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# Chevron Step Two's Domain

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# CHEVRON STEP TWO'S DOMAIN

Kent Barnett\* & Christopher J. Walker\*\*

An increasing number of judges, policymakers, and scholars have advocated eliminating or narrowing Chevron deference—a two-step inquiry under which courts defer to federal agencies' reasonable interpretations of ambiguous statutes the agencies administer. Much of the debate centers on either Chevron's domain (i.e., when Chevron should apply at all) or how courts ascertain statutory ambiguity at Chevron's first step. Largely lost in this debate on constraining agency discretion is the role of Chevron's second step: whether the agency's resolution of a statutory ambiguity is reasonable. Drawing on the most comprehensive study of Chevron in the circuit courts, this Article explores how circuit courts have applied Chevron step two to invalidate agency statutory interpretations. In doing so, it identifies three separate approaches that merit further theoretical and doctrinal development: (1) a more-searching textualist or structuralist inquiry into the statutory ambiguity in light of the whole statute; (2) an enhanced purposivist or contextualist inquiry; and (3) an inquiry into an agency's reasoned decisionmaking similar to arbitrary-and-capricious review under the Administrative Procedure Act.

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## INTRODUCTION

Calls within Congress, the legal academy, and the federal judiciary to eliminate or otherwise narrow judicial deference to administrative interpretations of law have grown in number and volume within recent years.<sup>1</sup> The canonical *Chevron* deference “two-step”—enunciating in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*—requires courts to defer to federal agencies’ reasonable interpretations of ambiguous statutory provisions they administer.<sup>2</sup> In the first step, courts assess whether the statutory provision at issue has a clear meaning.<sup>3</sup> If it does, that meaning controls.<sup>4</sup> If, however, the statute is ambiguous, courts proceed to the second step and assess whether the agency’s interpretation is reasonable.<sup>5</sup>

Since its inception in 1984, *Chevron*’s domain has grown more complicated.<sup>6</sup> At a preliminary step, called “step zero,” courts decide whether to engage in the *Chevron* two-step at all by asking whether Congress intended to delegate interpretive primacy to agencies instead of courts.<sup>7</sup> The current debate on step zero focuses on the major questions doctrine as articulated by Chief Justice Roberts for the Court in *King v. Burwell*, under which courts do not apply *Chevron* deference to statutory interpretations that implicate “major questions.”<sup>8</sup> Moreover, circuit courts have added additional wrinkles. For instance, some courts ask whether the agency understood itself as interpreting an ambiguous statute<sup>9</sup> or whether the agency seeks *Chevron* defer-

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1 See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018) (reviewing recent criticisms).

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

3 See *id.* at 842.

4 See *id.*

5 See *id.*

6 See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (exploring a number of ways in which *Chevron* deference has been further complicated and flagging outstanding questions regarding its domain).

7 For more on *Chevron* step zero, see *id.* at 836–37; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207–11 (2006). For a recent review of the literature and caselaw on the scope of *Chevron* deference under step zero, see Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 477–84 (2014). One of us has explored which considerations at step zero evidence congressional intent to delegate. See generally Kent Barnett, *Codifying Chevron*, 90 N.Y.U. L. REV. 1 (2015).

8 *King v. Burwell*, 135 S. Ct. 2480, 2491, 2494 (2015). See generally Kent Barnett & Christopher J. Walker, Response, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (2017) (defending the use of the major questions doctrine in the federal courts of appeals). One of us has argued that *King v. Burwell* is not just about major questions but, instead, part of Chief Justice Roberts’s larger agenda to narrow *Chevron* deference. See, e.g., Christopher J. Walker, *Toward a Context-Specific Chevron Doctrine*, 81 MO. L. REV. 1095, 1098–1105 (2016).

9 See generally Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017).

ence at step zero.<sup>10</sup> Others assess, after completing *Chevron's* two steps, whether the agency's action was arbitrary and capricious under the Administrative Procedure Act (APA).<sup>11</sup>

More recently, there have been calls to eschew nuance and abandon *Chevron* deference altogether. For instance, both the House and the Senate have introduced legislation to amend the APA to require courts to review de novo all agency interpretations of statutes and regulations.<sup>12</sup> Justice Thomas has expressed constitutional questions about *Chevron* deference, as have a number of circuit judges.<sup>13</sup> In 2017, the Senate confirmed Justice Gorsuch to the Supreme Court, who as a circuit judge expressly questioned *Chevron* deference.<sup>14</sup>

Lost in the debates regarding *Chevron's* future, however, is *Chevron* step two—the reasonableness inquiry—in affecting agency discretion. When contemplating *Chevron's* domain or its very existence, scholars have largely concentrated on how many steps *Chevron* has<sup>15</sup> or how step one should or does

10 See *Glob. Tel\*Link v. FCC*, 866 F.3d 397, 407–08 (D.C. Cir. 2017) (“The oddity here, however, is that the agency no longer seeks deference . . . . In these circumstances, it would make no sense for this court to determine whether the disputed agency positions advanced in the *Order* warrant *Chevron* deference when the agency has abandoned those positions.”).

11 See, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHIKENT L. REV. 1253, 1254 (1997).

12 See Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2 (2016); Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. § 2 (2016); see also Christopher Walker, *Courts Regulating the Regulators*, REG. REV. (Apr. 25, 2016), <https://www.theregview.org/2016/04/25/walker-courts-regulating-the-regulators/> (explaining how legislation is an outgrowth of recent Supreme Court criticism of *Chevron* deference).

13 See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (“An Article III renaissance is emerging against the judicial abdication performed in *Chevron's* name.”); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (criticizing both *Chevron* and *Auer*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (announcing that “[m]aybe the time has come to face the behemoth” that is *Chevron* deference); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–54 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (expressing concerns with *Chevron* deference).

14 See Press Release, Office of U.S. Senator Orrin Hatch, Hatch Questions Gorsuch on Holding Federal Bureaucracy Accountable to the Law (Mar. 23, 2017), <http://www.hatch.senate.gov/public/index.cfm?p=releases&id=4A30B354-85E8-4726-A5D2-61D282AF10EB> (quoting and linking to relevant Senate Judiciary Committee hearing testimony).

15 Some argue that *Chevron* has only one step. See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, Essay, 95 VA. L. REV. 597 (2009) (arguing that courts should simply review for reasonable interpretations). The Supreme Court has sometimes applied a *Chevron* one-step. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009); see also *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment). But others argue that Article III requires two distinct steps, where the first one considers statutory textual limits on agency discretion. See Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two*

operate.<sup>16</sup> Given the received wisdom that agencies nearly always prevail at step two,<sup>17</sup> the second step has largely seemed like a *fait accompli*, rarely worthy of significant study.<sup>18</sup> More recently, however, then-D.C. Circuit Judge Brown bemoaned the trend toward a one-step examination, arguing that “[t]runcating the *Chevron* two-step into a one-step ‘reasonableness’ inquiry lets the judiciary leave its statutory escort to blow on an agency’s dice.”<sup>19</sup>

Judge Brown’s colleague Judge Silberman has subsequently called for step two’s “muscular use . . . [to serve as] a barrier to inappropriate administrative adventure.”<sup>20</sup> He noted that the Supreme Court had often given short shrift to step two or appeared to go out of its way to frame its decisions under step one when step two would have been more appropriate.<sup>21</sup> When properly applied, he argued, “*Chevron*’s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion.”<sup>22</sup> We suspect other judges and courts will begin to consider Judge Silberman’s focus on step two’s domain and whether it should be more vigorous.

This Article—written for the *Notre Dame Law Review* Symposium, “Administrative Lawmaking in the Twenty-First Century”—responds to Judge Silberman’s call to explore how *Chevron* step two limits agency discretion. Drawing on our dataset of every published *Chevron* decision in the circuit courts from 2003 through 2013, we find that agencies prevail under the *Chevron* framework 77.4% of the time. If the court gets to *Chevron*’s second step, moreover, the agency-win rate rises to 93.8%, compared to a 39.0% win rate for cases

*Steps*, Essay, 95 VA. L. REV. 611, 612 (2009); see also *Waterkeeper All.*, 853 F.3d at 538–39 (Brown, J., concurring).

16 See, e.g., Linda Jellum, *Chevron’s Demise: a Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (arguing that the Supreme Court has moved, with some inconsistency from various Justices, from an intentionalist to a textualist inquiry at step one); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 85 n.9 (1994) (listing scholarship that considers the appropriate tools of statutory interpretation at step one).

17 See, e.g., Seidenfeld, *supra* note 16, at 100 (“At step two, courts almost never overturn agency interpretations as unreasonable.”).

18 But see Levin, *supra* note 11 at 1254 (arguing that step two and the APA’s arbitrary-and-capricious review should be understood as the same inquiry); Seidenfeld, *supra* note 16 (arguing that courts should take a more intensive inquiry into the agency’s decision-making process at step two).

19 See *Waterkeeper All.*, 853 F.3d at 539 (Brown, J., concurring).

20 *Glob. Tel\*Link v. FCC*, 866 F.3d 397, 419 (D.C. Cir. 2017) (Silberman, J., concurring).

21 See *id.* at 418–19 (citing, in particular, Justice Scalia’s analysis in *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994)). Judge Silberman’s call for a more vigorous step two echoes Mark Seidenfeld’s proposal for a “syncopated” *Chevron*. See Seidenfeld, *supra* note 16.

22 *Global Tel\*Link*, 866 F.3d at 418 (Silberman, J., concurring).

decided at step one.<sup>23</sup> In other words, only fifty-one of the 1158 agency statutory interpretations in our eleven-year dataset were invalidated by circuit courts at step two, confirming longstanding intuitions that step one plays the predominant constraining role.<sup>24</sup> These fifty-one agency losses, however, shed important empirical light on how *Chevron* step two actually operates to serve as a constraint on agency discretion.

As further detailed in Part II, our findings provide significant insight on how the circuit courts understand step two. We coded the courts' analysis of the fifty-one agency losses at step two for about thirty potentially relevant variables. The most cited variable was the statutory text (72.5% of the time), followed by the agencies' lack of reasoned decisionmaking (54.9%), and statutory purpose (47.1%). Other relatively popular practices included reading the statute as a whole (21.6%), reading the statute with other related statutes (15.7%), and considering whether the agency had changed its position (15.7%). When we categorized the fifty-one agency losses under three leading theories of how step two should operate, no one theory commanded a majority. Indeed, we were unable to categorize approximately 28% of them. For the remaining interpretations, courts rejected 33.3% of the fifty-one agency interpretations at step two under a review similar to the APA's arbitrary-and-capricious review, 27.5% under what we refer to as a "hyperpurposivist" inquiry, and 11.8% under what we categorize as a "hypertextualist" approach.

