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The Anatomy of Chevron: Step Two Reconsidered

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THE ANATOMY OF *CHEVRON*: STEP TWO RECONSIDERED*

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One of my former students wrote to me recently: "I never pull into a Chevron station without thinking of you." Isn't that heartwarming? Perhaps I have been underestimating the extent to which the aura of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] pervades the administrative law course and lodges in the consciousness of impressionable students. On the other hand, one thing I have surely never underestimated is the allure of *Chevron* for academics. Scholarship about that case has been the single hottest topic in the administrative law literature of the past decade.[2] Like the products of the Chevron Corporation, however, analyses of *Chevron* can be either crude or refined, and I hope this article will fall into the latter category.

More specifically, the concern of this article is the internal structure of what has become known as the two-step *Chevron* test. I begin, therefore, by quoting the familiar formula by which, according to the Supreme Court, a reviewing court is to evaluate an interpretation of a regulatory statute by the agency that administers the statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

* A dozen years ago I wrote an article with the self-explanatory title *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985) [hereinafter Levin, *Identifying Questions of Law*]. I mentioned in a footnote that I was "now preparing" a sequel on how questions of law in administrative law should be *resolved*. I did not fulfill that plan—partly because I chose to pursue other projects, but also because of the boom in case law and scholarship on *Chevron*, which rendered the original conception of the anticipated article obsolete. In subsequent years, a few readers (I would as soon not disclose *how* few) have inquired about the promised sequel. They, and all others who may have been eagerly awaiting the sequel, should please assume that this is it. Or at least it comes as close as anything I am likely to write. Some of the ideas in this article appeared in somewhat different form in Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 WAKE FOREST L. REV. 647 (1996) [hereinafter Levin, *Lessons of 1995*].

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

2. For a non-exhaustive list of forty-seven "principal" articles on *Chevron*, see John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 36 n.3 (1995).

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[3]

The main question that I will explore here is: What is the meaning or role of the second step in the *Chevron* formula? In other words, if an interpretation does not contravene the clear intent of Congress, on what grounds can it nevertheless be deemed "impermissible"? The voluminous literature on *Chevron* has little to say on this subject.[4]

The District of Columbia Circuit, which uses *Chevron* as the basis for analysis of administrative interpretations more consistently than any other court, has been troubled by the jurisprudence of step two. It has been especially puzzled about the relationship between step two and the traditional "arbitrary and capricious" test prescribed in § 706(2)(A) of the Administrative Procedure Act ("APA").[5] The D.C. Circuit sees an "overlap" or kinship between the two standards of review, but has been at something of a loss to know how to define their respective domains.[6]

I will propose for consideration a simple solution to this quandary: these two steps in the review process should be deemed not just overlapping, but identical.[7] If the courts would define the scope of the *Chevron* step one inquiry and of arbitrariness review as broadly as

3. *Chevron*, 467 U.S. at 842-43 (footnotes omitted).

4. *See, e.g.*, Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2104-05 (1990) (devoting only two paragraphs to step two in a fifty-page survey of *Chevron* issues). Among the principal exceptions to the general neglect are Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996); and Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

5. 5 U.S.C. § 706(2)(A) (1994). This standard of review goes by various names, including "abuse of discretion" and "rational-basis review," all of which are interchangeable. For convenience I will usually call it the arbitrariness test.

6. *See, e.g.*, Arent v. Shalala, 70 F.3d 610 (D.C. Cir. 1995), discussed *infra* Part III.C.

7. One major exception to this generalization should be noted. Among the functions of the arbitrariness test is to supply a standard by which courts can review *purely factual findings* made by administrative agencies in proceedings for which Congress has not specified a different standard of review. No one supposes, however, that the *Chevron* test has any direct bearing on the question of whether an agency's fact findings have adequate support. In this article I will refrain from continually reminding the reader of this exception, because as a practical matter courts seldom have difficulty distinguishing purely factual issues from normative issues during judicial review proceedings. The "factual" aspect of arbitrariness review is, therefore, readily severable from its other aspects. Of course, the exception discussed in this footnote does not even come into play in the numerous proceedings that do have a statutory standard of review for factual issues. The substantial evidence test of the APA, 5 U.S.C. § 706(2)(E) (1994), is the most obvious example, but there are many others. *See, e.g.*, Commissioner v. Duberstein, 363 U.S.

they should, there would be no need for a separate and distinct *Chevron* step two, and that test could simply be absorbed into arbitrariness review. If this notion were generally accepted, analysis of merits issues during judicial review could immediately become less complicated, without any necessary alteration in the *substance* of the court's tasks. At the same time, this solution would make application of *Chevron* step two more administrable, because courts and litigants could look directly to the vast body of case law and commentary on abuse of discretion review as a guide to the meaning of that aspect of the *Chevron* standard.

Let me be clear on what this article is not about. Much, or perhaps most, of the literature on *Chevron* has focused on the question of whether one should approve or disapprove of the broad judicial deference to administrative agencies that, in the authors' view, is commanded by that case.[8] This theme, which is often couched in separation of powers terms, is only peripherally related to my subject. Furthermore, despite the prominence of the arbitrariness test in my analysis, I also will not explore whether that test is being applied too intrusively or too deferentially. Thus I will steer clear of the ongoing debate in the academic literature over whether the so-called hard look doctrine, the dominant version of the arbitrariness test, is contributing to the stifling or "ossification" of the rulemaking process.[9]

All of those issues are important, but for present purposes I will assume that the courts' review standards are likely to remain just about as intrusive as they now are. As a social scientist might say, I will hold those variables constant, so that I can examine the doctrinal framework within which they interact. If, as a result of the critiques that I have just mentioned (or for other reasons), judicial review becomes either more or less deferential in the future than it is now, the structural issues that this article analyzes will still require attention.[10] The theoretical refinements that I will discuss are intended to serve comparatively neutral ends: simplicity and clear thinking in scope of review doctrine, improved communication among participants in the

278, 291 (1960) (construing 26 U.S.C. § 7482(a) as prescribing "clearly erroneous" test for review of Tax Court findings).

8. *See, e.g., infra* notes 14-15 and accompanying text.

9. A recent colloquy in the *Texas Law Review* between Professors Seidenfeld and McGarity provides an enlightening exploration of this issue. *See* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997).

10. At least, these issues will remain relevant if we assume that the two-step *Chevron* test will continue to exist in some form. I explain in Part I why it probably will.

judicial review process, and the increased legitimacy that courts may attain if they are seen as using an accessible framework over time. Regardless of the outcome of current debates over levels of deference, those goals should be appealing in their own right.

I. THE DOMESTICATION OF *CHEVRON*

Although *Chevron* is undoubtedly the "leading case" on judicial review of agencies' statutory interpretation, the past thirteen years have seen shifting perceptions about where, and to what extent, the case really "leads." I obviously cannot review the entire development of the doctrine here, but I will sketch briefly a conception of the role of *Chevron* in our contemporary judicial review system, because that conception is the starting point for the main business of this article.

The initial announcement of *Chevron* gave rise to a widespread belief that the Court had finally decided to put an end to inconsistencies in its case law by announcing a definitive test for judicial deference to administrative interpretations of statutes.[11] That perception took hold with particular force in the D.C. Circuit, the forum with the greatest frontline responsibility for judicial review of agency action.[12] This belief was usually coupled in the literature with an assumption that the *Chevron* test meant that courts were to become much more deferential to agencies than had been customary in the past. Whether or not that was the Court's intent, lower courts did in fact start treating *Chevron* as a leading case.[13] Meanwhile, the law reviews swelled with commentary approving[14] or disapproving[15] of this putatively bold move.

11. *See, e.g.*, Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986).

12. *See, e.g.*, Population Inst. v. McPherson, 797 F.2d 1062, 1069-70 (D.C. Cir. 1986) (Mikva, J.) ("We emphasize that our review of the Administrator's determination will of course be guided by the principles of deference articulated in *Chevron*."); Transbrasil S.A. Linhas Aereas v. Department of Transp., 791 F.2d 202, 205 (D.C. Cir. 1986) (Wald, C.J.) ("As always, our review of an agency's statutory interpretation takes off from *Chevron*."); Starr, *supra* note 11.

13. *See* Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984. Reportedly, another factor contributing to the "making" of this landmark case was that the Solicitor General's office made aggressive use of *Chevron* in arguing lower court appeals, while at the same time purposefully avoiding calling attention to it in the Supreme Court in a manner that might lead to an inconvenient "clarification" from the Court. *See* Thomas W. Merrill, *Confessions of a* Chevron *Apostate*, ADMIN. L. NEWS, Winter 1994, at 1, 14.

14. *See, e.g.*, Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

From the outset, however, the supposition that *Chevron* was intended to effect a major transformation in the law of deference was not unanimous.[16] After all, some reasoned, why would the Court undertake to settle such a far-reaching matter as the standard of review for legal issues in administrative law in a case in which only six Justices participated? Moreover, the opinion contained internal evidence that the Court did not really subscribe to the widely held assumption that *Chevron* called for deference to agency interpretations in almost all circumstances.[17] A recent peek behind the scenes at the Court has seemed to vindicate the opinions of those who doubted the ambitions of the decision: A scholar who has examined the file on *Chevron* in the papers of the late Justice Thurgood Marshall at the National Archives reports that it contains no evidence that any Justice saw the case as anything other than a routine environmental opinion.[18]

Regardless of what the Court originally intended, however, we now know that experience has not borne out the early predictions of a sea change in judicial deference. A strong revisionist view has emerged, interpreting *Chevron* as less deferential than many initially

15. *See, e.g.*, Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757 (1991); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

16. *See* Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 247 n.4 (1986) [hereinafter Levin, *Restatement Report*] (making fleeting reference to *Chevron*, which "has not yet become well established"). I cite this report, an elaborate compilation of doctrine developed under the auspices of the Section of Administrative Law of the American Bar Association, in order to document my own skepticism as of that time, and also (more importantly) to make the point that the large group of practitioners and scholars who contributed ideas to the report did not, generally speaking, assume that *Chevron* displaced prior doctrine as to deference on questions of law. *See also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992) [hereinafter Merrill, *Executive Precedent*] ("[T]here is reason to believe the participating Justices did not regard *Chevron* as a departure from prior law.").

17. Footnote 9 of *Chevron* declares:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent [citing eight cases]. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843 n.9. If "opinion leaders" of administrative law had paid more attention at the outset to this fairly moderate language from the opinion, instead of less restrained passages, perhaps the interpretation of *Chevron* as a prescription for near judicial passivity would never have taken hold. But footnote 9, which does not fit with the overall "image" of the *Chevron* opinion, is often not taken very seriously. Witness several well-regarded casebooks on public law that have reprinted the case with the footnote edited out. *See, e.g.*, RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 171 (2d ed. 1994); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 858 (2d ed. 1995); GLEN O. ROBINSON ET AL., THE ADMINISTRATIVE PROCESS 530 (4th ed. 1993).

18. *See* Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993).

assumed.[19] The clearest sign of the need for a reassessment has been the post-*Chevron* behavior of the Supreme Court. As studies by Professor Thomas Merrill have demonstrated, the Supreme Court itself has not, in the years since *Chevron*, been noticeably more deferential towards agencies' constructions of the statutes they administer than it had been prior to that decision.[20] Small wonder, then, that lower courts are observed to be failing to heed the "original" message of the *Chevron* case.[21] The Supreme Court's actions speak more loudly than (some of) the words of its most prominent case do, and those actions scarcely create the sort of consistent signal that would effectively impose discipline on a court of appeals panel that might be inclined to override an agency interpretation.

Nevertheless, the prestige of *Chevron* lingers on. The allure of a single unifying framework for review of agencies' statutory interpretations has been strong. And perhaps the durability of *Chevron* has been enhanced by the very fact that it has turned out to be less confining than the early notices had suggested. In fact, the understanding that *Chevron* is a leading case on deference has now percolated upwards and finds sporadic, though far from consistent, recognition in the Supreme Court. Thus, in that Court, as elsewhere, jurists periodically speak of "*Chevron*" as shorthand for "the principle of deference on questions of statutory interpretation."[22]

A well-known lecture on *Chevron* by Justice Scalia[23] encapsulates much of the revisionist perspective. What he liked about *Chevron* was the universality or near universality of its framework, a vast improvement over what he regarded as the unpredictable state of prior law.[24] He effectively uncoupled that aspect of the case from the theme of sweeping deference to agencies: he himself found room in the opinion for courts to play a substantial role in identifying "clear" congres-

19. *See, e.g.*, William S. Jordan, III, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent* Chevron *Consensus*, 68 NEB. L. REV. 454, 484 (1989); Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129 (1993).

20. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994) [hereinafter Merrill, *Textualism*]; Merrill, *Executive Precedent*, *supra* note 16.

21. *See, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1070-71 (1995).

22. *See, e.g.*, Dunn v. CFTC, 117 S. Ct. 913, 920 n.14 (1997) (declining to rely on "*Chevron* principles" because statute seemed clear); Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 813 (1994) (describing the *Chevron* two-step test as "the formulation now familiar").

23. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

24. *See id.* at 516-17.

sional constraints on administrative action.[25] The question of "how clear is clear?" would, he predicted, dominate subsequent debate.[26]

Justice Scalia's analysis has proved prophetic. Today's reviewing courts regard *Chevron* as useful in providing a manageable framework, yet critical judicial scrutiny of administrative actions has continued. In other words, the flexibility that we have always seen in the courts' use of the deference concept has not disappeared, but it is now usually oriented around *Chevron* terminology. Of particular importance to this essay, the D.C. Circuit, which never interpreted *Chevron* as a command to abandon serious evaluation of the merits of agency interpretations,[27] continues to use the *Chevron* framework with great consistency.[28] Similarly, a number of commentators who are not particularly inclined to endorse judicial deference have made their peace with *Chevron*; they seek to reinterpret it, not dislodge it.[29]

In short, the principal question about judicial deference to administrative constructions has become, not whether the courts can live with *Chevron*, but how they can domesticate it for everyday use. To be sure, courts and commentators continue to debate whether various classes of cases should be regarded as falling outside the scope of the *Chevron* test.[30] Nevertheless, the applicability of the formula to the

25. *See id.* at 520-21.

26. *See id.*

27. *See* Schuck & Elliott, *supra* note 13, at 1041-42 (noting lower affirmance rate in D.C. Circuit than in other circuits).

28. *See* Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 242 (1996). *See also* PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 620 (9th ed. 1995) (quoting Judge Wald's advice in a 1994 speech to practitioners: "Now for you agency case lawyers. Chevron is the password. In every case involving statutory interpretation, think Chevron."). Of course, whether the D.C. Circuit's holdings are "consistent" with *Chevron* in the sense of being faithful to its spirit is debatable, because it depends on one's view of what the Supreme Court intended to accomplish. Those who assume, as I do not, that the Court wished to strike a dramatic blow for deference tend to see the D.C. Circuit as rebellious. *See, e.g.*, John F. Belcaster, *The D.C. Circuit's Use of the* Chevron *Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745 (1992).

29. *See* Seidenfeld, *supra* note 4; Sunstein, *supra* note 4, at 2105. *See also* Levin, *Lessons of 1995*, *supra* note *, at 655-57 (describing how proponents of regulatory reform legislation in the 104th Congress claimed that their bill would codify some form of *Chevron*, even though they wanted to move towards *broader* judicial scrutiny of agency interpretations).

30. *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 42 (1990) (arguing that *Chevron* should not apply to interpretations issued in informal "formats"); Timothy B. Dyk & David Schenck, *Exceptions to* Chevron, ADMIN. L. NEWS, Winter 1993, at 1, 13-16 (identifying nine situations in which courts have suggested that *Chevron* may not apply); Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996).

great majority of judicial review proceedings is widely conceded.[31] Accordingly, I believe that certain flaws in the *Chevron* framework, which I will explain in the next section, must be considered in light of an assumption that *Chevron* will likely continue for the foreseeable future to be regarded as the "leading case." Any remedies for these flaws are likely to come from reinterpretation of *Chevron*, not from its overthrow.

II. THE PROBLEM OF STEP TWO

I have said that *Chevron* is attractive to the courts because it appears to offer a fairly manageable framework. As regards the second step in the *Chevron* test, however, appearances may be misleading. A brief look at the face of the *Chevron* opinion exposes some of the questions it raised about how the second step should be applied. The Court initially framed step two as a question of whether the agency's interpretation is "permissible,"[32] but that phrasing was circular: obviously an interpretation that is not permitted is prohibited, but on what grounds would the Court refuse to "permit" an interpretation? Recognizing this opaqueness, analysts have generally assumed that the real point of step two is found in other passages in the opinion, in which the Court referred to step two as a test of reasonableness.[33] That term was at least familiar in the lexicon of judicial review, but it was so elastic as to be little improvement.[34]

The vagueness of the step two standard was troubling enough, but more pertinent to my theme is the fact that the two-step test also seemed to verge on internal incoherence. Under the structure of the

31. Criticisms of the two-step formula are still being voiced in some quarters, however. *See, e.g.*, Merrill, *Executive Precedent*, *supra* note 16, at 998-1003 (criticizing *Chevron* for its failure to give weight to "traditional deference factors" such as the longevity, consistency, and thoughtfulness of an agency's interpretation); *see also infra* note 35 (discussing Judge Stephen Williams' views).

32. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

33. *See id.* at 844, 845, 865, 866.

34. My favorite example of the ambiguity of "reasonableness" tests dates from the pre-*Chevron* era, when the Court may have been less self-conscious about its terminology. In American Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402 (1983), the Court used "reasonableness" in two different senses within a single opinion: first as the standard for determining whether an agency rule was arbitrary and capricious, *id.* at 417-18, and then (on a different substantive issue) as the standard for determining whether the agency's statutory interpretation should be upheld, *id.* at 422-23. Surely, however, those two tests cannot be identical. If they were, the distinction between law and policy would vanish. Although the Court's implicit equation between the two tests may reflect nothing more than careless draftsmanship, it is an apt reminder that scope of review doctrine has traditionally encompassed a multitude of "reasonableness" tests that are not entirely consistent with each other.

Chevron formula, a court should not reach step two unless it has already found during step one that the statute supports the government's interpretation or at least is ambiguous with respect to it. In other words, the agency's view is not clearly contrary to the meaning of the statute. If the court has made such a finding, one would think that the government's interpretation *must* be at least "reasonable" in the court's eyes. Why, then, is the second step not superfluous?[35] Obviously, if it is to be meaningful, the step two inquiry has to involve *qualitatively different* considerations from those implicated during step one. Yet the Court's opinion did not identify those considerations. In this sense, *Chevron* left the very meaning of the second step ill-defined; further clarification was going to be necessary.

To date, however, the Supreme Court's subsequent case law has offered little illumination on this score, because *in the thirteen years since* Chevron, *the Court has never once struck down an agency's interpretation by relying squarely on the second* Chevron *step.*[36] I base this assertion primarily on my own reading, and it is hard to prove a negative, but I can cite one important bit of corroborating evidence: In his careful analyses of cases between 1984 and 1993 in which the Court reviewed an agency interpretation, Professor Merrill found seventeen cases in which the government lost without the Court's relying on the *Chevron* framework, fourteen in which the government lost at step one, and *none* in which the government lost at step two.[37] As we have seen, the Court has not proved to be much more deferential in the post-*Chevron* era than it was before; but when it utilizes the *Chevron* framework, it either upholds the agency or reverses on the strength of step one.[38]

35. Judge Stephen Williams has questioned the utility of dividing statutory interpretation under *Chevron* into two discrete steps. *See, e.g.*, Sweet Home Chapter of Communities for a Great Ore. v. Babbitt, 30 F.3d 190, 193 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995); Colloquy, *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 123-24 (1990) (remarks of the Hon. Stephen F. Williams) [hereinafter Williams]. To a large extent I agree with the criticism, as will become apparent, but for now I will start with the conventional understanding of *Chevron* and work towards refinements that take the criticism into account. *See infra* Parts IV.A-B.

36. I may be the first commentator to try to extract significance from this interesting fact, but I am not the first to have noticed it. *See* Belcaster, *supra* note 28, at 752 n.42.

37. *See* Merrill, *Textualism*, *supra* note 20, at 376-77; Merrill, *Executive Precedent*, *supra* note 16, at 1034-41.

38. A possibly debatable case is Department of Treasury v. Federal Labor Relations Auth., 494 U.S. 922 (1990) (Scalia, J.), in which the Court relied on *Chevron* and declared that an agency interpretation was "not reasonable" because it was contrary to the plain meaning of the statute. *See id.* at 928 ("The FLRA's position is flatly contradicted by the language of" the statute and its arguments do not "overcome this plain text."). Plain meaning is, however, closely identified with the first *Chevron* step; thus, I share Merrill's apparent assumption, *see* Merrill,

Inevitably one is moved to wonder whether step two, as the Court conceives of it, serves any useful purpose at all. In an opinion that *upholds* an agency interpretation, perhaps the Court's finding that the agency interpretation is "reasonable" serves a useful purpose in legitimating the outcome. In effect, it provides a way for the Court to certify that the agency's view is not only consistent with congressional intent, but also socially responsible. At some point, however, litigants and lower court judges will look at the Court's actions as well as its words. If the administrative law community comes to believe that an agency that survives step one is home free, at least in the Supreme Court, step two could lose any credibility it may once have had.

In order to identify possible solutions to these conundrums, I will examine a series of decisions of the District of Columbia Circuit. That focus seems a natural one for several reasons. In the first place, the D.C. Circuit is a tribunal that encounters administrative law issues much more frequently than the Supreme Court does.[39] Moreover, as noted earlier, that court has taken *Chevron* seriously from the beginning and relies on the two-step framework with great regularity. It has thus become a "laboratory" in which we can observe a court trying to work out a meaningful role for step two. The circuit has, in fact, invalidated agency actions on the basis of step two of *Chevron* on a number of occasions, and the following discussion will give special emphasis to those cases.[40] To date, the court has not settled on a single approach to step two. Enough examples of several distinct approaches have emerged, however, to support a critical evaluation of those approaches.

Executive Precedent, *supra* note 16, at 1035, that the Court was using the word "reasonable" in a casual manner, without specific reference to the two-step framework. Even if one insists on deeming *Department of Treasury* a step two reversal, its reliance on the interpretive techniques of the first step would tend to confirm the proposition that the Court has not developed any distinctive mode of analysis for applying the second step.

39. *See* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 371 ("As a practical matter, the D.C. Circuit is something of a resident manager [in administrative law], and the Supreme Court an absentee landlord.").

40. This methodology reflects my belief that, in general, the best evidence about the meaning of a given standard of review comes from cases in which it is used to strike down an agency action. Loose talk about deference is a pervasive problem in writing about scope of review, but judicial reasoning that is used to explicate an actual holding can be evaluated against the relevant factual background and has a relatively strong claim to credibility.

III. STEP TWO AS ARBITRARINESS REVIEW

A. The Case Law

An important line of cases from the D.C. Circuit has implemented step two of the *Chevron* test through lines of argument that originated in abuse of discretion doctrine, often under banners such as "reasoned decisionmaking" or the judicial "hard look." The hard look case law basically requires an agency to generate a "reasoned analysis" supporting its exercises of discretion, "examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action."[41] In effect, the court has transformed the *Chevron* step two question of whether the agency action was "reasonable" into a question of whether it was "reasoned."

Perhaps the first of the court's cases to suggest this approach was *Rettig v. Pension Benefit Guaranty Corp.* ("PBGC").[42] The plaintiffs in *Rettig* were employees who had worked for their employer for decades without acquiring vested rights under their pension plan. After Congress enacted the Employee Retirement Income Security Act ("ERISA"), which required vesting, the employer amended its plan accordingly. Soon afterwards, the company went out of business, and plaintiffs sought plan termination insurance benefits from the PBGC. The agency denied their claims, relying on a section of ERISA that allowed the agency to disregard any benefit increases attributable to a plan amendment that had been adopted shortly before the plan terminated.[43]

The D.C. Circuit reversed. Although the court had the "strong impression" that Congress had contemplated benefits for persons in the plaintiffs' situation, it declined to hold that, for purposes of step one of *Chevron*, Congress's intentions were unambiguous.[44] Thus, the court reached step two. It argued that the basic purpose of the statutory exclusion was to prevent employers from "ballooning" their plans with generous benefits at a time when they could foresee that their plans would terminate, forcing the PBGC to bear the ultimate liability. Yet, the court explained, this fear of employer abuse was simply not implicated by plan amendments that Congress itself had *required* employers to adopt.[45] Quickly dismissing as flimsy several other pol-

41. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 57 (1983) (citations omitted).

42. 744 F.2d 133 (D.C. Cir. 1984).

43. *See id.* at 137-39.

44. *See id.* at 151.

45. *See id.* at 152.

icy arguments offered by the agency, the court emphasized that the plaintiffs' loss of pension benefits after many years of service was exactly the kind of problem that Congress had passed ERISA to rectify.[46]

In short, although the court invoked step two, its rationale actually amounted to a typical use of the hard look doctrine, and the court described it as such: the PBGC's position did not "reflect the results of a reasoned decisionmaking process calculated to accommodate the conflicting policies underlying ERISA."[47] Writing less than three months after *Chevron*, Judge Wald seemed more than a little uncertain about whether the Supreme Court's recent pronouncement had been intended to displace the arbitrary and capricious standard of the APA. "The possible difference in standards is not critical here, however," she continued, "because we do not believe the agency's rationale for the application of its rule to this set of facts would meet the APA standard either, . . . and *our analysis of the PBGC's action under the arbitrary and capricious standard would not differ in any material respect.*"[48]

The suggestion in *Rettig* that *Chevron* step two and the arbitrary and capricious test are similar to each other, if not identical, has continued to crop up in the D.C. Circuit's cases.[49] A more recent example is *Athens Community Hospital, Inc. v. Shalala*.[50] The Medicare Act permits the Secretary of Health and Human Services to redesignate a rural hospital as being in an urban area for the purpose of determining its reimbursement level. Under the Secretary's implementing regulations, a hospital could be eligible for redesignation if it was located within thirty-five road miles of an urban area *and* was in an adjacent county. Three hospitals that met the former criterion but not the latter challenged the rules, and the court agreed with their challenge. The thirty-five-mile requirement (which the court had already upheld in an earlier case) appeared sufficient to fulfill the objective of ensuring that an applicant competed for labor with urban

46. *See id.* at 152-55.

