DDD panel has acted in a predictable fashion in an important case involving the NLRB, and the NLRB seeks certiorari, the Court has an additional reason to wonder about whether the panel might have erred.

It is true that there are evident risks with giving a great deal of weight to panel composition. What matters is the court's conclusion and analysis, not the political affiliation of the appointing president. At the same time, the existence of a unified panel, reaching the predictable conclusion, does provide a signal that the conclusion and the analysis might be skewed. Indeed, it is likely that judgments about en banc review, and about whether to grant certiorari, are sometimes influenced by an appreciation of the composition of the panel. But this response would be at best a partial response to the politicized-voting situation. It would impose on agencies the perhaps considerable costs of appeal, an expense that would be spared if politicized decisions were avoided in the first instance. En banc review is necessarily rare, and agencies seek Supreme Court review infrequently, especially when their decision is invalidated as arbitrary or capricious; such invalidations depend on particular facts and are most unlikely to attract the Court's attention.⁷⁸ Even when agencies appeal, as we have seen, the Supreme Court grants certiorari in only a

78. Robert J. Hume, *Administrative Appeals to the U.S. Supreme Court: The Importance of Legal Signals*, 4 J. EMPIRICAL LEGAL STUD. 625, 632–33 (2007) (explaining that petitions are less likely to occur when a court invalidates an agency decision as arbitrary and capricious because, “[u]nlike cases based on the Constitution, an agency’s interpretation of a statute, or some other substantive grounds, cases that require an agency to improve its reasoning are normally viewed as frivolous by the Justices and denied review”).

small fraction of cases.⁷⁹ A warning flag may well be appropriate, but it cannot suffice to eliminate politicized voting.

3. *Political Rankings.* We have ranked Supreme Court Justices in terms of politicized voting, and it would be possible to be far more systematic in this vein, covering lower courts as well. Rankings might increase the transparency of the courts, which might enhance the public's understanding of the judiciary, and importantly, might give judges an additional reason to reflect before rendering decisions that fit with political expectations. Such rankings might be offered in scholarly journals or in more popular outlets.

On the other hand, judicial rankings run into some serious objections. They may erode public confidence in courts; for some observers, rankings might supplant evaluation of judicial opinions and reinforce a cynical view that law is always politics in the crudest sense. Rankings might serve to distract judges from rendering decisions in accordance with law and encourage them to burnish their public perception as neutral. Finally, the statistics underlying any rankings are likely to be too crude, failing to capture important dimensions of judicial judgment.

B. *Doctrinal Solutions*

1. *Rethinking Mead.* *Chevron* was intended to eliminate the role of judicial policy judgments from review of agency action; it has failed to do so. At the same time, the Court has retreated, in significant ways, from the *Chevron* framework by reducing deference in certain classes of cases. A relatively modest doctrinal response to the situation described here would be to rethink the Court's most serious retreat, in *United States v. Mead Corp.*,⁸⁰ on the ground that it has a serious unanticipated side effect, which is to increase the politicization of administrative law.

To make a long and complex story too short and simple,⁸¹ *Mead* draws a distinction between two kinds of deference to agency interpretations of law. The higher form of deference, reflected in *Chevron* itself, applies when agencies have exercised delegated

79. Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1194 & n.215 (2005).

80. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

81. For details, see generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

authority to make rules or to promulgate orders.⁸² The lower form of deference, reflected in *Skidmore v. Swift & Co.*,⁸³ might apply when agencies have not exercised such authority; the word “might” is necessary because the Court has not established clear ground rules.⁸⁴ An apparent rationale of *Mead* is that if agencies have gone through rulemaking procedures or through the adjudicative process, we have some guarantee of fairness and deliberation, in a way that justifies heightened deference.⁸⁵ If agencies have not gone through the relevant processes, perhaps the risk of unfairness or unreasonableness is heightened, in a way that justifies a firmer judicial hand.

The distinction between *Skidmore* and *Chevron* raises many complexities, and the doctrine is producing a great deal of confusion in the lower courts.⁸⁶ Intuition and common sense suggest another problem: it would appear likely that *Skidmore* review, authorized by *Mead*, may well ensure not a firmer judicial hand, but a situation in which judicial policy preferences play a (still) larger role than they do under *Chevron*. To evaluate this speculation, a great deal of empirical work would be necessary. But if *Chevron* has at least some kind of disciplining effect on judicial policy judgments, then *Mead* is likely to increase politicization.