These findings have significant implications for how the Supreme Court, circuit courts, litigants, and scholars should approach *Chevron* step two going forward. As discussed in Part I, the Supreme Court has not articulated a coherent approach to step two—originally suggesting some sort of hypertextualist inquiry but, increasingly, suggesting that step two includes an APA-like arbitrary-and-capricious review. The circuit courts, by contrast, have generally not embraced a hypertextualist inquiry when striking down agency statutory interpretations at step two. Instead, like the Supreme Court, many circuit courts have applied arbitrary-and-capricious review; others have embraced a more purposivist inquiry into congressional intent. The latter is largely absent from the Supreme Court's guidance on step two. That may well be due to the late-Justice Scalia's textualist influence on the Court. Perhaps after his passing, we will see an even greater interest on the Court in purposivism—or at least some version of contextualism—as an approach to statutory interpretation.<sup>25</sup> If so, such an approach may well find its way into

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23 Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 35 fig.3 (2017).

24 See *id.* at 32–34.

25 See, e.g., Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice A Tax Lawyer?*, 2015 PEPP. L. REV. 33, 35, 37 (noting that "it appears that contextualism is quickly replacing Justice Scalia's textualism as the foundation for statutory interpretation" on the Supreme Court, where "contextualism" is "some form of purposivism" that preferences "legislative substance over form" (internal quotations omitted)).

*Chevron* step two, as a means of further constraining agency interpretive authority.

This Article proceeds as follows: Part I discusses the *Chevron* framework and the competing theories of *Chevron* step two. Part II describes our study and reports its findings. Part III discusses the implications of our step-two findings and calls on the Supreme Court to provide further guidance regarding *Chevron* step two's domain—not just to assist lower courts implementing the *Chevron* doctrine but also to guide federal agencies in their statutory interpretation efforts. The Article concludes by calling for more judicial and scholarly attention to *Chevron* step two in light of how circuit courts have approached the issue.

## I. THE THEORY OF STEP TWO

The Supreme Court has given step two relatively little attention, as compared to steps zero and one. Nonetheless, the Court has rejected an agency's statutory interpretation at step two three times, and these three cases provide some limited guidance. Likewise, scholars have also considered, mostly to a limited degree, how step two should function. This Part discusses their theories. What follows is not an exhaustive treatment of the Court's or scholars' treatment of step two. Instead, it explores what we regard as the most significant analytical models from caselaw or scholarly discourse for step two.

### A. *Establishing the Chevron Doctrine*

At issue in *Chevron* were the 1977 Amendments to the Clean Air Act. They imposed certain requirements on states that had not achieved the EPA's national air-quality standards. The Act required these states to establish a permit program regulating "new or modified major stationary sources of air pollution."<sup>26</sup> The EPA's regulations allowed states to adopt a plant-wide definition of the term "stationary source."<sup>27</sup> Under this definition, an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without meeting the permit conditions if the alteration would not increase the total emissions from the plant.<sup>28</sup> In other words, the plant's various pollution-emitting devices were viewed as under a "bubble."<sup>29</sup> The challengers argued that the EPA's "bubble" concept was contrary to the statute because, they argued, "stationary source" included either a plant or any of its components that emitted more than a certain threshold of pollutant.<sup>30</sup> The Court upheld the EPA's interpretation.<sup>31</sup>

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26 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

27 *See id.*

28 *See id.*

29 *See id.*

30 *See id.* at 859.

31 *See id.* at 866.

The Court stated that because it was reviewing an agency's construction of a statute it administered, it had to follow two steps.<sup>32</sup> The first step was to investigate, using "traditional tools of statutory construction,"<sup>33</sup> whether Congress had directly spoken to the precise issue at question. If such intent was clear regarding the precise issue, then both the Court and the agency had to follow it.<sup>34</sup> However, if Congress had not spoken to the issue, then the Court itself could not impose its own construction.<sup>35</sup> Instead, the Court had to consider whether the agency's interpretation, in the face of a statute's express delegation or silence, was "permissible."<sup>36</sup>

Applying these two steps, the Court first noted that the Clean Air Act amendments did not explicitly define what Congress intended by a "stationary source."<sup>37</sup> Similarly, the Court found little guidance in the history of the Clean Air Act's enactment, an interpretive ruling from 1976, or the legislative history of the 1977 amendments to the Act.<sup>38</sup> Because Congress's intent was not clear, the Court moved to step two. Quoting one of its earlier decisions, the Court deemed the EPA's "bubble" concept "a reasonable accommodation of conflicting policies."<sup>39</sup> The EPA was entitled to deference based on the "technical and complex" regulatory scheme and the Agency's "detailed and reasoned" consideration.<sup>40</sup> In reversing the judgment of the court of appeals, the Court held that the Agency's interpretation was reasonable.<sup>41</sup> The Court emphasized that federal judges must respect the policy-making space within statutory ambiguities or silence by which Congress has delegated experts to fill.<sup>42</sup>

The Court provided little guidance on how to proceed through the various steps. As for what would become "step zero," the Court indicated that the *Chevron* two-step approach applies capaciously to any "agency's construction of the statute which it administers."<sup>43</sup> For step one, the Court repeatedly said that it was inquiring into congressional intent,<sup>44</sup> but it provided little guidance on how courts should ascertain congressional intent, except to say that courts should use "traditional tools of statutory construction."<sup>45</sup> That said, the Court itself looked at statutory text, the development of the statute, legislative history, and the purposes of the statute.<sup>46</sup>

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32 *See id.* at 842.

33 *Id.* at 843 n.9.

34 *See id.* at 842.

35 *See id.* at 844.

36 *Id.* at 842–43.

37 *See id.* at 859.

38 *See id.* at 845–64.

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

40 *Id.* at 865.

41 *Id.* at 845.

42 *See id.* at 865–66.

43 *Id.* at 842.

44 *See, e.g., id.* at 842, 843 n.9, 845, 861.

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

46 *Id.* at 859–66.



For step two, it clarified that a “permissible” interpretation was a “reasonable” one.<sup>47</sup> The Court underscored that at step two the reviewing “court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”<sup>48</sup> And it indicated that a reasonable interpretation was one that sought to accommodate competing interests and arose from reasoned consideration.<sup>49</sup> Notably, the Court’s analysis in step two considered the interests that the statute sought to further, the complexity of the statutory scheme, the agency’s interpretive process, and the agency’s policy-laden enterprise.<sup>50</sup>

### B. *Developing Step Two’s Domain*

Despite numerous decisions that provide some guidance on step one,<sup>51</sup> the Court has rarely provided significant guidance on step two. Indeed, it has only rejected agency statutory interpretations at step two three times. We first turn to these three instances because they provide relatively significant guidance from the Supreme Court on how it conceptualizes the judicial inquiry under step two. Nonetheless, as we describe later in this Part, the Court has sent additional, potentially conflicting signals, in other decisions.

First, in *AT&T Corp. v. Iowa Utilities Board*, the Telecommunications Act of 1996 restructured local telephone markets to end local telephone-carrier monopolies and facilitate competition.<sup>52</sup> To that end, the Act required established carriers to share their network facilities with new competitors under what was known as the “necessary and impair” standard.<sup>53</sup> Established carriers complained that the FCC’s interpretation of this standard read the limitation out of the statute by essentially requiring established carriers to share their facilities in all cases.<sup>54</sup>

The Court agreed with the challengers and deemed the FCC’s interpretation unreasonable.<sup>55</sup> The Court engaged in no step-one analysis and did not even expressly refer to statutory ambiguity.<sup>56</sup> Nonetheless, the Court’s analysis of the reasonableness of the agency’s interpretation was textual

47 *Id.* at 843, 845.

48 *Id.* at 843 n.11.

49 *See id.* at 865.

50 *Id.* at 859–66.

51 See generally Jellum, *supra* note 16, for a thorough discussion of the Court’s and various Justices’ disputes over the “traditional tools of statutory construction” that apply at step one.

52 525 U.S. 366, 371 (1999).

53 *Id.* at 391–92 (internal quotations omitted).

54 *See id.* at 387–88.

55 *See id.* at 388–89. The end of the Court’s opinion clarified that it was considering the reasonableness of the FCC’s interpretation of ambiguous statutory provisions. *See id.* at 397.

56 *See id.* 386–92.

because it chastised the Agency for misreading the statute.<sup>57</sup> The FCC had understood Congress to intend established carriers “to provide all network elements for which it is technically feasible to provide access,”<sup>58</sup> although the statute only required carriers to permit access “at any technically feasible point.”<sup>59</sup> In other words, the statute indicated *where* access was to occur, while the FCC’s interpretation indicated *which* elements had to be shared.<sup>60</sup> But aside from this textual inquiry, the Court provided little guidance on step two, other than to indicate that it had some bite.

Second, fifteen years later, the Court struck down the EPA’s greenhouse-gas permitting standards in *Utility Air Regulatory Group v. EPA*.<sup>61</sup> The Court began under *Chevron* step one by holding that, contrary to the Agency’s interpretation, the Clean Air Act did not compel the Agency to regulate all “air pollutants,” such as greenhouse gasses.<sup>62</sup> Although the Court pointed to prior, contrary EPA positions, it engaged at step one in a purely textual and structural inquiry that considered various other provisions of the relevant statute.<sup>63</sup>

The Court then turned to step two and provided some gloss on how to review for reasonableness. The agency’s interpretation had to “account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’”<sup>64</sup> The Court determined that the EPA’s interpretation concerning certain permitting requirements under the Clean Air Act was “inconsistent with—in fact, would overthrow—the Act’s structure and design.”<sup>65</sup> (Relatedly, when holding that a separate regulatory action concerning “best available control technology” for limiting greenhouse-gas pollutants was reasonable under the same statute, the Court again relied on “statutory context.”)<sup>66</sup> The Agency’s interpretation as to permitting would also have led to an “unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.”<sup>67</sup>

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57 *Id.* at 391–92.

58 *Id.* at 391 (quoting *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 FCC Rcd. 15499, ¶ 278 (1966)).

59 *Id.* (quoting 42 U.S.C. § 251(c)(3)).

60 *Id.*

61 134 S. Ct. 2427 (2014).

62 *See id.* at 2439–42.

63 *See id.* at 2440–42.

64 *Id.* at 2442 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The *Robinson* Court did not engage in a *Chevron* inquiry, and the quoted language arose in the context of determining whether the statutory language was plain or ambiguous, although the Court referred to “broader context” in resolving the meaning of an ambiguous statutory term. *See Robinson*, 519 U.S. at 341 (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

65 *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

66 *Id.* at 2447–48.

67 *Id.* at 2436 (quoting *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44355 (proposed July 30, 2008) (to be codified at 40 C.F.R. pt. 1)).

