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Indiana Law Journal

Volume 89 | Issue 2 Article 3

Spring 2014

Should Chevron Have Two Steps?

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Should *Chevron* Have Two Steps?

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Prominent judges and scholars have criticized the familiar Chevron *deference scheme on the ground that its two steps are redundant. But each step of traditional two-step* Chevron *actually does unique interpretive work. In short, step one asks whether agency interpretations are mandatory, whereas step two asks whether they are reasonable. Other judges and scholars defend two-step* Chevron *on the ground that the second step should be equated with arbitrary-and-capricious review. But that approach makes* Chevron *partially redundant with the Administrative Procedure Act and compresses the distinct mandatoriness and reasonableness questions into an artificially singular first step. This Article identifies a new approach, called "optional two-step," which first asks whether the agency's view is reasonable and then gives courts discretion to determine whether the agency's view is also mandatory. This discretionary decision procedure recognizes that important normative considerations underlie the choice between one- and two-step versions of* Chevron*. For example, two-step* Chevron *fosters the rapid development of precedent, whereas one-step enforces norms of judicial restraint.* Chevron *thus resembles qualified-immunity jurisprudence, which has likewise struggled to answer the normative question of whether unnecessary holdings should be impermissible, obligatory, or optional. Qualified-immunity case law also sheds much-needed light on how courts should exercise their* Chevron *discretion. Finally, a review of all published federal appellate decisions citing* Chevron *in 2011 sheds light on current* Chevron *practice and suggests that optional two-step may best explain the tensions underlying current* Chevron *jurisprudence.*

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* J.D., Yale Law School; A.B., Harvard University. The author is grateful to Will Baude, Kristen Eichensehr, Steve Horowitz, Jerry Mashaw, Alex Potapov, Chris Re, Ganesh Sitaraman, Peter Schuck, Chris Walker, and the editors of this *Journal*. All views expressed herein are, of course, the author's alone and are not necessarily the views of the law firm with which the author is associated.

INTRODUCTION

Chevron deference has been with us for almost thirty years, and, for the great majority of that time, so have the deceptively familiar expressions "*Chevron* step one" and "*Chevron* step two."[1] In case after case—law review after law review—it was intoned that: "First, always, is the question whether Congress has directly spoken to the precise question at issue," since "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[2] However, "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] Thus was the activity of agency deference divided into two discrete phases, a first and a second, with the relationship between them a subject of constant mystification.[4]

Then came an important essay with a title that said it all: "*Chevron* Has Only One Step," by Professors Matthew C. Stephenson and Adrian Vermeule.[5] While recognizing that many commentators had "point[ed] out the difficulties of distinguishing between *Chevron*'s two steps,"[6] Stephenson and Vermeule were the first to conclude unequivocally that *Chevron*'s two steps are analytically equivalent and therefore redundant.[7] "The single question," the authors explained, "is whether the agency's construction is permissible as a matter of statutory

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1. Agency deference cases always involve a threshold inquiry into whether deference is appropriate at all. Some commentators refer to this inquiry as "step zero." *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). By contrast, other commentators refer to this threshold issue as the question of whether a particular case falls within "*Chevron*'s domain." *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001). Because it is simpler not to count this ever-present threshold issue as a distinct "step," this Article follows the latter approach.

2. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

3. *Id.* at 843.

4. For a prominent example of the academic literature trying to make sense of *Chevron*'s two steps, see Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254–55 (1997) (arguing that step two should be considered identical to arbitrary-and-capricious review); *see also infra* note 6 (citing other treatments).

5. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

6. *Id.* at 597 n.3 (collecting sources). For early suggestions that the two *Chevron* steps might be interchangeable, see *Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt*, 30 F.3d 190, 193 (D.C. Cir. 1994) (Williams, J.), *rev'd*, 515 U.S. 687 (1995); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 256 n.10 (1988).

7. *See* Stephenson & Vermeule, *supra* note 5, at 599.

interpretation . . . ."[8] According to Stephenson and Vermeule, we would lose nothing—and incur "no collateral cost"—by eliminating one of *Chevron*'s two identical steps.[9]

As it happened, the Supreme Court was already moving toward a "one-step" view of *Chevron*. Indeed, the Court had just made a similar point, per Justice Antonin Scalia, in a passage that Stephenson and Vermeule excerpted as the headnote of their essay. In the quoted passage, the Court explained that it was "omitting the supposedly prior [step one] inquiry of 'whether Congress has directly spoken to the precise question at issue'" and was instead proceeding immediately to the step-two "proposition . . . that a reasonable agency interpretation prevails."[10] Step one was superfluous, according to the Court, for "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."[11] That observation notably failed to persuade *Chevron*'s author, Justice John Paul Stevens, who wrote in dissent that the Court's revisionist approach was "puzzling."[12]

The years since Stephenson and Vermeule's essay have been good to the one-step version of *Chevron* that they recommended. While the Supreme Court sometimes differentiates between the traditional two steps, it more often proceeds as though *Chevron* consisted of a singular precept: if the agency's interpretation is reasonable, then that interpretation is entitled to deference and should be followed.[13] Justice Scalia penned one of the most recent statements of this view, and he supported it with a now-familiar citation: "See Stephenson and Vermeule, *Chevron* Has Only One Step."[14]

But every movement meets resistance, and a number of commentators have opposed the trend toward one-step *Chevron*. Most notably, Professors Kenneth A. Bamberger and Peter L. Strauss authored a rejoinder that appeared to defend the traditional notion that *Chevron* has two separate steps.[15] Yet Bamberger and Strauss actually defended two-step *Chevron* based on their own revisionist view[16]—namely, that step two replicates the Administrative Procedure Act's general prohibition on arbitrary-and-capricious agency action.[17] Under that approach, a

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8. *Id.* ("[T]he two *Chevron* steps both ask this question, just in different ways. As a result, the two steps are mutually convertible.").

9. *Id.* at 609.

10. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) (citation omitted).

11. *Id.*

12. *Id.* at 241 n.5 (Stevens, J., dissenting).

13. *See infra* Part III.A.

14. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment).

15. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009).

16. Bamberger and Strauss acknowledge that *Chevron* is often read in accord with what this Article calls "traditional" *Chevron*. *See id.* at 613–14 ("*Chevron*'s language about the 'precise question at issue' has misled many, both judges and commentators, to characterize Step One as if its function were exhausted once a court has found statutory ambiguity . . . .") (footnote omitted).

17. *See* 5 U.S.C. § 706(2)(A) (prohibiting "arbitrary" and "capricious" agency action); Bamberger & Strauss, *supra* note 15, at 625 ("At this [second] step, Section 706(2) of the Administrative Procedure Act sets the general standard . . . .").

court's own statutory interpretations are confined to step one, whereas step two asks whether the agency has undertaken an adequately rational decision-making process.[18] Many courts in fact follow that alternative model, thereby sowing additional confusion regarding *Chevron*'s proper operation.[19] The resulting analytical disarray has become so severe that some commentators now cite it as a reason to abandon *Chevron* altogether.[20]

This Article begins by isolating the invaluable insights of prior commentary. On the one hand, Stephenson and Vermeule correctly gleaned that there is often no difference between *Chevron*'s two steps. In particular, there is no difference between *invalidating* an agency action at step one as opposed to step two. On the other hand, Bamberger and Strauss were right to observe that mandatoriness and reasonableness findings have distinct implications.[21] Indeed, there is a very important difference between *upholding* an agency interpretation as mandatory or as reasonable: only the former bars future agency reinterpretations. Adding these insights together leads to a conclusion contrary to both pairs of commentators: traditional *Chevron* has two distinct steps that respectively ask whether the agency's view is mandatory and whether it is reasonable. Contrary to Stephenson and Vermeule, each of the two steps does unique work. And, contrary to Bamberger and Strauss, neither step replicates the APA's separate prohibition on arbitrary-and-capricious agency action.

But if traditional *Chevron* does indeed have two distinct steps, it is fair to ask whether it should. On reflection, there are important advantages and disadvantages to traditional *Chevron*'s command that courts should ask about both mandatoriness and reasonableness in every case. For example, requiring courts to answer both questions facilitates the rapid development of the law, but asking only about reasonableness seems consistent with principles of judicial restraint. Instead of following traditional two-step, perhaps courts should ask only about reasonableness. Or perhaps courts should view *Chevron* as a discretionary decision procedure, such that they normally ask only about reasonableness but sometimes also ask about mandatoriness. In short, mandatoriness findings could be obligatory, prohibited, or discretionary.

This tripartite menu of options has an analogue in qualified-immunity doctrine. In both contexts, courts have debated the virtues and vices of issuing helpful-but-unnecessary decisions. In the qualified-immunity context, however, courts have settled on a discretionary decision procedure featuring an optional second step: courts first ask whether the government acted reasonably and then have the option to ask whether the government's conduct was also lawful.[22] A discretionary two-step decision procedure also makes sense in the *Chevron* context. What is more,

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18. *See infra* note 73 (quoting Bamberger & Strauss, *supra* note 15, at 613).

19. *See infra* note 66 (collecting sources).

20. *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 835 (2010) ("*Chevron* thus has anywhere from one to four steps depending on what and how one counts. After twenty-five years, we should expect more clarity regarding the application of a framework doctrine like *Chevron*.").

21. *See infra* note 70.

22. *See* Pearson v. Callahan, 555 U.S. 223, 227 (2009).

examining qualified immunity helps shed light on how courts should exercise the discretion afforded them by optional two-step *Chevron*.

The foregoing conclusions find support in an empirical review of current *Chevron* practice, including a survey of all published federal appellate decisions that cited *Chevron* in 2011. This research updates earlier studies and suggests that many courts already employ an optional two-step approach.

The argument proceeds in three parts. Part I addresses the logical structure of *Chevron* deference in order to assess the variety of ways in which the deference inquiry might be implemented. After discussing the dueling writings of Professors Stephenson and Vermeule and Bamberger and Strauss, this Part identifies "optional two-step" *Chevron*, whereby a court first asks whether the agency's interpretation is reasonable and then has the option of asking the additional question whether the agency's view is also mandatory.

Part II considers the normative structure of *Chevron* deference—that is, the unavoidable but previously overlooked set of prescriptive issues that must dictate which version of *Chevron* ought to be adopted. Far from being practically interchangeable, each distinct version of *Chevron* deference has its own set of advantages and disadvantages. Traditional two-step fosters the rapid development of the law, whereas one-step accords with longstanding principles of judicial restraint. For its part, optional two-step has the advantage of paralleling the decision-making procedure now used in qualified-immunity cases.

Part III then provides an empirical perspective by studying recent judicial practice in the Supreme Court and federal courts of appeals. While each of the three logically available versions of *Chevron* finds precedential support, recent Supreme Court jurisprudence generally implements the optional two-step approach. That is, the Court sometimes chooses to ask about both mandatoriness and reasonableness, but it more often asks only about reasonableness. The courts of appeals are similarly conflicted over the number of steps in the *Chevron* inquiry. These findings shed light on *Chevron*'s practical operation, along with the consequences of modifying the existing *Chevron* deference framework.

Finally, the Conclusion offers a brief comment on the new doctrinal territory that optional two-step opens up. As noted, courts should exercise discretion in *Chevron* cases; and, more to the point, they already appear to be doing so. Yet the viability of that approach depends on the development of new doctrines that might guide, and thereby legitimize, courts' exercise of their *Chevron* discretion.

I. THE LOGICAL STRUCTURE OF *CHEVRON* DEFERENCE

Debates over the structure of *Chevron* often focus on descriptive or logical claims. Professors Stephenson and Vermeule offer a useful case in point, as even their title—"*Chevron* Has Only One Step"—suppresses normative considerations. This Part discusses the leading works on the structure of *Chevron* deference. In particular, this Part takes up the one-step version of *Chevron* advocated by Stephenson and Vermeule, as well as the distinct version of *Chevron* propounded by Professors Bamberger and Strauss. Through an analysis of these competing proposals, this Part establishes a new, clearer understanding of the logical options available. Once this groundwork is accomplished, it will become possible to

evaluate the strengths and weaknesses of competing formulations of the *Chevron* inquiry, each of which offers a substantively different deference regime.

