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# *Chevron*'s Two Steps

Kenneth A. Bamberger

Peter L. Strauss
*Columbia Law School*, strauss@law.columbia.edu

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*Kenneth A. Bamberger*[*] *and Peter L. Strauss*[**]

THE framework for judicial review of administrative interpretations of regulatory statutes set forth in the landmark *Chevron U.S.A. v. Natural Resources Defense Council*[1] decision prescribes two analytic inquiries, and for good reason. The familiar two-step analysis is best understood as a framework for allocating interpretive authority in the administrative state; it separates questions of statutory implementation assigned to independent judicial judgment (Step One) from questions regarding which the courts' role is limited to oversight of agency decisionmaking (Step Two).[2]

The boundary between a reviewing court's decision and oversight roles rests squarely on the question of statutory ambiguity. For while courts, using "traditional tools"[3] of statutory interpretation, should decide directly whether statutory language permits or clearly excludes the possibility of a given agency interpretation, judges must withdraw to a supervisory role when agency choices fall within a zone of ambiguity left by congressional instructions. In that oversight role, courts may ask whether an agency employed appropriate processes or reasoning in making an interpretive choice. But if the choice was reached in a reasonable manner, judges must let the administrative interpretation stand. Thus defining the areas of ambiguity within which agencies possess primary interpretive authority constitutes a—if not the—central component of judges' independent Step One task.

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[*] Assistant Professor of Law, University of California, Berkeley, School of Law (Boalt Hall). Many thanks to Eric Biber, Ronald Levin, Melissa Murray, Anne Joseph O'Connell, Martin Shapiro, and Molly Van Houweling for discussion and comment.

[**] Betts Professor of Law, Columbia University.

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

[2] See Peter L. Strauss, Overseers or "The Deciders"—The Courts in Administrative Law, 75 U. Chi. L. Rev. 815, 817 (2008).

[3] *Chevron*, 467 U.S. at 843 n.9.

Professors Stephenson and Vermeule's provocative essay on this issue[4] offers several important observations regarding inconsistencies evident in the doctrinal formulations employed by courts applying *Chevron*'s framework for judicial review. Yet it ultimately proposes two doctrinal alterations that threaten greater problems than any it seeks to resolve.

First, the essay suggests collapsing *Chevron*'s independent judicial task into a "unitary" inquiry into "the reasonableness of the agency's statutory interpretation,"[5] with no explicit mention of statutory clarity. Removing the charge that judges deal squarely with the key question of ambiguity muddies *Chevron*'s task-allocation function, thus distracting courts from an essential judicial function: that of bounding agency authority. In so doing, it invites courts to elide the constraints *Chevron* rightly imposes on the scope of independent judicial construction of regulatory statutes and undermines the utility of judicial decisions reviewing agency action as guides for future administrative choices. It also blunts *Chevron*'s utility as a framework for circumscribing the appropriate scope of independent judicial decisionmaking more generally, including in those cases in which a court must resolve a statute's meaning *before* an agency has exercised its interpretive authority in a format entitled to *Chevron* deference.[6]

Second, Stephenson and Vermeule propose shoehorning Step Two's judicial oversight function into what they term "standard" hard look review under the Supreme Court's *State Farm* decision,[7] lest courts take an "unjustified departure from the standard approach" in the *Chevron* arena.[8] While the scope of their fears is not fully articulated, their formulation neglects the reality that the courts' oversight role under Section 706(2)(A) of the Administrative Procedure Act[9] varies with context. Not all agency decisions

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[4] Matthew C. Stephenson & Adrian Vermeule, Chevron Has Only One Step, 95 Va. L. Rev. 593 (2009).

[5] Id. at 593–94.

[6] See infra Section II.A, discussing the issues raised by such cases in light of the Supreme Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

[7] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–44 (1983).

[8] Stephenson & Vermeule, supra note 4, at 602–03.

[9] 5 U.S.C. § 706(2)(A) (2006).

that are reviewed for "reasonableness," whether or not they involve statutory interpretation as an element, invite hard look review. Moreover, that formulation needlessly points away from the possibility of important *Chevron*-specific elements of the courts' supervisory role over the process of agency interpretation. It further constrains the judicial use of deference as an important tool for promoting an agency's employment of particular decisionmaking procedures in reaching interpretive choices that would not arise in the context of "vanilla" hard look review.