Notably, the Court cited its decision in *FDA v. Brown & Williamson Tobacco Corp.* when rejecting the EPA's interpretation at step two.<sup>68</sup> The Court refused to permit agencies to acquire newly discovered authority to require permits "in a long-extant statute . . . [over] 'a significant portion of the American economy.'"<sup>69</sup> The Court in *Brown & Williamson* had refused, within step one, to permit the FDA to regulate tobacco because the Court did not think Congress would delegate "a decision of such economic and political significance to [the FDA] in so cryptic a fashion."<sup>70</sup> In *Utility Air Regulatory Group*, the Court expanded the domain of the same principle—what is commonly known as the "major questions doctrine"—to step two when rejecting an agency's statutory interpretation.

Third in our trilogy is *Michigan v. EPA*.<sup>71</sup> Relying on both arbitrary-and-capricious review under the APA and *Chevron* step two, the Court in *Michigan v. EPA* rejected the EPA's refusal to consider costs when regulating certain air pollutants.<sup>72</sup> The Clean Air Act directed the EPA to regulate power plants' air pollutants as "appropriate and necessary."<sup>73</sup> The EPA interpreted the phrase to mean that the Agency could not consider costs.<sup>74</sup>

After citing its decisions concerning arbitrary-and-capricious review, the Court cited *Chevron* and held that the Agency's interpretation was unreasonable (without engaging in any step-one analysis).<sup>75</sup> The Court, similar to its reasoning in *Iowa Utilities Board*,<sup>76</sup> contrasted the "appropriate and necessary" provision with other provisions within the Act,<sup>77</sup> and it referred to "the backdrop of . . . established administrative practice" of considering costs in regulation.<sup>78</sup> In rejecting the Agency's counterarguments, the Court also considered its prior precedent under the Clean Air Act,<sup>79</sup> additional textual arguments,<sup>80</sup> and a limited purposivist inquiry into why Congress treated power plants differently from other pollution emitters.<sup>81</sup> Notably, in the middle of its *Chevron* analysis, the Court referred to *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, one of its most significant arbitrary-and-capricious decisions.<sup>82</sup>

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68 *Id.* at 2443.

69 *Id.* at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

70 *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160.

71 135 S. Ct. 2699 (2015).

72 *Id.*

73 *Id.* at 2704.

74 *See id.* at 2704–06.

75 *See id.* at 2706–07.

76 525 U.S. 366 (1999).

77 *See Michigan*, 135 S. Ct. at 2707–08.

78 *Id.* at 2708.

79 *See id.* at 2709.

80 *See id.*

81 *See id.* at 2709–10.

82 *See id.* at 2706 (citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

Because the Court has spent so little time on how to approach step two in the context of rejecting an agency's interpretation,<sup>83</sup> we consider here three possible analytical methods that either caselaw (including additional guidance from the Court) or scholars have suggested.

### 1. Hypertextualism and Structuralism

The first is what we refer to as “hypertextualism” or “structuralism.” By this we mean a judicial inquiry at step two that focuses significantly on the text of the statute and its meaning within the statute as a whole and in other related statutes. Courts may refer to canons of statutory interpretation or, similar to Ronald Levin's characterization, “belatedly discover[ ] clear meaning” that is contrary to the agency's interpretation at step two through various interpretive methods.<sup>84</sup> Courts do not engage in hypertextualism or structuralism by simply referring to statutory text to guide their inquiry in passing or in concert with other more significant interpretive methods. Instead, their analysis provides a focused inquiry on the text or structure of the statute, a collection of related statutes, or both. In short, hypertextualism or structuralism is merely a continuation of a textualist-based step one, except that its focus (in theory) is on the reasonableness of the interpretation, not whether statutory ambiguity exists.

The Supreme Court's analysis may be best thought of as engaging in hypertextualism or structuralism. In *Iowa Utilities Board*, the Court narrowly focused on the language of related statutory provisions at issue by considering how the Commission's misreading of a provision concerning feasibility affected its regulation of network-element sharing under the “necessary and impair” standard.<sup>85</sup> Likewise, in *Utility Air Regulatory Group*, the Court

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83 The Supreme Court's 4-1-4 decision in *Rapanos v. United States*, 547 U.S. 715 (2006), might be another case that involves step two. But it is difficult to categorize and does not shed much light on *Chevron* step two's domain. First, the Court's plurality arguably framed its analysis as a step-one discussion. Compare *id.* at 731–32 (plurality opinion) (noting that the “only natural definition of the term ‘waters’ . . . cannot bear the expansive meaning the Corps would give it”), and *id.* at 738 (providing an alternative argument that “[e]ven if the term ‘the waters of the United States’ were ambiguous” as to intermittent and ephemeral water flows), with *id.* at 739 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)) (stating that the Agency's interpretation was not “based on a permissible construction of the statute”). Nonetheless, the Chief Justice (one of the plurality's members) curiously suggested in a separate concurring opinion that the Agency may have rulemaking authority to delineate the reach of a “somewhat ambiguous” statute. *Id.* at 758 (Roberts, C.J., concurring). Justice Kennedy's controlling opinion, concurring in the judgment, may be best described as providing analysis based on some hybrid of *Chevron* step two and the Court's “significant nexus” standard from an earlier Court decision. See *id.* at 759, 766, 778 (Kennedy, J., concurring in the judgment). He argued that the court of appeals, on remand, should consider the proper factors under the Court's “significant nexus” test. See *id.* at 759, 783–87. The four dissenting justices would have deferred to the Agency under *Chevron* step two. See *id.* at 788 (Stevens, J., dissenting).

84 Levin, *supra* note 11, at 1283.

85 See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387–88 (1999).

focused on the disputed language's context within the statute as a whole and the statute's permitting-process design. Indeed, the Court did so in both rejecting one of the EPA's statutory interpretations and upholding another.<sup>86</sup> Finally, the Court relied primarily on textual arguments—by comparing the “appropriate and necessary” standard with other provisions of the relevant act—in rejecting the EPA's interpretation in *Michigan v. EPA*.<sup>87</sup>

Perhaps the most obvious concern with a hypertextual or structural step two is that it appears to render step two largely redundant. As Linda Jellum has argued, the Court, despite inconsistency with the *Chevron* decision itself, has transitioned to a textualist, as opposed to an intentionalist, inquiry at step one.<sup>88</sup> If that is so, then it is difficult to see how a similar or more expansive textual or structural inquiry at step two adds much to the inquiry. In fact, as *Utility Air Regulatory Group* indicates, the Court's step-one analysis, although largely relying on prior agency positions, included a significant discussion of the statute's various provisions when rejecting the EPA's argument that the statute compelled the Agency's broad interpretation of “air pollutant.”<sup>89</sup> And, to further intermingle the two steps, the Court imported the major questions doctrine that it had earlier used as part of step one to step two.

That said, the Supreme Court's reliance on the major questions doctrine may give step two a *raison d'être* by moving beyond textual inquiries into a broader search for congressional intent. By considering whether the Agency's interpretation would present a major question of economic or political significance in *Utility Air Regulatory Group*, the Court was looking past the statutory text.<sup>90</sup> Instead, it sought to glean whether Congress, despite its silence, would have intended for the EPA to require permitting in a capacious manner.<sup>91</sup> But this intentionalist framing for step two is not without its complications. Step two would become merely an extended inquiry into whether the agency's interpretation is contrary to congressional intent, precisely *Chevron*'s stated step-one purpose. By focusing on congressional intent, step two would not address the reasonableness of an interpretation when Congress's intent is not clear.

## 2. Hyperpurposivism

Instead of extended textual or structural approaches at step two, courts could engage in an extended inquiry into the purpose of the statute—what we call “hyperpurposivism.” The benefit of this analytical method is that it creates a separate space for step two if a textual inquiry, as has increasingly occurred, subsumes step one. If Congress's intent was not clear (as determined at step one), comparing the agency's interpretation with the purpose

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86 See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014).

87 *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

88 See Jellum, *supra* note 16, at 729.

89 *Util. Air Regulatory Grp.*, 134 S. Ct. at 2440–42.

90 See *id.* at 2444.

91 See *id.*

of the statute or statutory scheme provides a relatively predictable and familiar way of assessing reasonableness in the void of ambiguity. The Court, to a limited extent, relied on purposivism (by considering why Congress treated power plants differently than other polluting sources) in rejecting the EPA's interpretation in *Michigan v. EPA*.<sup>92</sup> Moreover, focusing on the statute's purpose recognizes Congress's inability to express its intent as to myriad factual circumstances that its members could never envision when enacting legislation.<sup>93</sup> Finally, purposivism is a familiar tool for statutory interpretation that is appropriate for *Chevron* because *Chevron* is limited to agency statutory interpretation.<sup>94</sup> Indeed, there is a burgeoning literature that has called for a more purposivist approach to agency statutory interpretation (than to judicial statutory interpretation) based on the comparative institutional expertise.<sup>95</sup>

Mark Seidenfeld has argued that step two should have a more pronounced role than step one—what he refers to as a “syncopated *Chevron*.”<sup>96</sup> Because Congress often fails to (or cannot) expressly state its intent as to all matters, judges with a textual inquiry in step one may mistakenly incorporate their policy preferences under the guise of ascertaining “plain meaning.”<sup>97</sup> Courts should, instead, be humble at step one and engage in a more thorough review at step two. Courts should ensure at step two that the agency, when acting within statutory ambiguity, has considered the statute's purpose and, often with legislative history in hand, the various interest groups' or legislators' policy preferences at issue when Congress enacted the legislation.<sup>98</sup> This focus on whether the agency has considered the many and, oftentimes, conflicting interests is consistent with *Chevron* itself. The *Chevron* Court held that the EPA's interpretation was reasonable in part because it “represent[ed] a reasonable accommodation of manifestly competing interests” and “reconcil[ed] conflicting policies.”<sup>99</sup>

But a purposivist inquiry has its downsides. For one, it is far from clear that step one should exclude a purposivist inquiry. After all, *Chevron* itself instructed courts to apply “traditional tools of statutory construction”<sup>100</sup> and used purposivism as part of its step-one inquiry.<sup>101</sup> (And for the ardent tex-

92 *Michigan*, 135 S. Ct. at 2710.

93 See Seidenfeld, *supra* note 16, at 111–24.

94 See, e.g., *Judulang v. Holder*, 565 U.S. 42, 52–53 n.7 (2011) (refusing to apply *Chevron* to agency decision because it concerned policy, not statutory interpretation).

95 See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1398–401 (2017) (reviewing literature and discussing some empirical support for position).

96 See Seidenfeld, *supra* note 16, at 87.

97 See *id.* at 119–21.

98 See *id.* at 129–30, 134.

99 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

100 *Id.* at 843 n.9.