A. Traditional Chevron *Has Two Distinct Steps*

Stephenson and Vermeule rest their case on a single claim: that steps one and two of the traditional two-step *Chevron* inquiry are formally identical and therefore redundant.[23] When two propositions are formally identical, it is illogical to think they are different, or to treat them differently. The claim that steps one and two are identical thus provides a powerful basis for critique. If Stephenson and Vermeule are correct, then *any* differentiation between *Chevron*'s two steps would be a logical error—a confusion, by definition. We should not abide an "artificial division of one inquiry into two."[24]

Stephenson and Vermeule take as their principal target judges and scholars who think that *Chevron*'s two steps address different questions of statutory interpretation.[25] The authors particularly have in mind people who "believe that Step One requires them to ascertain whether the statute has a single, clear meaning before deciding whether the agency's interpretation is reasonable."[26] Of course, the Supreme Court's actual decision in *Chevron* said precisely that. But Stephenson and Vermeule think that the Court misspoke—as it must have done if *Chevron*'s two steps were actually identical. Stephenson and Vermeule acknowledge their revisionist ambition in so many words: "Sometimes judges write watershed opinions whose deep logic only gradually becomes clear and whose language fails to capture that deep logic."[27] The remainder of this Part argues that *Chevron*'s actual "language" captures its "logic" more effectively than does the one-step approach proposed by Stephenson and Vermeule.

There are three possible outcomes in every case involving judicial deference to an agency interpretation: (i) the statute clearly means what the agency says, (ii) the statute is ambiguous as to what the agency says, or (iii) the statute is clearly contrary to what the agency says.

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23. *See, e.g.*, Stephenson & Vermeule, *supra* note 5, at 597 ("*Chevron*, properly understood, has only one step."); *id.* at 599 ("[T]he two *Chevron* steps both ask this question, just in different ways. As a result, the two steps are mutually convertible."); *id.* at 609 ("Judges and scholars could simplify matters, at no collateral cost, by recognizing that *Chevron* . . . has only one step.").

24. *Id.* at 597–98.

25. *Id.* at 605–06. The U.S. Solicitor General recently offered a succinct statement of the traditional view that *Chevron* calls for an interpretive exercise at both steps. *See* Transcript of Oral Argument at 34–35, City of Arlington v. FCC, 133 S. Ct. 1863 (2013) (No. 11-1545) (Solicitor General Verrilli: "Step 1 of *Chevron* . . . of course . . . us[es] the normal tools of statutory construction," and "Step Two of *Chevron* . . . asks whether the agency's interpretation of the provision at issue . . . [is] within the bounds of what the language can reasonably accommodate . . . [.]").

26. Stephenson & Vermeule, *supra* note 5, at 605.

27. *Id.* at 609 (arguing that "there is no need for courts and scholars to cling to the original language of" *Chevron*).

The two-stage decision procedure that the Supreme Court described in *Chevron* ensures that courts consider each of the three foregoing options. At step one, the court asks if Congress "has directly spoken to the precise question at issue," thereby either adopting or ruling out the agency's position.[28] If Congress has directly addressed the question at issue, then the court must further determine whether the agency's views accord with the clear "intent of Congress."[29] And if Congress has not directly addressed the relevant question, then the court goes on to step two and asks if the agency's position "is based on a permissible construction."[30]

Traditional two-step *Chevron* thus asks two questions, each with two possible answers (yes/no). That approach creates a certain degree of redundancy. Two questions, each with two possible answers, leaves room for four possible outcomes defined by a two-by-two matrix. Yet only three actual deference options exist. The diagram below depicts the four possible pairs of answers created by applying traditional two-step *Chevron* (i.e., yes/yes, yes/no, no/yes, and no/no), along with the fact that there are only three substantive results available at the inquiry's conclusion (i.e., mandatory, reasonable, and unreasonable).

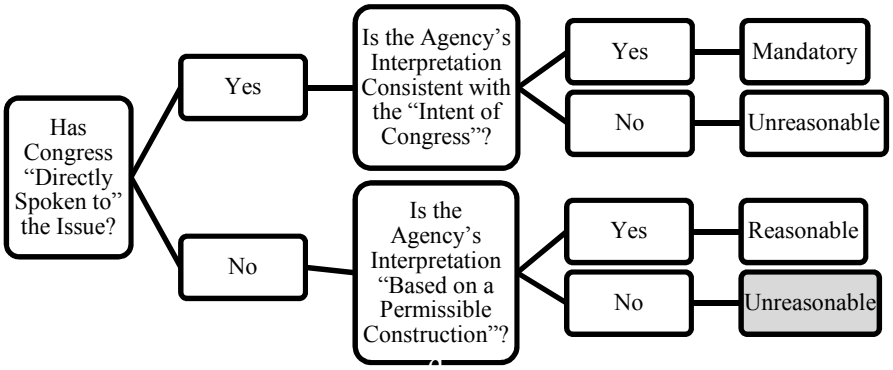

Figure 1. Traditional Two-Step *Chevron*.

The redundancy is easily located. A yes/yes pair of answers means that the agency's reading is mandatory: Congress has spoken directly, and the agency's view accords with Congress's direction. A yes/no pair means that the agency's view should be overturned for defying Congress's specific resolution of the relevant issue. And a no/yes pair means that the agency's view is permissible in light of Congress's silence and so warrants deference. Those pairs of answers describe all of the three possible outcomes in agency deference cases.

Yet the traditional two-step framework leaves open the possibility of a fourth possible pair: no/no, where the agency's reading survives step one but is nonetheless impermissible at step two. That scenario, which is shaded in the diagram above, is materially indistinguishable from the aforementioned yes/no pair.

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28. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
29. *Id.*
30. *Id.* at 843.

In both cases, something about the statute is both clear and inconsistent with the agency's view. In other words, any judicial decision to invalidate agency action as a yes/no at step one can be recharacterized as a no/no decision at step two.

This is where the critique offered by Stephenson and Vermeule has force: a yes/no pair under two-step *Chevron* really is logically indistinguishable from a no/no pair. The Supreme Court was therefore correct to say, as quoted in Stephenson and Vermeule's paper, that "if Congress has directly spoken to an issue [at step one] then any agency interpretation contradicting what Congress has said would be unreasonable [at step two]."[31] To that limited extent, it is accurate to say that traditional two-step *Chevron*, as articulated by the Supreme Court, contains a redundancy.

Stephenson and Vermeule capitalize on the limited redundancy present in traditional two-step *Chevron* by picking examples that showcase that point. Near the opening of their essay, for example, the authors state that "the two *Chevron* steps both ask [the same] question, just in different ways" and therefore "are mutually convertible."[32] Stephenson and Vermeule then describe two cases—*FDA v. Brown & Williamson Tobacco Corp.*[33] and *Goldstein v. SEC*[34]—in which courts struck down agency interpretations under step one and step two, respectively. Stephenson and Vermeule assert that these examples prove that "Step One and Step Two opinions are always mutually convertible."[35] But that conclusion is incorrect.

The examples chosen by Stephenson and Vermeule instead prove, at most, that yes/no and no/no pairs are interchangeable, as indicated by the above diagram. The purported interchangeability of *Chevron*'s two steps evaporates in cases where agency interpretation is upheld: yes/yes pairs lead to findings that the agency's reading is mandatory, whereas no/yes pairs produce the very different result that the agency's reading is reasonable. Revealingly, Stephenson and Vermeule's interchangeability examples do not include a judicial decision *upholding* an agency interpretation.[36] Had the authors introduced such an example, they would have confronted the difference between step-one and step-two holdings.

What happens when *Chevron* is reduced to only one step? The one-step version of *Chevron* that Stephenson and Vermeule propose is essentially the same verbal formulation as step two.[37] And the authors express their conclusion by saying that step one is unnecessary. So it appears that the one-step version of *Chevron* proposed by Stephenson and Vermeule, like step two, has only two possible answers, either yes or no. To repeat the key sentence from Stephenson and Vermeule's essay: "The single question is whether the agency's construction is

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31. Stephenson & Vermeule, *supra* note 5, at 597 (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009)).

32. *Id.* at 599.

33. 529 U.S. 120 (2000).

34. 451 F.3d 873 (D.C. Cir. 2006).

35. Stephenson & Vermeule, *supra* note 5, at 600.

36. For another example of this pattern in Stephenson and Vermeule's essay, see *infra* note 40 and accompanying text.

37. Stephenson & Vermeule, *supra* note 5, at 605.

permissible as a matter of statutory interpretation . . . ."[38] A question that uses the word "whether" in this way normally has only "yes" or "no" as possible answers.

That leads to a serious problem, however. A single question with two possible answers cannot possibly capture the full range of answers available in deference cases. Again, there are three potential answers in all agency deference cases: the agency's interpretation may be mandatory, it may be reasonable, or it may be impermissible. Because one-step *Chevron* can be answered in only two ways (yes or no), it cannot capture one of the three possible answers in agency deference cases.

So Stephenson and Vermeule are faced with a choice. They can either give up on their claim that two-step and one-step *Chevron* are analytically identical, or they must say that one-step *Chevron* has three possible answers. Given that their entire critique hangs on the proposition that one-step and two-step *Chevron* are interchangeable, Stephenson and Vermeule would presumably adopt the latter of these options.

But if Stephenson and Vermeule take the view that one-step *Chevron* has three possible answers, then they would not have simplified the traditional two-step approach. Again, a "whether" question like one-step *Chevron* invites two possible options, either yes or no. For a "whether" question to permit three options, it must be accompanied by some other principle specifying the full range of possibilities. That is, Stephenson and Vermeule cannot rest after having asked their purportedly solitary question: "whether the agency's construction is permissible as a matter of statutory interpretation."[39] Rather, they must then ask a follow-up question: "Also, please consider whether the agency's construction is mandatory." Ironically, "one-step" *Chevron* can function as intended only with the help of a second step.[40]

In sum, those who hope to capture the full range of options in deference cases do not face a choice between two redundant steps and a single elegant step, as Stephenson and Vermeule would have it. The choice is instead between: (i) two questions, each with yes or no as options; and (ii) one question with yes or no as options, accompanied by a separate direction to consider another yes or no question. A moment's reflection reveals that (i) and (ii) are substantively identical. And both have two steps.

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38. *Id.* at 599.

39. *Id.*

40. Deviating from Stephenson and Vermeule's framework, one might suggest that traditional *Chevron*'s two steps should be fused together, thereby creating a single, three-option question. In effect, this version of *Chevron* would ask: "Is the agency's interpretation reasonable, unreasonable, or mandatory?" But any two-step procedure can be rewritten as a one-step question with a menu of options, and the availability of a multipart question hardly demonstrates that a two-step procedure would be redundant.

Imagine, for example, you want to know whether visitors to the Land of Oz are good witches and, if they aren't, whether they are wicked or not witches at all. You might then adopt a two-step procedure: first, ask whether a particular visitor—say, Dorothy—is a witch; if yes, then further ask whether Dorothy is wicked. Clearly, each step of that procedure does unique work. Yet the two-step procedure is equivalent to asking the single, multipart question whether Dorothy is a wicked witch, a good witch, or not a witch at all. The single, multipart question hardly qualifies as a simplifying improvement. Just so with *Chevron*.

B. The Additional Step Is Important

We have already seen that the traditional two-step approach to *Chevron* ensures consideration of all three possible answers to deference questions. By contrast, one-step *Chevron* must be complemented by an additional question in order to ensure consideration of the full range of possible answers. To the extent that Stephenson and Vermeule have not accepted or made clear the need for this separate step, they risk truncating, instead of simplifying, the traditional *Chevron* inquiry.[41]

After outlining the distinction between reasonable and unreasonable agency interpretations, Stephenson and Vermeule confront the exact position advocated here: "We might distinguish Step One and Step Two by interpreting Step One to ask whether Congress has clearly specified *one, and only one,* permissible interpretation of the statute."[42] Quite so. That is just another way of saying—as argued above—that step one asks whether the agency's interpretation is mandatory, apart from whether it is reasonable or unreasonable. Stephenson and Vermeule should leap at their own suggestion.

Instead, the authors reject that straightforward conclusion—as they must in order to advance their thesis that having a second step does no additional work. How can they do this? In short, by denying that the additional step matters.