## I. STEPHENSON AND VERMEULE'S ONE-STEP *CHEVRON* PROPOSAL

Stephenson and Vermeule marshal three valuable insights regarding *Chevron*'s standard. First, they correctly distinguish two distinct analytic elements of judicial review of agency interpretations. These they call 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).[10] We would simply call these "Step One" and "Step Two."

Second, they offer compelling support for the notion that the question whether a statute evidences clear congressional intent and the question whether an agency interpretation falls outside the area of discretion committed to its charge by reason of statutory ambiguity are interrelated elements of the independent judicial task[11]—despite the fact that the latter inquiry has sometimes been located by courts in *Chevron*'s second step.[12] Indeed, *Chevron*'s language about the "precise question at issue"[13] has misled many,

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[10] Stephenson & Vermeule, supra note 4, at 600.

[11] Id. at 594.

[12] An example can be found in *MCI Telecommunications v. American Telephone & Telegraph*, which asks, at what is identified (misleadingly in our view) as Step Two of its *Chevron* analysis, whether an agency's interpretation of an ambiguous statute goes "beyond the meaning that the statute can bear." 512 U.S. 218, 229 (1994). This point was made earlier by Ronald Levin, who calls these cases "belatedly discovered" Step One decisions, in that they ultimately rest on a determination of the boundary of legitimate agency discretion created by statutory ambiguity, the core Step One question. See Ronald M. Levin, The Anatomy of *Chevron*: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1280–86 (1997).

[13] *Chevron*, 467 U.S. at 842.

both judges and commentators, to characterize Step One as if its function were exhausted once a court has found statutory ambiguity—that courts only look for themselves for point solutions, leaving the rest to the agency under Step Two. Professors Stephenson and Vermeule start their analysis as if that were the obvious meaning of the case, a posture that gives their critique greater intuitive appeal. They then, however, present a model that reveals the judicial function to be that of bounding ambiguity, rather than of identifying single solutions. They also subsequently acknowledge that "[s]ome courts and commentators . . . interpret[] the content of the two steps differently"[14]—that is, Step One as judicial ascertainment of the range of meaning available to the agency; Step Two as review of any agency determination falling within that range. We are among this latter group.

Third, following a line of scholarship begun by Ronald Levin,[15] they properly note the correspondence of the judicial oversight role traditionally exercised under *Chevron* with the general "arbitrary, capricious, [or] abuse of discretion" standard for performing that function under Section 706(2)(A) of the Administrative Procedure Act.[16]

In explicating these insights, however, they propose revisions to the doctrine guiding each of *Chevron*'s "interpretive" and "decisionmaking" steps.

They first argue that the two interpretive inquiries *Chevron* identifies—first, whether a statute resolves clearly or displays ambiguity regarding the precise issue raised by the agency interpretation, and second, whether the agency's choice is thereby permissible—are, in fact, redundant. The ultimate determination whether an agency's construction falls into the range of interpretation allowed by the statute is not furthered, they contend, by a prior analytical determination of the limits Congress has placed on the agency's interpretive discretion. Thus the distinction "serves no useful purpose."[17] Indeed, they speculate that forcing courts to begin with *Chevron*'s traditional inquiry into the existence of statutory ambiguity might actually undermine *Chevron*'s deference

[14] Stephenson & Vermeule, supra note 4, at 599.
[15] See Levin, supra note 12, at 1267–69.
[16] 5 U.S.C. § 706(2)(A) (2006).
[17] Stephenson & Vermeule, supra note 4, at 598.

principle by feeding the judicial inclination to fix statutory meaning independently and hence foreclosing interpretive options that might otherwise be left to administrative discretion. Accordingly, they conclude, *Chevron* review should be reduced to a single question: is the agency's interpretation "reasonable"?[18]

Having collapsed the interpretive question into a unitary inquiry, Stephenson and Vermeule advocate removing the decisionmaking inquiry from *Chevron*'s ambit altogether. Inquiring into the manner in which an agency reached its choice at Step Two, they argue, renders that step redundant with "standard *State Farm*-style hard look review" of administrative policymaking.[19] Such redundancy, again, "serves no useful purpose"[20] but threatens two harms. Courts may engage in an "unjustified departure from the standard approach to hard look review," by concluding that it is "different in the context of statutory interpretation than in other domains where agencies make discretionary policy choices."[21] Moreover, courts may feel constrained to decide contested interpretative issues when cases might otherwise be resolved on straightforward decisionmaking grounds. The judicial oversight function, they conclude, should track "standard" *State Farm* requirements: "the decision must be based on a consideration of the relevant factors, and the agency must offer an explanation that is plausible and consistent with the evidence before the agency."[22]

It is with these doctrinal proposals that we express concern.