What does current evidence show? A noteworthy fact: on the Supreme Court itself, politicized voting does not seem to be greater under *Skidmore* than under *Chevron*. The Stevens-Souter-Breyer-Ginsburg group shows a 27 percent greater willingness to validate liberal agency decisions than conservative agency decisions under *Chevron*; the corresponding figure is 23 percent under *Skidmore*.⁸⁷

82. *Mead*, 533 U.S. at 226–27.

83. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). An exceedingly valuable empirical study is Kristin Hickman & Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007).

84. *Mead*, 533 U.S. at 228 (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” (footnotes omitted)).

85. *See id.* at 229–30 (characterizing express congressional authorizations of notice-and-comment rulemaking and formal adjudication as “good indicator[s] of delegation meriting *Chevron* treatment” because they “tend[] to foster the fairness and deliberation that should underlie a pronouncement of such force”).

86. *See* Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003) (calling the D.C. Circuit’s “*Mead*-related work product . . . in a nontrivial number of cases, flawed or incoherent”).

87. Miles & Sunstein, *Do Judges*, *supra* note 1, at 846.

The Rehnquist-Scalia-Thomas group shows a 30 percent greater willingness to validate conservative agency decisions than liberal agency decisions under *Chevron*; the difference is 37 percent under *Skidmore*.⁸⁸ Because of the small numbers of votes, neither of these differences is statistically significant.

We do not know whether greater differences would be found in the lower courts; the issue would be well worth investigating. No clear evidence shows whether courts that use *Skidmore*, rather than *Chevron*, end up with more invalidations, greater politicization, or both. But it is possible that the use of *Skidmore*, rather than *Chevron*, does not create more in the way of either invalidations or politicized voting. Further empirical work would be extremely helpful in this domain.⁸⁹

The more general point is that politicized voting remains high under *Chevron*, and hence the doctrinal shift from *Skidmore* to *Chevron* would not be likely to do a great deal to reduce the problem. The key data involve voting patterns under *Chevron*, and more general use of the *Chevron* framework would seem to leave those patterns intact.

2. Increased Deference.

a. *The Central Idea.* A natural response to the data would be to argue for increased deference, or a kind of “super-*Chevron*,” in the relevant domains. If Republican appointees are invalidating liberal agency decisions at a high rate, and if Democratic appointees are invalidating conservative agency decisions at a high rate, then we might want more deferential review from both sides. If the evident aspiration of *Chevron* has failed, there seems to be strong reason to reduce the intensity of judicial review of agency interpretations of law. And if arbitrariness review is being conducted in a way that shows a significant effect from judicial policy preferences, then the most obvious response would be to reduce the intensity of such review. What is now a “hard look” might be transformed into a “soft look.”

There are, however, three objections to this recommendation.⁹⁰

88. *Id.*

89. Relevant data and arguments can be found in Eskridge & Baer, *supra* note 2 *passim*.

90. A possible doctrinal solution, in some domains, would be to prefer rules over standards. It has been shown that this approach can serve to reduce the effects of judicial ideology. See Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of*

b. *Objections.* The first objection is that a degree of politicization may be a necessary price to pay for forms of judicial review that have otherwise desirable consequences. Increased deference may, for example, eliminate a valuable *ex ante* deterrent to careless or arbitrary decisions at the agency level.⁹¹ The benefits of that deterrent effect may outweigh the costs of politicized review. We have seen that in a sense, agencies face an *ex ante* “policy lottery” once their decisions are challenged because they cannot know whether the panel will be RRR, DDD, RRD, or DDR. The existence of that lottery is likely to ensure better decisions simply because of a certain probability of invalidation. The point applies both to agency interpretations of law and agency judgments of policy and fact. In both cases, agencies are likely to be disciplined by the existing standards of review. To put the point another way: the correlations between judicial ideology and validation rates do not demonstrate that all things considered, the current doctrinal balance between judicial ideology and agency error is inappropriate. Even if we could reduce those correlations, we might not be satisfied, because the risk of agency error might increase.