Stephenson and Vermeule first explain that "Congress' intention may be ambiguous within a range, but not at all ambiguous as to interpretations outside that range, which are clearly forbidden"; and they further note that statutes can be open to a "range of reasonable interpretations," thereby giving rise to "'policy space' within which agencies may make reasoned choices."[43] Having reiterated those uncontroversial observations, Stephenson and Vermeule conclude: "There is therefore no good reason why we should decide whether the statute has only one possible reading before deciding simply whether the agency's interpretation falls

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41. Arguing in a similar vein, Professors Bamberger and Strauss briefly suggested that, "[t]o the extent" one-step *Chevron* preserves what this Article calls mandatoriness findings, its "proposed doctrinal change" would be "merely a semantic one." Bamberger & Strauss, *supra* note 15, at 617. However, Bamberger and Strauss immediately minimized the importance of mandatoriness findings by asserting that they are rare. *See id.* at 615–16 (stating that judicial interpretations that "precisely map[] a singular congressional intent on the issue at hand" are of "lesser interest in our judgment, given the rarity of point judgments by Congress, particularly in the context of administrative law"). That point tended to support one-step *Chevron*, since the alleged rarity of mandatoriness holdings suggests that little would be lost by dropping the mandatoriness question from the *Chevron* inquiry.

Bamberger and Strauss primarily argued against one-step *Chevron* on the ground that courts applying that approach might sometimes give the mistaken impression of having made mandatoriness holdings. *See id*. at 617–21; *id*. at 618 (arguing that "a court that . . . concludes only that an agency interpretation passes muster . . . is permitted a sort of aggrandizement by implication" in that it "may invite the inference that its holding constitutes a precedential Step One analysis"). But any potential confusion on that score could easily be dispelled by making clear that one-step *Chevron* asks only about reasonableness and therefore renders mandatoriness findings impossible.

42. Stephenson & Vermeule, *supra* note 5, at 602 (emphasis in original).

43. *Id.*

into the range of permissible interpretations."[44] Taking the absolutist line necessary to defend their essay's thesis, to say nothing of its pithy title, Stephenson and Vermeule assert that "nothing of consequence turns on whether the set of permissible interpretations has one element or more than one element; the only question is whether the agency's interpretation is in that set or not."[45]

That last statement, read literally, is incorrect. What Stephenson and Vermeule presumably mean is that *whether the agency wins* doesn't turn on "whether the set of permissible interpretations has one element or more," so long as "the agency's interpretation is in that set."[46] That narrower statement would be true enough. But as the authors elsewhere recognize,[47] it is a mistake to think that "*nothing of consequence* turns on whether the set of permissible interpretations has one element or more than one element."[48] If a court says that the "set of permissible interpretations has one element"[49] while upholding an agency interpretation, then it has made what is normally called a "step-one holding."[50] It has bound the agency to adhere to its reading henceforth, no matter what the expert agency might later discover and come what may in the upcoming election cycle. By contrast, if the court says that "the set of permissible interpretations has"—or may have—"more than one element,"[51] then the agency remains free to seek out and adopt another element in the set. Whether an agency is constrained by its own success marks the critical difference between a reading that is mandatory and one that is reasonable.

We can be more specific. Both step-one and step-two rulings in favor of agencies demonstrate that the agency's view is at least reasonable. But step-one rulings mean something more—namely, that all other views of the relevant issue are unreasonable. In other words, a step-one holding in favor of an agency consists of a reasonableness finding (as to the agency's view) plus an unreasonableness

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44. *Id.* Viewed in isolation, this sentence could be read to pertain only to the timing of the two steps; that is, the sentence could mean that there is no reason to ask whether the agency's reading is mandatory "before" asking whether it is reasonable. *Id.* But surely there is a difference between asking both of those questions and asking only one of them. In other words, there is a difference between asking (at step one) if the agency's reading of the statute is mandatory and asking (at step two) if the agency's reading is reasonable. Stephenson and Vermeule are wrong to insist that we lose nothing by asking only the second question. Further, the timing of the two steps may actually be important as well. *See infra* Part II.

45. *Id.*; *see also id.* at 609 (asserting that adopting one-step *Chevron* would come at "no collateral cost").

46. *Id.* at 602.

47. *Id.* at 605–06 ("[T]he more judges are inclined to declare that a statute has one and only one meaning, the harder it will be for future agencies to adopt alternative constructions of the same statute that the initial court did not anticipate."); *see also* Bamberger & Strauss, *supra* note 15, at 616 ("[A] judicial precedent holding that a particular interpretation is either required or precluded fixes statutory meaning to that extent, foreclosing future agency constructions to the contrary.").

48. Stephenson & Vermeule, *supra* note 5, at 602 (emphasis added).

49. *Id.*

50. *E.g.*, Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 193 (3d Cir. 1995) ("The Supreme Court's decision in [*Reno v. Koray*, 515 U.S. 50 (1995)] is a classic *Chevron* step one holding" because the agency's view was upheld as "not ambiguous.").

51. Stephenson & Vermeule, *supra* note 5, at 602.

finding (as to all other views). That additional, prohibitory conclusion does not arise when a court affirmatively responds to the question, "Is the agency's view permissible?" When a court affirms an agency interpretation for being reasonable, it thereby postpones the mandatoriness inquiry, perhaps indefinitely. Once again, a defining feature of traditional two-step *Chevron* is its insistence that courts find agency interpretations to be mandatory whenever possible. In sharp contrast, one-step *Chevron* would forgo those findings by asking only whether the agency's interpretation is reasonable.

Besides having obvious practical importance for judicial and agency decision-making, the difference between mandatory and reasonable readings also goes to one of *Chevron*'s core purposes: fostering political accountability.[52] Under one-step *Chevron*, courts would hold agency interpretations to be reasonable without clarifying whether they are mandatory. Those holdings would obscure whether responsibility for the agency policy lies most immediately with the Executive or with Congress. Consider interpretations offered by non-independent, executive-branch agencies over which the President has considerable influence, such as the Environmental Protection Agency (EPA). When the agency interprets a federal statute, interested parties will very much want to know whether that interpretation was mandatory or reasonable. If it was mandatory, then interested groups must seek relief in the halls of Congress. But if the agency's interpretation was only reasonable, then aggrieved parties might prefer to visit the White House first.

Mandatory readings are also integral to implementation of the Supreme Court's holding in *Brand X*[53] that judicial interpretations of statutes subsequently bind agencies only if the reviewing court specifies that its interpretation was unambiguous.[54] In a footnote, Stephenson and Vermeule argue that *Brand X* would be unaffected by one-step *Chevron*, but in making this claim they once again overlook cases that involve a prior agency victory.[55] According to the authors, "if the prior court stated clearly that the agency's (current) interpretation was outside the zone of the permissible, then the agency may not now adopt that interpretation."[56] Having thus narrowed their gaze to cases involving invalidation of agency action, Stephenson and Vermeule conclude: "nothing in the logical structure of the inquiry requires a distinction between cases in which the zone of the permissible reduces to a single point, and cases in which it does not—the

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52. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency . . . .").

53. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005) (explaining that "a precedent holding a statute to be unambiguous forecloses a contrary agency construction" (citing Neal v. United States, 516 U.S. 284 (1996))).

54. *See* Bamberger & Strauss, *supra* note 15, at 616 (making this point, albeit without distinguishing cases involving agency victories from defeats).

55. As discussed in Part I, inadequate attention to agency victories also underlies Stephenson and Vermeule's overbroad claim that the two steps are always interchangeable. *See supra* text accompanying note 35.

56. Stephenson & Vermeule, *supra* note 5, at 606 n.32.

distinction at the heart of the current two-step framework."[57] But what if the prior court had held at step one that the agency's earlier interpretation was mandatory—in other words, that "the zone of the permissible reduces to a single point"?[58] In that event, the agency would have been limited as to future interpretations. In pointed contrast, the agency would not be so limited if the prior court had issued only a one-step holding pertaining to reasonableness alone.

For all these reasons, Stephenson and Vermeule are wrong to claim that "the only question is whether the agency's interpretation is in that set," that is, the set of reasonable readings, "or not."[59] Perhaps that is the only question that we *should* ask, but it is not the only available or important question in agency deference cases. Traditional two-step asks the additional, highly significant question of whether the agency's reading is mandatory.

C. How to Cure Traditional Chevron*'s Redundancy*

We saw earlier that traditional two-step *Chevron* generates a limited redundancy. To summarize: asking the two successive questions that make up traditional two-step *Chevron*, where each question is susceptible to two answers, yields four possible outcomes. Yet there are only three possible answers in deference cases: mandatory, reasonable, and unreasonable. The redundancy arises when agency interpretations are held to be unreasonable—an outcome that is equally available at either step one or step two.

Fortunately, this limited redundancy can be cured. The simplest way to do so is to tweak step one so that it focuses on the unique work made possible by that step—namely, finding agency interpretations to be mandatory.[60] To implement that tweak, courts engaged in step one might ask "[w]hether Congress has directly spoken to the precise question at issue" in a way that mandates the reading offered by the agency?[61] Or, even more simply: "Is the agency's reading mandatory?" If no, then step two would follow without modification.

Under this revision, there would be three possible outcomes: yes, no/yes, and no/no. And each outcome would lead to a unique, non-duplicative answer. A yes outcome would mean that the agency's view is mandatory. A no/yes outcome would mean that the agency's view is reasonable. And a no/no outcome would mean that the agency's view is unreasonable. This revision is consistent with the Court's statement in *Chevron* that, "[i]f the intent of Congress is clear, that is the end of the matter."[62] And it also accords with the common practice of referring to

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57. *Id.*

58. *Id.*

59. *Id.* at 602.

60. Another solution would be to ask (at step one) whether the agency's view is reasonable and (at step two) whether the agency's reading is mandatory. In other words, step one might ask whether the agency's reading is consistent with the statute. If no, then the agency would lose, and the inquiry would end. If yes, then an obligatory, non-optional step two would ask if the agency's view is also mandatory. *Cf. infra* note 125.

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

62. *Id.*

mandatoriness findings as "step-one" holdings.[63] Below, Figure 2 illustrates this revised version of traditional two-step *Chevron*.

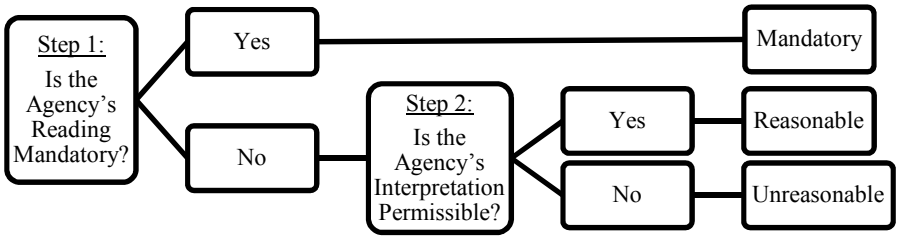

Figure 2. Revised Traditional Two-Step.

In order to focus attention on the unique work being done at step one, the remainder of this Article will adopt the above tweak. Again, this revision calls for courts to ask at step one, "Is the agency's reading mandatory?" Courts would then ask the same step-two question that doubles as one-step *Chevron*, "Is the agency's reading permissible?"

D. The Possibility of an Optional Two-Step Procedure

So far, we have seen that traditional *Chevron* is defined in part by having two steps, each of which does unique and important interpretive work. Asking whether an agency interpretation is both mandatory (step one) and reasonable (step two) reveals more information than just asking about either mandatoriness or reasonableness alone.

But traditional two-step *Chevron* has another defining feature: it makes mandatoriness findings, well, mandatory. That is the effect of requiring consideration of both steps in every case. Under traditional two-step *Chevron*, there is no way to reach the second step (on reasonableness) without previously considering at the first step whether Congress has spoken directly to the interpretive question in a way that would preclude later agency re-interpretation.

One-step *Chevron* actually rules out the possibility of mandatoriness findings. When asked, "Is the agency's view permissible," courts implementing one-step *Chevron* will answer "yes" and thereby terminate the case, even when the real answer is, "Not only is it permissible, it's mandatory."[64] Put another way, two-step *Chevron* makes mandatoriness findings obligatory, whereas one-step *Chevron* makes mandatoriness findings impermissible.

There is a third, intermediate option. Instead of being either obligatory or impermissible, mandatoriness findings could be optional. The essential deference question, after all, is the question of reasonableness. If the agency is reasonable, it wins. And if it is unreasonable, it loses. By contrast, the mandatoriness question is

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63. *See supra* note 50.

64. Saying that an interpretation is "mandatory" means more than saying that it is the "best" interpretation. When the best reading is also the only reasonable one, then it is mandatory. *See supra* text accompanying note 51.

expendable: it is important only because of the useful information it reveals for future decision making by litigants, administrators, courts, and legislators.

