

***Chevron* Step One-and-a-Half**

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The Supreme Court says that *Chevron* has two steps: Is the statute ambiguous (Step One) and if so, is the agency's interpretation of the ambiguous provision a permissible one (Step Two)? Yet over the last three decades, the D.C. Circuit has inserted an intermediate step between Steps One and Two: Did the agency recognize that the statutory provision is ambiguous? If not, then the D.C. Circuit refuses to proceed to *Chevron* Step Two and remands the matter to the agency. This doctrine—which we dub “*Chevron* Step One-and-a-Half”—has led to dozens of agency losses in the D.C. Circuit and D.C. federal district court, but it has gone entirely unmentioned in administrative law casebooks and is rarely referenced in the academic literature. The few who have not ignored the doctrine have treated it with skepticism. Chief among those skeptics is now-Chief Justice John Roberts, who while a D.C. Circuit judge sternly criticized his colleagues for applying the doctrine.

This article presents a more sympathetic account of *Chevron* Step One-and-a-Half. After providing an overview of the *Chevron* Step One-and-a-Half doctrine, we offer several theories as to why *Chevron* Step One-and-a-Half cases continue to arise, even though agencies can easily avoid the doctrine by stating that they would hew to their view regardless of whether the relevant statutory provision is ambiguous. Some number of *Chevron* Step One-and-a-Half cases might be explained by the fact that agencies are ignorant of the doctrine or ambivalent about their own policies, but we suggest that there also may be strategic reasons why agency actors might maintain that a statute is unambiguous. For instance, agency lawyers with a preference for a particular reading (or with patrons who have such a preference) might seek to increase influence over policy by declaring that a statute can be interpreted only one way. Alternately, an agency might claim that a statute is unambiguous in order to reduce the probability that the White House's Office of Information and Regulatory Affairs will second-guess the agency's choice. In a similar manner, an agency might attempt to evade political accountability for an unpopular policy by claiming that the choice was compelled by Congress. Finally, an agency might maintain that a statute is unambiguous in order to “lock in” an interpretation so that future administrations cannot undo it. After identifying the potential causes of *Chevron* Step One-and-a-Half cases, we consider how courts ought to respond to the potential for strategy agency behavior. We suggest that when viewed in this light, *Chevron* Step One-and-a-Half helps to uphold the theoretical justifications for *Chevron* deference. While *Chevron* Step One-and-a-Half remands also impose undeniable costs on administrative agencies, we argue that these costs ought to be evaluated against the considerable benefits that the doctrine potentially brings.

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INTRODUCTION

The Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* has created a cottage industry in choreography. Justice Stevens's opinion introduced the famous *Chevron* two-step.¹ Thereafter, Thomas Merrill and Kristin Hickman identified a *Chevron* "Step Zero"—"the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all."² (Some subdivide step zero into two steps of its own, creating a four-step test.³) A quarter century after the *Chevron* decision, Matthew Stephenson and Adrian Vermeule declared that in fact "*Chevron* has only one step": "whether the agency's construction is permissible as a matter of statutory interpretation."⁴ Meanwhile, some judges now view *Chevron* as "a three-step inquiry,"⁵ while others suggest that the number of steps probably doesn't matter much in practice.⁶ Little wonder, then, that others throw up their hands (or their feet?) and dismiss the entire step-defining exercise.⁷

One might infer from this choreographic confusion that we now have too many formulations of *Chevron*, with no need for another. One might also

¹ 467 U.S. 837 (1984).

² Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 n.19 (2006) (crediting Merrill and Hickman for the article's title).

³ See, e.g., William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations*, 54 ADMIN. L. REV. 719, 725 (2002) ("[T]he Court erected a new four step test to replace what we once knew as the *Chevron* two step.").

⁴ Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009). But see Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 624-25 (2009) (rejecting that argument); Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 608 (2014) (similar).

⁵ See *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015) ("[U]nder *Chevron* . . . we engage in a three-step inquiry when reviewing an agency's interpretation of a statute."); *Restrepo v. Att'y Gen. of the U.S.*, 617 F.3d 787, 792 (3d Cir. 2010) ("When confronted with a potential *Chevron* application, we administer a three-step analysis.").

⁶ See, e.g., *Carter v. Welles-Bowles Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (arguing that "[i]f you believe that *Chevron* has two steps, you would" reach a result one way, and "[i]f you believe that *Chevron* has only one step," you'd reach the same result another way).

⁷ See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2154 (2016) ("In short, the problem with certain applications of *Chevron*, as I see it, is that the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision. . . . [W]e need to consider eliminating that inquiry as the threshold trigger."); Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed And Why It Can Be Overruled*, 42 CONN. L. REV. 779, 832 (2010) ("The number of steps in *Chevron* in any given case may turn out to depend on who writes the Court's opinion.").

draw the conclusion that a doctrine designed to simplify judicial review of agency statutory interpretations has instead had the opposite effect. And yet one might infer from this article's title that the authors, rather than trying to streamline *Chevron*, are scheming to propose yet another step in the *Chevron* shuffle—or more precisely, a half-step. One might ask, quite fairly, whether the *Chevron* dance really needs another move. (One might also groan that we already have taken the dance metaphor too far.⁸)

Although we are mindful of *Chevron* fatigue, the fact remains that neither the one-step, two-step, three-step, nor four-step formulation of *Chevron* captures an important doctrinal development that has occurred in the federal courts. In the classic *Chevron* two-step, the court asks at Step One “whether Congress has directly spoken to precise question at issue”; if the answer is negative, then the court proceeds to *Chevron* Step Two and asks “whether the agency’s answer is based on a permissible construction of the statute.”⁹ The D.C. Circuit and a handful of other courts, however, now do something different. After deciding that the statute is ambiguous but before deciding whether the agency’s construction is permissible, these courts ask a separate question: whether the agency itself recognized that it was dealing with an ambiguous statute. In these courts, a misstep at this intermediate stage is fatal to an agency’s cause: the court will remand if the agency claimed that the statute is clear but the court concludes it is not. In other words, the agency will lose if it mistakenly says that the issue can be resolved at *Chevron* Step One while the court determine that it should be resolved at *Chevron* Step Two.