The second objection is that statistical patterns of the sort described here might rematerialize even with increased deference. Indeed, reduced deference might produce precisely the same patterns. Even after a decision to strengthen *Chevron* deference, new researchers might discern politicized voting of the same level that we have reported here. The reason is that litigants should be expected to adjust their behavior to the existing standard of review.⁹² If deference were increased, some cases would not be brought that were brought before the increase, and the level of validation might therefore remain identical. And in the (by hypothesis close) cases that would be brought under the new standard, political judgments might inevitably

Voting Rights Jurisprudence, 75 U. CHI. L. REV. 1493 (2008). In the context at hand, however, it is difficult to see how this solution might be made to work.

91. William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975) (“It is a great tonic to a program to discover that even if a regulation can be slipped or wrestled through various layers of internal or external review [inside the bureaucracy] . . . the final and most prestigious reviewing forum of all—a circuit court of appeals—will inquire into the minute details of methodology. . .”).

92. See Miles & Sunstein, *Do Judges*, *supra* note 1, at 869 (“[S]o long as there is some room for review, political differences will matter at the point where that review occurs. If, for example, the agency must be upheld unless the statute is entirely without ambiguity, then litigants will challenge agency action only when the statute is (arguably) entirely without ambiguity, and then agencies will interpret statutes aggressively in their preferred directions.”).

play a role, producing disparities of the sort we have described. In fact we might even venture an invariance hypothesis: *because litigants adjust their behavior to the existing standard of review, the level of validations and the degree of politicized voting will be unaffected by that standard.*

It is not clear that this invariance proposition is correct.⁹³ If judicial review were entirely unavailable, of course, there would be no politicized voting. But if judicial review were available but exceptionally deferential, is it obvious that the rate of validation and politicized voting would remain constant? The answer depends on the responsiveness of litigants and agencies to changes in the scope of review. If neither litigants nor agencies are highly responsive, we should expect that increased deference would increase validation rates and decrease politicized voting. If litigants are highly responsive, but agencies are not, we might expect that increased deference would have little effect. However we analyze the details, the general objection is straightforward: an increase in deference might have little or no effect on politicized voting.

The best response to this objection is that even if the statistics remain the same, the politicized voting is in an important sense less damaging, because with greater deference, agencies are given greater room to maneuver from Republican appointees and Democratic appointees alike. A softening of review should ensure that political differences among the two sets of appointees would have a correspondingly smaller effect on ultimate outcomes. Even if the statistical analysis looks the same, a softening of review would ensure a reduced effect from politicized voting.

The third objection is that the real problem may be politicized validations, not politicized invalidations, and if this is so, then more deferential review would seem perverse. As we have suggested, nothing in the evidence outlined here demonstrates that the level of validations is too high. The real story may be the deferential approach of RRR panels to conservative agency decisions and of DDD panels to liberal agency decisions. If this is so, then a softening of review may be affirmatively perverse, because it will increase the deference of RRR and DDD panels to decisions to which they are already too deferential.

93. See *id.* at 869–70 (discussing “[t]he inevitability of politics”).

c. Evaluation. It emerges that a general increase in deference should reduce disparities in politicized invalidations. To that extent, it would indeed be responsive to a plausible reading of the evidence sketched here. But the price of this gain may be too large; to answer that question, we need to know more about what is gained and what is lost. And for those who are concerned about politically motivated validations, increased deference would sacrifice a great deal. We are left with the conclusion that both RRR and DDD panels should be careful about both validations and invalidations that square with their predicted inclinations, but with an understanding that a softening of judicial review is not fully justified by, or an adequate response to, evidence of politicized voting. Our own conclusion, admittedly not compelled by the data, is that some softening of review would be warranted, because politicized invalidations are the most serious problem. Most of the time, it is more troublesome if courts are striking down agency action than upholding it, because the political process contains a range of safeguards against arbitrary or unlawful action in the first instance.

C. Institutional Solutions

Perhaps the best solution does not involve self-help or doctrinal change; perhaps it is institutional. But what form would an institutional solution take? And how would we produce that solution? We can imagine several possibilities.