47. *Id.* at 135.

48. *Id.* at 151 n.46 (emphasis added) (citations omitted).

49. *See, e.g.*, General Am. Transp. Corp. v. Interstate Commerce Comm'n, 872 F.2d 1048, 1053 (D.C. Cir. 1989) (stating that the two questions are "quite similar" and analyzing them as one); AFL-CIO v. Brock, 835 F.2d 912, 917 (D.C. Cir. 1987). This perception is not confined to the D.C. Circuit. *See* New York v. Sullivan, 889 F.2d 401, 410 (2d Cir. 1989) (Winter, J.) ("We need say little to dispose of appellants' contention that the regulations are arbitrary and capricious, as that test is functionally equivalent to the reasonableness test of *Chevron*."), *aff'd sub nom.* Rust v. Sullivan, 500 U.S. 173 (1991).

50. 21 F.3d 1176 (D.C. Cir. 1994).

hospitals and thus deserved a high reimbursement rate. Accordingly, the court reasoned, the additional requirement that the hospital be in an adjacent county served no discernible purpose.[51] Although the court stated that it was proceeding under *Chevron* step two, it relied squarely on case law defining arbitrariness and, indeed, appeared to regard these two rubrics as interchangeable.[52]

These are not isolated examples. It is not hard to find other cases in which the court has invalidated agency actions at step two of *Chevron* on the basis of lines of argument that seem much more like traditional rational basis review than like "statutory construction." For example, the D.C. Circuit has used step two of *Chevron* to set aside agency actions because they did not rest on a reasoned analysis[53] or failed to give a good explanation for a departure from precedent.[54]

In addition, one sometimes notices D.C. Circuit panels declaring that they will not consider the validity of an argument that could potentially justify an agency action as reasonable under step two of *Chevron*, because the agency must pass upon the argument first.[55] The principle that an agency action cannot be upheld except on grounds adopted by the agency originated as a component of abuse of discretion doctrine.[56] "The justification for this rule is that only the agency has authority to make discretionary determinations that Congress has delegated to it."[57] The D.C. Circuit's extension of the princi-

51. *See id.* at 1179-80.

52. *See id.* at 1179.

53. *See* Whitecliff, Inc. v. Shalala, 20 F.3d 488, 492 (D.C. Cir. 1994) (holding under step two that "the Secretary's indiscriminate equation of [two accounting concepts] is simply illogical, without any economic or accounting support and therefore an unreasonable interpretation of [the statute]"); LEECO, Inc. v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992) (reversing under step two because of agency's failure to explain extension of precedent); Coal Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989) (holding that mine safety rule, under which minor infractions would not be noted on employer's record, was unreasonable under step two because of agency's unexplained failure to take into account Congress's desire to impose higher penalties on repeat offenders).

54. *See* King Broadcasting Co. v. FCC, 860 F.2d 465, 470 (D.C. Cir. 1988); *cf.* Hammontree v. NLRB, 925 F.2d 1486, 1499-1500 (D.C. Cir. 1991) (en banc) (upholding order at step two because, inter alia, it was consistent with prior Board precedent).

55. *See* Consumer Fed'n of Am. v. United States Dep't of Health and Human Serv., 83 F.3d 1497, 1507 (D.C. Cir. 1996); Oil, Chem. & Atomic Workers Int'l Union v. NLRB, 46 F.3d 82, 90, 93 (D.C. Cir. 1995); Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994) ("The NLRA is ambiguous, so under *Chevron* we will be bound to accept any reasonable rule the Board accepts as an appropriate gap-filling measure. But the Board must select the rule."); City of Kansas City v. HUD, 923 F.2d 188, 192 (D.C. Cir. 1991) (stating that reliance on a mere litigating position of agency counsel would be unacceptable in arbitrariness review and thus should also be unacceptable in *Chevron* step two review).

56. The principle is usually traced to SEC v. Chenery Corp., 318 U.S. 80 (1943). *See generally* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199 (discussing the principle).

57. Levin, *Restatement Report*, *supra* note 16, at 261.

ple to step two jurisprudence is a further indication that the court sees its function under that step as being, at least to a significant extent, equivalent to reviewing an exercise of administrative discretion.

I emphasize that these cases illustrate the circuit's approach to *Chevron* step two through actual holdings, not just fleeting dicta about what step two could potentially mean. Cases in which an agency actually loses at step two offer the most clear-cut illustrations of the court's reasoning, but I am not making any claim about the frequency of those cases.[58] To determine how often challengers succeed using this line of argument, and thus how intrusively or deferentially the court applies it, would require a careful empirical study, which I have not undertaken. What these cases do illustrate is a mode of analysis that at least is available when the court chooses to make use of it.

Commentators, too, have occasionally acknowledged, although usually without extended analysis, the similarity between *Chevron* step two and arbitrariness review.[59] To say the least, then, the convergence between these two modes of review is a significant theme in contemporary judicial review, and its merits deserve serious attention.

B. Evaluation

In evaluating the emerging convergence in the D.C. Circuit between *Chevron* step two and the hard look doctrine, one must immediately confront a conceptual problem. The convergence will probably strike some readers as odd, because *Chevron* proclaims itself to be a case about "construction of a statutory provision."[60] That

58. Of course, there are also numerous cases in which the court examines an agency's factual and policy analysis, deems it rational, and finds on that basis that the agency action passes muster under step two. *See, e.g.*, Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 361-66 (D.C. Cir. 1989) (endorsing potential EPA regulatory approach to disposal of hazardous wastes as reasonable under step two on the basis of facts and policy reasoning); Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1483 (D.C. Cir. 1989) (upholding under step two, as based on a "reasonable explanation," informal procedures for adjudication of penalties for violation of hazardous waste management regulations); Center for Auto Safety v. National Highway Traffic Safety Admin., 793 F.2d 1322, 1340-41 (D.C. Cir. 1986) (upholding agency's relaxation of fuel economy standards as reasonable accommodation of statutory policies).

59. *See* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 725 (3d ed. 1992); Coverdale, *supra* note 2, at 45-46 n.66; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 200 (1992); Sunstein, *supra* note 4, at 2104-05. A fuller treatment, reaching conclusions similar to those advanced in this article, appears in KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 148-51 (3d ed. Supp. 1996). Although Professor Seidenfeld believes that under current law step two is so deferential as to be almost inconsequential, *see* Seidenfeld, *supra* note 4, at 96, he thinks it *should* be invigorated through an infusion of "hard look" methodology. *Id.* at 125-29.

60. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 866 (1984).

phrase, to many minds, connotes a set of distinctively "legal" issues, involving (for example) statutory language, legislative history, structure and purposes, and canons of construction, as distinguished from the kind of inquiry a court makes when it is overseeing an exercise of administrative discretion. On that assumption, a court should not even reach the question of whether an agency action is arbitrary and capricious until after the action has survived *Chevron* scrutiny.

A close reading of the Supreme Court's opinion suggests, however, that the *Chevron* test was not intended to deal only with statutory interpretation in that limited sense, and that the D.C. Circuit case law is a valid response to certain significant overtones in that opinion. Most telling of these overtones is the Court's explicit link between the theme of judicial deference and the concept of congressional delegation of authority. Just after setting forth the two-step review formula, the Court commented:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[61]

As this quotation seems to recognize, courts have for many years been accustomed to reviewing legislative regulations through a two-step process in which the judge would initially ask whether the agency had stayed within the bounds of its delegated discretion (in *Chevron*'s terms, was the agency's view "manifestly contrary to the statute"?), and then whether the agency had abused its discretion. One of *Chevron*'s most important innovations was to extend this model to agencies' statutory interpretations generally. As Professor Henry Monaghan had written the previous year, "[j]udicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency."[62] The Court added a

61. *Id.* at 843-44 (footnotes omitted).

62. Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983) (emphasis omitted). According to Professor Neuman, the Court apparently had Monaghan's views in mind when it formulated the *Chevron* standard of review. *See* Gerald L. Neuman, *Law Review Articles That Backfire*, 21 U. MICH. J.L. REFORM 697, 711-12 (1988). Neuman notes that, although *Chevron* did not cite Monaghan's article, the sentence from his article that I have quoted above had been quoted in an opinion by Justice White a few months earlier. *See* INS v. Chadha, 462 U.S. 919, 986 n.19 (1983) (White, J., dissenting); Neuman, *supra*, at 712. Actually, other commentators have also articulated models or theories of judicial review

twist to the Monaghan theory by also exhorting judges to refrain from finding (at step one) that the agency had acted outside its delegated authority unless the statutory obstacle was "clear;"[63] and much of the subsequent controversy about *Chevron* has revolved around the question of how "clear" a congressional mandate must be in order to meet this test. That refinement aside, however, the Court's delegation model strongly suggests that the second step of the *Chevron* formula was intended to be a direct counterpart to the arbitrariness test that courts had traditionally applied in their review of legislative rules. Otherwise, one would have to assume that the Court contemplated a sharp distinction between explicit and implicit delegations, which hardly makes sense.[64]

Continuing in the same vein, the Court observed that the "principle of deference to administrative interpretations"[65] requires a court to avoid disturbing an agency's choice if it is "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[66] Surely this notion of "interpretation" is strongly linked to the exercise of delegated authority.

The Court's discussion in *Chevron* of the actual EPA rule it was reviewing also evinces a broad understanding of "interpretation." For example, at one point the Court remarked, in support of the agency's definition of "stationary source," that "the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives [of the Clean Air Act] . . . [and] its reasoning is supported by the public record developed in the rulemaking process . . . ."[67] Thus the validity of the EPA's "interpretation" depended in part on the quality of the agency's reasoning and the strength of the

that resemble Monaghan's. *See, e.g.*, Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 262-65 (1988); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 475 (1950). The most detailed of these analyses can be found in Levin, *Identifying Questions of Law*, *supra* note *, at 16-46. (Although I would like to claim that my article influenced the Court as much as Monaghan's did, that boast would be somewhat weakened by the fact that my article did not appear in print until more than a year after the Court decided *Chevron*.)

63. *See* 467 U.S. at 842.

64. *See* Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 151 n.46 (D.C. Cir. 1984) (expressing doubt that the Court could have intended such a distinction).

65. 467 U.S. at 844.

66. *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

67. *Id.* at 863.

evidence in the record. This and similar passages in the opinion[68] imply that the Court was not referring to "interpretation" in a manner that envisioned a sharp distinction between law and policy. On the contrary, the Court apparently assumed that an agency is "interpreting" not only when it decides in the abstract what the statute means, but also when it applies that interpretation to a particular set of facts, or when it exercises its discretion within the boundaries allowed by the statute.

In short, *Chevron* apparently *did* think of "interpretation" in a broad sense: an activity that would embrace not only determinations that a court might scrutinize using traditional tools of statutory construction (which the Court said are available at step one[69]), but also determinations involving exercises of discretion (inferentially left for judicial scrutiny at step two). Although there is nothing inherently unworkable about the Court's concept of "interpretation," so long as all players in the game understand the usage,[70] it is somewhat confusing. In particular, one inelegant aspect of this analytical framework is that the Court did not pause to integrate it with the "arbitrary and capricious" standard of review, which under the APA is applicable to all agency actions. The D.C. Circuit case law summarized in the previous section can serve to rectify this omission. The circuit's emerging understanding of step two as overlapping abuse of discretion review is compatible with—if not indeed driven by—the Supreme Court's opinion.

Incidentally, this exegesis of the *Chevron* opinion suggests a credible explanation for the intriguing fact that the Supreme Court has never set aside an agency action on the basis of the second *Chevron* step.[71] Generally speaking, the Court grants certiorari in order to re-

68. *See id.* at 845 ("EPA's use of [the bubble] concept here is a reasonable policy choice for the agency to make."); *id.* at 863 ("[T]he agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena."); *id.* at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, . . . the challenge must fail.").

69. *See id.* at 843 n.9.

70. *Cf.* General Motors Corp. v. National Highway Traffic Safety Admin., 898 F.2d 165 (D.C. Cir. 1990). There the agency had stated its belief that "the correct *interpretation* of the statute does not permit [retroactive] amendments [in fuel economy standards]." *Id.* at 171 (emphasis added by the court). The petitioners took this statement to mean that the agency had erroneously believed that it was constrained by the statute and unable to exercise any policy judgment. Had they been right, they would have had a solid ground for reversal. *See infra* note 148 and accompanying text. But the court, examining the passage in context, decided that the agency could not have meant it that way. *See* 898 F.2d at 171-72.