## II. Assessing the Proposal

### *A. The Interpretive Question*

Critical to an evaluation of Stephenson and Vermeule's unitary interpretive analysis is a recognition that an agency interpretation may be permissible for two reasons: because it precisely maps a singular congressional intent on the issue at hand, or because it constitutes an agency policy determination that falls within the

[18] Id. at 593–94 ("*Chevron* calls for a single inquiry into the reasonableness of the agency's statutory interpretation.").
[19] Id. at 599.
[20] Id. at 601.
[21] Id. at 603.
[22] Id. at 599.

scope of agency discretion that is accorded by statutory ambiguity. The first of these reasons is of lesser interest in our judgment, given the rarity of point judgments by Congress, particularly in the context of administrative law. One may note, however, that in this context, the interpretation is properly the responsibility of judicial judgment, perhaps informed by agency views but nonetheless independent.[23]

When an agency interpretation is permissible for the second reason, however, the agency choice (so long as it were reached in a reasonable manner) remains undisturbed because a court in its oversight role must withdraw and accord it deference. Such deference is explicitly premised on a prior *judicial* definition of a region of statutory ambiguity—and specifically, on the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency."[24]

In cases reviewing agency interpretations that are, in fact, permitted by the statutory text, this distinction may bear little consequence on the resolution of the case at hand: the agency's interpretation is vindicated. Yet the systemic implications of such a difference for administration are real. As the Supreme Court explained in its recent *Brand X* decision, 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.[25] By contrast, a judicial determination that an agency interpretation embodies one option within the zone of indeterminacy makes it possible for the agency to put forth a different interpretation at a later time.

Moreover, the precise basis of a judicial holding that an agency choice exceeds the discretion accorded the agency matters a great deal in constraining judicial interpretation to its appropriate role. If

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[23] That is, save for the possibility that the agency's interpretation may itself constitute one of the "traditional tools of statutory interpretation." See Strauss, supra note 2 at 817 (citing Norwegian Nitrogen Prods. v. United States, 288 U.S. 294, 314–15 (1933); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544, 549 (1940); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (noting that, in reaching its independent conclusion, a court may find guidance in a responsible agency's judgment).

[24] Smiley v. Citibank (S.D.), 517 U.S. 735, 740–41 (1996).

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

the holding entails a judicial determination that the statute cannot bear the meaning the agency has given it, such a determination limits the interpretation on which any future agency action can be based. But it does not constrain the agency's action within any statutory discretion the court acknowledges the agency has. Thus, under *Brand X*, when a court holds that an agency construction is impermissible because it exceeds the scope of interpretive authority assigned to the agency by reason of statutory ambiguity, the court should not go on to offer its views of the best way to resolve statutory meaning. Its role as "decider" has been exhausted.

To the extent that courts applying Stephenson and Vermeule's unitary interpretive inquiry will distinguish between those agency constructions that are permissible because they are mandated by congressional instructions on the one hand and those that are permissible because they are encompassed within the zone of discretion accorded by statutory ambiguity on the other, then the proposed doctrinal change is merely a semantic one. Indeed, the case they identify as an illustration of the unitary *Chevron* paradigm, the Supreme Court's *Global Crossing* decision, demonstrates this point; the Court upheld as reasonable the FCC's construction of the Telecommunications Act but went on to clarify that the agency's choice was not mandated by the statute, but instead was simply one of a number of permissible options.[26] Thus, although the Court did not, in Stephenson and Vermeule's words, recite *Chevron*'s two-step language in "talismanic fashion,"[27] in practical terms it indicated both that the statute is ambiguous and that the agency's interpretation was consistent with the discretion that results.