101 See *id.* at 851–53 (“[Legislative history] does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in

tualists who reject a purposivist inquiry generally, it is not clear why they would reject it at step one yet use it at step two.) Second, Seidenfeld's call for agencies to consider policies and for courts to assess the agencies' reasoning process<sup>102</sup> sounds in the reasoned decisionmaking inquiry of "hard look" arbitrary-and-capricious review under the APA for policy decisions.<sup>103</sup> To the extent that it does so, a capacious purposivist approach risks having step two lose any independent purpose and become some flavor of arbitrary-and-capricious review. Indeed, Seidenfeld recognizes that his proposed version of step two would be "something akin to hard look review."<sup>104</sup> That said, *Chevron* itself deferred to the EPA in part because "the agency considered the matter in a detailed and reasoned fashion,"<sup>105</sup> suggesting that step two may not be hermetically sealed from arbitrary-and-capricious review under the APA.

### 3. Arbitrary-and-Capricious Review

Although others have noted the similarity between step two and arbitrary-and-capricious review,<sup>106</sup> Ronald Levin has perhaps most thoroughly developed the argument. Going further than Seidenfeld's proposal for step two to be akin to arbitrary review,<sup>107</sup> Levin argues that courts should allow the APA's arbitrary-and-capricious review to "absorb[ ]" step two.<sup>108</sup> Levin argues that step two does little work.<sup>109</sup> An agency's interpretation will only make it past step one if it is not clearly contrary to congressional intent.<sup>110</sup> Once it makes it past step one, it does not, by definition, contravene congressional intent.<sup>111</sup> Courts could address concerns over an agency's failure to provide reasons or to account for various factors (such as inconsistent provisions, irrational action within a broader administrative framework, etc.) under run-of-the-mill arbitrariness review.<sup>112</sup>

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improving air quality. Indeed, the House Committee Report identified the economic interest as one of the 'two main purposes' of this section of the bill.').

102 See Seidenfeld, *supra* note 16, at 128–30.

103 See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

104 See Seidenfeld, *supra* note 16, at 129.

105 *Chevron*, 467 U.S. at 865.

106 See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2105 (1990) ("The reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is 'arbitrary' or 'capricious' within the meaning of the APA."); accord Laurence H. Silberman, *Foreword: Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827–28 (1990).

107 Seidenfeld, *supra* note 16, at 129. Seidenfeld, however, contended that arbitrary-and-capricious review would have a separate space from step two. See *id.*

108 Levin, *supra* note 11, at 1255.

109 See *id.* at 1254–55.

110 See *id.* at 1261.

111 See *id.* at 1254.

112 See *id.* at 1294.

More recently, Catherine Sharkey has proposed a similar understanding of step two, except that she proposes to incorporate a stricter formulation of arbitrary-and-capricious review—known as “hard-look review”—into step two to ensure that agencies engage in reasoned decisionmaking.<sup>113</sup> One key benefit of the arbitrary-and-capricious approach—whether “soft glance”<sup>114</sup> or “hard look”—is that it potentially reconciles *Chevron*’s two steps and the APA’s judicial-review provisions: step one permits the courts to review questions of law de novo as required under § 706 of the APA, while step two (in the absence of any clear law to apply) permits courts to review for arbitrary agency action under § 706(a)(2)(A).<sup>115</sup>

Indeed, the Supreme Court may have held as much in decisions between *Iowa Utilities Board* and *Utility Air Regulatory Group*. In *United States v. Mead Corp.*, the Court quoted the APA’s arbitrary-review provision immediately after describing *Chevron* step two.<sup>116</sup> More recently, Justice Kagan, writing for a unanimous Court in 2011, appeared to confirm *Mead*’s suggestion in *Judulang v. Holder*.<sup>117</sup> In that decision, the Court reviewed the Board of Immigration Appeals’ decision concerning certain deportations under arbitrary-and-capricious review.<sup>118</sup> The Government had argued that the Court should use *Chevron* step two in its analysis, but the Court held that *Chevron* did not apply because the Agency decision was one of policy, not statutory interpretation.<sup>119</sup> Nonetheless, the Court said, quoting another then-recent unanimous decision (*Mayo Foundation for Medical Education and Research v. United States*): “Were we to [use *Chevron* step two], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is ‘arbitrary or capricious in substance.’”<sup>120</sup> Relatedly, the *Mayo* Court’s step-two analysis seemed as far-reaching as typical arbitrary-and-capricious review. The *Mayo* Court reviewed the IRS’s interpretation of “students” as excluding medical residents.<sup>121</sup> In deferring to the Agency at step two, the Court evaluated the IRS’s reasoned decisionmaking that considered, among other things, sensible line drawing for who qualifies as a “student” and the purposes of related statutory schemes.<sup>122</sup> And, as we saw in *Michigan v. EPA*, the Court mixed step two and arbitrary-and-capricious review.<sup>123</sup>

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113 See generally Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 *FORDHAM L. REV.* (forthcoming 2018), <https://ssrn.com/abstract=3092742>.

114 E.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *DUKE L.J.* 1321, 1411 (2010) (mentioning “soft glance” review).

115 See 5 U.S.C. § 706(2)(A) (2012).

116 533 U.S. 218, 229 (2001).

117 565 U.S. 42 (2011).

118 See *id.* at 45–53.

119 See *id.* at 52–53 n.7.

120 See *id.* at 52 n.7 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011)).

121 See *Mayo Found.*, 562 U.S. at 47.

122 See *id.* at 58–60.

123 See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).



But even more recently, the Supreme Court has sent mixed signals. In *Encino Motorcars, LLC v. Navarro*, the Court refused to apply *Chevron* deference to a Department of Labor regulation that interpreted automobile-service advisors as eligible for overtime pay.<sup>124</sup> Writing for the Court, Justice Kennedy stated that *Chevron* did not apply to “procedurally defective” regulations, including those for which the agency failed to “give adequate reasons for its decisions.”<sup>125</sup> The Court expressly cited the arbitrary-and-capricious standard under § 706 of the APA and the Court’s precedents related to that standard.<sup>126</sup> The Court was not clear as to whether this arbitrary-and-capricious review for lack of reasoned decisionmaking was part of, or separate from, *Chevron*’s two steps.

If arbitrary review and step two converge, this convergence requires, as Levin recognizes, some adjustment to what appears to be the Supreme Court’s step-one analysis.<sup>127</sup> Currently, the Court is inclined to engage in only a textual inquiry at step one.<sup>128</sup> If step one will become the domain of all statutory interpretation issues and arbitrary-and-capricious review will concentrate on process and reasoned decisionmaking, then step one must include all tools of statutory interpretation, including nontextualist tools of statutory construction. Until the Court does so, the convergence of step two with arbitrary-and-capricious review will leave purposivism (and other nontextualist tools) out of judicial review of agency statutory interpretation. Again, for strong textualists, perhaps no step-one reform is required. But the majority of the current Court applies purposivist tools to some extent.

Others, including Gary Lawson, have argued that courts should not collapse step two into arbitrary-and-capricious review.<sup>129</sup> Lawson argues that *Chevron* step two and APA arbitrary-and-capricious review have different objectives.<sup>130</sup> The former assesses the reasonableness of the agency’s interpretation without regard to how the agency reached its interpretive outcome.<sup>131</sup> The latter assesses the agency’s decisionmaking process to ensure that the agency did not reach its reasonable outcome in an arbitrary fashion (such as by placing several reasonable interpretations in a hat and pulling one out).<sup>132</sup> Moreover, Lawson argues that the tools for each inquiry are different. The former uses various statutory interpretation tools in interpreting the statute at issue, including legislative history, purpose, text, and structure.<sup>133</sup> The latter is a broader review that considers “anything that is

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124 136 S. Ct. 2117, 2127 (2016).

125 *Id.* at 2125.

126 *See id.* at 2125–26.

127 *See* Levin, *supra* note 11, at 1266–71.

128 *See* Jellum, *supra* note 16, at 770.

129 *See* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996).

130 *Id.* at 327.

131 *Id.* at 326.

132 *Id.* at 326–27.

133 *See id.* at 339.

generally relevant to reasoned decisionmaking.”<sup>134</sup> Because Lawson sees a narrower, but particular, role for step two as compared to arbitrary-and-capricious review, his inquiry would be consistent with a textual and limited purposivist inquiry for step two.

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In sum, over the three decades since the *Chevron* decision itself, the Supreme Court has only rarely taken the opportunity to expound on *Chevron* step two's domain. And when it has done so, the Court's guidance has been inconsistent and at times in tension. Figure 1 summarizes the Court's key *Chevron* step-two precedents.

FIGURE 1. SUPREME COURT STEP-TWO APPROACHES

Year	Decision	Approach
1984	<i>Chevron</i> <sup>135</sup>	Agency's reasoned consideration of purpose and policies (arbitrary review?)
1999	<i>Iowa Utilities Board</i> <sup>136</sup>	Hypertextualism
2001	<i>Mead</i> <sup>137</sup>	Arbitrary review
2011	<i>Mayo Foundation</i> <sup>138</sup>	Arbitrary review
2011	<i>Judulang</i> <sup>139</sup>	Arbitrary review
2014	<i>Utility Air Regulatory Group</i> <sup>140</sup>	Hypertextualism
2015	<i>Michigan v. EPA</i> <sup>141</sup>	Hypertextualism, arbitrary review
2016	<i>Encino Motorcars</i> <sup>142</sup>	Unclear: separate arbitrary review?

## II. STEP TWO IN THE CIRCUIT COURTS

As discussed in Part I and depicted in Figure 1, the Supreme Court has provided little guidance, much less consistent guidance, as to *Chevron* step two's domain. Indeed, as Bill Eskridge and Lauren Baer have explored, the Court from 1984 to 2006 applied *Chevron* deference inconsistently—only about a quarter of the time that it should have.<sup>143</sup> Perhaps the federal courts

134 See *id.* at 340.

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

136 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

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

138 *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011).

139 *Judulang v. Holder*, 565 U.S. 42 (2011).

140 *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

141 *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

142 *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016).

143 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, 1124–25 (2008); see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992) (“[I]t is clear that *Chevron* is often ignored by the Supreme Court. . . .

of appeals, which apply *Chevron* on a much more regular basis, are a better source for understanding *Chevron* step two's domain.

To understand how the circuit courts approach *Chevron* deference, we analyzed every published circuit court decision that referred to *Chevron* from 2003 through 2013. We have explored our findings at length elsewhere.<sup>144</sup> In this Article, we focus on how the circuit courts have applied step two. Section II.A briefly outlines the study design and dataset. Section II.B provides an overview of our general findings as to *Chevron*'s application in the circuit courts. Section II.C then takes a closer look at the cases in which the agency lost at step two to get a better sense of the various approaches to step two's domain.