The third potential version of the *Chevron* inquiry can be termed "optional two-step." Importantly, this previously unidentified approach would reverse the order of the traditional two steps. That is, optional two-step *Chevron* would first ask the reasonableness question, and then it would give courts discretion to ask a second question regarding mandatoriness. This reversed sequence helpfully prioritizes the indispensable and easier inquiry into reasonableness, while postponing the optional, harder question of mandatoriness. The advantages and disadvantages of optional two-step *Chevron* are discussed at length in Part II below.

E. On Equating Step Two with Arbitrariness Review

At first blush, the analysis provided above might seem like a defense of the conventional wisdom regarding *Chevron*, which holds that *Chevron* deference has two steps. But the above analysis actually goes against the grain of administrative case law and scholarship.

Many commentators,[65] with abundant precedential support,[66] offer a picture of *Chevron* wherein only step one concerns statutory interpretation as such. Step two, by contrast, is said to entail the requirement of rational explanation codified in section 706(2) of the Administrative Procedure Act (APA).[67] Professors Kenneth Bamberger and Peter L. Strauss exemplify this view.[68] As noted above,[69] Bamberger and Strauss helpfully distinguish between reasonableness and mandatoriness findings, but they argue that both of those inquiries are encompassed within step one.[70] At step two, by contrast, "Section 706(2) of the [APA] sets the

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65. *See* Bamberger & Strauss, *supra* note 15, at 621 n.39 (describing this view as reflecting an "emerging consensus"); *supra* note 16 (distinguishing the traditional view).

66. *See, e.g.*, Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) ("[U]nder *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'") (citation omitted) (internal quotation marks omitted); AT&T Corp. v. Iowa Utils Bd., 525 U.S. 366, 391–92 (1999); Chamber of Commerce of the U.S. v. FEC, 76 F.3d 1234, 1235 (D.C. Cir. 1996) ("[T]he second step of *Chevron* . . . overlaps with the arbitrary and capricious standard"); *supra* note 4.

67. As Bamberger and Strauss are careful to note, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), does not exhaust the range of factors relevant when testing agency interpretations under the APA, even though "*State Farm*'s inquiry into consideration of relevant regulatory factors and explanation based on record evidence certainly plays a significant role in determining the appropriateness of many agency interpretations." Bamberger & Strauss, *supra* note 15, at 622; *see also id.* at 625 ("While the statutory language defining [the step two] inquiry is the same language that governed *State Farm*, the emphasis may vary.").

68. *See* Bamberger & Strauss, *supra* note 15, at 602–04, 624–25; *see also* Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1162 (2012) ("Step two, thus seen, is merely what section 706(2)(A) of the APA commands."); Levin, *supra* note 4.

69. *See* text accompanying *supra* note 21; *supra* note 41.

70. When articulating step one, Bamberger and Strauss even use a sentence with a tripartite "either . . . or . . . or" construction. *See* Bamberger & Strauss, *supra* note 15, at 624 ("At *Chevron*'s first step, courts reviewing administrative constructions should begin by

general standard."[71] Thus, an agency would fail arbitrariness review at step two if it arrived at a reasonable interpretation of an ambiguous statute, but did so for arbitrary and capricious reasons.[72] On this view, step one is concerned with all substantive questions of statutory interpretation, whereas step two is occupied with the fundamentally procedural question of adequate explanation.[73]

However, any attempt to equate step two with arbitrariness review encounters a significant logical problem: it shoehorns consideration of two substantively distinct issues—reasonableness and mandatoriness—into a purportedly singular first "step." The familiar term "*Chevron* step one" thus becomes a misnomer. To solve this difficulty, the vision of *Chevron* propounded by Bamberger and Strauss might be relabeled "three-step *Chevron*." This new label would reflect that, for Bamberger and Strauss, the *Chevron* inquiry encompasses three distinct questions—namely, whether the agency's interpretation is reasonable, mandatory, and rationally explained.[74]

But does three-step *Chevron* really offer a distinct way to structure the deference inquiry? Table 1 explores this question by schematizing the role that section 706(2) plays under three approaches: traditional two-step *Chevron*, the three-step version of *Chevron* advanced by Bamberger and Strauss, and one-step *Chevron*.

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identifying whether congressional instructions clearly *either* require *or* preclude the choice the agency has made *or*, instead, whether the agency's choice falls within a range of possibilities permitted by language that Congress has left ambiguous.") (emphases added). This single question with a tripartite menu of options (mandatory, unreasonable, reasonable) can easily be rewritten as traditional two-step *Chevron*. *See supra* note 40.

71. *Id.* at 625.

72. Agencies can articulate unlawfully arbitrary reasons on the way toward arriving at substantively reasonable statutory interpretations. For example, an agency could simply flip a coin, and then, by happenstance, arrive at a defensible conclusion. *See State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem . . . ."). Bamberger and Strauss supply the example of an agency that erroneously "construed a prior judicial construction to mean that the statute could bear only one particular meaning." Bamberger & Strauss, *supra* note 15, at 622.

73. *See* Bamberger & Strauss, *supra* note 15, at 613 (distinguishing between "the 'interpretive question' (involving the permissibility of an agency construction in light of statutory language) and the 'decisionmaking question' (regarding the reasonableness of the process by which a permissible construction was reached)" and concluding: "We would simply call these [two questions] 'Step One' and 'Step Two.'").

74. Courts have sometimes followed such a three-step approach. *See, e.g.*, Int'l Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 335–39 (D.C. Cir. 1988).

Table 1. The Role of Arbitrariness Review.

Traditional Two-Step	Three-Step	One-Step
Chevron Step One: Is the Agency's reading mandatory? *Chevron* Step Two: Is the Agency's reading reasonable?	*Chevron* Step One: (i) Is the Agency's reading mandatory? (ii) Is the Agency's reading reasonable?	One-Step *Chevron*: Is the Agency's reading reasonable?
Arbitrariness Review: Is the Agency's reading arbitrary under section 706 of the APA?	*Chevron* Step Two: Is the Agency's reading arbitrary under section 706 of the APA?	Arbitrariness Review: Is the Agency's reading arbitrary under section 706 of the APA?

The bottom three cells are shaded because they are all substantively identical. The table thus indicates that the same APA review for rational decision making will take place under all three of the above-listed versions of *Chevron*. The only point of dispute is what that mode of review will be called. Under both traditional two-step and one-step *Chevron*, it is called "arbitrariness review." Under the three-step version propounded by Bamberger and Strauss, by contrast, the same analytical inquiry is called "*Chevron* step two."

The top three cells are more diverse. Moving from left to right, traditional two-step cleanly divides the distinct mandatoriness and reasonableness questions into two discrete steps. By contrast, three-step *Chevron* squeezes these two questions into the "step one" label, and so—as noted above—uses that term in a way that is misleading to the point of being inaccurate. Further, by compressing the mandatoriness and reasonableness questions into a single "step," Bamberger and Strauss obscure the important issue of whether both questions must be asked in every case.[75] The top right cell is in a category by itself. By eliminating the mandatoriness question entirely, one-step would substantively revise the traditional two-step *Chevron* deference inquiry.

As Table 1 illustrates, there is no substantive difference between traditional two-step and the three-step version of *Chevron* put forward by Bamberger and Strauss. And, as Stephenson and Vermeule pointed out, arbitrariness review also takes place under one-step *Chevron*.[76] The view advanced by Bamberger and Strauss is therefore distinctive primarily in its terminology.[77] Instead of discussing three-step

75. *See also supra* note 41. If Bamberger and Strauss did not require courts to ask both questions at step one, then their view would be substantively identical to optional two-step, discussed below.

76. *See* Stephenson & Vermeule, *supra* note 5, at 603–04 (likewise arguing that any attempt to equate step two with arbitrariness review would be "superfluous" with *State Farm* and the APA).

77. Bamberger and Strauss also defend their approach by contending that it accords with the weight of precedent. *See* Bamberger & Strauss, *supra* note 15, at 621. But, as argued

as a distinct option, we can simply remember that any version of *Chevron* deference must be accompanied by arbitrariness review.[78]

Bamberger and Strauss also draw a methodological distinction between the two steps. In particular, they contend that step two is the proper home of normative canons, such as the canon of constitutional avoidance.[79] But, as Bamberger has separately acknowledged, the Supreme Court appears to have rejected that view: at step one, courts are to use all the "traditional tools of statutory construction,"[80] including the avoidance canon.[81] In any event, starting with the question of interpretive methods cannot help us discern the proper structure of the *Chevron* inquiry. Instead, we need to identify and distinguish the available interpretive questions *before* we decide what interpretive tools to use in answering those questions. For example, Bamberger and Strauss may be correct that, when fixing statutory meaning, courts should not rely on certain interpretive tools.[82] But that methodological claim cannot tell us whether or when to fix statutory meanings through mandatoriness findings. If anything, attention to interpretive methods actually increases the importance of clearly distinguishing between mandatoriness and reasonableness findings, since different interpretive methods may be appropriate as to each of those questions.

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below, that claim is overstated. *See infra* note 175 and accompanying text. For more on Bamberger and Strauss, see *supra* note 41.

78. While courts might apply arbitrariness review somewhat differently if it were formally incorporated into *Chevron*, there is no obvious reason either why that would be so or whether such a disparity would be desirable. *Compare* Bamberger & Strauss, *supra* note 15, at 625 (noting that, when applying arbitrariness review as part of *Chevron*, the "focus may be on interpretive method, as opposed to the fact-intensive judgments at issue in *State Farm*"), *with* Stephenson & Vermeule, *supra* note 5, at 606 ("[I]f judges interpret Step Two as imposing a reasoned decisionmaking requirement that strongly resembles *State Farm* . . . the result may be an unjustified departure from the standard approach to hard look review in the statutory interpretation context.").

79. *See* Bamberger & Strauss, *supra* note 15, at 623–24; *see also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66–69 (2008). Bamberger and Strauss also suggest that legislative history may be considered only at step two, *see* Bamberger & Strauss, *supra* note 15, at 623–24, even though legislative history (for those who use it) is clearly a traditional tool of statutory construction.

80. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see also* Bamberger, *supra* note 79, at 64; *id*. at 77 ("The largest group of cases to consider the place of normative canons in review of agency interpretations treats them as the type of 'traditional tools' that courts may use to resolve textual ambiguity . . . ."); *id*. at 77–78 nn.40–45 (citing Supreme Court cases).

81. *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001); Edward J. DeBarolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 577 (1988); *see also* Hernandez-Carrera v. Carlson, 547 F. 3d 1237, 1250 (10th Cir. 2008) (McConnell, J.). *But see* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A* Brand X *Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139 (2012).

82. *See* Bamberger & Strauss, *supra* note 15, at 624 (arguing that substantive canons should be confined to step two in part because those canons "should not fix statutory meaning but rather leave a range of interpretive authority in agency hands"); Bamberger, *supra* note 79, at 114–23.

In sum, debating the appropriate label for arbitrariness review cannot help us determine what the statutory deference inquiry ought to be. The proper structure of *Chevron* deference must instead turn on a substantive question—namely, whether mandatoriness findings should be impermissible, obligatory, or optional.

F. The Three Distinct Versions of Chevron

It is time to take stock. From what has been shown so far, we know that no single version of the agency deference inquiry is logically compelled. Rather, there are several different analytic regimes traveling under the name *Chevron*.

First, "traditional two-step" asks initially whether the statute is clear and then whether the agency's interpretation is reasonable. To clarify and sharpen this approach,[83] step one can be understood to ask, "Is the agency's reading mandatory?"

Second, "optional two-step" asks whether the agency's reading is reasonable and then gives courts discretion to ask whether the agency's interpretation is not just reasonable, but mandatory.

Finally, "one-step" asks only whether the agency's interpretation is reasonable and never asks whether the agency's view is mandatory. These three versions of *Chevron* are outlined in the table below.[84]

Table 2. Three Versions of *Chevron*.

Traditional Two-Step	Optional Two-Step	One-Step
1. Is the Agency's reading mandatory?	1. Is the Agency's reading reasonable?	1. Is the Agency's reading reasonable?
2. Is the Agency's reading reasonable?	2. [Optional] Is the Agency's reading mandatory?	

So what we have is not a logically compelled choice, as Stephenson and Vermeule would have it, but rather a normative decision. *Chevron* comes in three distinct varieties, and we have to ask: Which option *should* we prefer?