71. *See supra* notes 36-38 and accompanying text.

solve relatively clear-cut legal issues; it leaves to the courts of appeals the primary responsibility for overseeing the manner in which agencies apply legal principles to particular fact situations.[72] If, as I have suggested, the second *Chevron* step is largely (if not entirely) coextensive with abuse of discretion review, one should expect the Court's certiorari policies to be similar in those two contexts. Thus, just as the Court rarely takes a case in order to hold that an agency action was legally authorized but involved an abuse of discretion, the Court is unlikely to take a case with the expectation of holding that an agency action passes *Chevron* step one but flunks step two.[73]

Assuming that, for the reasons just summarized, we can get past the conceptual difficulties posed by *Chevron*'s tacit theory of "interpretation," it is easy to see some of the advantages that the absorption of arbitrariness themes into *Chevron* step two review has had for the D.C. Circuit. Once the circuit had resolved to make consistent use of *Chevron* as the focus of its review of the substance of agency actions, it had to find a role for the second *Chevron* step that would set it apart from the work of the first step. The use of abuse of discretion arguments at step two has alleviated the problem. Analysis under step one of *Chevron* could proceed, as the Supreme Court had said it should, from the "traditional tools of statutory construction."[74] Abuse of discretion review, on the other hand, could be used to assess the rationality of an agency's exercise of discretion.[75] The court seems to be headed towards a fairly tidy analytical structure, in which step one asks whether the agency violated a clear mandate in the statute itself, and step two asks whether the agency used acceptable reasoning to get *from* the statute to its ultimate result.

72. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 523 (1981); Mobil Oil Corp. v. FPC, 417 U.S. 283, 306-10 (1974); Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951). Although the Court originally treated this principle as applying only to substantial evidence review of agency fact findings, as in *Universal Camera*, the *American Textile* and *Mobil Oil* opinions demonstrate that the Court also applies it to situations that are better described as involving exercises of administrative discretion.

73. This is not necessarily the only explanation for the absence of step two reversals in the Supreme Court. Another explanation may lie in the simple fact that the Justices usually try to avoid depicting themselves as lawmakers. Even when their reservations about the government's position have more to do with its practical implications than with evidence about the legislature's intent, they quite naturally look for a way to ascribe their position to Congress. Or perhaps I should say that they try to persuade *themselves* that the flaw in the agency's view is outside themselves—it is "in" the statute, or "in" legislative intent, or whatever else they decide to use as a basis for statutory interpretation. The customary rhetoric of statutory interpretation thus creates a powerful incentive to rely where possible on step one rather than step two.

74. *Chevron*, 467 U.S. at 843 n.9.

75. These two types of inquiry are not always separable, as I will discuss below, but they differ often enough to belie the idea that the two *Chevron* steps are basically redundant.

Moreover, the circuit already had available a rich body of reasoned decisionmaking precedents from which it could draw in giving meaning to the second *Chevron* step. Those precedents are hardly uncontroversial, but at least the judges of the circuit are familiar with the usual criticisms. Sometimes they respond to critiques from the agencies' side, sometimes to critiques from private interests, and sometimes to neither, but they have all thought about the issues and worked out accommodations that allow judicial business to be carried on. This tradition has enabled them to give definition and shape to their step two jurisprudence.

One might also speculate that the court sees the convergence of *Chevron* step two and arbitrariness review as helping to legitimize its reasoned decisionmaking precedents. The court has been able to say, as it engages in hard look review, that it is simply carrying out the responsibilities prescribed in the leading Supreme Court case on judicial review of the substance of agency actions.

C. *Overlap or Equivalence?*

Although the D.C. Circuit has often drawn upon the methods of arbitrariness review in its elaboration of *Chevron* step two, it has stopped short of actually calling them identical. Rather, it usually describes these two inquiries as "overlapping," adding that in some ways they probably diverge.[76] I intend to suggest, however, that this insistence on a possible divergence is misdirected. To that end, I will examine Judge Kenneth Starr's opinion in *Continental Air Lines, Inc. v. Department of Transportation*,[77] the D.C. Circuit's most frequently cited discussion of the "divergence."

The case grew out of legislation that was intended to protect the economic viability of Dallas/Fort Worth Regional Airport ("DFW") by restricting flights at a competing airport, Love Field. At a minimum, the statutory language limited Love Field traffic to flights within the immediate geographical region, but it left room for argument as to whether carriers such as Continental Air Lines, which also happened to operate interstate routes from other airports, were eligible to provide such flights. The Department ruled that Continental was eligible

76. *See, e.g.*, National Ass'n of Regulated Util. Comm'rs v. ICC, 41 F.3d 721, 726-27 (D.C. Cir. 1994), *discussed infra* Part IV.C.; Hazardous Waste Treatment Council v. United States EPA, 886 F.2d 355, 374 (D.C. Cir. 1989) (Silberman, J., concurring); *see also infra* note 141 (discussing Judge Wald's analysis)

77. 843 F.2d 1444 (D.C. Cir. 1988).

to operate at Love Field. Continental's competitors at DFW, along with the city of Dallas, appealed.

The court pronounced the statute ambiguous[78] and proceeded to *Chevron* step two. The court defined the critical inquiry as "whether the agency has advanced what the *Chevron* Court called 'a reasonable explanation for its conclusion that the regulations serve the . . . objectives [in question].'"[79] An agency action should survive scrutiny under this standard even if the reviewing court were to doubt that the action would "best promote" the policies or objectives of Congress; a court should strike down an agency action under step two only if the action "actually frustrated the policies that Congress was seeking to effectuate."[80] The Department's interpretation was readily acceptable under this standard, because "the purpose of the Love Field Amendment was to limit that airport's operations to 'short-haul' service. Permitting Continental to provide Love Field-Houston service was, obviously, entirely in keeping with that policy."[81]

In the course of explaining this standard of review, the court noted:

> This, of course, sounds closely akin to plain vanilla arbitrary-and-capricious style review. But it should immediately be made clear that interpreting a statute is quite a different enterprise than policymaking. . . . [M]uch of the "arbitrary and capricious" style analysis concerned with reasoned agency decisionmaking . . . cannot be applied directly to the question of whether an agency's interpretation of a statute is "contrary to law." It would be inappropriate, therefore, to import wholesale that body of law and apply it in a conceptually distinct arena.[82]

In the specific context of *Continental Air Lines*, Judge Starr's distinction was unconvincing. Since he had already decided that the statute was inconclusive on the issue under consideration, the thrust of his argument was that the agency had done an acceptable job of reasoning *from* the statute. The general intent of Congress was to acquiesce in short-haul flights at Love Field, and the Continental application was compatible with that objective. He could easily have labeled his argument a "reasoned decisionmaking" holding.[83] In fact, he ac-

78. *See id.* at 1447-49.
79. *Id.* at 1452 (alteration in original) (quoting *Chevron*, 467 U.S. at 863).
80. *Id.* at 1452-53.
81. *Id.* at 1453.
82. *Id.* at 1452.
83. Had Judge Starr concluded that the purposes of the amendment militated so strongly towards allowing interstate carriers to operate short-haul flights at Love Field that Congress *must* have intended that result, so that the Department of Transportation would have been powerless to decide otherwise, he would have been adopting a rationale that perhaps could *only* be

knowledged as much when he noted that his analysis was virtually the same as that of *Rettig*.[84] The essence of hard look review is careful examination of an agency's reasoning process, and the conclusions that the agency has drawn in reasoning from the underlying statute are certainly an important element of that examination. When Judge Starr labeled the agency's view an "interpretation," he may not have been misusing the English language, but his label did not change the reality that he was, in essence, reviewing the agency's exercise of discretion.

Indeed, from one perspective it is arguable that Judge Starr *should* have relied on the phraseology of reasoned decisionmaking case law, rather than the *Chevron* framework, in resolving the case. As I have mentioned, he defined *Chevron* step two as an inquiry into whether the agency's action "actually frustrated" congressional policy. In articulating this test, he mused that it was susceptible of abuse, because courts might too freely invoke it to override agencies' discretionary choices. He also acknowledged, however, that judges conducting arbitrariness review have long since come to terms with that challenge: the judicially elaborated expectation of reasoned decisionmaking "over the years has come to mean a variety of well-known factors."[85] He did not argue that courts never misapply the hard look doctrine, but he did say that "*[i]f carried out correctly*, arbitrary-and-capricious style review does not put the court into the (agency's) driver's seat."[86] Inasmuch as he apparently believed that hard look case law had already worked out, to the extent doctrinal formulas and precedents can, the proper degree of deference, it is somewhat ironic that he should have elected to try to cover the same ground with a new and untested analytical framework, within which the proper degree of deference would be up for grabs.

I do not intend this exegesis to demonstrate that Judge Starr's assumption of an unavoidable divergence between arbitrariness review and *Chevron* step two review was necessarily wrong, but only that he did not make a persuasive case for it. And, regardless of whether or not he was right, D.C. Circuit judges continue to voice the

described as statutory interpretation. Then one would have to ask whether that line of argument should be regarded as arising under *Chevron* step one or step two. But it seems evident from the *Continental Air Lines* opinion as a whole that Judge Starr did not see the legislation in those terms.

84. 843 F.2d at 1452-53.

85. *Id.* at 1451.

86. *Id.* (emphasis added).

same assumption.[87] That view has, however, generated uncertainties of its own. The uncertainties have perhaps never been more visible than in *Arent v. Shalala*,[88] a case in which the judges of the D.C. Circuit could not even agree among themselves about whether to treat a challenger's contentions as an arbitrariness argument or a step two argument.

The issue in *Arent* concerned Food and Drug Administration ("FDA") guidelines under which retail food stores were to furnish consumers with nutrition information about raw produce and fish. A statute provided that the guidelines were to remain voluntary unless the FDA found that retailers were not in "substantial compliance" with them. The petitioners challenged the FDA's position that, in this context, the "substantial compliance" test would be satisfied if sixty percent of retail food stores followed the guidelines.

In his majority opinion, Chief Judge Edwards declared that, although the petitioners had framed their argument under *Chevron*, their analysis was misdirected. "*Chevron* is principally concerned with whether an agency has authority under a statute," he wrote, and in this case "there is no question that the FDA had authority to define the circumstances constituting food retailers' substantial compliance."[89] Thus, he continued, "[t]he only issue here is whether the FDA's discharge of that authority was reasonable," an issue that "falls within the province of traditional arbitrary and capricious review."[90] In a concurring opinion, Judge Wald faulted the majority for second-guessing the parties' choice of how to present their case.[91] She thought the case should be resolved by asking "whether the agency's interpretation is reasonable and consistent with Congress' purpose in enacting the [underlying statute]."[92] She believed that this inquiry was "well within the bounds of typical *Chevron* step two analysis."[93] Both judges, however, acknowledged an "overlap" between *Chevron* and arbitrariness review, despite their inability to agree on where to draw the line.[94]

Public wrangling about this somewhat abstruse issue is uncommon, and the question of which label was preferable in *Arent* is not

87. *See supra* note 76 and accompanying text.
88. 70 F.3d 610 (D.C. Cir. 1995).
89. *Id.* at 615-16.
90. *Id.* at 616.
91. *See id.* at 619 (Wald, J., concurring).
92. *Id.* at 620.
93. *Id.*
94. *See id.* at 615, 616 n.6 (Edwards, C.J.); *id.* at 620 (Wald, J., concurring).

important to my analysis at this point.[95] Nevertheless, the disagreement in *Arent* between these two highly experienced judges is certainly striking. One might have expected that, after a dozen years of living with *Chevron*, a fundamental question like this would already have been resolved. Nothing about the issues in *Arent* was unusual; the disagreement between Chief Judge Edwards and Judge Wald might just as easily have surfaced in any of a hundred other cases instead. *Arent* aptly highlights the puzzlement besetting the circuit's judges and litigants regarding the relative roles of *Chevron* step two and arbitrariness review.[96] Further evidence of confusion on the subject can be found in other opinions in which a panel has declared, without much elaboration, that an issue that a challenger has framed as a *Chevron* step two claim is really an arbitrariness claim,[97] or vice versa.[98] Usually the panels simply declare the issue to be one or the other, neither explaining their choice nor acknowledging that in similar circumstances other panels have made the opposite choice.

95. For a case like *Arent*, in which the petitioners had no evident step one argument, I personally prefer the arbitrariness terminology because the case law under that rubric is more fully developed and provides clearer guidance than the *Chevron* step two case law does. Moreover, although Judge Wald's cautionary message about respecting the parties' own choice of analytical frameworks is generally good advice, it has less force when the confusion among litigants is largely attributable to the court's own confusing precedents (in this instance, precedents that posit what I regard as an unnecessary and unwieldy distinction between *Chevron* step two and arbitrariness). Nevertheless, my preference is mainly a matter of taste. I agree with Judge Wald's statement that if *Arent* could *not* be deemed to fall within step two, neither could numerous other cases that the court has decided using that terminology. *See id.* at 620 (Wald, J., concurring).

Incidentally, if a distinction between *Chevron* step two and arbitrariness review is indeed to be drawn, neither of the opinions in *Arent* offered a satisfactory account of how to draw it. When they undertook to explain the kind of case that might fall within *Chevron* but not arbitrariness review, each used language suggesting that they were thinking primarily about the *first* step in the *Chevron* analysis. *See id.* at 615 (Edwards, C.J.) ("[A] reviewing court's inquiry under *Chevron* is rooted in statutory analysis and is focused on discerning the boundaries of Congress' delegation of authority to the agency . . . ."); *id.* at 620 (Wald, J., concurring) ("[W]e might invalidate an agency's decision under *Chevron* as inconsistent with its statutory mandate, even though we do not believe the decision reflects an arbitrary policy choice[, if we] determine that Congress has selected a different—albeit, in our eyes, less propitious—path [than the agency's].").