### A. *The Study Design and Data Set*

Our database of 2272 judicial decisions, collected with broad search parameters, includes all published decisions from the circuit courts over an eleven-year period (2003–2013) that refer to the *Chevron* doctrine. Within the relevant 1327 of those collected opinions, we uncovered 1558 instances of judicial review of an agency statutory interpretation (not merely any kind of agency action). Largely following Eskridge and Baer's methodology,<sup>145</sup> we coded each agency statutory interpretation with respect to nearly forty different variables, including: information about the decision (circuit, year, judges, separate opinions); information about the agency interpretation (the agency, subject matter, final agency decisionmaker, agency procedure used, and ideological valence of agency's interpretation); and information about the judicial outcome (outcome as to agency, ideological valence of the decision, standard of review applied, and factors that influenced the court's decision).<sup>146</sup> Our coding and analysis process are described in greater detail in *Chevron in the Circuit Courts*.<sup>147</sup>

To gather supplementary information for this Article, we returned to the dataset to code about thirty additional variables when the court rejected the agency's interpretation at step two. We selected the instances in which the courts rejected the agency's interpretation because, based on our review of all the *Chevron* circuit-court cases, we thought it was significantly more likely that the courts would have a more meaningful discussion of step two in those cases than in cases in which the courts determined that the agency interpre-

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[T]he two-step framework has been used in only about one-third of the total post-*Chevron* cases in which one or more Justices recognized that a deference question was presented.”)

144 See Barnett & Walker, *supra* note 23, at 28–70; see also Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3132045>; Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting Chevron Deference*, 15 J. EMPIRICAL L. STUD. (forthcoming 2018), <https://ssrn.com/abstract=2984302>.

145 See Eskridge & Baer, *supra* note 143, at 1093–97.

146 See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts: The Codebook Appendix*, 116 MICH. L. REV. ONLINE 1 (2017).

147 Barnett & Walker, *supra* note 23, at 21–27.

tation was reasonable. The additional coded variables included which tools and factors the court mentioned when making the step-two determination as well as an attempt to categorize the depth and type of step-two analysis. The variables are further discussed in Section III.C. To conduct this additional coding, we followed a similar process as for the original coding: a research assistant conducted the preliminary coding of each case where the agency lost at step two, and then one of us (Walker) conducted a secondary review of each case.

As we noted in greater detail in *Chevron in the Circuit Courts*, there are a number of significant methodological limitations in our study design.<sup>148</sup> In addition to the standard limitations involved in judicial decisions of varying clarity and quality, we only looked at circuit court decisions, not district court decisions; only published decisions, not those where circuit courts declined to designate for publication; and only decisions that cited or otherwise referred to *Chevron* deference.

### B. General Findings

As we report in *Chevron in the Circuit Courts*, our findings suggest that *Chevron* deference matters: agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%) or, especially, de novo review (38.5%). Put differently, there was nearly a twenty-five percentage-point difference in agency-win rates with *Chevron* deference (77.4%) than without (53.6%).<sup>149</sup> As one would expect, agency interpretations advanced through more formal procedures were more likely to prevail in court than those advanced through less formal procedures.<sup>150</sup> Somewhat surprisingly, interpretations made in formal adjudication (74.7%) were slightly more successful than those made in notice-and-comment rulemaking (72.8%)—though such differences could also reflect differences in agency interpretive practices in each of these procedures.<sup>151</sup>

It is important to note that the agency-win rates varied significantly by agency and subject matter.<sup>152</sup> For instance, the Federal Communications Commission (82.5% agency-win rate), Treasury Department (78.9%), and, perhaps surprisingly, National Labor Relations Board (78.1%) were a few of the big winners among the agencies. By contrast, the Equal Employment Opportunity Commission (42.9%), Energy Department (45.5%), and Department of Housing and Urban Development (54.2%) were among the biggest losers in the circuit courts.<sup>153</sup> The findings were similar as to subject matter.<sup>154</sup> Moreover, independent agencies outperformed executive agencies as to overall agency-win rate (77.0% to 70.2%) and frequency of *Chevron*

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148 See *id.* at 25–27.

149 See *id.* at 28–32, 30 fig.1.

150 See *id.* at 35–44.

151 *Id.* at 37 fig.4.

152 See *id.* at 49–56.

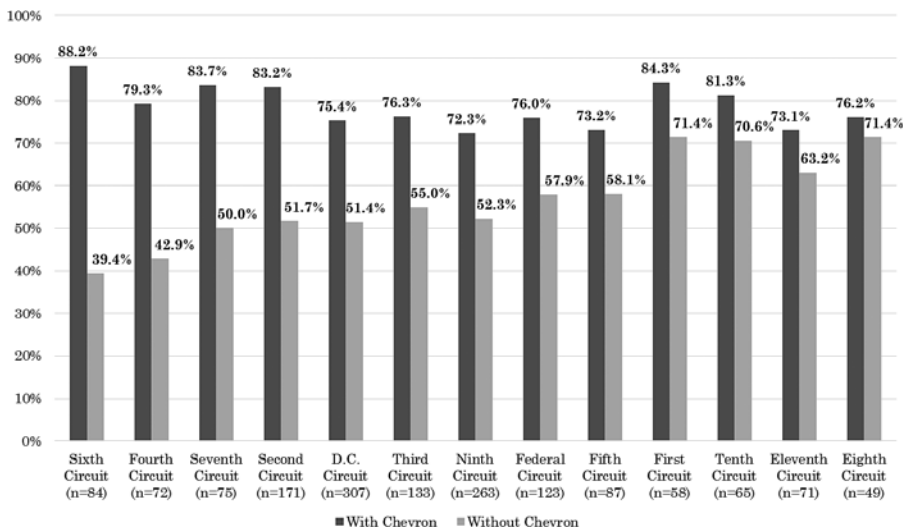
153 See *id.* at 54 tbl.3.

154 See *id.* at 49–52, 50 tbl.2.

application (82.5% to 73.2%)—though agency-win rate evened out when *Chevron* applied (79.6% to 76.8%).<sup>155</sup>

We also found significant variation among the circuit courts.<sup>156</sup> For agency-win rates, the First Circuit was the most agency friendly (82.8%), while the Ninth Circuit was the least agency friendly (65.8%).<sup>157</sup> As for *Chevron*'s application, the D.C. Circuit applied it almost as a matter of course at 88.6% of the time, while the Sixth Circuit applied it only 60.7% of the time.<sup>158</sup> Once *Chevron* applied though, the agency seemed to prevail as a matter of course in the Sixth Circuit (88.2% of the time, the highest rate), while the agency won only 72.3% of the time in the Ninth Circuit, the lowest rate. The differential between agency-win rates with and without *Chevron* indicates that agencies prevailed more in all circuits when *Chevron* applied. The most striking was the Sixth Circuit, with its nearly fifty-percentage-point difference in agency-win rates. Only the Eighth Circuit had a differential that was less than five percentage points, and the Eleventh Circuit was the only other circuit with a differential of less than ten percentage points.<sup>159</sup> Figure 2 depicts agency-win rates by circuit with and without *Chevron*.<sup>160</sup>

FIGURE 2. AGENCY-WIN RATES BY CIRCUIT WITH AND WITHOUT *CHEVRON* DEFERENCE (N=1558)



For purposes of this Article, we care most about how the circuit courts applied *Chevron*. Circuit courts applied *Chevron* 74.8% of the time in our

155 See *id.* at 56–57, 57 fig.10.

156 See *id.* at 44–49.

157 See *id.* at 44 fig.7.

158 See *id.* at 48 fig.9.

159 See *id.*

160 Figure 1 is reproduced from *id.* at 48 fig.9.

dataset.<sup>161</sup> When *Chevron's* two-step approach applied, the circuit courts resolved the matter at step one (i.e., the step at which the courts ask whether Congress's intent was clear) 30.0% of the time, and, of those *Chevron* step-one decisions, agencies prevailed 39.0% of the time.<sup>162</sup> "Consistent with prior studies, the vast majority of agency interpretations" (70.0%) "made it to step two."<sup>163</sup> And an even greater percentage of interpretations that made it to step two (93.8%) were upheld.<sup>164</sup> In other words, of the 817 agency statutory interpretations that made it to step two, the agency lost with respect to only fifty-one of them. To put these numbers in context, Figure 3 depicts agency-win rates under each deference standard (*Chevron*, *Skidmore*, and de novo review), as well as breaks out separately the agency-win rate at *Chevron* steps one and two.<sup>165</sup>

The conventional wisdom is certainly true: Once a court decides to apply the *Chevron* framework, the critical litigation battleground takes place at step one. If a court finds the statute unambiguous at step one, the agency-win rate is roughly the same as de novo review (39.0% and 38.5%, respectively). If the court advances to step two, however, the agency wins almost every time. But not always. The fifty-one instances in which the agency lost at *Chevron* step two are explored in much greater detail in the following Section.

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161 *Id.* at 29.

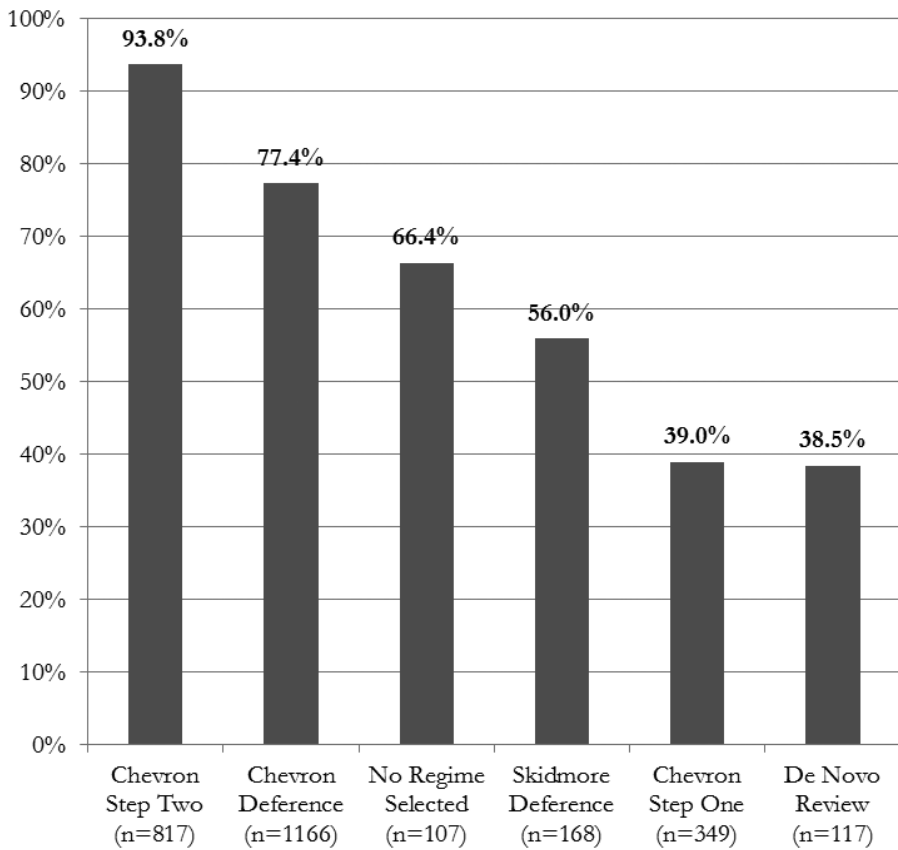
162 *See id.* at 33 fig.2.