1. *Clearer Statutes.* If Congress spoke unambiguously, partisan voting should not be anticipated, because all judges would agree about statutory meaning. Recall that in most administrative law cases in the data set, Republican and Democratic appointees agree. Certainly in a regime governed by *Chevron*, truly unambiguous statutes would not produce divisions between RRR and DDD panels. Indeed, truly unambiguous statutes would not need *Chevron* to squelch those divisions. Perhaps the lesson of politicized voting is simple: *Congress should legislate more clearly.*

But there are two problems with this solution—one small, the other large. The small one is that because of the selection point, political voting should be expected in those cases that end up being litigated. This is a small point because even if we see such voting, it would be along a modest margin; the stakes would be lowered. The larger point is that there are formidable objections to the idea that Congress should enact clearer statutes. In many cases, Congress lacks

the information to legislate with particularity, and greater specificity would likely diminish social welfare rather than increase it.⁹⁴ Greater specificity on Congress's part may well ensure that committees, some of them highly susceptible to interest-group power,⁹⁵ would be responsible for the content of federal law.⁹⁶ It is true that unambiguous legislation would reduce politicized voting, but it would also have a series of undesirable consequences.

2. *Supermajorities.* Might voting rules help? In an illuminating essay, Professors Jacob Gersen and Adrian Vermeule argue that the goals of the *Chevron* approach might be implemented, not through doctrine, but through a special voting rule.⁹⁷ Suppose that agency action could not be struck down, under the *Chevron* framework, unless all three judges supported that result. At first glance, a unanimity requirement would ensure against politicized invalidations. It follows that if the goal is to depoliticize administrative law, a voting rule might do far better than doctrinal innovation. And if judicial review of agency action for arbitrariness shows a political bias, a voting rule would seem to be a sensible solution. Perhaps agency action should not be invalidated as arbitrary unless all three judges, on a three-judge panel, can be persuaded to vote for invalidation.

In some domains, a special voting rule would undoubtedly make a great deal of sense. Unfortunately, the proposal runs into several objections. There is an obvious practical problem: who would enact a supermajority requirement? Judges are unlikely to have either the desire or the will to do so. At first glance, Congress would have to implement this response, and legislation to this effect seems most unlikely, in part because well-organized private groups would work

94. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1745–48 (2002).

95. See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 798 (1990) (“Students of Congress have long contended that interest group influence flourishes at the committee level . . .”); Ken Kollman, *Inviting Friends to Lobby: Interest Groups, Ideological Bias, and Congressional Committees*, 41 AM. J. POL. SCI. 519, 522 (1997) (“[A] general consensus exists . . . that interest groups are vital to many committee decisions.”).

96. See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 26 (1999).

97. See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 676 (2007) (“A voting-rule version of *Chevron* would . . . allow more precise calibration of the level of judicial deference over time, and holding the level of deference constant, a voting rule would produce less variance in deference across courts and over time, yielding a lower level of legal uncertainty than does the doctrinal version of *Chevron*.”).

hard to defeat it, in part because it is foreign to our traditions. It might well be best to attempt to counteract politicized voting in a more conventional and less unprecedented way.

Moreover, the data suggest another objection to this approach, at least if it is intended as a response to politicized voting in administrative law. The most serious problem comes on RRR and DDD panels; it is on such panels that the most politicized voting can be found. On RRD and RDD panels, the role of politics is limited and even hard to detect. The evidence suggests that a unanimity requirement would provide help where no help is required and would provide no help where help is greatly needed. It emerges that the Gersen/Vermeule proposal is a plausible if partial response to the risk of excessive invalidations, but it would not solve the problem of politicized administrative law. And for those who suspect politically motivated validations, a voting rule, of the sort that Professors Gersen and Vermeule recommend, would seem perverse. Unanimity might be required to uphold rather than invalidate agency action; but to say the least, that approach would present problems of its own.

3. *Mixed Panels.* Much of modern adjudication is undertaken by federal administrative agencies. Indeed, the National Labor Relations Board, the Securities and Exchange Commission, and the Federal Communications Commission do much of their business via adjudication. By federal statute, these and other agencies must have mixed compositions, in the sense that no more than a bare majority of their members can come from a single political party.⁹⁸ Recent evidence shows that the partisan affiliation of board members predicts their votes and suggests that mandated partisan composition matters within these agencies.⁹⁹ Building on these precedents, we might be tempted to suggest that federal courts of appeals do better if they have mixed compositions—and that in certain cases, at least, mixed compositions might be mandated.¹⁰⁰

98. See, e.g., 15 U.S.C. § 78d(a) (2006) (requiring bipartisan composition of the Securities and Exchange Commission).

99. Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 35* (Feb. 12, 2007) (unpublished manuscript), available at <http://dho.stanford.edu/research/partisan.pdf> (reviewing the empirical literature and finding that partisan affiliation of Federal Communications Commission commissioners correlates with voting patterns, even after controlling for the party of the appointing president).