96. At least one district judge in the circuit found Chief Judge Edwards' opinion deeply baffling. *See Proceedings of the Sixth Annual Robert C. Byrd Conference on the Administrative Process*, 10 ADMIN. L.J. AM. U. 251, 261 (1996) (remarks of the Hon. Royce Lamberth) (asserting that the majority opinion "has thrown a monkey wrench in the *Chevron* deference analysis" and "basically said we do not think much of *Chevron* deference," leaving him to "struggle with whether to follow what I think is the correct statement of law in Judge Wald's concurrence, or the panel opinion").

97. *See* Chamber of Commerce v. Federal Election Comm'n, 76 F.3d 1234, 1235-36 (D.C. Cir. 1996).

98. *See* Chemical Waste Mgmt., Inc. v. United States EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989).

My view is that both Chief Judge Edwards and Judge Wald were right—except in arguing that the other was wrong. For they were debating an artificial question. In the remainder of this article I will suggest that the D.C. Circuit's strenuous efforts to divide up the terrain between arbitrariness review and *Chevron* step two should be abandoned; the court, as well as other courts, would do better simply to treat these two modes of analysis as equivalent.[99] I will maintain that step one review and arbitrariness review, properly defined, can cover all the types of inquiries that courts actually use step two to address. The effort to find some middle step that falls within neither of the former two types of review is not only unnecessary, but actually undesirable because it defines the scope of those two inquiries in an unjustifiably narrow fashion.

All this will take some careful explication in the next part of this article, but the reader should note from the outset that, if I am right, there would be definite benefits to declaring that the two standards are equivalent. A conspicuous advantage of such a declaration is that it would tend to simplify scope of review doctrine. Judges would be able to think about review of the merits as a two-step process instead of a three-step process. Today one often sees judicial decisions in which a court works its way through two *Chevron* steps and *then* through review for abuse of discretion, usually with no discernible theory for classifying arguments as being one or the other.[100] If step two and arbitrariness were equated, the courts could ask themselves the same sorts of questions about a given agency action as before,[101] but they would be able to use a more compact analytical framework. Litigants, in turn, would have an easier time briefing cases, because they would have fewer conceptual categories to try to keep straight.

A little over a decade ago, in *Association of Data Processing Service Organizations v. Board of Governors*,[102] the D.C. Circuit accom-

99. As mentioned earlier, I acknowledge one exception to this generalization: In those appeals in which the court uses an arbitrariness standard to evaluate the purely factual findings of an agency, it performs a function that probably cannot be identified with *Chevron* step two. *See supra* note 7.

100. *See, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990); Hazardous Waste Treatment Council, Inc. v. United States EPA, 886 F.2d 355, 361-66 (D.C. Cir. 1989); Orloski v. Federal Election Comm'n, 795 F.2d 156 (D.C. Cir. 1986).

101. As I remarked in the introduction to this article, I am not ignoring the many policy-based critiques of hard look review in the literature, nor intimating that they have no merit. Rather, my position is that any relaxation in the application of the hard look standard would not undercut the case for equating step two with arbitrariness review. If anything, simplification of scope of review doctrine may facilitate resolution of that controversy by pruning away unnecessary verbiage and thereby making the policy issues stand out more sharply.

102. 745 F.2d 677 (D.C. Cir. 1984).

plished an analogous simplification of judicial review doctrine by declaring that an agency needs the same amount of factual evidence to satisfy the substantial evidence test, on the one hand, and the abuse of discretion test, on the other. This was a welcome development, because, although the case law had been full of casual statements that the substantial evidence test is a more rigorous standard, that distinction no longer had a sound policy foundation.[103] Thanks to then-Judge Scalia's opinion in *Data Processing*, litigants and judges in the D.C. Circuit no longer have an incentive to debate each other over which standard to apply, and they can freely cite precedents from substantial evidence cases during disputes governed by the arbitrariness test, and vice versa.[104] Some circuits continue to endorse the obsolete distinction rejected in *Data Processing*,[105] but courts that have abandoned that distinction have made their case law on standards of review a little less complicated and difficult, without any real change in the underlying relationship between court and agency. The equation between *Chevron* step two and abuse of discretion review could serve a very similar function.

All of this assumes, however, that a *Chevron* step two inquiry contributes nothing to judicial review that arbitrariness review does not already provide (and that also cannot be provided by *Chevron* step one review). To test this proposition, I will examine in the next part some of the case law's efforts to define such a role.

IV. Alternative Approaches to Step Two

At the center of this article is the question of why the *Chevron* test has two steps: why is the second one not redundant? The previous part analyzed a body of case law that has answered this question by associating the second step with arbitrariness review. In this part we shall examine cases in which other D.C. Circuit panels have offered alternative—but to my mind less satisfactory—answers. I will argue that some of these alternative approaches are potentially misleading; at best, none of them is needed if review under *Chevron* step one and arbitrariness review are properly defined. Again I will focus primarily on cases in which an agency has *lost* at step two, because

103. *See* Levin, *Restatement Report*, *supra* note 16, at 272.

104. *See also* Midtec Paper Corp. v. United States, 857 F.2d 1487, 1496-98 (D.C. Cir. 1988) (following *Data Processing* and holding more generally that scope of review principles are roughly the same for adjudication and rulemaking).

105. *See, e.g.*, AFL-CIO v. OSHA, 965 F.2d 962, 970 (11th Cir. 1992); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1213 n.13 (5th Cir. 1991).

they provide the most vivid and revealing illustrations of the operation of step two reasoning of any given kind.

A. *Bifurcated Statutory Construction*

One approach, which differs markedly from the conception of step two explored in the previous section, but which can claim at least a modicum of case law support, contemplates that reviewing courts should apply the two-step test of *Chevron* by dividing up the terrain of statutory interpretation into textual and nontextual components. That is, a court should use step one to decide whether the *text* of the agency's governing statute nullifies the agency's position; if it does not, the court should proceed to step two and inquire whether other conventional tools of construction cast doubt on the agency's position. Over the years, a handful of cases from the Supreme Court[106] and the D.C. Circuit[107] have seemed to endorse this approach.

Perhaps the clearest illustration of how an agency might lose at step two under this approach is *Kennecott Utah Copper Corp. v. United States Department of Interior*.[108] The Interior Department issued rules regarding the damages it could collect, in its capacity as public trustee, from persons who had injured natural resources or caused oil spills. Under the statute, the limitations period applicable to such damage claims ran from the date when Interior's rules were "promulgated."[109] The D.C. Circuit thought this term was ambiguous: it could mean the date when the rules were initially announced, or it could mean—as the agency argued—the date on which the rules became finalized after all judicial review and post-remand proceedings were complete.[110] That ambiguity was enough to get the agency past step one, because "[o]ur concern at this stage in our analysis is

106. *See* National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) (suggesting that courts should look to the "plain language of the statute" at step one and "the structure and language of the statute as a whole" at step two); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference . . . ."); Merrill, *Textualism*, *supra* note 20, at 357-58 (noting this implication in the cases just cited).

107. *See* Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995) (stating that, in the paradigmatic *Chevron* case, "the question for the reviewing court is whether the agency's construction of the statute is faithful to its plain meaning, or, if the statute has no plain meaning, whether the agency's interpretation is 'based on a permissible construction of the statute'"); Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1451 (D.C. Cir. 1994) (defining step one as "looking to the 'statutory language at issue, as well as the language and design of the statute as a whole,'" while step two requires "assess[ing] whether the Secretary's interpretation is reasonable in light of the 'language, legislative history, and policies of the statute'").

108. 88 F.3d 1191 (D.C. Cir. 1996).

109. *See id.* at 1209.

110. *See id.* at 1210-11.

whether the statutory text is precise."[111] Nevertheless, Interior's definition failed step two: it was "not a reasonable interpretation of the statute, viewed with an eye to its structure and purposes,"[112] because it would enable the department to prolong industry's exposure to damage claims indefinitely.

What makes *Kennecott* and similar cases interesting is that they seem to conceive of *Chevron* as a case about "statutory interpretation" in the most conventional sense—i.e., as involving the sort of analytical techniques a court would use if it were reading a statute in a non-administrative context. Many administrative lawyers probably think of *Chevron* as being about statutory interpretation in that sense. *Kennecott* illustrates how a court can recognize two discrete steps in the judicial role even within the confines of that conception of "interpretation." It is easy to see how, under these assumptions, *Chevron* could be understood as a two-step test that still leaves room for a separate and subsequent inquiry into whether the agency action was arbitrary and capricious.

To date, the bifurcated approach to statutory construction epitomized by *Kennecott* is decidedly a minority view. Arguably, it contradicts some of the language of the *Chevron* opinion itself, which seemed to assert that all "traditional tools of statutory construction" are available at step one.[113] More importantly, post-*Chevron* cases have often set aside agency interpretations by drawing upon the full range of conventional statutory construction techniques at step one. Arguments from statutory structure and purpose, as well as legislative history (among judges who are willing to consult it), are regularly examined at that step.[114] So are canons of construction.[115] In fact, there

111. *Id.* at 1211.

112. *Id.* at 1213.

113. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).

114. *See, e.g.*, Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) (rejecting agency's interpretation on the basis of structure and purpose arguments); Dole v. United Steelworkers, 494 U.S. 26 (1990) (same); Sullivan v. Zebley, 493 U.S. 521 (1990) (same); City of Cleveland v. United States Nuclear Regulatory Comm'n, 68 F.3d 1361, 1366 & n.4 (D.C. Cir. 1995); American Scholastic TV Programming Found. v. FCC, 46 F.3d 1173, 1180 (D.C. Cir. 1995); Alabama Power Co. v. United States EPA, 40 F.3d 450, 454 (D.C. Cir. 1994); LaRouche v. Federal Election Comm'n, 996 F.2d 1263, 1266 (D.C. Cir. 1993).

115. *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988) (rejecting agency's interpretation on basis of constitutional avoidance canon); Chamber of Commerce v. Federal Election Comm'n, 69 F.3d 600, 605 (D.C. Cir. 1995) (same); Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (same). This is not to say that canons of construction will always suffice to create the kind of "clear" statutory meaning needed to overcome the agency's interpretation at step one. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 184-85 (1991) (according deference under *Chevron* despite First Amend-

is room to wonder whether the court in *Kennecott* really gave much consideration to the implications of its version of the two-step test.[116]

Inasmuch as inconsistency in approaches to scope of review doctrine is a familiar and perhaps ineradicable feature of modern judicial review, *Kennecott*'s minority status might not, in itself, be a strong charge against it. More decisive, however, is the difficulty of identifying a persuasive normative justification for dividing the process of statutory interpretation into two distinct steps in this manner.

The past decade, of course, has seen the blossoming of wide-ranging debates over statutory construction methods, and those debates are not going to be settled any time soon. There is, however, no evident reason why the *Chevron* doctrine should incorporate any particular position in this controversy. Indeed, if it is to be successfully "domesticated," the *Chevron* test should remain usable by judges on all sides of the controversy. The obvious solution is to define the operative test at step one as a question of whether the court finds that the agency's interpretation violates the clear meaning of a statute. Judges can then continue to debate each other about the best way to determine what meaning a statute "clearly" possesses, drawing upon the same principles as they would use in any other statutory construction controversy. It is hard to see why these "traditional tools" should not be consolidated into a single "step" in administrative law cases, just as they are in other cases.

B. Belatedly Discovered Clear Meaning

In another type of case in which the D.C. Circuit sometimes rules against an agency at step two, the court's reasoning proceeds according to the following pattern: Initially, the court finds that the parties have framed for decision a narrow legal issue that the controlling statute does not specifically answer. In light of this ambiguity, the court declares that the agency has passed *Chevron* step one. Then the court moves to step two and concludes, using the conventional tools of stat-

ment issues raised by agency's interpretation); Greenberg, *supra* note 30 (arguing that *Chevron* deference should overcome lenity canon when agency construes regulatory statute that can be enforced criminally). My point is simply that the decision about *whether* a canon creates the requisite clarity can and should be made as part of the step one inquiry, instead of being postponed until later in the court's decisionmaking process.

116. *See* Engine Mfrs. Ass'n v. United States EPA, 88 F.3d 1075, 1088 n.41 (D.C. Cir. 1996) (stating, four days before *Kennecott*, that all traditional tools may be considered at step one); Ohio v. United States Dep't of Interior, 880 F.2d 432, 441 (D.C. Cir. 1989) (holding, in an earlier appeal from the same rulemaking proceedings reviewed in *Kennecott*, that all traditional tools of construction are pertinent to determining whether Congress had an intention on the precise question at issue).

utory construction, that one of the premises of the agency's argument cannot be reconciled with the underlying statute. Therefore the agency loses. The question I discuss in this section is whether this paradigm demonstrates a role for step two that cannot be performed equally well by either *Chevron* step one review or abuse of discretion review.