II. THE NORMATIVE STRUCTURE OF *CHEVRON* DEFERENCE

Having now arrived at a clear understanding of how courts might logically structure *Chevron*, it is time to ask the normative question of how *Chevron* should

83. *See supra* Part I.C.

84. Someone who subscribed to the view offered by Professors Bamberger and Strauss—that is, someone who thought that step two entailed arbitrariness review—might view all three versions of *Chevron* outlined in Table 2 as alternative ways of implementing step one. By contrast, someone who wished to keep *Chevron* and *State Farm* distinct would view the arbitrariness review established by the APA as an additional analysis undertaken apart from the three versions of *Chevron* listed in Table 2. *See supra* Part I.D.

be structured. This analysis must proceed over nearly uncharted ground. Despite all the articles on the proper structure of *Chevron*, normative considerations have played only a peripheral role—even as descriptive and logical arguments abound.[85] As discussed below, each of the different versions of *Chevron* has its own strengths and weaknesses. To focus the analysis, this Part develops a novel analogy to qualified-immunity doctrine, which has likewise struggled with the question of whether unnecessary lawmaking should be impermissible, obligatory, or optional. On balance, the qualified-immunity analogy cuts in favor of optional two-step. However, the normative case for optional two-step may depend on the development of new rules capable of guiding and legitimizing courts' exercise of their previously unrecognized *Chevron* discretion.

A. Beginning to Assess the Options

The obvious strength of traditional two-step *Chevron* is that it fosters rapid development of the law. Courts that apply traditional two-step always ask, at step one, whether the statute is clear. Therefore, traditional two-step always discloses when an agency's reading is mandatory. And discovering that an agency's position is not just acceptable but necessary is a huge help—to litigants, to courts, and to the agency itself. How many business decisions, lawsuits, executive-branch lobbying efforts, and agency deliberations could be spared by finding out early whether an agency's interpretation is obligated by law? All other things being equal, it is plainly much more efficient to clarify the law sooner rather than later.[86]

But all other things might not be equal.[87] Perhaps resolving issues of statutory meaning sooner rather than later will generate inefficient decision making and even error. Restraint may be especially warranted in the *Chevron* context, because the question whether an agency's view is mandatory may not be squarely addressed, either by the government or by its challengers. The outcome of any particular agency challenge, after all, will turn only on whether the agency's reading is impermissible, regardless of whether it is mandatory. Thus, there is normally no need to take up the potentially difficult and time-consuming question of mandatoriness. It may therefore be preferable for courts to postpone ruling out potential agency constructions until they are adopted by the government and squarely challenged as unreasonable.

There are also legitimacy problems associated with traditional two-step *Chevron*. A supporter of one-step *Chevron* might point out, for example, that it is unnecessary in agency deference cases to find that the agency's reading is not just

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85. Normative considerations have appeared more saliently in arguments for abandoning *Chevron* deference. *See, e.g.*, *supra* note 20; *infra* note 128.

86. Similar points are sometimes made regarding unnecessary holdings in the alternative. *See, e.g.*, Karsten v. Kaiser Found. Health Plan, 36 F.3d 8, 11 (4th Cir. 1994) ("Thus, from the perspective of judicial economy, alternative holdings are a welcome blessing for courts at all levels."); *see also infra* notes 102, 119 and accompanying text.

87. *See, e.g.*, *Karsten*, 36 F.3d at 11 ("[A]lternative holdings also provide courts, particularly appellate courts reviewing alternative holdings below, with the tempting opportunity to stray into the practice of advisory opinion-making, solving questions that do not actually require answering in order to resolve the matters before them.").

reasonable but mandatory.[88] And, in the language of contemporary judicial restraint, when it is not necessary to decide, it is necessary not to decide.[89] For the same reasons that courts typically eschew unnecessarily broad holdings and refuse to afford precedential effect to dicta,[90] they might also disfavor the unnecessary lawmaking that marks traditional two-step *Chevron*.

Is optional two-step *Chevron* the best of both worlds? It certainly does allow courts to clarify the law by finding agency interpretations to be mandatory, as opposed to reasonable. Whether that choice is viewed as a plus or a minus largely depends on whether courts are likely to choose wisely. When a court opts to find an agency reading mandatory, it has either helpfully clarified the law or rashly erred. And if a court simply finds the agency's reading to be reasonable, without reaching the question of whether the reading is mandatory, then it has either exercised prudent restraint or ducked an important question.

A defender of traditional two-step *Chevron* might add that judicial discretion in this context raises its own legitimacy concerns. Federal judicial authority is normally thought to emanate not from discretion, but from the need to resolve a concrete legal dispute.[91] To authorize gratuitous judicial rulings arguably transforms courts into *de facto* legislatures. And once courts have license to reach out beyond what is necessary to resolve the case at hand, they might exercise that discretion opportunistically. For example, courts might reach the mandatoriness question only when the agency's interpretation is attractive (to the judges) as a matter of policy.

In comparing the various versions of *Chevron*, the key variables appear to be the following: (1) how often agencies are challenged for adopting statutory readings that are not just reasonable, but mandatory; (2) how efficiently and accurately courts can identify mandatory as opposed to reasonable agency interpretations in cases where only reasonableness is at issue; (3) how willing courts are to find statutes mandatory, even when not required to do so; and (4) how forcefully legitimacy concerns counsel judicial restraint in the *Chevron* context.

B. The Analogy to Qualified Immunity

The foregoing three versions of *Chevron* might usefully be compared and contrasted with the imperfectly analogous context of qualified immunity. By way of background, qualified-immunity cases raise two questions: (i) on the merits, did the official violate the law, and (ii) was the official's view of the law reasonable? If the court affirmatively answers the first question, it establishes a new legal principle binding on future officials. But if the court affirmatively answers only the

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88. *See supra* text accompanying note 48 (discussing Stephenson and Vermeule).

89. PDK Labs., Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

90. *E.g.*, S. Union Co. v. United States, 132 S. Ct. 2344, 2352 n.5 (2012) (citing Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006)).

91. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) (quoting Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

second question, then it does nothing more than excuse the official from liability, without establishing a prospective bar on official conduct.[92]

Various decision procedures are available in qualified-immunity cases. Under *Saucier v. Katz*, courts were once obliged to answer the merits question in every case, thereby clarifying the law and providing binding guidance for future officials.[93] Today, under *Pearson v. Callahan*, courts retain the option of reaching the merits and thereby making prospectively binding law, even when the case could be disposed of based on a reasonableness finding alone.[94] And, in *Camreta v. Greene*, three Justices of the Supreme Court floated a third, as-yet-untested possibility—namely, that courts should answer only the reasonableness question, without unnecessarily reaching the merits.[95] These three versions of the qualified-immunity inquiry are outlined in the table below.

Table 3. Three Versions of Qualified Immunity.

Saucier	*Pearson*	*Camreta* Dissenters
1. Was the Official's action constitutional?	1. Was the Official's action reasonable?	1. Was the Official's action reasonable?
2. Was the Official's action reasonable?	2. [Optional] Was the Official's action constitutional?	

The above three views of how courts should decide qualified-immunity cases nicely line up with the three varieties of *Chevron* summarized in Table 2. Traditional two-step *Chevron* is analogous to the now-abandoned *Saucier* regime, in that both approaches required courts to reach merits issues unnecessarily for the sake of clarifying the law. Optional two-step is akin to the status quo qualified-immunity regime under *Pearson*, where courts have the option, but not the obligation, to reach the merits unnecessarily. And one-step *Chevron* is like the still-untested view that courts should not reach underlying merits issues at all when their decisions culminate in findings of qualified immunity.

The foregoing pairing of *Chevron* approaches with qualified-immunity cases tends to favor the optional two-step approach, since that version of *Chevron* aligns with the now-reigning approach to qualified immunity. But qualified-immunity doctrine itself is dynamic and, indeed, may not yet have come to rest. As a result, the history of qualified-immunity jurisprudence offers support not just for optional two-step, but also for each of the other versions of *Chevron*. In *Camreta*, for

92. *See generally* Pearson v. Callahan, 555 U.S. 223, 227 (2009).

93. Saucier v. Katz, 533 U.S. 194 (2001).

94. *Pearson*, 555 U.S. 223.

95. Camreta v. Greene, 131 S. Ct. 2020, 2036 (2011) (Scalia, J., concurring) ("The alternative solution, as Justice Kennedy suggests, is to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity. . . . I would be willing to consider it in an appropriate case.") (citations omitted); *id.* at 2043–45 (Kennedy, J., dissenting).

example, legitimacy concerns encouraged three Justices to entertain what might be called "one-step qualified immunity."[96] And the fact that the Supreme Court once adhered to the two-step procedure set out in *Saucier* confirms that there is something to be said for requiring courts to clarify the law under traditional two-step *Chevron*.[97]

Moreover, academic arguments over qualified-immunity doctrine often parallel, and so shed light on, some of the previously noted objections against optional two-step *Chevron*. For example, the discretionary power to make unnecessary law in qualified-immunity cases has led to concerns that courts might opportunistically reach the merits only when doing so is attractive to the judges as a matter of policy.[98] Commentators have also expressed misgivings about treating gratuitous judicial statements—dicta—as binding precedent, even in situations where the Supreme Court has invited that practice.[99] As we have seen, analogous versions of both concerns are present in connection with optional two-step *Chevron*.[100]

The analogy to qualified immunity illuminates at least one important respect in which the case for traditional or optional two-step *Chevron* is stronger than the case for unnecessary merits decisions in qualified-immunity cases. Under *Saucier*, courts were required—and, under *Pearson*, they are now permitted—to make merits determinations that cut against an ultimate finding in favor of immunity. For example, a qualified-immunity decision might find a particular search unconstitutional, but nonetheless recognize that a reasonable officer could have thought otherwise. In that scenario, the finding that the officer's action was unconstitutional would cut against (though of course would not refute) the subsequent holding in favor of awarding that officer immunity. By contrast, traditional and optional two-step *Chevron* would create unnecessary legal rulings that reinforce the court's ultimate disposition: the agency is said to be, not just reasonable, but indisputably correct. Because mandatoriness findings arguably establish the agency's right to prevail for an analytically distinct reason,[101]

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96. *Cf. id.* at 2036 (Scalia, J., concurring); *id.* at 2037 (Kennedy, J., dissenting) (discussing "the necessity of avoiding advisory opinions").

97. *See Pearson*, 555 U.S. at 236 (holding that while "the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial").

98. *See* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 142–43 (discussing opportunistic merits decisions in qualified-immunity cases).

99. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 872–82 (2005); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006) (extensively criticizing *Saucier* for mandating the creation of dicta and for its treatment as precedent).

100. *See supra* Part II.A.

101. Courts sometimes adopt dual holdings separately applying more and less demanding standards of review. *E.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1145 n.5 (2013) ("[T]o the extent that the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement, respondents fall short of even that standard . . . ."); United States v. Ozbirn, 189 F.3d 1194, 1200 (10th Cir. 1999) ("We conclude that under the circumstances, Trooper Smith had either probable cause to stop Mr. Ozbirn for committing a violation of a Kansas traffic law, or the reasonable articulable suspicion necessary to justify an investigatory stop.").

traditional two-step *Chevron* can be likened to courts' long-recognized authority to issue holdings in the alternative.[102]

On the other hand, perhaps the strongest argument for unnecessarily reaching the merits in qualified-immunity cases—the fear of permanent legal ambiguity—does not apply in connection with *Chevron*. As the Court has explained: "if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, [then] standards of official conduct would tend to remain uncertain," perhaps for long periods of time.[103] In other words, qualified immunity could allow unlawful governmental actions to be upheld as reasonable over and over again, with no guaranteed mechanism for ever finding them unlawful. Indeed, the day when federal courts would finally reach the merits "may never come."[104] By contrast, agencies that deviate from mandatory readings can be challenged and then found to have acted unreasonably. Thus, one-step *Chevron*—unlike one-step qualified immunity—does not threaten to leave unlawful government conduct protected by a permanent state of jurisprudential "limbo."[105]

Chevron and qualified immunity are also distinguishable in terms of their subject matter, but those differences tend to be mutually offsetting. Qualified immunity typically pertains to constitutional rights, and there are special concerns in that context: constitutional decisions are normally avoided until necessary,[106] and constitutional rules that are left unenforced in court may not be enforced at all. On both fronts, *Chevron* is a lower-stakes proposition: there is no special rule commanding courts to avoid statutory holdings, and administrative law principles backed by Congress might be viewed as less dependent on judicial enforcement than constitutional ones. *Chevron* also focuses on constraining agencies, whereas qualified immunity largely applies to individual officers, like police. It is not obvious which type of governmental decision maker—powerful, highly visible regulators, or a diffuse set of inexpert and potentially anonymous officers—is more in need of clear, constraining law.