163 *Id.* at 33; cf. 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, 31 & fig.A (1998) (noting that out of 253 interpretations, 72.7% were resolved under a "reasonableness" inquiry under a *Chevron* analysis with only one step (72 interpretations) or under step two of a two-step inquiry (112 interpretations)). By contrast, Thomas Merrill found almost the inverse in his study of Supreme Court decisions from 1984 to 1990—only 44% of *Chevron* decisions made it to step two. *See* Merrill, *supra* note 143, at 981 tbl.1.

164 *See* Barnett & Walker, *supra* note 23, at 33.

165 Figure 2 is reproduced from *id.* at 35 fig.3. The "no regime selected (n=107)" category refers to those cases where the circuit courts declined to choose a deference standard, usually holding that the answer would have been the same under any standard.

FIGURE 3. AGENCY-WIN RATES BY DEFERENCE STANDARD, INCLUDING *CHEVRON* STEPS ONE AND TWO (N=1558)



### C. *Step-Two Findings*

Before turning to how the circuits applied *Chevron* step two when the agency lost, it is perhaps helpful to describe the set of fifty-one agency statutory interpretations. Although interpretations are spread pretty evenly across the eleven years in the dataset,<sup>166</sup> the same was not true as to agency, circuit, or subject matter. As for the subject matter, immigration dominated in step-two losses, with 19 agency statutory interpretations or 37.3% of the total. This is not too surprising as agency interpretations of immigration statutes constituted 30.6% of the entire dataset (478 agency interpretations),<sup>167</sup> and agency-win rates in the immigration context were generally lower than in other regulatory contexts.<sup>168</sup> The environmental context had the second-

166 Among the agency losses at step two, there were 4 interpretations in 2003, 5 in 2004, 8 in 2005, 4 in 2006, 2 in 2007, 7 in 2008, 2 in 2009, 2 in 2010, 7 in 2011, and 7 in 2013.

167 See Barnett & Walker, *supra* note 23, at 27.

168 See, e.g., *id.* at 7, 37–40, 45 (breaking out immigration cases from the rest of the findings).

most step-two losses (7 agency interpretations or 13.7% of all agency step-two losses), and no other subject had more than three step-two losses.<sup>169</sup> The breakdown by agency is similar.

With respect to step-two losses by circuit, the D.C. Circuit leads the way with 19, or 37.3% of the total losses. This is noteworthy, as the D.C. Circuit makes up only 19.7% (307 of 1558 agency interpretations) of the entire dataset.<sup>170</sup> That said, the D.C. Circuit was also the circuit most likely to apply the *Chevron* framework (88.6%), compared to the average (74.8%) and median (73.2%) circuit.<sup>171</sup> The Ninth Circuit is the only other circuit with more than five step-two agency losses, with 9 or 17.6% of the total losses. The Ninth Circuit makes up 16.9% (263 of 1558 agency interpretations) of the entire dataset, the second most after the D.C. Circuit.<sup>172</sup> All of the other circuits have five or fewer agency step-two losses, with the Fourth Circuit having none.<sup>173</sup> The Fourth Circuit is remarkable: in eleven years and seventy-two instances of judicial review,<sup>174</sup> the Fourth Circuit never invalidated an agency statutory interpretation at step two.

Before turning to which factors the circuit courts considered at step two, we briefly note which factors played little to no role.<sup>175</sup> Of the twenty-three factors we coded as potentially relevant at step two, the circuit courts never mentioned the following in their step-two analysis: (1) the distinct subject matter, (2) the existence of a major question, (3) the agency's political

169 There are 216 total agency statutory interpretations in the dataset that are from the environmental context. The other subject matters with step-two losses are: business regulation (1 loss in 53 total agency interpretations in dataset); civil rights (1 in 12); energy (3 in 50); entitlement programs (3 in 139); federal government (2 in 11); Indian affairs (1 in 15); collective bargaining/labor (3 in 62); tax (1 in 48); telecommunications (3 in 81); transportation (3 in 43); antidumping/trade (2 in 52); and employment (2 in 84). It is worth noting that the following subject matters for which there are at least 10 agency statutory interpretations in the dataset had no step-two losses: agriculture (21 total agency interpretations); criminal law (10); education (21); health and safety (47); intellectual property (27); pensions (17); and prisons (19).

170 See Barnett & Walker, *supra* note 23, at 49 tbl.1.

171 *Id.* at 45.

172 *Id.* at 49 tbl.1.

173 The First (n=58), Second (n=171), Fifth (n=87), Sixth (n=84), and Seventh (n=75) Circuits all have only one agency step-two loss, whereas the Eleventh Circuit (n=71) has two, the Eighth Circuit (n=49) has three, the Tenth (n=65) and Federal (n=123) Circuits have four, and the Third Circuit (n=133) has five. The numbers in parentheses reflect the total agency statutory interpretations from that circuit in the whole dataset (n=1558). See *id.*

174 *Id.*

175 To be clear, these findings only relate to the circuit courts' reliance on these factors at step two. In many instances, courts may have cited these factors as relevant at step zero or one. See *id.* at 58–73 & figs.11–14 (discussing these factors in greater detail as to the other steps). Nonetheless, we reported earlier that courts hardly ever mention certain factors. See *id.* at 68 (“The five remaining factors were obscure in circuit-court decisions. Courts invoked political accountability in 0.5% of all interpretations, public reliance in 0.7%, contemporaneity in 1.9%, national standards in 2.2%, and congressional acquiescence in 3.1%.”).



accountability, (4) the lack of agency expertise, (5) the importance of national uniformity of the law, (6) the contemporaneity of the agency interpretation, (7) public reliance on the agency interpretation, (8) the format or procedures used to promulgate the agency interpretation including (9) the use of rulemaking, or (10) congressional acquiescence in the agency interpretation. Similarly, only one decision resorted to a dictionary definition<sup>176</sup> or a normative canon of statutory construction (there, constitutional avoidance),<sup>177</sup> and only two looked to semantic canons.<sup>178</sup>

So which factors did seem to matter? As depicted in Figure 4, the most cited factor (72.5%) is reliance on the statutory text. That statutory text is the big winner should come as no surprise. Indeed, one may reasonably be surprised that courts do not always return to the text as a starting point for determining whether an agency's interpretation of an ambiguous statute is reasonable, especially in light of the Supreme Court's textual approach in *Iowa Utility Board*.<sup>179</sup> The next most cited factor (54.9%) may be surprising to some: courts' emphasis on the agency's lack of reasoned decisionmaking. The factor usually arose in one of two ways: the court criticized the agency's lack of reason giving for its interpretation, or it faulted the agency for not providing a sufficient reason for deviating from the agency's earlier statutory interpretation. The third most cited factor (47.1%) is statutory purpose, followed by the similar purposivist factors of legislative history (27.5%), contrary to the right "policy" (23.5%), and leading to absurd results (23.5%).

As for other factors, perhaps surprisingly, courts resorted to judicial precedent as a gauge of reasonableness 23.5% of the time.<sup>180</sup> Courts also relied at step two on reading the statute as a whole (21.6%), on reading the statute *in pari materia* with related statutes (15.7%), and on the fact that the agency had changed its statutory interpretation (15.7%).

176 In fact, the court did not even cite a dictionary, but just referred repeatedly to the "plain meaning" of a statutory term. See *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004) ("That the agency's definition of Plaintiff's worksite contravenes the plain meaning of the term 'worksite' is one indicia of congressional intent that militates against deference to the agency's construction of the statute under the second step of *Chevron*.").

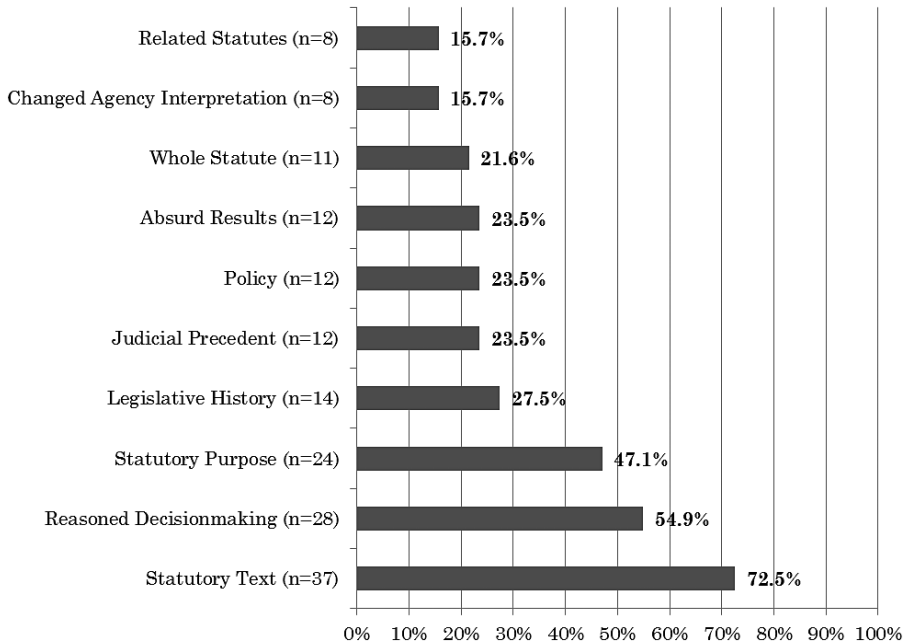
177 See *Union Pac. R.R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 900 (8th Cir. 2013) ("Finding no statutory or logical reason to accept CBP's interpretation of [19 U.S.C.] § 1584(a)(2), we 'decline to construe the [statute] in a manner that could in turn call upon [us] to resolve difficult and sensitive questions arising out of the guarantees of the' Fifth Amendment Due Process Clause." (second and third alteration in original) (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979))).

178 See *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1232 (10th Cir. 2005) ("Generally, when Congress includes a specific term in one provision of a statute, but excludes it in another, it is presumed that the term does not govern the sections in which it is omitted."); *Akhtar v. Burzynski*, 384 F.3d 1193, 1199 (9th Cir. 2004) (*expressio unius canon*).