Cases in this category tend to be complicated. Therefore, although the model just described sometimes forms the basis for actual holdings in some D.C. Circuit opinions,[117] I will use a concurring opinion to illustrate it, because the details of the case provide a relatively simple illustration of the type of reasoning I am describing.

In *Natural Resources Defense Council, Inc. ("NRDC") v. Reilly*,[118] the EPA promulgated rules in 1989 to control emissions of radionuclides (radioactive particles) from facilities licensed by the Nuclear Regulatory Commission ("NRC"), but it issued a series of stays that prevented the rules from going into effect. The NRDC brought suit, contending that the agency's authority to continue issuing such stays had run out. Statutory deadlines predating the Clean Air Act Amendments of 1990 supported the NRDC's position.[119] The EPA's defense was based on § 112(d)(9) of the 1990 legislation, which stated that the agency could refrain from issuing a radionuclides standard to govern NRC-regulated facilities if it determined, after rulemaking proceedings, that NRC regulations governing those facilities provided "an ample margin of safety" to protect the public health. The EPA contended that subsection (d)(9) impliedly permitted it to postpone the effectiveness of its radionuclides standard pending further study.[120] Speaking through Judge Buckley, the court disagreed, holding that a separate provision of § 112—subsection (q)(1)—required the court to enforce the agency's preexisting duty to allow the standard to go into effect.[121]

Judge Silberman, concurring, developed a more complex argument for rejecting the EPA's position. In his view, subsection (q)(1) was ambiguous and might possibly authorize the EPA to stay its radionuclides rule under subsection (d)(9).[122] For Judge Silberman, the

117. *See infra* note 128 and accompanying text.
118. 976 F.2d 36 (D.C. Cir. 1992).
119. *See id.* at 41.
120. *See id.* at 40.
121. *See id.* at 41.
122. *See id.* at 43 (Silberman, J., concurring). More specifically, subsection (q)(1) provided that already-promulgated rules must go into effect "unless modified as provided in this section . . . ." According to Judge Silberman, the only provision of section 112 that could possibly be

ambiguity in the relationship between the two clauses precluded reversal of the EPA under *Chevron* step one.[123] Nevertheless, he argued, the EPA's interpretation was "unreasonable" for purposes of *Chevron* step two, because, even if the agency could rely on subsection (d)(9) to stay already-promulgated rules, the structure of that subsection indicated that the agency must conduct a rulemaking proceeding and make the "ample margin of safety" determination. The provision could not be construed to allow the EPA to delay the effective date of its standard without taking those steps.[124]

What I find noteworthy about Judge Silberman's rationale is that he could easily have written it as an application of the *first* step of the *Chevron* formula. Had he chosen to use step one terminology, Judge Silberman could have said that, although § 112(d)(9) was ambiguous in some respects,[125] its language and structure did show that "the intent of Congress [was] clear"[126] on at least one point: the EPA could not continue suspending its radionuclides standard without following the procedures of that subsection.

The Silberman opinion in the radionuclides case is representative of a substantial line of D.C. Circuit authority in which the court has assumed, at least tacitly, that an agency action should survive step one because Congress had not expressed a clear position on the narrow issue that the parties had framed for decision. Usually this assumption leads to affirmance of the agency's action.[127] Occasionally, however, it leads to the same outcome as in Judge Silberman's *NRDC v. Reilly* concurrence: the court reaches *Chevron* step two and rejects the agency's position using statutory construction methods that are essentially the same as the techniques usually associated with *Chevron* step one.[128] Because of their resemblance to step one reversals, I refer to

used to "modif[y]" the radionuclides standard for purposes of subsection (q)(1) was subsection (d)(9). Yet, he continued, the latter provision did not overtly deal with stays of already-promulgated rules; rather, the discretion that it appeared to give the EPA was discretion *not to promulgate* rules. *See id.*

123. *See id.* at 41.

124. *See id.* at 44.

125. That is, Judge Silberman, unlike Judge Buckley, was willing to assume that the statute would have allowed EPA to continue suspending the standard if the agency *had* followed the subsection (d)(9) procedures. *See id.*

126. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

127. *See, e.g.*, Central States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099, 1104 (D.C. Cir. 1991); Capitol Technical Servs., Inc. v. FAA, 791 F.2d 964, 970-71 (D.C. Cir. 1986).

128. *See* Abbott Lab. v. Young, 920 F.2d 984, 988 (D.C. Cir. 1990); Associated Gas Distrib. v. Federal Energy Regulatory Comm'n, 899 F.2d 1250, 1261-63 (D.C. Cir. 1990); Northern Natural Gas Co. v. Fed. Energy Regulatory Comm'n, 827 F.2d 779 (D.C. Cir. 1987) (en banc). The complex facts of these cases resist easy summary. Professor Seidenfeld, however, has subjected

cases in this category of step two reversals as instances of "belatedly discovered clear meaning."

My contention here is that *Chevron* step one review is an entirely appropriate medium for arriving at results like those in the line of cases just described. Step one should be defined to encompass all contentions that a court seeks to resolve using the "traditional tools of statutory construction." At first glance, the *Chevron* opinion may seem to indicate otherwise, because it declares that the court should initially focus its attention on whether Congress has "directly addressed the precise question at issue."[129] That language, however, gives reviewing courts quite a bit of latitude in determining what the "precise question" in a given case really is. "Precise questions" are not self-defining; they stem from the parties' contentions, as well as the judge's own attempts to separate matters that the statute leaves open from matters that the statute definitively resolves. Thus, for example, if an opinion writer frames the "precise question at issue" as being whether Congress has clearly ruled out an option the agency has chosen, or a premise on which the agency has sought to act, the stage may be set for reversal at step one.[130] There is in fact considerable case law in which the Supreme Court or the D.C. Circuit has overturned an agency's interpretation by imaginatively defining the "precise question at issue" in this fashion.[131]

Northern Natural to an extended (and unsympathetic) critique. *See* Seidenfeld, *supra* note 4, at 121-24. Most pertinently to the present discussion, he notes: "The manner in which the court relied on the general architecture of the Act to find FERC's action unlawful corresponds to the manner in which other courts have found clarity in otherwise ambiguous statutes at step one of *Chevron*." *Id.* at 121.

129. *Chevron*, 467 U.S. at 843.

130. *See* Williams, *supra* note 35, at 124-26; *cf.* Monaghan, *supra* note 62, at 27:

> The court's task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria. In such an empowering arrangement, responsibility is shared between court and agency; the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all of what it does mean.

131. *See, e.g.*, City of Chicago v. Environmental Defense Fund, Inc., 511 U.S. 328, 339 (1994) (EPA's interpretation "goes beyond the scope of whatever ambiguity § 3001(i) contains."); Department of Treas. v. Federal Labor Relations Auth., 494 U.S. 922 (1990); Pittston Coal Group v. Sebben, 488 U.S. 105, 113 (1988) (holding that black lung disease statute was somewhat openended but nevertheless "simply will not bear the meaning the Secretary has adopted"); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that statutory term "well-founded fear of persecution" was somewhat ambiguous but that Congress had impliedly forbidden the particular interpretation chosen by INS); Ohio v. United States Dep't of Interior, 880 F.2d 432, 442-43 (D.C. Cir. 1989) (holding that, although "Congress delegated to [the agency] a considerable measure of discretion in formulating a standard [for assessing damages from persons responsible for environmental mishaps]," nevertheless the agency's view must be reversed under *Chevron* step one because "the precise question here is a far more discrete one: whether DOI is entitled to treat use value and restoration cost as having equal presumptive legitimacy as a measure of damages").

As a theoretical matter, much can be said for treating all contentions regarding an allegedly clear legislative mandate as part of a single statutory construction inquiry. In each situation the judge will be relying on "traditional tools of statutory construction." That the issue has to be framed in a somewhat more subtle manner when the allegedly "clear" mandate relates to the agency's premises rather than its ultimate result does not fundamentally alter the nature of the court's task.[132] Nor is it evident why the quantum of deference accorded to the agency's views should depend on whether the allegedly "clear" congressional mandate pertains to the agency's premises, as opposed to the agency's result. In practice, the deference that courts display in these two situations seems to be about the same. The judges in the "belatedly discovered clear meaning" cases have phrased their holdings in step two terminology (declaring that the agency's view was "unreasonable"),[133] but their decisions disclose no solid indication that their scrutiny is less intensive by virtue of their proceeding under step two rather than step one.[134] In short, so long as the issue at hand is whether an element of the agency's argument conflicts in some way with the unambiguous intentions of the legislature, the court's inquiry should not be fragmented into two discrete steps. It should be resolved in a unified fashion at step one.

Admittedly, the model of judicial review that I have been developing here might be thought to draw lines that are too inflexible for the workaday world of judging. Practically minded judges might say to themselves that, even if *Chevron* step one is theoretically the right framework for resolution of all statutory issues that involve the "traditional tools of statutory construction," they would not want to forego the option of addressing those issues under step two instead. Such reluctance would be easy to understand. Because the *Chevron* two-

132. *See* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) ("[Complexity] alone is insufficient to invoke *Chevron* deference. Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry.").

133. *See* NRDC v. Reilly, 976 F.2d 36, 44 (D.C. Cir. 1992) (Silberman, J., concurring); Abbott Lab. v. Young, 920 F.2d 984, 988 (D.C. Cir. 1990); Northern Natural Gas Co. v. Federal Energy Regulatory Comm'n, 827 F.2d 779, 784 & n.7, 792 (D.C. Cir. 1987).

134. For example, the dissent in *Northern Natural*, *see* 827 F.2d at 796-99 (Wald, J., dissenting), as well as Professor Seidenfeld, *see* Seidenfeld, *supra* note 4, at 121-24, have offered seemingly powerful arguments that the court overreached in reversing the FERC in that case. Lacking a sufficient background in natural gas regulation, I am not going to evaluate these critiques here. The *Northern Natural* opinion does not, however, read as though the court analyzed the "reasonableness" of FERC's interpretation with any greater degree of deference than one would have expected if the court had defined the issue as ascertaining whether Congress had a "clear intent" about the acceptability of FERC's conduct.

step test is so widely regarded as a controlling standard of review these days, judges often feel that the demands of craftsmanship impel them to divide their analysis into a step one segment and a step two segment. Yet the arguments that judges wish to address in a given case will not always divide neatly into statutory and nonstatutory categories.[135] An easy way in which a court might deal with that dilemma would be to skip quickly past step one (remarking that the statute is "unclear") and then resolve the main controversy in the case by canvassing a (possibly somewhat disorganized) combination of statutory and nonstatutory arguments at step two.[136] The option of keeping the boundaries of step two flexible may seem particularly attractive to judges in the regional circuits and district courts, who normally spend much less time pondering scope of review issues in administrative law than the judges of the D.C. Circuit do.[137]

As one who has done a great deal of writing about scope of review, I freely acknowledge the elusiveness of the subject, and I try not to expect everyone to share my zeal for doctrinal precision and consistency.[138] But a healthy measure of tolerance for slippage or even sloppiness in judicial opinion writing does not undermine the argument that I have been developing. Remember, I am *not* claiming that *Chevron* step two should be consigned to oblivion. Rather, my claim is that step two should be regarded as equivalent to arbitrariness review, because that mode of review, taken together with *Chevron* step one, can accommodate all the lines of analysis that courts have been pursuing under *Chevron* step two. In this particular context, the commingling of issues that the judge described in the preceding paragraph may desire can be achieved within the rubric of arbitrariness review.

The reason is that arbitrariness review in administrative law has always overlapped statutory construction to some extent. Issues that, analytically speaking, might be better seen as questions of law (deter-

135. Alternatively, a court might wish to remain deliberately vague about the extent to which its opinion rests on statutory compulsion. This impulse might spring from a laudable hesitation to decide too much at once about the statute's reach.

136. A more rigorous, and probably preferable, alternative to that approach is to argue that scrutiny at step one *narrows* the range of possibilities available under the statute, and that, within the confines of that range, the agency's actual choice was "unreasonable" (in the arbitrariness sense) under step two. *See* Massachusetts v. United States Dept. of Transp., 93 F.3d 890, 892-93 (D.C. Cir. 1996).

137. Of course, the conceptual problems are just as daunting, if not more so, for litigants who may have only a passing familiarity with *Chevron* but must write briefs applying its framework.

138. *See* Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1086 (1995) (suggesting that inconsistencies in scope of review doctrine are attributable in part to tendency of judges in any given case to focus primarily on substantive issues).

mining how much authority an agency had) are allowed to shade into questions of discretion (determining whether the agency misused its authority). Some of our leading precedents defining abuse of discretion review confirm this overlap: Under *Overton Park* abuse of discretion review asks in part whether the agency considered the "relevant factors,"[139] and under *State Farm* one consideration bearing on whether a rule is arbitrary and capricious is whether the agency "has relied on factors which Congress has not intended it to consider."[140] From a purist's point of view, step one might be the better vehicle for such issues, but if a court is disposed not to use that category, abuse of discretion review is a time-honored alternative. One can *call* the latter alternative "*Chevron* step two," but no actual departure from traditional arbitrariness analysis is required.