In the end, the analogy to qualified-immunity jurisprudence cannot answer which version of *Chevron* is most defensible, and that normative question will have to be addressed on its own terms. But the qualified-immunity cases nonetheless shed light on the similar issues presented by *Chevron*. And, to the extent that there are good reasons to take different approaches in the *Chevron* and qualified-immunity contexts, courts and commentators should confront and justify their choice to adopt divergent approaches. Indeed, the burden should be on critics of

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102. *See, e.g.*, McClellan v. Miss. Power & Light Co., 545 F.2d 919, 925 n.21 (5th Cir. 1977) ("It does not make a reason given for a conclusion in a case *obiter dictum*, because it is only one of two reasons for the same conclusion." (emphasis in original) (quoting Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340 (1928))). *But see* Maxwell L. Stearns & Michael Abramowicz, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) (criticizing "the general understanding that alternative holdings in a case all count as holdings").

103. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

104. Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011).

105. *Id.*

106. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341, 346 (1936) (Brandeis, J., concurring).

optional two-step to explain why that discretionary procedure is inadvisable in agency-deference cases, even though a substantially similar deference regime is now settled practice in cases raising qualified immunity. At a minimum, comparing *Chevron* with qualified immunity demonstrates that there is an important normative choice to be made in both contexts.

C. Deriving Standards for Judicial Discretion

The analogy to qualified immunity points out perhaps the largest gap in the existing literature on *Chevron*'s structure. Because existing commentary has not identified the possibility of an optional two-step approach to *Chevron*, there has been no discussion of *when* courts might, in their discretion, reach the issue of mandatoriness. By contrast, the Supreme Court has supplied significant (though by no means exhaustive) guidance as to when discretion should be exercised in the qualified-immunity context. The Court's qualified-immunity jurisprudence thus offers a guide to the appropriate exercises of discretion in the *Chevron* context.

Pearson supplies the leading statement of when discretionary merits findings are appropriate in qualified immunity cases.[107] The Court's discussion intermittently addressed the inherent trade-offs posed by unnecessary law clarification. For example, *Pearson* opened by pairing the general benefit of law clarification—namely, that it "promotes the development of constitutional precedent"[108]—with the corresponding costs of requiring time-consuming, expensive litigation on a matter that amounts to an "essentially academic exercise."[109] The Court also noted that reaching the merits in qualified-immunity cases "departs from the general rule of constitutional avoidance."[110] So the Court was faced with weighty concerns cutting both for and against unnecessary lawmaking. Realizing this, *Pearson* directed courts to consider a range of case-specific considerations.[111]

While *Pearson*'s discussion of this issue is not so clearly organized, it is possible to discern two clusters of circumstances when, in the Court's view, the benefits of clarifying the law are outweighed by countervailing problems.

First, unnecessary lawmaking is to be avoided when the benefits of law clarification are unusually minimal. *Pearson* supplied several examples of cases falling in this general category, such as: (i) when "the constitutional question is so factbound that the decision provides little guidance" to courts and private parties;[112] (ii) "when it appears that the question will soon be decided by a higher court," thereby diminishing the need for immediate resolution;[113] and (iii) when "resolution of the constitutional question requires clarification of an ambiguous state statute" that might subsequently be reinterpreted by a state court.[114]

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107. *See Camreta*, 131 S. Ct. at 2032 (explaining that the Court in *Pearson* had "detailed a range of circumstances in which courts should address only the immunity question").

108. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

109. *Id.* at 237.

110. *Id.* at 241.

111. *Id.* at 237–40.

112. *Id.* at 237.

113. *Id.* at 238.

114. *Id.*

Second, unnecessary lawmaking is to be avoided when it poses a heightened risk of error.[115] Again, *Pearson* supplied examples, such as: (i) when the plaintiff's claims "may depend on a kaleidoscope of facts not yet fully developed," thereby forcing the court to speculate as to the ramifications of its decision;[116] (ii) when "the briefing of constitutional questions is woefully inadequate" to ensure an intelligent ruling;[117] and (iii) when "the defendant's right to appeal the adverse holding on the constitutional question may be contested" based on the general rule that prevailing parties cannot appeal.[118]

Some of *Pearson*'s guideposts do not intelligently carry over to the *Chevron* context. For example, federal deference cases do not generally pose issues of state statutory interpretation or turn on factual issues requiring record development. The other factors, however, carry over with only modest adjustments. Thus, courts might conclude that discretionary mandatoriness findings are appropriate only when: (i) the legal issue posed is likely to implicate future agency action, so that resolving it promptly will provide guidance to the government and to private parties; (ii) there is no special reason to think that a higher court or regulatory change will soon resolve the issue;[119] (iii) the briefing is strong, particularly as to the unnecessary question of mandatoriness; and (iv) the agency's right to appeal a constraining mandatoriness finding is unlikely to be contested, perhaps because the other side is itself likely to seek further review.[120]

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115. *Cf. id.* at 239 ("[T]he first step of the *Saucier* procedure may create a risk of bad decisionmaking.").

116. *Id.* at 239 (quoting Dirrane v. Brookline Police Dept., 315 F.3d 65, 69–70 (1st Cir. 2002).

117. *Id.*

118. *Id.* at 240. *Pearson* raised this point as a general problem, but the more recent *Camreta* decision shows it to be a case-specific concern. In permitting an appeal by a defendant who had lost on the merits but ultimately won on qualified immunity, *Camreta* rested on the fact that one of the two defendants had to change the way he did his job in light of the merits decision issued by the court of appeals. *See* Camreta v. Greene, 131 S. Ct. 2020, 2029 (2011). The other defendant, by contrast, was no longer employed in the relevant job and so apparently lacked standing to seek certiorari. *See id.* at 2034 n.9. So, if only the second defendant had been in the case, Supreme Court review would appear to have been impossible. Anticipating that result, perhaps courts should refrain from unnecessarily reaching the merits when they foresee that the defendant will be unable to appeal.

119. Given that the main benefit of mandatoriness findings is that they clarify the law, perhaps the Supreme Court should be more eager to issue such holdings than intermediate courts, which should in turn be more eager than trial courts. *Cf.* Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727 (2014).

120. Continuing the analogy between *Chevron* and qualified immunity, perhaps the government should be able to appeal an unwanted step-one finding that its present interpretation is not just reasonable, but mandatory. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting) ("[D]oes the victorious agency have the right to appeal a Court of Appeals judgment in its favor, on the ground that the text in question is in fact *not* (as the Court of Appeals held) unambiguous, so the agency should be able to change its view in the future?" (emphasis in original)).

The foregoing rules of thumb are helpful, but may not go far enough. To prevent themselves from opportunistically resolving unnecessary legal issues[121]—in either the qualified immunity or *Chevron* contexts—courts should adopt objective criteria for unnecessary lawmaking.[122] In qualified-immunity cases, courts could reach out to resolve the merits if, but only if, they can point to a number of other cases in which the same issue has already been raised, only to be avoided on grounds of qualified immunity.[123] This rule provides some assurance both that law-clarification would be helpful and that the discretionary power to reach the merits would be implemented in a neutral way.

An analogous objective criterion is available in the *Chevron* context: if a court can point to a number of litigants who have attempted to interpret the statutory provision in question, then the court might fairly conclude that it has obtained sufficient familiarity with the provision to have anticipated—and ruled out—every interpretation that an agency could plausibly put forward. In unusual circumstances, this requirement might even be satisfied within the confines of a single case, such as when a number of diverse parties offer well-litigated statutory interpretations.[124] By adopting this objective test of interpretive experience, a court would ensure not only that it has become deeply immersed in the relevant statutory scheme, but also that resolving the issue of mandatoriness is likely to be of considerable utility.

D. The Psychological Burdens of Unnecessary Lawmaking

In a provocative passage, *Pearson* offered an important insight into judicial psychology that overlaps with an academic debate concerning *Chevron* deference. Because it is impossible to "specify the sequence in which judges reach their conclusions in their own internal thought processes,"[125] *Pearson* recognized that "there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all."[126]

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121. *Cf. supra* note 98 (discussing analogous concerns in the qualified-immunity context).

122. Courts sometimes create similar guidelines via self-imposed rule. *E.g.*, SUP. CT. R. 10 (attempting to list objective criteria for the discretionary decision to grant certiorari, such as the existence of a circuit conflict).

123. For a somewhat similar proposal, see Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and Beyond)*, 80 FORDHAM L. REV. 643, 678 (2011) (arguing that the "principal determinant of a decision to reach the merits after finding qualified immunity ought to be the availability of adequate opportunities for constitutional elaboration elsewhere," while adding that courts should also consider "such factors as the importance of the constitutional issue, *the frequency with which it has been invoked* or will likely be invoked again, and the extent to which government officials lack adequate guidance from circuit law") (emphasis added).

124. *Compare infra* note 150 (providing a case where the test is satisfied), *with infra* note 159 (providing a case where the test isn't satisfied).

125. Pearson v. Callahan, 555 U.S. 223, 239; *cf. supra* note 60 (discussing how to order the two steps of traditional two-step).

126. *Pearson*, 555 U.S. at 239.

Unfortunately, *Pearson* conflated this important point with the more general observation that courts may not "devote as much care" when "uttering pronouncements that play no role in their adjudication."[127] In other words, the *Pearson* Court felt that judges might give inadequate attention to constitutional issues whose resolution (the judges anticipated) would not affect the disposition of the case at hand.

Yet the implications of *Pearson*'s psychological insight are more significant than the Court let on. In short, the psychological burdens associated with qualified immunity potentially go to judicial bias, and not just judicial inattention. When a judge eyeballs a constitutional claim and quickly ascertains that the officer didn't violate clearly established law, it is possible that the judge has implicitly adopted a negative view of the plaintiff's underlying claim on the merits. The defendant, after all, has already been adjudged a reasonable officer, whereas the constitutional claimant has become—quite literally—a loser. That cognitive development may favor the government, perhaps in ways that the judge does not consciously appreciate. Conversely, a judge who begins the analysis by assessing the merits of a constitutional claim and finding a violation might then have difficulty stepping back to determine whether, at the time of the violation, the officer's conduct was nonetheless reasonable.

Analogous psychological problems have garnered attention in the context of *Chevron* deference. As Justice Stephen Breyer has written (and others have agreed[128]): "It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable."[129] In other words, step one of traditional two-step *Chevron* forces judges to think about what Congress has unambiguously tried to do in a particular provision, and undertaking that inquiry may prevent judges from impartially applying step two. Stephenson and Vermeule count this concern as a point in favor of one-step *Chevron*.[130] By asking a singular question, the argument goes, one-step frees courts from having to ask about "best" interpretations,[131] thereby allowing for quick, unbiased conclusions as to whether agency interpretations are reasonable.[132]

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127. *See id.* at 239–40 (quoting Horne v. Coughlin, 191 F.3d 244, 247 (2d Cir. 1999)).

128. Professors Jacob E. Gersen and Adrian Vermeule have emphasized this point in arguing for replacing *Chevron* with a supermajority voting rule. *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 697–98 (2007).

129. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986) (emphasis in original).

130. *See* Stephenson & Vermeule, *supra* note 5, at 605 ("For one thing, if judges spend an inordinate amount of time trying to figure out the *best* construction of the statute, it may be difficult for them to shift mental gears to decide whether an agency interpretation that differs from the judge's sense of the best interpretation is nonetheless reasonable." (emphasis in original)); *see also* Matthew C. Stephenson, *The Costs of Voting Rule* Chevron*: A Comment on Gersen and Vermeule's Proposal*, 116 YALE L.J. POCKET PART 238, 241–42 (2007) ("I think (though I cannot prove) that in a typical *Chevron* case, the judge . . . stops [analyzing the agency's view] not when she has determined that the agency's interpretation is the best one, but when she has decided that it falls into the realm of plausibility . . . .").

131. Stephenson & Vermeule, *supra* note 5, at 605. Stephenson and Vermeule refer to "best" interpretations because they do not acknowledge the distinct category of mandatory interpretations. *See supra* note 64.

132. *But see infra* text accompanying note 173 (discussing empirical findings that undermine this point).