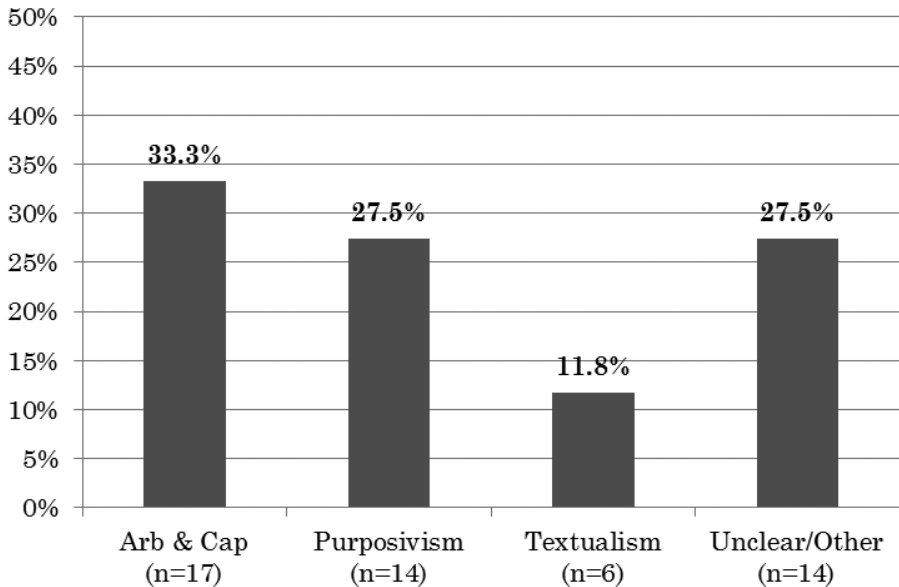
179 See *supra* Section I.B.

180 Cf. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

FIGURE 4. FACTORS RELIED ON AT CHEVRON STEP TWO (N=51)



Circuit court reliance on these factors underscores the prevalence of two of the three predominant approaches to *Chevron* step two's domain: the hyperpurposivist inquiry and an arbitrary-and-capricious review similar to that under the APA. The latter approach is similar to what the Supreme Court has suggested, called for, or applied in, respectively, *Mead*, *Judulang*, and *Michigan v. EPA*. To a lesser extent, we also see a hypertextualist approach similar to what the Court largely did in *Utility Air Regulatory Group*, *Iowa Utilities Board*, and *Michigan v. EPA*. To further flesh out these findings, we categorized the circuit courts' overall approach to *Chevron* step two's domain under these three theories based on the main thrust of the court's analysis. In other words, if a court primarily relied on hypertextualism but referred in passing to a purposivist argument, we categorized the interpretation as hypertextualist. We set to one side any cases that were unclear, overly cursory, or otherwise too difficult to categorize. Figure 5 depicts those findings as to circuit courts' approaches to step two when agencies lose.

FIGURE 5. CIRCUIT COURT APPROACHES TO *Chevron* Step Two's Domain

As depicted in Figure 5, one-third (33%) of the step-two cases involve some form of arbitrary-and-capricious review, whereas 27.5% of the step-two cases utilize a hyperpurposivist approach. Only a half-dozen cases (11.8%) embrace a more-searching textualist or structuralist approach (even if courts frequently make some reference to the statutory text at issue), with the remainder (27.5%) being unclear, too cursory, or otherwise too difficult to categorize.

When courts apply the arbitrary-and-capricious approach at *Chevron* step two, they usually focus on the quality of (or lack thereof) the agency's reasoning, with heightened scrutiny when an agency has changed its interpretation or advanced conflicting interpretations.<sup>181</sup> The Third Circuit's approach in *Castillo v. Attorney General* is illustrative: "The [Board of Immigration Appeals], to date, has offered no attempt to reconcile, reject, or otherwise explain its inconsistent decisions. In fact, it has not even recognized that

181 See, e.g., *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) ("The problem here is that the Board's decision is inconsistent with its decisions in other similar cases."); *Am. Airlines, Inc v. TSA*, 665 F.3d 170, 177 (D.C. Cir. 2011) ("Ultimately, TSA's decision here must be vacated either because the agency improperly deviated from its provided prioritization list or because the agency has failed to make a prioritization list that would comport with the mandates of the 2007 Act."); *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1365 (Fed. Cir. 2011) (holding that the agency "has failed to adequately explain why it has interpreted this statutory provision inconsistently"); *Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 607 (9th Cir. 2008) (invalidating agency interpretation at step two because it "represents a complete departure from its previous interpretation"); *Env'tl. Def., Inc. v. EPA*, 509 F.3d 553, 561 (D.C. Cir. 2007) ("EPA's explanation . . . does not address this inconsistency."); *NSK Ltd. v. United States*, 390 F.3d 1352, 1357 (Fed. Cir. 2004) (finding agency's interpretation "internally inconsistent").

there may be a problem with its own decisions in the present context.”<sup>182</sup> Sometimes, however, the courts take a hard look at the agency’s reasoning and fault the agency for failing to take into account certain factors.<sup>183</sup> Sometimes, moreover, the courts fault the agency for failing to provide a reasoned decision at all.<sup>184</sup>

When circuit courts apply the hyperpurposivist approach at *Chevron* step two, they focus on ascertaining “congressional intent”<sup>185</sup> by looking to the “purpose”<sup>186</sup> or “goal”<sup>187</sup> of the statute, including at times whether it is a “reasonable policy choice for the agency to make.”<sup>188</sup> To divine purpose under this approach, the circuit courts often cite legislative history.<sup>189</sup> Sometimes courts also invoke a variant of the absurdity doctrine to conclude that

182 *Castillo v. Att’y Gen.*, 729 F.3d 296, 310 (3d Cir. 2013).

183 *See* *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (“What was a reasonable balancing of competing statutory priorities twenty years ago may not be a reasonable balancing of those priorities today.”); *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 152–56 (D.C. Cir. 2005) (“A statutory interpretation premised in part on either a non-existent factor or one that results from an unexplained departure from prior Commission policy and practice is not a reasonable one.”); *Qwest Commc’ns Int’l Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (faulting the agency for failing to consider “other principles, including affordability”); *Davis v. EPA*, 348 F.3d 772, 783 (9th Cir. 2003) (invalidating agency interpretation that “ignore[s] possible harm to a nonattainment area”); *see also* *Union Pac. R.R. Co. v. U.S. Dep’t of Homeland Sec.*, 738 F.3d 885, 898–99 (8th Cir. 2013) (faulting the agency for failing to explain how the cases cited provide reasonable grounds for the agency interpretation).

184 *See* *Robles-Urrea v. Holder*, 678 F.3d 702, 708 (9th Cir. 2012) (faulting the agency because it “entirely fails to explain why” its interpretation is reasonable); *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 211 (D.C. Cir. 2011) (faulting the agency for “fail[ing] to address the consultant’s letter when issuing its 2007 final rule”); *TNA Merch. Projects, Inc. v. FERC*, 616 F.3d 588, 593 (D.C. Cir. 2010) (“Thus, although we will defer to a reasonable definition by the Commission, we cannot defer to one that is unexplained.”); *Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 660 (D.C. Cir. 2005) (observing that the “EPA provides no reason why it signifies the substantive difference EPA presses here”); *see also* *Christ the King Manor, Inc. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 730 F.3d 291, 314 (3d Cir. 2013) (faulting the agency “because we cannot discern from the record a reasoned basis for the agency’s decision”).

185 *See, e.g.*, *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004); *Akhtar v. Burzynski*, 384 F.3d 1193, 1199–200, 1202 (9th Cir. 2004).

186 *See, e.g.*, *Shays v. FEC*, 528 F.3d 914, 922 (D.C. Cir. 2008) (finding the agency’s interpretation “was both unexplained and contrary to [the statute’s] purpose, violating the APA and failing *Chevron* step two review”).

187 *See, e.g., id.* at 925 (finding that “the challenged regulation frustrate[s] Congress’s goal of ‘prohibiting soft money from being used in connection with federal elections’” (quoting *McConnell v. FEC*, 540 U.S. 93, 177 n.69 (2003))).

188 *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 845 (1984)); *accord* *Alvarado v. U.S. Att’y Gen.*, 610 F.3d 1311, 1316 (11th Cir. 2010).

189 *See, e.g.*, *Ibarra v. Holder*, 736 F.3d 903, 912 & n.12 (10th Cir. 2013); *Flint Hills Res. Alaska, LLC v. FERC*, 631 F.3d 543, 549–50 (D.C. Cir. 2011) (Randolph, J., dissenting); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1021–22, 1026 (9th Cir. 2005); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1270 (D.C. Cir. 2004).

the agency's interpretation would result in "absurd results" compared to Congress's intended objectives.<sup>190</sup>

Finally, in the half-dozen instances of hypertextualism or structuralism at *Chevron* step two, circuit courts emphasized the overall "statutory scheme"<sup>191</sup> or "structure,"<sup>192</sup> sometimes assessing the agency interpretation "construed in conjunction with the language of related statutory and regulatory provisions."<sup>193</sup> This more textualist—though minority—approach to step two seems quite similar to the Supreme Court's early approach to *Chevron* step two discussed in subsection I.B.1.

### III. IMPLICATIONS OF STEP-TWO FINDINGS

In this symposium contribution, our purpose is mainly descriptive. Accordingly, we present our findings without suggesting how courts should, if at all, alter how they approach step two. But we do offer some thoughts on our findings.

One should not view our findings as to step two in isolation. A court's view or use of step one may affect its view of step two. The more work that a court can do (or does) at step one means the less work it may need to do at step two and vice versa. For instance, if textualist judges do not employ their preferred tools at step one (because, say, ambiguity is obvious), they may be inclined to use those tools at step two. Indeed, the Supreme Court's hypertextualist step-two decisions suggested as much. In both *Iowa Utilities Board* and *Michigan v. EPA*, the Justices with a textualist bent who formed the majority barely referred to (or ignored) step one and thus had no place other than step two for a textualist inquiry. That said, in *Utility Air Regulatory Group*, the textually inclined majority did engage in a significant textual step-one analysis and then continued in step two with more textualism.<sup>194</sup> But,

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190 See, e.g., *Int'l All. of Theatrical & Stage Emps. v. NLRB*, 334 F.3d 27, 34 (D.C. Cir. 2003) ("Besides the internal inconsistency produced by the Board's reading, the Board's reading produces absurd results in individual cases."); *accord* *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1318 (Fed. Cir. 2012); *Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005); see also *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 997 (D.C. Cir. 2013) (finding the agency's interpretation too "capacious").

191 *Scheerer v. U.S. Att'y Gen.*, 445 F.3d 1311, 1322 (11th Cir. 2006).

192 *Zheng v. Gonzales*, 422 F.3d 98, 117 (3d Cir. 2005).

193 *Filja v. Gonzales*, 447 F.3d 241, 254 (3d Cir. 2006); *accord* *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 391 (D.C. Cir. 2005) (utilizing a structural or whole-text approach at step two to strike down an agency statutory interpretation); see also *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 894 (D.C. Cir. 2006) (faulting the EPA at step two for failing to reconcile its statutory interpretation "with the 1990 Amendments [to the Clean Air Act], which Congress purposefully crafted to limit EPA discretion"), *decision clarified on denial of reh'g*, 489 F.3d 1245 (D.C. Cir. 2007); *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (applying a textualist approach to step two, though ultimately invoking constitutional avoidance to strike down the agency statutory interpretation).