In short, a court has *two* alternative doctrinal frameworks with which it can justifiably evaluate the kind of issue that has led to reversal in a "belated discovered clear meaning" situation. The notion that in this type of case *Chevron* step two serves a function that would otherwise go neglected is, therefore, doubly erroneous.[141]

139. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

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

141. In a recent article, Judge Wald has suggested three reasons for continuing to distinguish *Chevron* step two from arbitrariness review: (1) "Arbitrary and capricious review focuses on an agency's decisionmaking processes and explanations. *Chevron*, on the other hand, focuses on statutory language, structure and purpose." (2) Collapsing *Chevron* step two into arbitrariness review would improperly augment the courts' power, because it would be "no longer enough for an agency to select one of several permissible statutory interpretations, rather the agency must justify its selection of one particular permissible interpretation." (3) "Similarly, requiring agency interpretations to consider all relevant factors could mean that agencies must take account of vague expressions of congressional intent, thereby releasing Congress from *Chevron*'s mandate that it must speak clearly." Wald, *supra* note 28, at 244.

I agree in concept with the first point, but in my view the contrast Judge Wald wants to draw is better seen as a distinction between *Chevron* step one and arbitrariness review. *See supra* notes 129-134 and accompanying text. The second point is a puzzler, because under current doctrine I believe a court normally *would* expect an agency to explain why it chose one of several statutory interpretations that are available because of congressional ambiguity, and I am surprised that Judge Wald does not think so, too. *Chevron* teaches that a court should not impose *its own* preference among competing readings of an ambiguous statute, but asking for a reasoned explanation of *the agency's* choice is precisely what step two is about. Besides, if, as standard reasoned decisionmaking doctrine teaches, a court can expect an agency to justify its choices among policy options, it would be odd not to impose the same expectation with respect to choices the agency makes among readings of a statute. *Cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397 (1986) (questioning the rationality of a judicial review system in which courts are more deferential on matters of law than on matters of policy).

My reply to Judge Wald's third point is similar: a reasoned response to congressional mixed signals is indeed part of the obligation that courts regularly impose on agencies at step two. *See, e.g.*, Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133 (D.C. Cir. 1984) (Wald, J.). Yet, because that response may take a form that the legislature would not have preferred, Congress still has an incentive to "speak clearly."

C. Erroneously Perceived Legal Obstacle

A variation on the category of step two reversals examined in the preceding section is a line of cases in which the court has remanded an administrative action because the agency mistakenly believed itself constrained by its governing statute. A useful case for scrutiny of this model is *National Association of Regulatory Utility Commissioners (NARUC) v. ICC*.[142] The *NARUC* case concerned a congressionally mandated plan for "single-state registration" of vehicles operated by interstate motor carriers. Under that system, each carrier would register with a single state, which would charge a fee for each registered vehicle and then divide up the money with other states participating in the system. The state would also issue receipts showing that these fees had been paid. The statute required that "copies of the receipt . . . be kept in each of the carrier's commercial motor vehicles."[143] The ICC's implementing regulations provided that the carrier would be responsible for making copies of the receipt for each of its vehicles. State regulatory authorities challenged this aspect of the regulations, arguing that the Commission should instead have mandated that the states themselves should furnish the copies. Such a system, they argued, would protect their revenue interests: officials would be able to use roadside enforcement action to check for state-issued copies and thereby assure themselves that the carriers had paid the requisite fees.

The D.C. Circuit, speaking through Judge Silberman, set aside the ICC rules for two reasons. First, the Commission had refused the states' request with the observation that such a scheme would impermissibly draw the agency into assisting with state enforcement efforts.[144] But the court rejected, as "incorrect statutory interpretation," the idea that Congress had forbidden such assistance: "Nothing in the language of the statute or in the legislative history supports that extraordinary statement. To the contrary, we think that Congress' requirement that copies of the state-issued receipts be carried in each vehicle can reasonably be understood *only* as intended to aid state roadside enforcement."[145] Second, the ICC had suggested that the states could enforce their laws by auditing carrier records in-

142. 41 F.3d 721 (D.C. Cir. 1994). The extended analysis of this case in Lawson, *supra* note 4, at 332-43, was the inspiration for my treatment of it here, although my conclusions differ from his.

143. 49 U.S.C. § 11506(c)(2)(B)(ii) (1994).

144. *See* 41 F.3d at 727. Professor Lawson questions whether the agency actually made this claim, *see* Lawson, *supra* note 4, at 340 n.100, but for present purposes I assume with the court that it did.

145. 41 F.3d at 728.

stead. The court could not understand how that "quixotic" alternative "could possibly substitute, under any plausible cost/benefit analysis, for the traditional—and congressionally approved—method of roadside enforcement."[146] Nor did the court see any respect in which the states' preferred system would cause real inconvenience to carriers. Thus it was "unreasonable for the Commission to favor the interests of [carriers] in a manner that wholly undermines those of the [states]."[147]

As we evaluate the court's exegesis of the possible distinction between *Chevron* step two and arbitrariness review, it will be useful to distinguish between the court's two rationales. The second rationale is a classic example of reasoned decisionmaking review, conventionally viewed as bearing on whether the agency action was arbitrary and capricious. To that extent, *NARUC* was no different from *Rettig* and other cases examined in Part III.A., in which *Chevron* step two has been held to encompass that sort of judicial inquiry.

The *NARUC* court's first rationale, however, is more reminiscent of the "belatedly recognized clear meaning" cases examined in Part IV.B., because it too has the flavor of statutory construction. More particularly, it is an example of a lengthy body of D.C. Circuit precedents that have invalidated administrative actions because the agency took an overly narrow view of its legal authority and therefore erroneously failed to exercise its discretion.[148] These precedents, which can be traced back to classic Supreme Court cases such as *SEC v. Chenery Corp.*,[149] bear a close kinship to the ordinary fare of step one review. Indeed, virtually by definition they implicate a legal determination regarding which the agency cannot claim to have used its discretion. One can, if one prefers, label the issue abuse of discretion[150] or step

146. *Id.*

147. *Id.*

148. *See, e.g.*, American Petroleum Inst. v. United States EPA, 906 F.2d 729, 740 (D.C. Cir. 1990); Kamargo Corp. v. Federal Energy Regulatory Comm'n, 852 F.2d 1392, 1398 (D.C. Cir. 1988); Baltimore & Ohio R.R. v. ICC, 826 F.2d 1125, 1128-29 (D.C. Cir. 1987); International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB, 814 F.2d 697, 707-08 (D.C. Cir. 1987); Phillips Petroleum Co. v. Federal Energy Regulatory Comm'n, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986); Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985); Process Gas Consumers Group v. United States. Dep't of Agric., 694 F.2d 778, 792 (D.C. Cir. 1982) (en banc); Herz, *supra* note 59, at 228-30.

149. 318 U.S. 80, 95 (1943). A slightly more apposite early precedent, involving an agency's misinterpretation of a *statute* (rather than, as in *Chenery*, the common law) and consequent failure to exercise discretion, is Federal Communications Comm'n v. RCA Communications, Inc., 346 U.S. 86, 91-96 (1953).

150. I have myself described this judicial doctrine as an element of abuse of discretion doctrine. *See* Levin, *Lessons of 1995*, *supra* note *, at 662.

two, but the label has, or should have, no real bearing on the essential nature of the court's task. Once again, there would seem to be no logical reason why either the methods of construction or the degree of deference displayed in such a case should differ from a typical step one case. Sometimes, indeed, the court does approach the issue under step one.[151]

NARUC makes a particularly worthwhile "vehicle" for analysis here, because the court used its opinion as an occasion for some general reflections about the relationship between *Chevron* step two and arbitrariness review. Judge Silberman acknowledged the considerable overlap between the two review standards.[152] He also suggested, however, that they are not interchangeable, because each may be more appropriate to a different kind of case:

> When Congress' instructions are conveyed at a high level of generality, an agency is not likely to consider its action as an "interpretation" of the authorizing statute, nor is that action likely to be challenged as a "misinterpretation." (Yet even then, the agency would be expected to assert that a particular decision was shaped by the general policy concerns that animated the legislation.) When, on the other hand, the statute is quite specific, agency action normally is evaluated in terms of how faithfully it follows the more detailed direction; in such cases the question is more obviously whether the agency permissibly interpreted the statute. In any event, the more an agency purports to rely on Congress' policy choice—as set forth in specific legislation—than on the agency's generally conferred discretion, the more the question before the court is logically treated as an issue of statutory interpretation, to be judged by *Chevron* standards.[153]

In disposing of the case before it, the court declined to classify its reasons for rejecting the ICC copy rule as falling within either *Chevron* step two or arbitrariness review, because this was "a case that overlaps both administrative law concepts."[154] Of course, that was true in a straightforward sense. As we have seen, the holding rested on two alternative grounds; the court relied in part on an arbitrariness

151. *See, e.g., American Petroleum Inst.*, 906 F.2d at 740:

> EPA concluded that the terms of the RCRA left it *no choice* but to disclaim authority to prescribe treatment standards for [zinc-bearing] slag [resulting from metals reclamation]. . . . It follows that we can uphold EPA's construction of the statute *only* if the agency's exercise of authority over the slag was indeed foreclosed by the RCRA under *Chevron* step one.

152. *See NARUC*, 41 F.3d 721, 726-27 (1994); *see also* Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827 (1990) ("It may well be that the second step of *Chevron* is not all that different analytically from the APA's arbitrary and capricious review.").

153. 41 F.3d at 727.

154. *Id.* at 728.

rationale and in part on a rationale that was unambiguously interpretive (termed step two by the court, although I would call it a step one issue). But the court's dictum concerning the respective roles of "interpretation" and of arbitrariness review, suggesting a continuum or spectrum extending between them, seems less helpful. The discussion may be descriptively accurate, but I am not sure how a court would actually make use of the suggested continuum if it wanted to try.

In light of my discussion in the preceding section, I would reformulate the court's argument. In any given case, the court must decide *how far* it will express its views "as a matter of law" on the substantive issues in the case, and *how far* it will, instead, treat the issues as a matter of discretion and consider whether the agency used that discretion rationally. The court has to draw this line regardless of whether it prefers to characterize its "interpretive" role as a step one or step two exercise. The line it draws has real-world significance, because to the extent that the court expresses its position in "legal" terms, the agency would have much more difficulty departing from that position afterwards.[155] In a given case, the court's choices about how far the statute should be read as tying the agency's hands can be challenging, as the substantive disagreement between Judges Buckley and Silberman in *NRDC v. Reilly* aptly illustrates.[156] At least, however, this way of posing the problem emphasizes its practical aspect, and judges may be best able to deal with it effectively in those terms. Conceptual conundrums about whether the agency's position sounds more like interpretation than discretion, or vice versa, are probably less likely to be helpful, because most cases involve elements of both.[157]

D. Farfetched Result

One final category of *Chevron* step two reversals remains to be examined. In this category a court holds that an agency's interpretation is "unreasonable" *not* because of a clear mandate in the statute, and *not* because of a lack of thorough consideration (the typical basis

155. *See, e.g.*, Neal v. United States, 116 S. Ct. 763, 768-69 (1996) (stating that judicial precedents constrain sentencing commission interpretations under the doctrine of stare decisis, notwithstanding deference policies, but commission may abandon old approaches "within its sphere to make policy judgments"); Herz, *supra* note 59, at 226-28 (discussing effect of *Chevron* on agencies' freedom to depart from judicial precedents).

156. *See supra* note 125 and accompanying text.

157. To some degree, indeed, Judge Silberman was clearly mindful of this fact, as may be seen from the sentence in parentheses in the above block quote from *NARUC*. *See supra* text accompanying note 153.

for a "reasoned decisionmaking" reversal), but simply because the court finds the interpretation farfetched. Of course, judges usually prefer, when they override agencies' statutory interpretations, to claim that they are enforcing the will of Congress, not their own policy preferences. But even though the Supreme Court has never used the *Chevron* framework to set aside an agency action on a pure "farfetched result" basis, the same is not true in the lower courts.

A D.C. Circuit case that does appear to fit this paradigm is *Republican National Committee ("RNC") v. Federal Election Commission ("FEC")*.[158] The case concerned a provision of the Federal Election Campaign Act that requires political committees to use their "best efforts" to induce donors who contribute more than $200 to furnish certain information (name, address, occupation, and employer) for reporting purposes. An FEC rule implementing this mandate directed committees to send follow-up inquiries to donors who failed to supply the information initially. The follow-up requests, as well as the original solicitations, had to state that "federal law requires political committees to report the [information] for each individual."[159] The court found that the rule passed *Chevron* step one, because the statutory term "best efforts" was ambiguous, but that it was so unreasonable that it failed step two. "We simply do not believe," the court said, "that Congress authorized the Commission to forbid political committees from accurately stating the law."[160] Not only was the required statement erroneous, but it might mislead donors to believe that they were obligated to supply the information, which was not so. "Although the mandatory statement's language may well produce higher reporting rates, we doubt that Congress authorized the Commission to accomplish this purpose by misleading donors."[161]

It is not absolutely certain that *RNC* fits the paradigm under discussion, because, as the quoted sentences show, the court did phrase its conclusion in terms of what Congress had authorized. Nevertheless, the court developed its argument without relying directly on the language, structure, or policies of the Act. It focused squarely on the absurdity of the government's insisting that committees must lie to their donors. Moreover, the internal structure of the *RNC* opinion leaves no doubt that the court meant to distinguish between its *Chevron* analysis (which included the holding just described) and an arbi-

158. 76 F.3d 400 (D.C. Cir. 1996).
159. *Id.* at 404.
160. *Id.* at 406.
161. *Id.*

trariness analysis.[162] I will assume, therefore, that *RNC* does illustrate the type of holding with which this section is concerned.