Optional two-step replicates many of the benefits associated with one-step *Chevron*, while avoiding the psychological difficulties suggested by *Pearson*. As an initial matter, optional two-step would allow courts to ask first, and often exclusively, about the relatively easy question of reasonableness. And only after a court has assured itself that the agency's reading is reasonable would it even consider whether to reach the more difficult optional issue of mandatoriness. Thus, courts applying optional two-step would often both begin and end their reasonableness analyses without asking about "best" interpretations at all.[133]

And even when courts applying optional two-step did reach the issue of mandatoriness, they would not encounter the psychological burdens suggested in *Pearson*. As noted above, a court that immediately recognizes the existence of qualified immunity may have a hard time fairly contemplating whether the admittedly "reasonable" defendant nonetheless acted unconstitutionally. But there is no similar tension in asking whether a reasonable agency interpretation is also mandatory.[134] Knowing that an agency acted reasonably simply tees up the possibility that the agency also acted in a way that was mandated by law. The first conclusion does not prejudice the second one.

Given the above, traditional two-step *Chevron*—like the "rigid order of battle" adopted in *Saucier*[135]—may pose special psychological burdens for judges. By contrast, one-step avoids those problems, and optional two-step largely seems able to do so as well.

E. The Incomplete Case for Optional Two-Step

As promised, each substantively distinct version of *Chevron* has its own strengths and weaknesses. Traditional two-step requires a relatively complex analysis in every case and may impose significant psychological burdens on judges, thereby increasing the risk of error; but it also ensures that courts seize every opportunity to find that agency interpretations are mandatory. One-step is the simplest of the three options and accordingly minimizes the possibility that psychological burdens might warp outcomes; but its elegance comes at the steep price of forgoing many opportunities to find statutory clarity.

Optional two-step promises to avoid the deficiencies of its stricter cousins. By embracing a discretionary decision-making process, optional two-step would allow courts to reach the issue of mandatoriness when doing so is most beneficial and least likely to result in error. But optional two-step can reliably achieve this goal only if courts identify objective criteria to guide their *Chevron* discretion. As argued above, for example, courts might ask whether many litigants have interpreted the statutory provision at issue. An affirmative answer would suggest both that the provision is important enough to benefit from law-clarification, and that the court is equipped to resolve the mandatoriness question.

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133. Stephenson & Vermeule, *supra* note 5, at 605.

134. *Cf. supra* text accompanying note 102.

135. Pearson v. Callahan, 555 U.S. 223, 234 (2009) (citing Purtell v. Mason, 527 F.3d 615, 622 (7th Cir. 2008)).

Yet the normative case for optional two-step remains incomplete absent consideration of actual judicial practice. To address those important issues, the next Part turns to the empirical structure of *Chevron* deference.

III. THE EMPIRICAL STRUCTURE OF *CHEVRON* DEFERENCE

Arguments for one or another version of *Chevron* invariably rest on controversial claims about actual judicial practice. For example, commentators often assert that their own views accord with the weight of the case law, that opposing views of *Chevron* threaten disruption of the status quo, or that various proposed reforms either would or would not meaningfully change existing trends.[136] This Part tackles the foregoing empirical questions by examining a number of important recent decisions, as well as by examining all published federal court-of-appeals decisions citing *Chevron* in 2011. Because (as we have seen) there are three substantively distinct versions of *Chevron*, and each has its own unique set of advantages and disadvantages, it should be no surprise that courts have at various times appeared to adopt different solutions. Still, overall practice in federal appellate courts broadly supports the optional two-step approach—even though current doctrine has not identified that approach or justified its *sub silentio* revision of the traditional two-step *Chevron* framework.

A. In the Supreme Court

Recent Supreme Court cases frequently depict *Chevron* as a two-step inquiry.[137] In *Mayo Foundation for Medical Education and Research v. United States*, for example, the Court discussed and applied each of *Chevron*'s two steps at length before expressly upholding an agency interpretation as "reasonable" at step two.[138] In a similar vein, *Judulang v. Holder* discussed "the second step of the test we announced in *Chevron*," while comparing it with arbitrariness review under the Administrative Procedure Act.[139] And in *Roberts v. Sea-Land Services, Inc.*, a particular statute provided "unambiguous" support for the agency's proffered reading, thereby allowing the Court to resolve the case without asking the step-two question whether the agency's view was "entitled to deference."[140]

But many recent decisions cast *Chevron* as an essentially unitary inquiry. In *Holder v. Gutierrez*, for example, the Court held that an agency's interpretation "prevails if it is a reasonable construction of the statute, whether or not it is the only

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136. *See infra* note 174.

137. For the most recent example, see *City of Arlington v. FCC*, which referred to *Chevron*'s "now-canonical formulation" involving "two questions." 133 S. Ct. 1863, 1868 (2013) (internal quotation marks and citation omitted).

138. 131 S. Ct. 704, 714 (2011). Notably, *Mayo* understood step two to encompass arbitrariness review. *Id.* at 711, 714–15. For an older two-step case, see *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002).

139. 132 S. Ct. 476, 483 n.7 (2011).

140. 132 S. Ct. 1350, 1363, n.12 (2012). This case didn't use step one/two terminology. *Cf. infra* note 168.

possible interpretation or even the one a court might think best."[141] And, in upholding the agency's interpretation, the Court distinguished between the questions of reasonableness and mandatoriness: "We think the BIA's view on imputation meets that standard, and so need not decide if the statute permits any other construction."[142] Likewise, *Astrue v. Capato* said that "even if the [Social Security Administration's] longstanding interpretation is not the only reasonable one, it is at least a permissible construction that garners the Court's respect under *Chevron*."[143] In both of these cases, the Court expressly declined to determine whether the statute unambiguously favored the agency's reading, as would traditionally be required under *Chevron* step one.

On balance, the Supreme Court's recent cases appear to reflect an optional two-step approach. In cases like *Sea-Land Services*, the Court finds agency interpretations to be not just reasonable, but mandatory. At the same time, the Court often declines to reach the issue of mandatoriness. So the Court sometimes asks about mandatoriness and sometimes chooses not to do so—just as optional two-step would recommend.

Even Justice Scalia's recent opinion citing Stephenson and Vermeule could be read to accommodate discretion in this area. To be sure, Justice Scalia asserted—incorrectly[144]—that "[w]hether a particular statute is ambiguous *makes no difference* if the interpretation adopted by the agency is clearly reasonable—and it would be a waste of time to conduct that inquiry."[145] But Justice Scalia also said that "'Step 1' has never been an essential part of *Chevron* analysis" and is "hardly mandatory."[146] In saying that "Step 1" should be viewed as unessential and non-mandatory, Justice Scalia may have left open the possibility that the mandatoriness question is warranted in some cases. And that, as we have seen, is optional two-step.

In effect, the Court has quietly brought its agency-deference and qualified-immunity doctrines into alignment. Though unnecessary lawmaking was originally deemed obligatory both in *Chevron* and in *Saucier*, the Court has gradually backed off those stringent demands in favor of a discretionary approach. But while *Pearson* made that doctrinal transition explicit in the qualified-immunity context, the Court has so far failed to clarify that *Chevron*'s two-step approach has likewise become optional.[147] It is time to do so.

B. In the Courts of Appeals

Perhaps because of the Supreme Court's failure to specify what analytic regime it is applying—or even to identify the optional two-step approach as an available

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141. 132 S. Ct. 2011, 2017 (2012).

142. *Id.*

143. 132 S. Ct. 2021, 2026 (2012).

144. Stephenson and Vermeule advanced a similarly overbroad claim. *See supra* note 46 and accompanying text.

145. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 n.1 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

146. *Id.* at 1846 & n.1.

147. *See supra* Part II.B.

option—experience in the federal courts of appeals is mixed. However, courts regularly apply two-step *Chevron* in cases where it makes a difference.[148] By contrast, no court consistently applies one-step *Chevron* as an obligatory approach. Indeed, one of the few judicial decisions that explicitly invokes Stephenson and Vermeule's paper cites it as a "but see" to the proposition that the court would follow "the familiar two-part *Chevron* framework."[149]

For a recent, high-profile example of two-step *Chevron* in action in the federal courts of appeals, consider the recent challenge brought in the D.C. Circuit by states and private parties against the EPA's regulation of greenhouse gas.[150] The *Chevron* question in the case was whether the EPA had reasonably interpreted the statutory term "any air pollutant" to include greenhouse gas.[151] Distinguishing *Chevron*'s two steps, the D.C. Circuit resolved the issue at step one by expressly holding that the statutory provision's meaning was "unambiguous" and that Congress had directly spoken to the question.[152] In particular, the court held that the statutory phrase "any air pollutant" unambiguously included "all regulated air pollutants, including greenhouse gas."[153] This holding—which the Supreme Court has now granted certiorari to review[154]—meant that the statute's broad language was impliedly limited to "regulated" pollutants, but was not impliedly limited in any of the other ways suggested by the state and private-party challengers.

That step-one holding mattered. If the political winds had shifted and the EPA desired to change course, both the agency and potential challengers would have known that one avenue of statutory interpretation had been closed off, at least in cases heard by future D.C. Circuit panels. As in *Sea-Land Services*,[155] added legal clarity would have been forgone if the court had followed one-step *Chevron* and asked only whether the agency's view was reasonable.

Remarkably, federal judges sometimes dispute (in effect) whether to apply the two-step or one-step versions of *Chevron*. For example, in *Teva Pharmaceuticals, USA, Inc. v. Leavitt*, the D.C. Circuit considered the FDA's statutory responsibilities with regard to filings for new drug applications under the Hatch-Waxman Act.[156] The agency suggested that its role was largely ministerial, in that it should simply accept certain information supplied by the new drug applicant. The D.C. Circuit majority agreed with the agency's position. Indeed, the court held that

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148. *See, e.g.*, Higgins v. Holder, 677 F.3d 97, 102 (2d Cir. 2012); Khalid v. Holder, 655 F.3d 363, 366–67 (5th Cir. 2011); Ass'n of Irritated Residents v. EPA, 632 F.3d 584, 596 (9th Cir. 2011); Mei Fun Wong v. Holder, 633 F.3d 64, 74 (2d Cir. 2011).

149. Teva Pharms. USA, Inc. v. Sebelius, 595 F.3d 1303, 1315 (D.C. Cir. 2010).

150. Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012).

151. *Id.*

152. *Id.* at 134–36.

153. *Id.* (emphasis omitted). All three panel judges later underlined this point when writing to explain the D.C. Circuit's decision to deny en banc review. *See* Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *2 (D.C. Cir. Dec. 20, 2012) (Sentelle, C.J., concurring in denial of en banc review) ("[T]he panel's interpretation of the statute is the only plausible one.").

154. *See* No. 12-1248 (cert. granted Oct. 15, 2013).

155. *See supra* text accompanying note 140.

156. 548 F.3d 103 (D.C. Cir. 2008).

the agency's proffered interpretation of its regulatory obligations was not just reasonable, but mandatory. In doing so, the court specified: "[W]e review FDA's interpretation of the Act it administers under step one of the two-step analysis in *Chevron*."[157]

Judge Stephen Williams concurred specifically to dispute the majority's express step-one holding.[158] As Judge Williams put it, the majority opinion "seems to imply that the statute requires the FDA to accept" a new drug applicant's self-reported information and so "impos[es] on [the FDA] the ministerial role that it has chosen for itself."[159] Judge Williams disagreed with the majority's step-one mandatoriness finding. "I have seen no reasoning," he explained, "that would support the idea that the statute mandates a ministerial role . . . ."[160] The judge then added that, "for this case, all that is needed is a conclusion that the FDA's adoption of that role is reasonable."[161] In other words, Judge Williams objected to the majority's decision to opine—unnecessarily, but in compliance with traditional two-step *Chevron*—on the statute's mandatory meaning.

The fact that federal judges sometimes dispute whether to adhere to traditional two-step *Chevron* demonstrates that the choice among the varieties of *Chevron* has real consequences. If one-step *Chevron* were adopted, the result would not be a costless clarification, as Stephenson and Vermeule believe,[162] but a substantive change in a fundamental principle of administrative law. Yet this important choice has so far gone unappreciated by scholars, and the few cases that do address this issue do not approach it any systematic way. What courts need are principles for the appropriate exercise of their *Chevron* discretion.

C. A Data-Driven Assessment

Many arguments concerning the structure of *Chevron* deference rest on empirical claims, yet solid data of the relevant type is hard to come by.[163] To support one-step *Chevron*, for example, Stephenson and Vermeule cited Orin Kerr's important 1998 study on deference in administrative-law cases.[164] According

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157. *Id.* at 105–06.