One might call this move “the *Prill* doctrine” in honor of *Prill v. NLRB*, the D.C. Circuit case from 1985 that is sometimes cited as the rule’s origin.¹⁰ Or perhaps one might call it “the *Negusie* doctrine” in honor of *Negusie v. Holder*,¹¹ a 2009 case in which the Supreme Court arguably applied the rule as well (though, as discussed below, the *Negusie* rule is a slightly different one). We choose to call it “*Chevron* Step One-and-a-Half,” because—well—that is what it is: a way station between *Chevron* Step One and *Chevron* Step Two. Whatever one calls it, however, we should recognize it for what it is and ask

⁸ But others have taken it farther. *See, e.g., Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (Henderson, J.) (“[U]nder the *Chevron* two-step, we stop the music at step one if the Congress has directly spoken to the precise question at issue But if the statute is silent or ambiguous, we dance on [to] step two”); *Braintree Elec. Light Dep’t v. FERC*, 667 F.3d 1284, 1288 (D.C. Cir. 2012) (Garland, J.) (“[T]he *Chevron* two-step is a dance for the court . . .”).

⁹ *Chevron*, 467 U.S. at 842-43.

¹⁰ 755 F.2d 941 (D.C. Cir. 1985); *see also* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. (forthcoming 2017) (discussing “the *Prill* doctrine”).

¹¹ 555 U.S. 511 (2009).

why it exists. This article attempts to do just that.

While *Chevron* Step One-and-a-Half has up until now been a doctrine without a name, it is nonetheless a doctrine with skeptics. Chief among them is now-Chief Justice John Roberts. In a concurring opinion that he wrote while on the D.C. Circuit, then-Judge Roberts criticized his colleagues for invoking *Prill* and its progeny. Judge Roberts said that he had “no quarrel with the basic proposition . . . that when an agency erroneously concludes that a statutory interpretation is required by Congress, we should remand to give the agency an opportunity to interpret the statute in the first instance.” But he argued that the doctrine ought not apply unless there is “real and genuine doubt concerning what interpretation the agency would choose” if the agency were aware of the ambiguity.¹² In all other cases, Judge Roberts said, the doctrine we dub *Chevron* Step One-and-a-Half “outstrips its rationale”¹³ and “convert[s] judicial review of agency action into a ping-pong game.”¹⁴ Nicholas Bagley, in turn, has urged that such “real and genuine doubt” will vanishingly rare. “The very fact that an agency has read the statute in a particular way,” writes Professor Bagley, is *itself* strong evidence “that it prefers the interpretation it adopted to the one that it did not adopt.”¹⁵ And quite often that probative evidence will be backed up by a representation—in writing and signed by agency lawyers—stating that the agency would stay the course on remand even if the reviewing court were to conclude that the statute is susceptible to multiple meanings. In light of this reality, the Chief Justice and Professor Bagley would have *Chevron* Step One-and-a-Half be invoked infrequently rather than becoming a standard part of the *Chevron* analysis.

Indeed, regardless of whether one subscribes to the view of the Chief Justice and Professor Bagley, one might wonder why *Chevron* Step One-and-a-Half is ever invoked. That is, why would an agency *ever* insist that a statute is unambiguous? From an agency’s perspective, disclaiming ambiguity seems like a self-inflicted wound, and an easily avoided self-inflicted wound at that. Indeed, if agencies seek to enhance their own autonomy (as some common accounts of agency motivation maintain¹⁶), one might expect them *always* to

¹² *PKD Labs. Inc. v. U.S. Drug Enforcement Agency*, 362 F.3d 786, 808 (2004) (Roberts, J., concurring in the judgment).

¹³ *Id.* at 809

¹⁴ *Id.* at 809 (quoting *Time, Inc. v. U.S. Postal Serv.*, 667 F.2d 329, 335 (2d Cir. 1981)) (internal quotation marks omitted).

¹⁵ Bagley, *supra* note 10, at ____.

¹⁶ See, e.g., John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Significance*, 93 NW. U. L. REV. 641, 702 (1999) (“[T]he occasions are rare on which a regulatory agency has voluntarily ceded control without some compelling need that required such a surrender. The usual assumptions of

argue that the statute is ambiguous so long as a non-frivolous argument exists. After all, under *Chevron*, ambiguity acts as a grant of discretion,¹⁷ and discretion is power.¹⁸ Why would an agency disavow discretion it could credibly claim?

Yet *Chevron* Step One-and-a-Half remands have occurred in dozens of cases—including in high-profile matters. This means that agencies are denying (or at least declining to acknowledge) that the relevant statute is ambiguous, even when non-frivolous arguments in favor of ambiguity are available (arguments that a court ultimately concludes are meritorious). So what is tripping these agencies up on the path to Step Two? We suggest several reasons why agencies might maintain that a statute is unambiguous even though such an assertion disadvantages the agency in litigation. The first, and perhaps most mundane, is agency ignorance: agency lawyers may simply be unaware of the *Chevron* Step One-and-a-Half doctrine. But while ignorance might be to blame the first time that an agency encounters the doctrine, the explanation is less plausible as time goes on, especially for agencies that have had actions remanded by the D.C. Circuit on *Chevron* Step One-and-a-Half grounds on multiple occasions.¹⁹ A second reason is agency ambivalence: the agency might believe that a particular result is statutorily compelled while also being unconvinced that it is an optimal policy, but yet still not care enough about the policy consequences to investigate whether arguments in favor of ambiguity might exist. We think that this too is a plausible explanation in some cases, though not in all.

We suggest here that even when agency actors are aware of the *Chevron* Step One-and-a-Half doctrine, and even when they have a firm preference for a particular interpretation, they sometimes may have strategic reasons to say that a statute is unambiguous despite the potentially negative litigation consequences. One such strategic motivation involves intra-agency politics: agency lawyers who prefer a particular outcome might claim that their

political science are that public agencies act to maximize their powers, just as private firms seek to maximize revenues or profits.”); *cf.* *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“By contrast, deferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”).

¹⁷ See Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1145 (2012) (explaining that *Chevron* “empower[s]” agencies “to act in a manner that creates legal obligations”).

¹⁸ See, e.g., *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962).

¹⁹ The Federal Communications Commission, the Department of Health and Human Services, the Department of Transportation, and the National Labor Relations Board are all repeat losers before the D.C. Circuit in *Chevron* Step One-and-a-Half cases. See Online Appendix.

preferred outcome is statutorily ordained, anticipating that non-lawyers within the agency will be ill-equipped to contest that claim. A second strategic motivation involves intra-executive branch politics: an agency might claim that a particular result is statutorily compelled so as to avoid having to convince the White House's Office of Information and Regulatory Affairs ("OIRA") that the agency's preferred outcome is cost-justified relative to feasible alternatives. A third strategic motivation involves inter-branch politics: an agency might seek to shirk blame for an unpopular policy by claiming that responsibility lies with Congress. Fourth, an agency might maintain that a statute unambiguously points one way in an effort to prevent future administrations from choosing a different route.