Yet Stephenson and Vermeule do suggest that a "unitary" *Chevron* analysis might permit courts to skip over discussion of statutory ambiguity and proceed directly to the conclusion that an agency's interpretation is permissible.[28] And courts experimenting with an abandonment of *Chevron*'s "talismanic" language have

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[26] Global Crossing Telecomms. v. Metrophones Telecomms., 550 U.S. 45, 56 (2007) ("We do not suggest that the FCC is required to find carriers' failures to divide revenues to be § 201(b) violations in every instance.")

[27] Stephenson & Vermeule, supra note 4, at 601.

[28] Id. at 602 (defending their proposal as a means of avoiding the situation in which judges believe they must "ascertain whether the statute has a single clear meaning before deciding whether the agency's interpretation is reasonable").

done exactly that. Sidestepping the question of whether deference or independent judgment guided its analysis, for example, the Supreme Court in *Edelman v. Lynchburg College* found an agency interpretation "reasonable," explaining that it constituted the interpretation that the majority would adopt "even if . . . we were interpreting the statute from scratch."[29] Such fudging language permits a court to uphold an agency's construction and even to suggest that it constitutes the "best" interpretation of statutory language, without any prior determination as to whether it is acting in its "decider" role regarding the bounds of agency discretion or is simply acting as an overseer of a judgment committed to agency decision. The regrettable consequence is to obscure whether the court's construction binds further agency decisionmaking conclusively or leaves future decisionmaking to agency interpretive authority.

Far from furthering the types of judicial minimalism that Stephenson and Vermeule correctly endorse, a court that does not engage in an explicit ambiguity analysis but concludes only that an agency interpretation passes muster (thus avoiding an explication of the necessary grounds of its conclusion) is permitted a sort of "aggrandizement by implication." It may invite the inference that its holding constitutes a precedential Step One analysis for *Brand X* purposes, fixing the legal meaning of a statute and precluding future agency interpretations that diverge from it.[30] Agencies, in turn, might be deterred from seeking regulatory changes warranted by

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[29] 536 U.S. 106, 114 (2002).

[30] Professor Vermeule, in his recent work on rule-of-law issues in administrative law, himself suggests the tendency toward this sort of implication. In discussing review of agency action implicating national security, in which context *Chevron*'s scope is contested, he describes that "[i]n general, courts often claim that the statute, correctly read, supports the government's view, leaving unclear or undecided whether the government's view would prevail if the statute were unclear." He continues by suggesting a strong precedential read of these outcomes, noting that "[i]mplicitly, many of these cases might be described as *Chevron* Step One cases in which the court simply held that the government's view was clearly correct." Adrian Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev 1095, 1128 (2009); see also Richard J. Pierce, Jr., Administrative Law Treatise 60 (4th ed. Supp. 2008) (suggesting, in discussing *SEC v. Edwards*, 540 U.S. 389, 396–97 (2004), which upheld with no mention of deference an agency interpretation reached in a formal adjudication—a type of procedure typically triggering interpretive deference under *Chevron*—that "[p]erhaps the Court meant to say that it did not need to confer any deference on SEC's interpretation because the statute is not ambiguous on this point").

sound policy by the misimpression that a court has already given a precedential imprimatur to outdated choices.

Minimizing the centrality of ambiguity analysis in *Chevron*'s framework could have the greatest detrimental effect in a category of cases in which *Chevron* deference plays no formal role at all. These cases might be thought of as those decided in *Chevron*'s "shadow." They involve judicial construction of regulatory statutes committed to an agency's administration, but regarding which the agency has not yet adopted an interpretation in a format (such as notice-and-comment rulemaking) that triggers *Chevron*'s perspective of "oversight" rather than "decision." In these cases, the importance of judicial recognition of ambiguity analysis as the starting point for statutory interpretation is at its apex. For after *Brand X*, where courts recognize that congressional instructions create a zone of ambiguity committed to agency administration on an issue before them, their decisions do not fix statutory meaning. They simply decide the question provisionally, in a manner that resolves the case at hand but leaves future choices in agency hands.[31]