Step two reversals on this basis are very rare. In fact, *RNC* is the only clear-cut example that I have found in my reading of the numerous decisions in which the D.C. Circuit has applied the *Chevron* formula over more than a dozen years' time.[163] Nevertheless, as we round out our survey of step two case law, the reasoning exemplified by the *RNC* case deserves attention. It may be the most natural and straightforward way to read *Chevron*'s admonition that at step two the reviewing court must determine whether the agency's interpretation was "reasonable." Probably many people believe that the courts, when they apply the second *Chevron* step, ought to be *looking for* this kind of error, even though it will seldom be found. In fact, Professor Gary Lawson has argued that an inquiry of this sort—what he calls an "outcome test"—should constitute the *only* focus of *Chevron* step two.[164] He conceives of an outcome test as being entirely unconcerned with the reasoning the agency used to support its interpreta-

162. *See id.* at 404-07 (court's *Chevron* analysis); *id.* at 407-09 (court's arbitrariness analysis).

163. An arguable additional example is Resolution Trust Corp. v. Walde, 18 F.3d 943 (D.C. Cir. 1994), which held that the RTC lacked statutory authority to subpoena private papers from banking executives for the purpose of determining whether they had sufficient net worth to warrant suing. Although the court said that the agency's interpretation was unreasonable, *id.* at 949, its opinion relied heavily on a careful analysis of the Fourth Amendment case law and is probably best read as resting on the principle that statutes should be construed so as to avoid constitutional infirmity.

164. *See* Lawson, *supra* note 4, at 325-26, 338. This characterization of Professor Lawson's views may not be entirely fair, because to some degree he appears to contemplate that *Chevron* step two should be understood as a test of "reasonableness" that looks *neither* to the bare policy consequences of the agency action (considered apart from the statute itself) *nor* to the quality of the reasoning by which the agency supports its interpretation (which he regards as the proper province of arbitrariness review). *See id.* at 341-42. This is a somewhat unfamiliar notion, but Lawson seems to be building on an earlier article in which he explored the possibility of treating legal reasoning as subject to standards of proof that are analogous to the standards used to decide issues of fact. *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992). An attempt to evaluate this possibility would take me into deeper jurisprudential waters than befits the focus of this article.

However, assuming that such a model could be devised, Lawson has not seriously attempted to demonstrate why this notion of "reasonableness" would improve the judicial review system in some way, such as by making it more logical, easier to understand, more effective in imposing necessary discipline on agencies, or more effective in securing agencies' autonomy. As he himself recognized in his earlier article, a justification of *Chevron* must rest on "normative considerations of judicial administration and political theory." *Id.* at 885. The same is true when one wants to justify any particular *version* of *Chevron*. Except for one fleeting policy argument, which I address *infra* at note 170, he does not venture into that territory. Thus, I see Lawson's theoretical model as a path that the law might have taken but has not, and for which the case has not been made. On the other hand, his model is at least functionally similar, albeit not identical, to the rationale of *RNC*, and the skepticism I will express about the value of separating "outcome" from "process" issues, *see infra* notes 168-70 and accompanying text, has some bearing on his views as well.

tion. In this manner he would sharply distinguish step two from arbitrariness review, which he thinks should concentrate on what he calls "process" concerns—essentially, the cogency of the agency's reasoning.

Obviously the "farfetched result" approach to *Chevron* step two should be used cautiously (if at all). But in the extreme case in which a court might use it as a basis for reversal, does this approach exemplify an attractive role for *Chevron* step two that step one review and arbitrariness review cannot fulfill equally well? I think not, for two principal reasons.

First, consideration of whether an agency's position is farfetched is already a legitimate component of both of those two modes of review. After all, the "traditional tools of statutory construction," which a court is supposed to consult when applying *Chevron* step one, include the maxim that the legislature must be presumed not to intend an absurd result.[165] Indeed, that reasoning may well be the optimal path to decision when a court wants to rely on the deplorable consequences of the agency's interpretation *in combination with* other conventional interpretive techniques, such as arguments from statutory language, history, and structure. Similarly, attention to whether the tangible result of an agency's action is reasonable has always been a component of arbitrariness review. When the Court said in *Overton Park* that a reviewing court applying the arbitrary and capricious test should ask whether the agency displayed a "clear error of judgment," it seemed to have precisely this sort of inquiry in mind.[166] "Indeed, examination of whether an agency has made a truly unpalatable discretionary choice is perhaps the most traditional function of 'arbitrary and capricious' review."[167] The recent rise of the hard look doctrine has tended to eclipse this judicial role, but one sees little indication that the growth of the hard look (a development that, after all, was intended to *augment* the courts' control over agency action) has also operated to purge arbitrariness review of its original meaning.

165. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 68-69 (1994); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 450-53 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989); *id.* at 527 (Scalia, J., concurring); Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978).

166. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 416 (1971), *citing, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 182 (1965) ("[A] minute speck of dust on a window pane would hardly support a refusal [to license a dairy] based on uncleanliness.").

167. Levin, *Restatement Report*, *supra* note 16, at 254 (citing ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910), as an early example of review for "unreasonableness" as distinct from review for legal error).

Second, if courts were to proceed on the assumption that "outcome" is the concern of *Chevron* step two and "process" is the concern of arbitrariness review, I do not believe that judicial review doctrine would be improved. This would be an unhealthy development, because "outcome" issues and "process" issues should not be analyzed in isolation from each other. They work best when considered in tandem. An agency's duty of reasoned decisionmaking is not a command to engage in lengthy discussion for the sake of lengthy discussion. It is an obligation to deal meaningfully with issues that might otherwise be troublesome enough to raise doubts about the rationality of the agency's position.[168] Thus, the questionable policy consequences of an agency's chosen interpretation are among the factors that give direction to a court's implementation of the reasoned decisionmaking standard. We can see this interplay at work in, for example, the *NARUC* court's second reason for rejecting the ICC's copy rule: the enforcement system that the agency envisioned as an alternative to the states' traditional enforcement approach looked so "quixotic" that "the Commission must explain how such an alternative could possibly substitute" for the states' preferred approach.[169]

In short, to the extent (if any) that a court is prepared to take the policy wisdom of an agency's decision into account during judicial review, that consideration ought to occur in conjunction with either conventional statutory construction or the reasoned decisionmaking standard, instead of being spun off into a doctrinal "test" of its own. Nothing need turn on whether, in a given case, the court refers to "*Chevron* step two" or "arbitrariness" as the review standard that implicates both questions about the agency's explanation and questions about the soundness of the agency's policy. What matters is that courts ought to face these two kinds of questions simultaneously, not separately.[170] The rarity of cases like *RNC* suggests that this is exactly what judges, at least in the D.C. Circuit, are already doing.

168. Courts exercising the power to reverse for inadequate explanation should normally be expected to specify some weakness in the agency's decision and to make a credible argument that this weakness might, unless more fully justified, warrant a conclusion that the action is substantively arbitrary. Thus, the typical logic of the court's argument is as follows: "We detect an apparent problem with the agency's rationale . . . . Because we detect this potential abuse of discretion, the agency must justify its position more fully."

Id. at 262-63.

169. *NARUC*, 41 F.3d at 728; *see supra* note 146 and accompanying text.

170. In arguing for separate treatment of the two issues, Professor Lawson reasons as follows:

[I]t is probably the better part of valor to keep the distinction clear by limiting *Chevron*'s reasonableness test to review of outcomes and leaving process review to the fa-

V. CONCLUSION

After more than a dozen years, the second step in the *Chevron* standard of review remains ill-defined. Undoubtedly a major part of the explanation for this haziness is that, although the Supreme Court's opinion spoke of ground rules for "statutory interpretations," the internal logic of the *Chevron* formula made it directly relevant to judicial review of exercises of administrative discretion—a class of determinations that are analytically quite different from "interpretations" in the conventional sense. The sweep of the *Chevron* test has made it difficult to implement, because the Court made no serious effort to integrate its two-step formula with the arbitrariness standard of the APA, which covers much of the same territory.

To this day the Court has remained largely, though not totally, oblivious to the overlap it was creating between these two constructs.[171] In general, indeed, the Court—which from the outset was probably less committed to the *Chevron* formula than many observers assumed—has preferred to leave the test open-ended, declining to re-

> miliar "hard look" standard. Courts and lawyers are then less likely to misunderstand or misapply the relevant process test. The "hard look" doctrine, after all, is familiar to judges and administrative lawyers; the trick is simply to get them to apply that familiar doctrine to agency legal conclusions. *Chevron* is confusing enough, without making the step two reasonableness requirement perform double-duty as both an outcome test and a process test.

Lawson, *supra* note 4, at 343-44. Unlike Lawson, I am not persuaded that "getting [judges and administrative lawyers] to apply [the hard look] doctrine to agency legal conclusions" is particularly difficult. I have observed no real reluctance on the courts' part to give serious consideration to well-supported contentions that particular agencies have failed to engage in reasoned decisionmaking. I would thus question the factual predicate of his argument against making *Chevron* step two (or for that matter arbitrariness) "perform double-duty." Moreover, if avoiding confusion is the issue, I would suggest that the courts' effort to devise separate roles for *Chevron* step two review and arbitrariness review is itself one of the main sources of confusion in current doctrine. *See supra* notes 88-98 and accompanying text. The thesis of this article is that they have little or no reason to make this effort in the first place.

171. Occasionally, as in *Chevron* itself, the Court has shown a degree of awareness of the overlap. *See* Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1734 (1996) (cross-referencing to section of opinion that applied *Chevron* reasonableness test and calling it a discussion of whether interpretation was arbitrary and capricious); Rust v. Sullivan, 500 U.S. 173, 187 (1991) ("We find that the Secretary amply justified his change of interpretation with a 'reasoned analysis,' [and thus] we must defer to the Secretary's permissible construction of the statute."). But this is exceptional. More representative of the Justices' inattention to the relationship between *Chevron* step two and arbitrariness review is the Court's opinion in National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992). One issue in that case was whether, under step two, the Court could defer to an interpretation that was merely implicit, yet clearly discernible, in the agency's opinion. The Court gave an affirmative answer, *id.* at 418, 419-20, but appeared to regard the question as novel and difficult. Had the Court approached the case as involving arbitrariness review, that question would have been easy. The Court could simply have invoked the longstanding principle, familiar in the arbitrariness context, that a reviewing court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc., v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974).

solve very much about the scope of review of legal issues in administrative law. Given the complications of the subject matter, that reticence has perhaps been wise. But the practical result is that most of the work of ironing out the internal tensions in the *Chevron* test has gone on elsewhere.

In this article, accordingly, I have studied the development of *Chevron* step two in the D.C. Circuit. That court's large administrative law caseload and strong commitment to domesticating the *Chevron* formula for routine use have made it a uniquely apt laboratory for observation of the implementation of the two-step test. This article has outlined the manner in which the circuit has recognized the natural overlap between *Chevron* step two and arbitrariness review and has built up a body of case law predicated on that perception. The overlap itself is now well established in D.C. Circuit case law, and the administrative law community ought to take more notice of this development than it apparently has.

At the same time, one continues to see warnings in the D.C. Circuit case law that the overlap must be less than total, for interpretation and discretion are different. I, on the other hand, have suggested that when *Chevron* step one and arbitrariness review are given the scope that they intrinsically warrant, there is no judicial business left over to be resolved within the exclusive province of *Chevron* step two. It is too late in the day to simply abrogate the second step as excess baggage; the prestige of the *Chevron* formula makes such a development unlikely. But courts could achieve roughly the same result by simply extending the "overlap" theme to its logical conclusion and declaring that *Chevron* step two and arbitrariness review are equivalent to each other.

Even that much is likely to be a hard sell, at least in the short run. The habit of thinking about *Chevron* and arbitrariness review in separate conceptual boxes is deeply entrenched. Still, one might reasonably expect to hear more about "overlap" over time, and less about "divergence," as these doctrines continue to evolve.

The skeptical reader may have doubts about the social utility of my analysis—a pure exercise in attempted clarification, with no aspiration to promote either more deferential or more intrusive judicial review. Yet its neutrality may be exactly what gives the analysis, or at least parts of it, the potential for acceptance. One can hardly expect judicial consensus on such momentous issues as the appropriate balance of power between courts and agencies in the elaboration of regu-

latory statutes. Judges do, however, share an interest in striving to develop a coherent analytical framework within which they can bring their philosophical differences to bear on the resolution of individual cases. The function of an academic study like the present one is to publicize trends and to raise critical questions that may force more careful reflection on the elusive dynamics of *Chevron* review. With broader understanding of what is at stake may come a broader consensus about the proper terms of the debate.