After laying out the various reasons why *Chevron* Step One-and-a-Half cases might continue to arise, we consider whether these reasons justify the doctrine's existence. Despite the hostility that the doctrine faces from some quarters, we suggest that Step One-and-a-Half produces potentially important benefits. In particular, this half step advances the values that motivate (and help justify) *Chevron* in the first place. If agencies are entrusted with discretionary power on the grounds that they are more accountable than courts, then judicial review should encourage agencies to take full account for their decisions. *Chevron* Step One-and-a-Half can serve to encourage this accountability in an administrable way. It can also help to ensure that deference is reserved for cases in which agencies employ the expertise that they (at least ostensibly) have and that courts do not. To be sure, the doctrine imposes costs as well, in the form of judicial remands and further litigation. Neither the benefits nor the costs are quantifiable, and we cannot confidently say whether the net welfare effects of the doctrine are positive or negative. What we can say, though, is that the potential benefits of *Chevron* Step One-and-a-Half have been overlooked so far. This article seeks to bring those potential benefits to the fore.

This article concludes by considering the choices courts must make when applying the *Chevron* Step One-and-a-Half doctrine. For example, should the doctrine be triggered whenever an agency fails to acknowledge that a statutory provision might be ambiguous—or only when the agency affirmatively states that the statutory provision is clear? Our proffered justifications for the doctrine might counsel in favor of the former, but the D.C. Circuit tends to lean toward the latter view. Likewise, should the application of *Chevron* Step One-and-a-Half result in a remand to the agency—or should it also result in vacatur of the agency's rule? Remand without vacatur reduces *Chevron* Step One-and-a-Half's costs, and yet those "costs" are arguably the doctrine's virtues—the costs of *Chevron* Step One-and-a-Half potentially deter agencies from hiding their cards.

We realize, of course, that *Chevron* Step One-and-a-Half further complicates the *Chevron* analysis. The simpler version of *Chevron* set out in administrative law casebooks, however, does not descriptively reflect what is happening in the nation’s “administrative law court.”²⁰ We hope that by naming the *Chevron* Step One-and-a-Half doctrine, explaining how it might be justified, delineating its contours, and describing its applications, we can cut through some of the complexity..

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This article proceeds as follows. Part I introduces *Chevron* Step One-and-a-Half with an illustrative example. Part II, in turn, describes the origins of this doctrine and explains why Step One-and-a-Half is consistent with, but nonetheless distinct from, other administrative law doctrines like hard-look review and the bar on post hoc rationalizations. Part III then addresses a key puzzle presented by Step One-and-a-Half: Why do these cases continue to arise? The answer, we submit, is central to why *Chevron* Step One-and-a-Half can be a beneficial doctrine. Part IV then tentatively defends Step One-and-a-Half from its critics by demonstrating the connection between the doctrine and *Chevron*’s accountability and expertise justifications; whatever one thinks of the doctrine, it is a mistake to focus exclusively on its costs while ignoring its benefits. Finally, Part V considers some of the difficult choices that courts must make when applying *Chevron* Step One-and-a-Half in concrete cases.

I. ON *PRILL* AND POLAR BEARS

We begin by describing *Chevron* Step One-and-a-Half’s application in a particular case—not because it is an exceptional example of the doctrine, but because it is an entirely ordinary example.²² The Endangered Species Act

²⁰ Patricia M. Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 534 (1988).

²² The D.C. Circuit has ruled against an agency on *Chevron* Step One-and-a-Half grounds in each of the following cases:

- *Noble Energy v. Salazar*, 671 F.3d 1241, 1245-46 (D.C. Cir. 2012);
- *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011);
- *Prime Time Int’l Co. v. Vilsack*, 599 F.3d 678, 683 (D.C. Cir. 2010);
- *Sec’y of Labor v. Nat’l Cement Co. of Cal.*, 494 F.3d 1066, 1073, 1074-75 (D.C. Cir. 2007);
- *Menkes v. Dep’t of Homeland Security*, 486 F.3d 1307, 1313 (D.C. Cir. 2007);
- *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350 (D.C. Cir. 2006);

(ESA) defines “an endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.”²³ The Act does not address, however, whether a species is “endangered” when the possibility of extinction is far off in the future. (Or at least, the Act *arguably* does not address that question; more on this below.) The question is particularly significant with respect to polar bears, whose very survival may be affected by losses of sea ice over the next century.

The U.S. Fish and Wildlife Service, which administers the ESA with respect to land animals,²⁴ concluded in a May 2008 final rule that polar bears

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- Teva Pharms. USA. Inc. v. FDA, 441 F.3d 1, 4-5 (D.C. Cir. 2006);
 - PDK Labs., Inc. v. DEA, 362 F.3d 786 (D.C. Cir. 2004);
 - Arizona v. Thompson, 281 F.3d 248 (D.C. Cir. 2002);
 - ITT Indus., Inc. v. NLRB, 251 F.3d 995, 1004 (D.C. Cir. 2001);
 - Jacoby v. NLRB, 233 F.3d 611, 617 (D.C. Cir. 2000);
 - GTE Serv. Corp. v. FCC, 224 F.3d 768, 775-76 (D.C. Cir. 2000);
 - Transition Hospitals Corporation v. Shalala, 222 F.3d 1019 (D.C. Cir. 2000);
 - PanAmSat Corp. v. FCC, 198 F.3d 890, 896-97 (D.C. Cir. 1999);
 - Sea-Land Serv. v. Dep’t of Transp., 137 F.3d 640, 646-647 (D.C. Cir. 1998);
 - Alarm Industry Communications Committee v. FCC, 131 F.3d 1066 (D.C. Cir. 1997);
 - City of Los Angeles Dep’t of Airports v. Dep’t of Transp., 103 F.3d 1027, 1034 (D.C. Cir. 1997);
 - American Petroleum Inst. v. EPA, 906 F.2d 729, 740 (D.C. Cir. 1990);
 - Baltimore & O. R. Co. v. ICC, 826 F.2d 1125, 1129 (D.C. Cir. 1987);
 - Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986);
 - Prill v. NLRB, 755 F.2d 941, 942 (D.C. Cir. 1985).

The list is nonexhaustive, and does not include cases in which the D.C. federal district court invoked *Chevron* Step One-and-a-Half and the agency did not press an appeal before the D.C. Circuit. *See, e.g.,* Am. Petrol. Inst. v. SEC, 953 F. Supp. 2d 5, 13 (D.D.C. 2013); Int’l Swaps & Derivatives Ass’n v. CFTC, 887 F. Supp. 2d 259, 280-82 (D.D.C. 2012); Coalition for Common Sense in Gov’t Procurement v. United States, 671 F. Supp. 2d 48, 55-56 (D.D.C. 2009). Nor does it include cases in other circuits applying the doctrine. *See infra* note 114.