100. See Tiller & Cross, *supra* note 16, at 215 (calling for mandating politically mixed panels rather than pure random assignment).

As a response to the problems found here, there is a great deal to be said on behalf of panels of mixed composition. If DDD and RRR panels are the most serious problem, then that problem would appear to be solved by ensuring against unified panels. But a requirement of mixed panels would create both administrative and symbolic problems, and there may be pragmatic objections as well. Assignment to three-judge panels is now random,¹⁰¹ and it would be quite complicated to take steps to ensure that all such panels, in administrative law cases, have both Democratic and Republican appointees. In addition, judges are supposed to leave their political commitments behind once they become judges, and a requirement of mixed panels might seem objectionable insofar as it would be an acknowledgement that political commitments matter to judging. That acknowledgement might entrench the very problem that it is intended to reduce. Perhaps both Republican and Democratic appointees would conceive of themselves, to a somewhat greater degree, as political partisans, simply because the requirement of mixed composition would suggest as much.

The question, then, is whether the problem of politicized administrative law is sufficiently severe as to justify strong medicine of this kind. The answer may be affirmative, at least in cases in which the stakes are especially high. The issue is whether other, less aggressive responses can provide adequate safeguards.

4. *Rethinking Judicial Selection and Confirmation.* Perhaps the most straightforward response to politicized voting would be to alter the process of judicial selection and confirmation. The goal would be to produce smaller differences, or no differences, between Republican and Democratic appointees in the domain of administrative law. A president could certainly move in this direction on his own, perhaps by seeking to appoint judges whose voting patterns are less likely to be politicized, perhaps by appointing a mix of judges whose overall patterns would be less ideological. The Senate could act either on its own or with the president, aiming to ensure less partisan appointees or an ideological mix for any particular administration.

An approach of this kind would have real advantages, especially insofar as it would move the emphasis, in judicial appointments, away from ideology and toward professionalism. But it too would run into

101. See *supra* note 16 and accompanying text.

objections. Administrative law is not the most salient domain of the appointments process (however much administrative law specialists may lament that admittedly unfortunate fact!). The high-profile issues, typically involving constitutional law, will inevitably dominate the discussion. Any president is likely to want to appoint judges who fall, broadly speaking, into one kind of camp rather than another, and at least for the Supreme Court, a degree of politicization is inevitable.

There is a further point. A president, and a Senate, might reasonably believe, on some occasions, that the judiciary has already been “skewed,” and that for new appointments, taking account of likely voting patterns is a way of redressing the balance. Having said that, we believe that it is entirely appropriate for administrations to seek a mix of appointees, rather than to steer the judiciary in a single direction. But a defense of this claim would take us well beyond our topic here.¹⁰²

CONCLUSION

In the recent period, administrative law has been highly politicized in the sense that the voting patterns of Republican appointees are significantly different from the voting patterns of Democratic appointees. The politicized patterns are strikingly similar in *Chevron* cases and in arbitrariness cases. In both domains, federal judges show especially politicized voting patterns on unified panels, where the disparities between Republican and Democratic appointees are very large. On the Supreme Court itself, many of the Justices show an ideological “skew” in their application of the *Chevron* framework.

It is reasonably clear that no one should be happy about this state of affairs. It is much less clear what should be done about it. Sunlight is often a disinfectant, and perhaps a broader knowledge of recent patterns will supply a kind of corrective; we have suggested that publicized “rankings” of judges, in terms of politicization, might provide some help. There is certainly reason for greater skepticism about courts of appeals decisions when unified panels reach a conclusion that fits with their expected predilections. Doctrinal changes, calling for heightened deference to agency action, would decrease the likelihood of politicized invalidations. It would not,

102. For a relevant discussion, see generally David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *YALE L.J.* 1491 (1992).

however, decrease the likelihood of politicized validations, and that problem would be made worse by doctrinal changes producing greater deference.

The largest lesson is that there is more reason to trust the outcomes of mixed panels than the outcomes of unified panels. Whether mixed panels should be required is not a question that the evidence can itself answer; but it is a question that the evidence makes it reasonable to ask. Our largest hope is that an understanding of politicized administrative law, and of possible responses, will bear on many domains in which federal judges are divided along predictable lines, and indeed other domains in which entrenched differences, and potential biases, create potential difficulties for both private and public institutions.