Consider, in this light, Justice Scalia's heated dissent from *Brand X*.[32] The dissent erred in assuming that if a court happened to have to decide some issue that fell within an agency's statutory discretion before the agency had reached the issue in a *Chevron*-empowered manner, its doing so would "make law" on that question. If one accepts that premise, it would follow that when the agency later came to that issue and decided it, the agency might be in the position of "overruling" a judicial decision—a fundamental separation of powers problem. But the conclusion that Congress has given an agency discretion over a matter precludes finding that a court reaching the matter before the agency does is "making law." This reasoning converts a judicial decision on that matter into no more than a resolution of the particular case. The court must decide the case, and so it does—just as federal courts sitting in diversity sometimes decide questions of state law, or state courts decide questions of other states' law or of the law of other nations. In

[31] See Kenneth A. Bamberger, Provisional Precedent: Protecting Flexibility in Administrative Policymaking, 77 N.Y.U. L. Rev. 1272, 1294–306 (2002) (proposing, and setting forth the rationale for, such an outcome).

[32] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1005–20 (2005) (Scalia, J., dissenting).

none of these cases does the decision have precedential value (other than, perhaps, for lower courts in the deciding court's own hierarchy until such time as the authority empowered definitively to resolve the issue does so). So while judicial bounding of agency discretion has precedential value, any judicial judgment on a question within that discretionary area—that may be required because the agency has not yet definitively acted—does not.[33] Such a reality suggests that doctrine should be clarified, if at all, to *strengthen Chevron*'s indication that interpreting courts must address the existence of ambiguity first as a means for ensuring recognition of the appropriate judicial role, rather than to orient judicial decision-making towards a touchstone of interpretive reasonableness.

The confusion sown in this category of "*Chevron*'s shadow" cases by eschewing ambiguity as the analytic touchstone is evidenced in the Supreme Court's recent decision in *Rapanos v. United States*.[34] The plurality in that case employed the language of a "unitary" *Chevron* standard, rejecting an Army Corps of Engineers' informal interpretation of the Clean Water Act as "not 'based on a permissible construction of the statute.'"[35] By employing this formulation, the plurality obscured its holding as to the scope of any statutory ambiguity and the resulting doctrinal significance for the relationship between the agency and a reviewing court. At various points in its decision, the plurality indicated that the relevant statutory provisions bear some significant degree of ambiguity. But the decision then engaged in a fairly ambitious independent judicial determination of statutory meaning, arriving at one single "plausible interpretation."[36] This, despite the assertion in a separate concurrence by Chief Justice Roberts, one member of the plurality, that the statute's ambiguity *would have* permitted the agency to reach its own distinct conclusion had the agency engaged in appropriately formal notice-and-comment rulemaking.[37] Read together, these opinions suggest that the plurality's inverted *Chev-*

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[33] See Bamberger, Provisional Precedent, supra note 31, at 1310–11.

[34] 547 U.S. 715 (2006).

[35] Id. at 739 (2006) (plurality opinion) (quoting *Chevron*, 467 U.S. at 843).

[36] Id.

[37] Id. at 757–58 (Roberts, C.J., concurring); see Kenneth A. Bamberger, Normative Canons in the Review of Agency Policymaking, 118 Yale L.J. 64, 104–05 (2008) (discussing *Rapanos*).

*ron* analysis permitted judicial foreclosure of an interpretive realm rightly assigned to agency authority.[38]

The disorder evidenced in *Rapanos*, to be sure, cannot be laid at Stephenson and Vermeule's door. Yet the decision does suggest the way in which downplaying the importance of ambiguity as the starting point for statutory interpretation might invite courts to disregard *Chevron*'s suggestion of judicial caution in moving beyond setting the boundaries of agency interpretive authority, to outright judicial interpretation.

### *B. The Decisionmaking Question*

Courts and commentators have converged on an emerging consensus that the "arbitrary, capricious, and abuse of discretion" standard set forth in Section 706(2)(A) supplies the metric for judicial oversight at Chevron's second step.[39] Stephenson and Vermeule take this notion one step further, arguing for a complete identity between one type of Section 706 review—the "hard look" review of ultimate agency policy decisions typified by the Supreme Court's *State Farm* decision—and decisionmaking oversight in *Chevron* cases. Determinations as to whether interpretative decisions are "reasonable" and therefore entitled to judicial deference, they argue, should depend on the same factors employed in reviewing other agency policy choices: "the decision must be based on a consideration of the relevant factors, and the agency must offer an explanation that is plausible and consistent with the evidence before it."[40] Because, they conclude, there is "no obvious reason" for treating interpretive choices differently, providing a distinct forum

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[38] See also S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 378 (2006) (leaving unclear whether its decision fixed the relevant statute's meaning or permitted the agency to revisit the issue, where an agency interpretation was not reached in a formal manner deserving of deference but "confirms our understanding of the everyday sense of the term").