Note, moreover, that the total number of cases in which an agency interpretation fails at *Chevron* Step Two is quite small. Reviewing all *Chevron* decisions in the courts of appeals published in 2011, Richard Re identified only two instances in which the court ruled against the agency specifically at Step Two. *See Re, supra* note 4, at 640. Kent Barnett and Christopher Walker identify less than five Step Two invalidations per year in a review of circuit court cases between 2003 and 2013, with the D.C. Circuit accounting for less than a fifth of all *Chevron* cases in the courts of appeals. *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts* 5, 44 fig. 8 (Univ. of Ga. Sch. of Law Research Paper Series, Paper No. 2016-27, July 2016), <http://ssrn.com/abstract=2808848>.

²³ 16 U.S.C. § 1532(6).

²⁴ On the division of responsibility between the Interior Department’s Fish and Wildlife Service and the Commerce Department’s National Marine Fisheries Service, *see Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 470-71 (3d Cir. 1997).

are “threatened” but not “endangered.”²⁵ (The term “threatened species” in the ESA refers to “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”²⁶) While acknowledging that projected changes in future sea ice conditions pose a danger to the polar bear’s survival in the long run, the Service contended that the “plain language” of the Act shows that an “endangered” species must face a “substantial and immediate” risk of extinction, whereas a “threatened” species is one that faces a “less imminent” danger.²⁷ Shortly after the Service issued its final rule, complete with this temporal distinction, the Center for Biological Diversity and other environmental groups sued the Service in federal district court in the District of Columbia for failing to classify polar bears as “endangered.”²⁸ The environmental groups argued that the Service had misinterpreted the ESA by reading an imminence requirement into the definition of “endangered.”²⁹

Readers familiar with foundational principles of administrative law might expect that this case would be resolved on the basis of the *Chevron* doctrine.³⁰ And indeed, that is where the district court began:

The framework for reviewing an agency’s interpretation of a statute that the agency is charged with administering is set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* The first step in this review process is for the court to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . If the court concludes that the statute is either silent or ambiguous with respect to the precise question at issue, the second step of the court’s review process is to determine whether the interpretation proffered by the agency is based on a permissible

²⁵ Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008).

²⁶ 16 U.S.C. § 1532(20).

²⁷ See *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 748 F. Supp. 2d 19, 26 (D.D.C. 2010).

²⁸ A number of other plaintiffs, including the State of Alaska and Safari Club International, sued the Service arguing that polar bears do not meet the definition of “threatened.” *Id.* at 20-21.

²⁹ See Third Amended Complaint of Plaintiffs Center for Biological Diversity, Natural Resources Defense Council and Greenpeace, Inc., *In re Polar Bear Endangered Species Act Listing*, 748 F. Supp. 29 19 (No. 08-764) (ECF No. 30).

³⁰ See generally *Chevron Inc. v. NRDC*, 467 U.S. 837 (1984).

construction of the statute.³¹

The district court then examined the “text, structure, and legislative history” of the ESA and determined that “the statute is silent or ambiguous with respect to the specific issue” in the case: whether an endangered species must be in danger of *imminent* extinction.³² And recall what the court just said about *Chevron*: if the statute is “silent or ambiguous” on the specific issue, then the court proceeds to the second step and determines whether the agency’s interpretation of the statute is “permissible.” One might assume, then, that the district court would proceed to the second step of the *Chevron* analysis. But that assumption would be incorrect.

The district court did not reach *Chevron* Step Two. (Or, at least, it did not reach *Chevron* Step Two for another year.) Instead, it said:

Upon finding the definition of an endangered species to be ambiguous, the Court would normally be required to defer to any permissible agency construction of the statute under step two of the *Chevron* analysis. In this case, however, there is no permissible construction to which the Court can defer. . . . [The Fish and Wildlife Service] relies exclusively on a plain-meaning interpretation of the ESA. As *Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress’s intent is not plain from the statute’s face, this Court is precluded from according the agency’s interpretation deference under *Chevron*.³³

The district court’s key analytical move was to say that deference at *Chevron* Step Two is reserved for instances in which the agency “recognizes” the ambiguity in the statute. Significantly, the district court cited no Supreme Court precedent for this proposition. Instead, it relied on a D.C. Circuit precedent, *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration*,³⁴ which itself invoked a line of D.C. Circuit cases dating back to the 1985 case *Prill v. National Labor Relations Board*.³⁵ The district court then remanded the case back to the Fish and Wildlife Service for the agency to decide whether to adopt the same imminence requirement as a matter of its own discretion.

³¹ *Id.* at 24-25 (citations and internal quotation marks omitted).

³² *Id.* at 28-29 (internal quotation marks omitted).

³³ *Id.* at 29 (citations and internal quotation marks omitted).

³⁴ 471 F.3d 1350 (D.C. Cir. 2006).

³⁵ 755 F.2d 941 (D.C. Cir. 1985).

The rest of the story is perhaps predictable. Following the district court's remand order, the Fish and Wildlife Service submitted a "memorandum of supplemental explanation" stating that even if the statutory definition of "endangered" is ambiguous, it still hews to the view that the classification should be limited to species facing an immediate risk of extinction. In a section titled "The Policies and Purposes of the ESA," the Service explained that "species currently on the brink of extinction . . . generally need stringent protection," which the "endangered" classification provides. But "[f]or species not yet on the brink of extinction, particularly for those that have yet to experience any notable decline in numbers or range, [the 'threatened' classification] offers the flexibility to fashion restrictions according to the needs of the species, which reflects the generally longer time frames available to test differing conservation strategies."³⁶ The case went back to the district court, which concluded that "the agency's Supplemental Explanation sufficiently demonstrates that the Service's definition of an endangered species, as applied to the polar bear, represents a permissible construction of the ESA and must be upheld under step two of the *Chevron* framework."³⁷ The D.C. Circuit upheld the district court's ruling,³⁸ and the polar bear is still listed as "threatened" but not "endangered."³⁹

While the outcome of the polar bear post-remand saga may not be surprising, much else about the story is puzzling. For one: Why did the *Chevron* Step One-and-a-Half question arise in the first place? Why didn't the Fish and Wildlife Service insert a disclaimer in its listing rule along the following lines: "we think the plain meaning of 'endangered' is that the danger of extinction must be imminent, but even if we are wrong on that score and the statute is ambiguous, we would arrive at the same result in the exercise of our discretion"? This sort of disclaimer does not appear to be uncommon,⁴⁰ and yet the Service omitted it here. Why? It is easy to

³⁶ Supplemental Explanation for the Legal Basis of the Department's May 15, 2008, Determination of Threatened Status for Polar Bears 7-8 (Dec. 22, 2010), *Ctr. for Biological Diversity v. Salazar* (In re Polar Bear Endangered Species Act Listing), 794 F. Supp. 2d 65 (D.D.C. 2011) (No. 08-764) (ECF No. 237-1).