158. *Id.* at 108 (Williams, J. concurring).

159. *Id.*; *see also id.* at 110 (disputing any conclusion that "the statute locks the FDA into a ministerial role").

160. *Id.* at 108.

161. *Id.*

162. Stephenson & Vermeule, *supra* note 5, at 609 (asserting that one-step *Chevron* has "no collateral cost").

163. Most empirical studies on judicial application of *Chevron* have focused on bottom-line outcomes and assessed those results in light of independent variables such as judicial ideology. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?*: *An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006). These studies, while illuminating in many ways, do not look under the hood of the *Chevron* inquiry to ascertain, for example, what work is being done at step one as opposed to step two.

164. Stephenson & Vermeule, *supra* note 5, at 605 n.30 (citing Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30 (1998) (reporting that, in 1995 and 1996, published federal court of appeals decisions "condensed the two-step test into a single question of

to Kerr's research, more than a quarter of published *Chevron* cases during a two-year period collapsed the traditional two-step inquiry into just one step.[165] However, Kerr's study was not focused on the structure of *Chevron* deference and so did not collect data on several questions relevant to present debates over *Chevron*'s structure. And, of course, Kerr's data is now over fifteen years old, so trends in *Chevron* deference could have shifted over time. This Part provides an updated empirical assessment of several questions specifically relevant to debates over the structure of *Chevron* deference.

1. The Data and Basic Results

The data analyzed below come from a LexisNexis search for all published federal court of appeals decisions in the year 2011 that cited *Chevron*. This search resulted in a dataset comprising some 191 cases. However, many of these cases did not actually undertake a *Chevron* deference inquiry. For example, about twenty-five cases declined to apply *Chevron* after conducting what is sometimes called a "step zero" analysis.[166] Other cases cited *Chevron* outside the agency deference context, such as to establish that plain text controls questions of statutory interpretation.[167] Excluding the foregoing types of cases left 110 separate *Chevron* applications. These applications were coded according to whether they applied *Chevron* as a one- or two-step inquiry, whether the agency's interpretation was upheld or invalidated, and whether any invalidation occurred at step one or step two. The results are summarized below and depicted in the following tables (with approximate percentages).

Table 4. Relative Use of One- and Two-Step *Chevron*.

Two-Steps	One-Step	Applies First Step Only
82	24	4
74.5%	22%	3.5%

Above, Table 4 shows the distribution of cases that announced *Chevron* as having one step (asking only about reasonableness) or two steps (asking first whether Congress has unambiguously addressed the issue, and then whether the agency's reading is permissible). This table also includes a separate category for

whether the interpretation was 'reasonable' in 28% of the applications")); *see also* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1023 & n.94, 1025 (1990) (discussing evidence concerning the conventional view that *Chevron* established a more deferential two-step inquiry).

165. *See* Kerr, *supra* note 164, at 30.

166. For an explanation of the term "step zero," see *supra* note 1.

167. *See, e.g.*, United States v. Collazo-Castro, 660 F.3d 516, 519 (1st Cir. 2011) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984))); United States v. Manzo, 636 F.3d 56, 61 (3d Cir. 2011).

cases that quote and apply only step one, without either reaching or mentioning step two. As the data indicate, the great majority of cases identify the two discrete steps of the traditional *Chevron* inquiry. However, a substantial minority of cases characterize *Chevron* as having only one step, as recommended by Stephenson and Vermeule. Finally, the table also indicates that a small number of cases ask only whether the agency's interpretation is unambiguously correct, without mentioning step two.

Table 5. Frequency of *Chevron* Outcomes.

Reasonable	Unreasonable	Mandatory	Survives Step One
64	29	14	3
58%	26.3%	13%	2.7%

Table 5 shows the distribution of outcomes in *Chevron* cases. The first three columns respectively record holdings that agency readings are reasonable, unreasonable, or mandatory. The table also notes a few cases in which courts found a statute ambiguous at step one but then expressly resolved the case on other grounds, without applying step two. This table shows that the government won about three-quarters of all *Chevron* cases. Further, the table shows that mandatoriness findings comprise a significant fraction of *Chevron* holdings.

Table 6. Outcomes Under One- and Two-Step *Chevron*.

	One Step		Two Steps		Only First Step	
Reasonable	20	74%	45	57%	0	—
Unreasonable	7	26%	22	28%	2	50%
Mandatory	0	—	12	15%	2	50%

Table 6 combines the information in the previous two tables to show outcomes in *Chevron* cases under the one- and two-step versions of *Chevron*. This table also includes a category labeled "only first step," to reflect the handful of decisions that rely on a finding of unambiguousness without indicating that that finding constitutes a step-one holding.[168] As the shaded cells indicate, agency decisions are found unreasonable with almost equal frequency under both the one-step and the two-step versions of *Chevron*. The main difference between the one- and two-step versions is, predictably, that only two-step *Chevron* results in mandatoriness findings—that is, findings that the statute unambiguously favors the agency's reading.

168. These cases may be applying a nominally one-step version *Chevron* that nonetheless includes a tripartite menu of possible options. *See supra* note 40; *see also supra* text accompanying note 140 (discussing *Sea-Land Services*).

Table 7. Invalidations Under Two-Step *Chevron*.

Fails at Step 1		Arbitrary at Step 2		Fails Both Steps		Ambiguous	
17	77.5%	2	9%	2	9%	1	4.5%

Finally, Table 7 provides a more detailed view of the roughly 28% of two-step *Chevron* cases that invalidated the agency's interpretation. About three-quarters of two-step invalidations occurred at step one. In addition, two cases ruled against the government specifically at step two based on arbitrariness findings.[169] Finally, two decisions purported to reject agency interpretations under both steps, while one case defied clear categorization.[170]

2. How the Data Inform Debates Over *Chevron*

As commentators have observed, the simple methodology employed above—though common in this area of scholarship—rests on a limited sample as well as on a number of inevitably disputable judgments.[171] The resulting data thus provide only a rough indicator of actual appellate practice. Nonetheless, the evidence suggests several conclusions.

First, the data shed light on the picture of *Chevron*'s logical structure outlined above in Part I. For example, Tables 5 and 6 reflect that only two-step versions of *Chevron* generate mandatoriness findings. Further, Table 7 suggests that step one of traditional two-step *Chevron* screens out agency interpretations that would separately fail as unreasonable under step two, for only when courts view step two as arbitrariness review do steps one and two diverge. This result confirms, as argued in Part I, that traditional two-step *Chevron* contains a redundancy in that invalidations under each step are interchangeable.[172] The substantive equivalence of step-one and step-two invalidations finds further support in the rare but remarkable practice of invalidating agency interpretations under *both* steps, apparently for the same reasons.

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169. *See supra* Part I.D.

170. The case that Table 7 marks as ambiguous, *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072 (9th Cir. 2011), was the single most difficult case to code. The *Chevron* issue was whether an agency had engaged in statutorily mandated "consultation." *Id.* Before addressing this question, the court block-quoted the traditional two-step summary of *Chevron* deference and noted during its summary of the parties' positions that "[b]oth prongs of the *Chevron* standard are in play in this case." *Id.* at 1084. Later, the court said both that it did not "read the statute as encompassing [the agency's] proffered definition" and that it was enforcing "the definition that Congress intended." *Id.* at 1086–87. The case thus avoided specifying whether it was ruling on step one or two (or both). In any event, the decision's ambiguity simply illustrates that, under traditional two-step *Chevron*, invalidations under step one and step two are interchangeable. *See supra* text accompanying note 31.

171. *See, e.g.*, Kerr, *supra* note 164, at 21–22 (discussing the challenges of empirical studies of this kind). For an example of a case that was particularly difficult to code, see *supra* note 170.

172. *See supra* Part I.A.

Second, the data clarify some of the practical stakes in choosing among the versions of *Chevron*, particularly the choice whether to adopt one-step. As an initial matter, Table 6 suggests that whether courts apply one-step or two-step has no significant effect on agencies' chances of victory. Instead, courts applying one-step and two-step *Chevron* both invalidated agency interpretations just over a quarter of the time. This finding undermines claims that psychological burdens might make one- or two-step *Chevron* more deferential.[173] Still, moving to one-step *Chevron* would have a significant effect on *Chevron* practice. As Table 5 depicts, just over one-tenth of *Chevron* cases result in mandatoriness findings. Under one-step *Chevron*, those results would transform into mere reasonableness determinations.

Third, current appellate practice significantly resembles, and may even implement, optional two-step *Chevron*. As noted in Part I, supporters of one- or two-step *Chevron* often argue that their preferred proposals mirror actual *Chevron* practice and, therefore, that alternatives could be confusing or destabilizing.[174] The reality, however, is that current practice is already highly heterogeneous—and has been that way for a long time. Indeed, Kerr's data from 1995 to 1996 show that over a quarter (28%) of all *Chevron* determinations turned on a one-step analysis.[175] If anything, courts' longstanding willingness to alternate between the one- and two-step versions of *Chevron*—including in the Supreme Court[176]—suggests that current *Chevron* practice broadly reflects a valid if unidentified approach: optional two-step.

Finally, if courts and commentators are to be faithful to existing practice, then *Chevron* discretion should be refined, not resisted. As the data indicate, courts already exercise considerable discretion when implementing *Chevron*. Instead of downplaying that reality or combating it by insisting on adherence to either one- or two-step across the board, commentators should aim to perfect the decision-making discretion underlying current practice. The most pressing task for future research is therefore to determine *how* judicial discretion in this area should be exercised. This Article has taken an initial step toward answering that question by mining qualified-immunity doctrine for principles that might guide discretionary *Chevron* determinations.[177]

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173. *Cf. supra* note 130 and accompanying text (discussing potential psychological burdens).

174. *See, e.g.*, *supra* text accompanying note 40 (discussing Stephenson and Vermeule). For another example, Bamberger and Strauss contend that the comparatively novel one-step view of *Chevron* "would muddy the doctrinal waters unnecessarily." Bamberger & Strauss, *supra* note 15, at 624; *see also id.* at 621 (discussing similar concerns).

175. *See* Kerr, *supra* note 164, at 30–31. Substantive outcomes also appear to be stable over time: if we count two-step decisions that rule in the agency's favor at step one as mandatoriness findings, then Kerr's data suggest that reasonableness, unreasonableness, and mandatoriness findings respectively comprised about 62%, 27%, and 11% of all *Chevron* cases—results that closely resemble the data summarized above. *See id.* at 30–31; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1122 (2008) ("[I]n cases where *Chevron* was the deference regime invoked by the [Supreme] Court, the agency won 76.2% of the time . . . .").

176. *See supra* Part III.A.

177. *See supra* Part II.C.

CONCLUSION

Chevron is due for a redesign. Justice Scalia and prominent scholars have argued that *Chevron*'s traditional two-step procedure is redundant and should be reduced to a single step. But each of *Chevron*'s two steps actually does unique work, as only step one reveals whether an agency's interpretation is not just reasonable, but mandatory. Meanwhile, other judges and scholars argue that *Chevron* does indeed have two steps—but only because the second step consists of arbitrariness review. That approach compresses the distinct reasonableness and mandatoriness inquiries into an artificially singular first step, while making step two redundant with arbitrariness under the APA. Moreover, the existing debate has focused almost exclusively on descriptive or logical considerations, and so has overlooked that the structure of *Chevron* deference raises important normative issues. For example, traditional two-step fosters the rapid development of precedent, whereas one-step enforces norms of judicial restraint.

This Article has offered a circumspect defense of a new version of *Chevron* called optional two-step, whereby courts have discretion to clarify the law by finding agency interpretations to be mandatory. This hybrid approach seeks to balance the values of law-clarification, decision-making efficiency, and judicial restraint. And, though it has never before been identified, optional two-step generally comports with recent practice in the Supreme Court and federal courts of appeals.[178] What is more, the normative case for optional two-step finds surprising support in the analogous domain of qualified immunity, which has likewise given federal courts limited discretion to clarify the law, even when doing so is unnecessary to resolve the case at hand. Yet the appeal of optional two-step depends on frankly acknowledging that federal courts already exercise discretion in *Chevron* cases. By identifying new doctrinal guideposts that might focus and legitimize their exercise of *Chevron* discretion, courts can make progress toward redesigning *Chevron*.

178. *See supra* Part III.