[39] Indeed, a growing scholarly consensus has formed around the proposition that *Chevron*'s second step, which we identify as the situs for the judicial oversight role, "should be explicitly understood to incorporate a 'reasonableness' requirement drawn from the arbitrary and capricious case law." M. Elizabeth Magill, Step Two of *Chevron v. Natural Resources Defense Council*, *in* A Guide to Judicial and Political Review of Federal Agencies 85, 99 (John F. Duffy & Michael Herz eds., 2005); see also 1 Richard J. Pierce, Jr., Administrative Law Treatise § 7.4, at 453 (4th ed. 2002); Levin, supra note 12, at 1268; Strauss, supra note 2, at 826.

[40] Stephenson & Vermeule, supra note 4, at 599.

for reviewing such choices with *Chevron*'s framework can only lead to "unjustified departure[s]" from the "standard approach."[41]

The invocation of a single neatly circumscribed standard of oversight, however, ignores the fact that the application of decisionmaking review under Section 706's residual "arbitrary and capricious" language, and even its hard look variant, varies greatly depending on the issues raised by the relevant context.[42] And while *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, it is very much the product of the high-consequence rulemaking involved in that case. We doubt, for example, that "hard look" plays much of a role in review of lower-stakes NLRB "unfair labor practice" determinations or SSA benefit determinations. Nor do the *State Farm* factors always identify the totality of factors involved in a reasonable process of statutory construction.

Indeed, there is good reason to conclude that oversight of agency interpretation should appropriately incorporate factors distinct from those developed in the review of an agency's exercise of policymaking expertise in light of a technical or scientific record, the context in which "hard look" review was developed.[43] Recent cases applying *Chevron* have suggested several such interpretation-specific factors distinct from "standard" *State Farm* review of policymaking. Such factors include whether an agency erroneously concluded that a statute unambiguously required a particular interpretation,[44] whether an agency correctly construed a prior judicial construction to mean that the statute could bear only one particular meaning,[45] and whether an agency had made the case to

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[41] Id. at 602–03.

[42] See Stephen G. Breyer et al., Administrative Law and Regulatory Policy 383 (6th ed. 2006); Strauss, supra note 2, at 820–21.

[43] See Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 511 (1974) (describing hard look review as follows: "[T]he court must study the record attentively, even the evidence on technical and specialist matters, 'to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion with reasons that do not deviate from or ignore the ascertainable legislative intent.'") (quoting his decision in Greater Boston Television v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970)).

[44] See PDK Labs. v. DEA, 362 F.3d 786, 794–97 (D.C. Cir. 2004).

[45] See Teva Pharms. v. FDA, 441 F.3d 1, 4–5 (D.C. Cir. 2006).

justify an interpretation that appeared to contradict the statute's plain language.[46]

Similarly, judicial oversight under *Chevron* offers a location for determining whether the agency decisionmaking process has appropriately taken account of other interpretive tools—like normative canons of construction[47] or legislative history[48]—when resolving ambiguity in the governing statute. It also provides a place to consider whether the agency has otherwise employed appropriately robust procedures in construing statutory language or determining the scope of its authority.[49] In other words, Step Two analysis considers whether agencies have permissibly exercised the interpretive

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[46] See Hill v. Norton, 275 F.3d 98, 99 (D.C. Cir. 2001) (holding that an agency's decision not to put invasive and destructive species of "mute swan" on a protected migratory bird list despite statutory inclusion of the category of "swan" was "very nearly governed by *Chevron* step one" but finding instead that agency action was arbitrary and capricious under step two, because it failed to explain the basis of its interpretation).

[47] See Bamberger, Normative Canons, supra note 37, at 108–23 (arguing that such canons should be considered in reviewing agency interpretations at Step Two, rather than used to resolve ambiguity independently by judges at Step One, as they often are).