³⁷ *Ctr. for Biological Diversity v. Salazar* (In re Polar Bear Endangered Species Act Listing), 794 F. Supp. 2d 65, 90 (D.D.C. 2011).

³⁸ *See In re Polar Bear ESA Listing & Section 4(d) Rule Litig.*, 709 F.3d 1 (D.C. Cir. 2013).

³⁹ *See* U.S. Fish & Wildlife Service, Environmental Conservation Online System, Polar bear (*Ursus maritimus*), <http://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=A0IJ>.

⁴⁰ *See, e.g.,* Nat'l Marine Fisheries Serv., Identification of 14 Distinct Population Segments of the Humpback Whale (*Megaptera novaeangliae*) and Proposed Revision of Species-Wide Listing, 80 Fed. Reg. 22,304, 22,348 (Apr. 21, 2015) ("To the extent it may be said that the statute is ambiguous as to precisely how the updated listings should replace the

understand how a Step One-and-a-Half issue might arise if no one had ever thought about this issue before, but the D.C. Circuit has been applying this doctrine for three decades. *Prill*, after all, was decided in 1985 and has been applied many times in the intervening years.⁴¹ Wouldn't one expect that agencies, after decades of litigation experience, would get the message and start to insert disclaimers of this sort in their rules as a matter of course?

And on a normative note: What use does *Chevron* Step One-and-a-Half serve? In the polar bear case, did the district court really anticipate that on remand, the Fish and Wildlife Service would say: "Gee, now that we know that the statute is ambiguous, we think that the term 'endangered' should apply to risks far off in the future and polar bears should be listed as 'endangered' going forward"? If the Service had wanted to list polar bears as "endangered," presumably it would have found in the statute the ambiguity so apparent to the district court. Agency officials and lawyers, after all, are pretty good at searching for ambiguity and, indeed, are often willing to press aggressive arguments in favor of it.⁴² So the district court surely suspected that the statutory interpretation adopted by the agency also reflected the agency's view of the best policy. Did it warrant an extra round of litigation just so that the Fish and Wildlife Service would say so in more explicit terms?

Especially in light of this example, we understand why some readers might conclude that *Chevron* Step One-and-a-Half is nonsense twice over—nonsense in that no sensible agency should ever find itself ensnared by the doctrine, and nonsense in that the doctrine itself accomplishes absolutely nothing. And yet we resist those conclusions. In Part III, we explain why a

original listing in such circumstances, we provide our interpretation of the statutory scheme."); Dep't of Veterans Affairs, Health Care for Homeless Veterans Program: Final Rule, 76 Fed. Reg. 52,575, 52,577 (Aug. 13, 2011) ("Even if the statute is ambiguous, our interpretation that it applies to veterans who are homeless and have a serious mental illness is consistent with Congress' intent."); Ctrs. for Medicare & Medicaid Servs., Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009, 73 Fed. Reg. 69,726, 69,746 (Nov. 19, 2008) ("First, we continue to believe that our interpretation is consistent with the plain language of the Medicare statute, and alternatively, if the statute is ambiguous to this point, we believe our interpretation best captures the Congress' intent and is a reasonable and permissible interpretation."); Dep't of Health & Human Servs., Health Care Fin. Admin., Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1998 Rates: Final Rule, 63 Fed. Reg. 26,318, 26,346 (May 12, 1998) ("Taking into consideration the statutory language, the statutory scheme, and the legislative history, we believe the best reading of the statute enacted by the Congress is that we should calculate a single number for hospitals within each class and not apply a wage adjustment. We believe that, in any event, the Secretary's policy is consistent with the statute and is reasonable.").

⁴¹ See *supra* note 22.

⁴² See, e.g., *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993) (rejecting the agency's argument in favor of ambiguity as "almost frivolous").

rational agency (or rational actors within the agency) might deliberately choose to argue that a statute is unambiguous without attaching any disclaimer (*i.e.*, without arguing in the alternative that even if the statute is ambiguous, the agency's construction is permissible). And in Part IV, we explain why in our view *Chevron* Step One-and-a-Half can produce benefits even if, in the mine run of cases, a remand to the agency will result in the agency spitting back the same rule with cosmetic changes to the preamble. But before doing so, we seek to situate *Chevron* Step One-and-a-Half in doctrinal context.

II. DOCTRINAL ANTECEDENTS OF *CHEVRON* STEP ONE-AND-A-HALF

To appreciate *Chevron* Step One-and-a-Half, it is necessary to understand three administrative law doctrines (doctrines no doubt familiar to many readers): *Chevron*, *Chenery I*, and *State Farm*. We argue that *Chevron* Step One-and-a-Half is consistent with each of these doctrines but not dictated by any one of them.

A. *Chevron*

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. is by most measures the most frequently cited case in administrative law.⁴³ It is certainly the most familiar to administrative law students.⁴⁴ And at first blush, it is among the most straightforward. *Chevron* calls on courts to apply a two-step framework when reviewing an agency's interpretation of the statute that it administers. The Court in *Chevron* articulated the two steps as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at

⁴³ By most measures but not by all: *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is arguably an "admin law" case, and it has been cited more frequently than *Chevron*. See Chris Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 9, 2014), <http://www.yalejreg.com/blog/most-cited-supreme-court-administrative-law-decisions-by-chris-walker>. And if one counts *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and we don't, *Daubert* comes out on top. *Id.*

⁴⁴ See Ronald M. Levin, *The Anatomy of Chevron Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁴⁵

The Court—per Justice Stevens—attempted to justify this deference in at least three ways: political accountability, comparative expertise, and implied delegation, with the first two being the most important in Justice Stevens' analysis. As to accountability, Justice Stevens reasoned that when a statute is ambiguous, it is better that a politically accountable agency rather than a politically isolated court determine what the statute means.⁴⁶ At the same time (and, indeed, the same breath), Justice Stevens emphasized the agency's expertise relative to judges, who “are not experts in the field.”⁴⁷ Finally, Justice Stevens (tentatively) advanced the theory that ambiguity constitutes an “implicit” delegation from Congress to the relevant agency to “fill [the] gap” in the statutory framework.⁴⁸ The upshot of the *Chevron* Court's analysis is a

⁴⁵ *Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁴⁶ *See id.* (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

⁴⁷ *Id.* at 865.