194 See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439–49 (2014).

perhaps seeking to bring something new to the *Chevron* analysis at step two, the Court introduced the major questions doctrine in the second step.<sup>195</sup>

Relatedly, our findings do not necessarily reveal circuit judges' preferences as to how step one or step two should operate. Circuit precedent may require judges to rely on tools of statutory interpretation for one step that they would prefer to use in another. For instance, if circuit precedent prohibits judges from considering legislative history<sup>196</sup> or certain interpretive canons as part of step one,<sup>197</sup> those judges may use those tools at step two. It may be that those judges—if they had their way at step one to rely upon legislative history or certain canons—would prefer a step two that focuses on reason giving and reasoned decisionmaking. Moreover, regardless of circuit precedent, we caution that we have only a small number of observations (fifty-one), and some judges (especially those outside of the D.C. Circuit) may not encounter meaningful step-two issues often or care to think deeply about the mechanics of how *Chevron* functions.

Together, judicial priors and inconsistent circuit precedent that binds some judges but not others strongly suggest that the Supreme Court has not been clear as to how each step should work. Although many have focused on

195 See *id.* at 2446. When more than a bare majority joined an opinion and described step two (such as in *Judulang* or *Mead*), it did not do so in a textual manner. Instead, perhaps seeking to avoid disagreement over a textual or purposivist step one or step two, the Court described step two as neither. It was, instead, an inquiry similar to arbitrary-and-capricious review. See *id.* at 2442.

196 For instance, the Third Circuit has held that courts should not consider legislative history at step one. See, e.g., *United States v. Geiser*, 527 F.3d 288, 292 (3d Cir. 2008) (“The Government is correct that legislative history should not be considered at *Chevron* step one.”). That said, a later Third Circuit panel expressed its concern over the reach of this limitation. See *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 307 n.8 (3d Cir. 2015) (suggesting that *Geiser* may only apply to instances in which the language is unambiguous). Other circuits have indicated their wariness in turning to legislative history at step one. See, e.g., *New Mexico v. Dep’t of Interior*, 854 F.3d 1207, 1227 (10th Cir. 2017) (“[W]e assume *arguendo* that an inquiry into legislative history is generally appropriate at *Chevron* step one.”); *Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496, 505 (4th Cir. 2011) (“[I]n consulting legislative history at step one of *Chevron*, we have utilized such history only for limited purposes, and only after exhausting more reliable tools of construction.”); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 122 (2d Cir. 2007) (“This court has generally been reluctant to employ legislative history at step one of *Chevron* analysis.”); see generally John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1521 (2014) (arguing against the use of legislative history at *Chevron* step one).

197 At least two circuits have indicated that the canon of constitutional avoidance is for step two, not step one. See, e.g., *Olmos v. Holder*, 780 F.3d 1313, 1321 (10th Cir. 2015) (holding that the canon did not apply at step one because it is used only when the statute is ambiguous); *Am. Fed’n of Labor & Cong. of Indus. Orgs. v. FEC*, 333 F.3d 168, 179–80 (D.C. Cir. 2003) (“[T]he constitutional issues raised by the Commission’s disclosure policy are properly addressed at *Chevron* step two.”). One of us has taken this argument a step further, arguing that the modern version of constitutional avoidance should play no role at *Chevron* step one or two. See generally 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).

the Court's inconsistent approaches to step one, our findings suggest that the Court's inconsistent approaches to step two have, not surprisingly, led to inconsistent approaches in the courts of appeals. To the extent that the Court has intended to establish a hypertextualist or arbitrary-and-capricious approach (the two leading contenders), the circuit courts do not seem to have gotten the message. They used the former only about 12% of the time and the latter 33% of the time. Indeed, in more than a quarter of our observations, we could not even categorize the nature of judicial review, and, in more than a quarter of our observations, the circuit courts used a hyperpurposivist inquiry, which the Supreme Court has not routinely mentioned. This is not a problem without a remedy. The Supreme Court, with plenty of theoretical foundation to guide it, should look for ways to bring coherence to the *Chevron* framework. To the extent that the Court thinks it has done so, our results demonstrate otherwise.

Despite the circuit courts' lack of step-two uniformity, the relatively strong showing of the arbitrary-and-capricious-review standard (which had a better showing than other analytical methods) suggests that circuit courts have better internalized the Supreme Court's repeated references to that method than other methods. This should not be surprising once one notices, based on Figure 1, that the Supreme Court has been suggesting or outright advocating for such review since 2001. It is likely much easier for the courts of appeals to discern what the Supreme Court says than what it does. Accordingly, it becomes less surprising that the courts of appeals appear to be following what the Supreme Court (mostly) says, not what the Court (mostly) does in rejecting agency interpretations at *Chevron* step two.

The divergence between the Supreme Court's more textualist approach and the circuit courts' more purposivist approach is remarkable. The circuit courts have generally failed to adopt the hypertextualist approach at step two that the Supreme Court has articulated in a number of cases. Instead, many circuit courts have pioneered a more purposivist approach—one that is largely absent at the Supreme Court. That absence may well be due to the late-Justice Scalia's outsized textualist influence on the Supreme Court's approach to statutory interpretation. As one of us has noted, prior to Justice Scalia's passing, the Court, with perhaps Chief Justice Roberts leading the way, had already begun to embrace a variant of purposivism—perhaps better labeled “contextualism”—in which the Court seems to prioritize the purpose or substance of the statute over its text or form.<sup>198</sup> Such contextualism has not reached *Chevron* step two at the Supreme Court—yet. But we would not be surprised if the Supreme Court's trend away from textualism and toward contextualism also makes its way to step two. If it does, the Court will find circuit courts quite adept at applying such a new approach, as they have already been doing so for decades.

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198 See Hoffer & Walker, *supra* note 25, at 36–39; accord Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 421 (2015) (arguing that a number of other opinions from the Court reveal a more purposivist approach where “legal ambiguity can spring from a mix of text, purpose, and pragmatism”).

One final observation is worth making. The Supreme Court's failure to provide sufficient guidance on *Chevron* step two's domain does not just affect how lower courts implement the doctrine. It also affects how federal agencies interpret statutes and draft regulations. One of us (Walker) previously surveyed 128 federal agency rule drafters at seven executive departments (Agriculture, Commerce, Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (Federal Communications Commission and Federal Reserve).<sup>199</sup> Among more than twenty interpretive tools included in that survey, *Chevron* deference was the tool reported by the most agency rule drafters (90%) as being used when interpreting statutes and drafting regulations.<sup>200</sup> The vast majority of respondents indicated that they think about judicial review when interpreting statutes and view their chances of prevailing in court as better under *Chevron*. "Indeed, two in five rule drafters surveyed agreed or strongly agreed—and another two in five somewhat agreed—that a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies."<sup>201</sup>

Despite the central role of *Chevron* deference in their statutory interpretation and rule-drafting practices, the agency rule drafters surveyed were all over the place when asked about whether seventeen interpretive tools should apply at *Chevron* steps zero, one, and two. Figure 6 depicts those findings as to eight interpretive tools that best correspond with the coding of our *Chevron* step-two cases.<sup>202</sup>

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199 See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

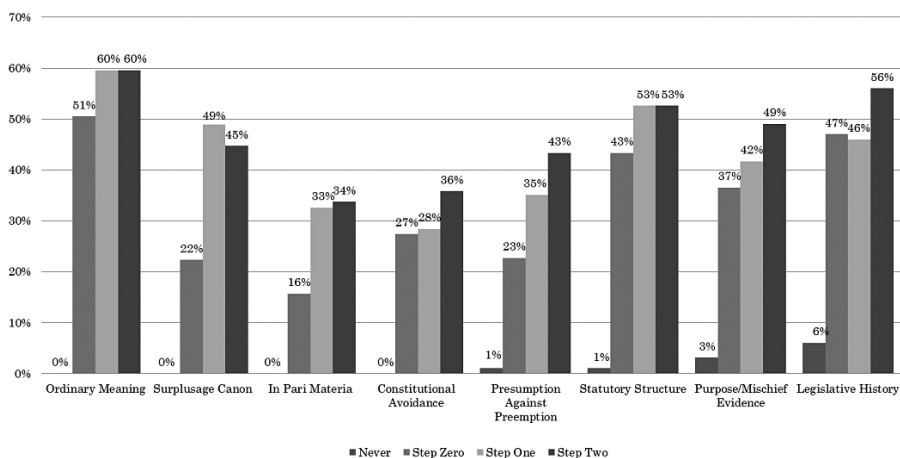
200 *Id.* at 1020 fig.2.

201 *Id.* at 1063; see also Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 721–28, 722 fig.3 (2014) (exploring these findings in greater detail).

202 These findings have not been reported in prior work; they are drawn from Questions 21 and 28 of the survey data, which are on file with the authors. Although the overall response to the survey was 128 agency rule drafters, the response rate as to these individual questions varied.



FIGURE 6. AGENCY RULE DRAFTERS' USE OF INTERPRETIVE TOOLS AT *CHEVRON* STEPS



As illustrated in Figure 6, the rule drafters surveyed tended to apply purposivist tools (purpose/mischief evidence and legislative history) more at step two than steps zero or one. The same is true for substantive canons, such as constitutional avoidance and the presumption against preemption. But none of these findings is definitive, and a fair number of respondents indicated they did know—ranging from 10% to 44% of the respondents depending on the interpretive tool. As the Supreme Court considers how to further define *Chevron* step two's domain (and the *Chevron* doctrine more generally), it is important to keep in mind that the Court's instructions will not only affect how lower courts apply the doctrine, but also how agencies approach their interpretive duties. Indeed, federal agencies may be the Supreme Court's primary audience, at least in terms of the audience who engages in the most statutory interpretation on a daily basis.<sup>203</sup>

## CONCLUSION

As judges, policymakers, litigants, and scholars continue to debate the future of *Chevron* deference, they should not focus only on whether to eliminate *Chevron* entirely, or on the mechanics or breadth of steps zero and one. Instead, they should also consider *Chevron* step two. As Judge Silberman recently observed, "*Chevron's* second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion."<sup>204</sup>

203 Cf. Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1101–02 (2018) (documenting how federal agencies, not Congress, have become the primary lawmakers today).

204 *Glob. Tel\*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring).

To date, the Supreme Court has provided little guidance on *Chevron* step two. And the guidance the Court has proffered has been underwhelming and inconsistent. As detailed in this Article based on the most comprehensive study of *Chevron* in the federal courts of appeals, the circuit courts have largely ignored the Supreme Court's more textualist approach to step two, opting instead for a more purposivist inquiry. At the same time, however, the circuit courts have embraced the Supreme Court's more recent emphasis on arbitrary-and-capricious review at step two. These findings suggest that *Chevron* step two is fertile ground for more theoretical and doctrinal development.