[48] See generally Jerry L. Mashaw, Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation, 57 Admin. L. Rev. 501, 511 (2005) (describing agency capacity to use legislative history for insight into statutory goals); Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 Chi.-Kent L. Rev. 321, 329–31 (1990) (same).

[49] See Bamberger, Normative Canons, supra note 37, at 118 (suggesting various procedures courts might require before deferring to an agency's interpretation in light of normative canons of construction); Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DePaul L. Rev. 227, 256–58 (2007) (suggesting the denial of deference as a penalty default rule for an agency's failure to engage in certain procedures to ensure "full compliance with the congressional and executive mandates designed to ensure robust dialogue and debate among state and federal stakeholders"); cf. Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1237–39 (2006) (suggesting that agencies should notify Congress when relying on avoidance canons in interpreting statutes). William Eskridge and Lauren Baer provide compelling evidence that courts already vary the level of interpretive deference under Step Two in light of the procedures used to reach administrative interpretations, attributing the "markedly higher win rates for agency interpretations embodied in rulemaking as opposed to adjudications," in part to a sense that the former "might produce legal directives that are perceived of as relatively more *legitimate* than the typically ad hoc directives issued in administrative adjudications." 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, 1147 (2008).

authority delegated to them by reasonably employing appropriate methods for elaborating statutory meaning. Such review, albeit not the type of "hard look" review conventionally associated with *State Farm*, fits comfortably within the framework of Section 706(2)(A). These questions lend themselves to consideration within the *Chevron* framework because their answers implicate the resolution of statutory ambiguity, the appropriate scope of agency discretion in light of the governing statute's meaning, and the boundary between the judicial decision and judicial oversight functions. Yet when their determination involves judicial oversight of agency choices rather than independent judicial judgment, the outcomes should not fix statutory meaning but rather leave a range of interpretive authority in agency hands. This is *Chevron*'s Step Two.

To the extent, then, that the equation of judicial oversight in the *Chevron* context with *State Farm* suggests that the permissible factors to be considered are limited by understandings of "arbitrary and capricious" review developed in other contexts, it offers too cramped a notion of the judicial supervisory role. If it does not, we do not see value in effecting a doctrinal shift in contravention to current practice.

## CONCLUSION: *CHEVRON*'S TWO STEPS

Although, as we believe, Stephenson and Vermeule's proposals would muddy the doctrinal waters unnecessarily, their thoughtful essay nonetheless suggests an opportunity to articulate clearly what *Chevron*'s two steps involve, an enunciation that, we hope, reflects their valuable insights.

At *Chevron*'s first step, courts reviewing administrative constructions should begin by 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. If the former, statutory meaning is set; consistent agency interpretations should be upheld on the court's own authority, while contrary constructions must be rejected. If the latter, agency interpretations that do not fall within the zone of indeterminacy permitted by the statute's language must be struck down. This constitutes the scope of the independent judicial task.

Once courts determine, however, that the existence of ambiguity has placed primary authority for a matter in agency hands and that the scope of that ambiguity permits the agency choice, the judicial role moves from decision to oversight, and thus to *Chevron*'s second step. At this step, Section 706(2) of the Administrative Procedure Act sets the general standard, and courts inquire as to whether the agency's judgment on a matter within its delegated authority is "reasonable."[50] While the statutory language defining that inquiry is the same language that governed *State Farm*, the emphasis may vary. The focus may be on interpretive method, as opposed to the fact-intensive judgments at issue in *State Farm.*

Understood as such, *Chevron*'s two steps promote clarity in judging, provide guidance for administrative decisionmakers, and supply an appropriate framework for the relationship between executive and judicial action.

[50] The instruction of § 706 that courts are to decide all questions of law is not inconsistent with this approach. What authority the statutory language confers on an agency is a question of law. Once it is answered in Step One, other elements of § 706, notably § 706(2)(A), address the question whether that authority has been properly exercised. Cf. NLRB v. Hearst Publ'ns, 322 U.S. 111, 130–31 (1944) (noting that if the agency has authority to implement a statute, the court's review is limited to determining whether the agency has acted within the authority the court independently finds to have been given it (step one) and has done so reasonably (step two)).