⁴⁸ *Id.* at 844. To be sure, Justice Stevens did not claim that Congress *intentionally* delegated such gap-filling authority to agencies. Rather, he stated that whether Congress did so intentionally or not, the Court would still infer such a delegation, no doubt because of the political accountability and expertise justifications. *See id.* at 865. (“Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.”). Many thus have dubbed this “implied delegation” a legal fiction. *See, e.g.,* John Manning, *Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457, 458 (2014). Today, however, there is more reason to think that Congress legislates against the backdrop of *Chevron*, *see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995-97 (2013), though, there is also evidence suggesting that some members of Congress do not want courts to apply *Chevron*, *see* H.R.4768 (2016) (proposed legislation, passed by House of Representatives, calling for de novo review). For purposes here, it matters not whether *Chevron* reflects congressional intent. In either event, *Chevron* is still a decision of the Supreme Court entitled to *stare decisis* weight.

“counter-*Marbury*” rule of interpretation: rather than saying ““what the law is,”” courts confronted with ambiguous language should defer to the “technical expertise and political accountability” of the agency charged with administering the statute.⁴⁹

While Justice Stevens framed the *Chevron* inquiry in two-step terms, several scholars have argued that there is a preliminary step implicit in the *Chevron* analysis, at which the court decides whether to apply the *Chevron* framework at all. Thomas Merrill and Kristin Hickman have called this “*Chevron* Step Zero.”⁵⁰ Although Step Zero is complicated (indeed, it may have sub-steps of its own, hence the suggestion that *Chevron* has four steps⁵¹), the gist of this idea is that if *Chevron* is based (even in part) on a theory of implied delegation, then it is reasonable to think that there some categories of interpretations for which Congress would not want the agency calling the shots. For example, a court may decline to defer at Step Zero because, as in *United States v. Mead Corp.*, the procedures used by the agency were so lacking in formality that it is improbable to think Congress intended the resulting interpretations to receive deference.⁵² Or, a court may deny deference at Step Zero because, as in *FDA v. Brown & Williamson Tobacco Corp.*, the policy is so important that it is unlikely that Congress wanted it resolved by an agency.⁵³ The latter version of Step Zero recently received a boost from Chief Justice Roberts in *King v. Burwell*, the 2015 case about whether Affordable Care Act tax credits should be available to individuals who enroll in insurance plans through federal rather than state-run exchanges.⁵⁴ Writing for a six-justice majority, the Chief declined to defer to the Internal Revenue Service’s interpretation of the statute, reasoning that the matter was of such “deep ‘economic and political significance’” and so “central to this statutory scheme” that “had Congress wished to assign that question to an agency, it surely would have done so expressly.”⁵⁵

One can see how *Chevron* Step Zero might be derived from the Court’s decision in *Chevron*. It is not immediately obvious, though, that *Chevron* Step One-and-a-Half follows from *Chevron* itself. Justice Stevens’s opinion in *Chevron* never suggests that deference depends on whether an agency

⁴⁹ Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583, 2584 (2006) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁵⁰ See Merrill & Hickman, *supra* note 2, at 836.

⁵¹ See, e.g., Jordan, *supra* note 3, at 725.

⁵² 533 U.S. 218, 231 (2001).

⁵³ 529 U.S. 120, 159 (2000).

⁵⁴ 135 S. Ct. 2480 (2015)

⁵⁵ *Id.* at 2489 (quoting *Brown & Williamson*, 529 U.S. at 159).

recognizes ambiguity in the statute.⁵⁶ *Chevron* simply says that when Congress has delegated interpretive authority to an agency, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”⁵⁷ Nowhere does the Court even hint that the administrator of an agency must recognize that her “reasonable” interpretation is not the only permissible interpretation. While we argue below that Step One-and-a-Half is *consistent* with the core purposes of *Chevron*, it would be difficult to argue that Step One-and-a-Half is *prescribed* by *Chevron*.

But even if *Chevron* Step One-and-a-Half cannot be derived directly from *Chevron*, new insights about *Chevron* can indeed be derived from *Chevron* Step One-and-a-Half. First, consider Matthew Stephenson and Adrian Vermeule’s claim—noted above—that “*Chevron* has only one step.”⁵⁸ Stephenson and Vermeule assert that the “single question” in every *Chevron* case is “whether the agency’s construction is permissible as a matter of statutory interpretation.”⁵⁹ For at least a fleeting moment, the Supreme Court seemed in accord with Stephenson and Vermeule’s one-step formulation.⁶⁰ More recent Supreme Court opinions describe *Chevron* in two-step terms.⁶¹

⁵⁶ Indeed, one might question whether the agency in *Chevron* fully acknowledged its own discretion under the Clean Air Act. See Env’tl. Protection Agency, Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans: Final Rule, 46 Fed. Reg. 50,766, __ (Oct. 14, 1981) (“Congress expressly provided that states are to play the primary role in pollution control. It also intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. Today’s action follows this mandate by allowing states much greater flexibility in developing their nonattainment area NSR programs and attainment demonstrations.” (citations omitted)).

⁵⁷ *Chevron*, 467 U.S. at 844.

⁵⁸ See Stephenson & Vermeule, *supra* note 4.

⁵⁹ *Id.* at 599.

⁶⁰ See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) (“[S]urely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”).

⁶¹ See *Encino Motorcars, LLC v. Navarro*, 195 L. Ed. 2d 382, 392 (U.S. 2016) (“In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency’s interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*.”); *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (“When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in *Chevron* . . . ‘In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.’ This is one of those cases.”). Note, though, that in both of these cases, the Court ultimately declined to apply the *Chevron* framework, resolving the matter in what might be described as *Chevron* Step Zero, see Kristin E. Hickman, *The (Perhaps) Unintended*

What *Chevron* Step One-and-a-Half teaches us is that, at least in any court that applies the doctrine, the difference between Step One and Step Two very much matters. A court may believe that an agency's interpretation of a statute is permissible and yet still flunk the agency on *Chevron* Step One-and-a-Half grounds because the agency failed to describe its interpretation in Step Two terms. In this respect, *Chevron* does indeed have (at least) two steps—and any agency that disagrees will have its hat handed to it.

Not only does the existence of *Chevron* Step One-and-a-Half demonstrate that Stephenson and Vermeule's consolidation of the *Chevron* inquiry fails to fit with D.C. Circuit doctrine, but it also offers direction into the order in which the inquiry should occur. Richard Re has argued that courts should have the option of proceeding with the *Chevron* inquiry in reverse: “optional two-step *Chevron* would first ask the reasonableness question, and then it would give courts discretion to ask a second question regarding mandatoriness.”⁶² Re further argues that the optional two-step formulation of *Chevron* is consistent with current practice in the federal courts of appeals.⁶³ *Chevron* Step One-and-a-Half suggests that at least in the D.C. Circuit, courts do not have the option of resolving *Chevron* cases on Step Two grounds alone—at least not in cases in which the court ultimately upholds the agency's interpretation. If a plaintiff or petitioner seeking review of an agency rule brings a *Chevron* Step One-and-a-Half challenge in the D.C. Circuit or D.C. federal district court, the appellate panel or district judge does not have the option of holding that the agency's interpretation is reasonable and calling it a day. To respond to the *Chevron* Step One-and-a-Half challenge, the panel would have to determine whether the agency acknowledged ambiguity in the statute; if not, then the panel or district judge would have to determine whether the agency's characterization of the statute as unambiguous is correct. To be sure, an agency that jumps straight to Step Two without expressing any opinion on the statute's ambiguity (or lack thereof) might survive *Chevron* Step One-and-a-Half (more on this in Section V.A). But a court that jumps straight to Step Two in a case where a Step One-and-a-Half challenge has been raised would be acting inconsistently with D.C. Circuit doctrine.

B. *Chenery I*

Four decades *Chevron*'s senior, the *Chenery I* rule is another “hoary

Consequences of King v. Burwell, 2015 PEPP. L. REV. 56, or *Chevron Step 0.5*, see Daniel Hemel & Michael Pollack, *Chevron Step 0.5*, WHATEVER SOURCE DERIVED (June 23, 2016), <http://bit.ly/2aDfVUu>.

⁶² Re, *supra* note 4, at 619.

⁶³ *Id.* at 641.

principle of administrative law.”⁶⁴ And like *Chevron*, the *Chenery I* rule is easy to state but not always to apply: when a court reviews an agency decision, “[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”⁶⁵ In other words, if the agency proffers a bad reason for its decision, a court will not uphold the decision just because the agency could have offered a good reason. In fact, this rule applies even if the agency’s own lawyers later offer that very good reason to the court during judicial review.⁶⁶ Instead, so long as the agency has any discretion in the matter (for there is no reason to remand otherwise⁶⁷), what matters is what the agency said at the time of its decision.

The facts of *Chenery I* provide a good example of how this works. In *Chenery*, a company proposed a reorganization. The Securities and Exchange Commission agreed to allow the reorganization, “but also ordered that ‘preferred stock’ acquired by certain ‘officers, directors, and controlling stockholders’ while reorganization plans were before the Commission could not ‘participate in the reorganization on an equal footing with all other preferred stock.’”⁶⁸ The SEC justified its decision by invoking common law principles as articulated by courts. The Supreme Court concluded, however, that the common law principles relied on by the SEC were inapplicable to this situation—the agency misunderstood the common law.⁶⁹ Instead of deciding whether the agency’s decision could be sustained on other grounds, the Court remanded to the agency. (Much like in the polar bear litigation, the agency responded on remand with new justifications for its old position, and the Supreme Court upheld the agency’s decision the second time around.⁷⁰)

⁶⁴ Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 684 (2007) (Stevens, J., dissenting) (citing SEC v. Chenery Corp., 318 U.S. 80 (1943)); see also Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007) (emphasizing the constitutional significance of the doctrine).

⁶⁵ S.E.C. v. Chenery Corp., 318 U.S. 80, 87 (1943).

⁶⁶ See, e.g., Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 526 (1985) (“A corollary of this rule is that ‘the post hoc rationalizations’ of the agency or its counsel ‘cannot serve as a sufficient predicate for agency action.’”) (quoting American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981)).

⁶⁷ See, e.g., Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 544-545 (2008) (“We will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion. But FERC has lucked out: The *Chenery* doctrine has no application to these cases, because we conclude that the Commission was required [to act as it did].”).

⁶⁸ Aaron L. Nielson, *Beyond Seminole Rock*, – GEO. L.J. – (2017) (quoting SEC. v. Chenery Corp., 318 U.S. 80, 81 (1943)).

⁶⁹ See SEC v. Chenery Corp., 318 U.S. 80, 89 (1943).

⁷⁰ See SEC v. Chenery Corp., 332 U.S. 194 (1947) (*Chenery II*). Cite to Nielson Georgetown.

The *Chenery I* principle is often invoked in modern administrative law (though not quite as often invoked as *Chevron*). It played a prominent role in *Michigan v. EPA*, a 2015 decision in which the Supreme Court rejected EPA's claim that it could regulate mercury emissions from coal power plants.⁷¹ The D.C. Circuit likewise invokes *Chenery I* on a regular basis when an agency puts forth a new rationale for an action in litigation that the agency did not cite in the first instance.⁷² To be sure, as noted above, *Chenery I* does not require a remand when the agency's decision is the only one the law allows, and sometimes (though rarely) an agency may offer a post-hoc justification.⁷³ But as a general rule, *Chenery I* requires an agency's decision to clear two hurdles: it both must be lawful *and* the reason why it is lawful must be the one given by the agency itself at the time it announced the decision. Otherwise, the decision cannot stand, even if the same outcome could be permissible.

On one view, *Chevron* Step One-and-a-Half is simply an application of *Chenery I*.⁷⁴ If an agency initially says that it is adopting a particular position because it believes that the statute so requires, a court cannot uphold the agency's action on the ground that the statute is ambiguous but the agency's interpretation is permissible. The agency, after all, gave the "wrong" reason for its decision.

Yet the path from *Chenery I* to *Chevron* Step One-and-a-Half may not be quite as straightforward, depending on how broadly one reads *Chenery I*. Consider again the polar bear example. Imagine two potential arguments that the Fish and Wildlife Service could make in the preamble to its listing rule:

(a) Congress clearly intended for the term "endangered" to include an imminence requirement. The legislative history says that Congress sought to establish "two levels of protection"—"endangered" and "threatened"—with the two levels distinguished by whether the danger of extinction is

⁷¹ See *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) ("This line of reasoning contradicts the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action."); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (similar).

⁷² See, e.g., *NLRB v. S.W. Regional Council of Carpenters*, -- F.3d --- (D.C. Cir. 2016) ("Even if the Board had explained the relevance of these alleged factual differences, we cannot address this argument because it did not appear in the Board's orders below.").

⁷³ See, e.g., *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (allowing post hoc justifications when "there was such failure to explain administrative action as to frustrate effective judicial review"). But see *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (concluding that even in such circumstances, it is often preferable to remand).

⁷⁴ This was certainly the view of the majority in *Prill* itself. See *Prill v. NLRB*, 755 F.2d 941, 948 (1985) ("We think that the teachings of *Chenery* are plainly implicated in this case.").

“imminent.”⁷⁵

(b) The text of the Endangered Species Act is ambiguous as to whether “endangered” includes an imminence requirement. Nonetheless, we believe that such a requirement best carries out congressional intent. The legislative history says that Congress sought to establish “two levels of protection”—“endangered” and “threatened”—with the two levels distinguished by whether the danger of extinction is “imminent.”⁷⁶

Assume, for present purposes, that the court considers legislative history to be a relevant consideration, at least at *Chevron* Step Two.⁷⁷ Would there really be a *Chenery I* problem with upholding the agency’s listing decision, whether the agency’s proffered rationale is (a) or (b)? In both scenarios, the agency has cited the legislative history as a reason for its decision, and so *Chenery I* (arguably⁷⁸) allows the court to rely on that reason on review. And yet in scenario (a), the agency might well run into a *Chevron* Step One-and-a-Half problem. Unlike in scenario (b), the agency in scenario (a) does not acknowledge ambiguity. Quite the contrary, the agency maintains that congressional intent is clear. To be sure, the agency relies on legislative history rather than statutory text, but the D.C. Circuit has said under similar circumstances that if an agency does not acknowledge ambiguity, then it is undeserving of *Chevron* deference.⁷⁹

To put the point in slightly different terms: Imagine an agency says that “the statute unambiguously means X for reasons A, B, and C.” *Chenery I* clearly prevents the agency from pivoting in litigation and arguing that the statute should be interpreted to mean X for reasons D, E, and F. It is not so

⁷⁵ See S. Rep. No. 93-307, at 3 (July 1, 1973).

⁷⁶ See *id.*

⁷⁷ See, e.g., *Fournier v. Sebelius*, 718 F.3d 1110, 1123 (9th Cir. 2013) (holding that, at *Chevron* Step Two, “legislative history permissibly may be considered”).

⁷⁸ Of course, one could read *Chenery I* in a more maximalist fashion, such that scenario (a) would not be upheld since the agency did not acknowledge its discretion, just as if the agency had not acknowledged its discretion for reasons that do not sound in statutory interpretation. Even though the agency said its reading was consistent with the legislative history, by definition it could have reached another result despite the legislative history. Otherwise, this could not be a *Chevron* Step Two case. It is enough here to observe that it is not obvious that *Chenery I* should be read in such a maximalist fashion, though, for what it is worth, one of the authors (Nielson) subscribes to a maximalistic view, while the other (Hemel) is not yet persuaded. Perhaps tellingly, courts also appear to vary widely on how they understand *Chenery I*. See, e.g., *Bagley*, *supra* note 10, at ____.

⁷⁹ See *PDK Labs. Inc. v. U.S. Drug Enforcement Agency*, 362 F.3d 786, 794 (D.C. Cir. 2004).

obvious, though, that *Chenery I* stands in the way of a court saying: “We believe that the statute is ambiguous, but reasons A, B, and C are all perfectly good reasons for interpreting the statute to mean X, and so we affirm the agency.” That latter disposition may or may not be consistent with *Chenery I*, depending on how broadly one reads *Chenery I*. But no matter how one reads *Chenery I*, it definitely would run afoul of *Chevron* Step One-and-a-Half.

C. *State Farm*

If *Chevron* Step One-and-a-Half is not implicit in *Chevron* and is not (necessarily) required by *Chenery I*, might it be derived from the *State Farm* doctrine? *State Farm* holds that an agency must “articulate a satisfactory explanation for its action”—it must show, in other words, that its action was “the product of reasoned decisionmaking.”⁸⁰ Perhaps we can say that an agency flunks the “satisfactory explanation” requirement—and therefore regulates unreasonably—when it says that the statute is unambiguous even though the statute is susceptible to multiple meanings.

Maybe—but we are doubtful. The fact that an agency thinks Congress’s intent is clear while the court thinks the statute is ambiguous does not mean that the agency’s view is unreasonable. As we allude to above, some courts consider legislative history at *Chevron* Step One: on this view, legislative history can render a statute unambiguous under certain circumstances.⁸¹ Others consider legislative history only at Step Two.⁸² An agency and a court might disagree as to whether to resolve a statutory interpretation question at Step One or Step Two, but that does not mean that either holds an unreasonable view, much less that the agency has employed a faulty process or ignored key parts of the problem.

More generally one can conceptualize statutory clarity as a spectrum (say, from 0 to 1, with 0 being totally ambiguous and 1 being completely clear).⁸³ The statute specifying that presidential elections must be held “on the Tuesday next after the first Monday in November” might qualify as an 0.99 on the

⁸⁰ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52 (1983)

⁸¹ *See Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496, 504-05 (4th Cir. 2011) (“[W]e have described legislative history as one of the traditional tools of interpretation to be consulted at *Chevron*’s step one.”).

⁸² *See, e.g., Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 666 (D.C. Cir. 2011) (“Although we would be uncomfortable relying on such legislative history at *Chevron* step one, we think it may appropriately guide an agency in interpreting an ambiguous statute.”).

⁸³ For a similar take, see Kavanaugh, *supra* note 7, at 2137-38.

scale,⁸⁴ while the Federal Communications Commission's power over assignment of station licenses (such assignments are allowed if the Commission determines "the public interest, convenience, and necessity will be served"⁸⁵) might land at 0.01. We might further imagine that any statutory provision 0.5 or higher is "unambiguous" for *Chevron* purposes (i.e., the case will be resolved at Step One), and any statutory provision below 0.5 on the clarity scale is "ambiguous" (i.e., the case can proceed to Step Two). We might also imagine that intelligent interpreters acting in good faith will sometimes differ in their assessments, at least over a limited range. For instance, you might rate a provision an 0.3 on the clarity scale while another equally intelligent, equally well-intentioned interpreter might rate the same provision an 0.2 or an 0.4 (though probably not an 0.9).

From this perspective, an agency's statement that a statutory provision is unambiguous may sometimes show that the agency's decision is not the "product of reasoned decisionmaking," but not always. It might be unreasonable for the FCC to say its license assignment power is unambiguous. But an agency might reasonably conclude that a statutory provision is an 0.51 while the court sees it as an 0.49. In the latter scenario, the agency would have a *Chevron* Step One-and-a-Half problem (assuming it does not insert the requisite disclaimer), but there would be no obvious *State Farm* issue. To be sure, we are not saying that 0.5 is the right threshold, nor that such fine distinctions are necessarily possible. The important point is that an agency's decision can be the product of "reasoned decisionmaking," the hallmark of *State Farm*, yet still fail *Chevron* Step-One-and-a-Half.

Granted, there are affinities between *Chevron* Step-One-and-a-Half and *State Farm*: both doctrines look to the content of an agency's explanation for adopting a particular position. But not every case in which the agency runs into a *Chevron* Step-One-and-a-Half problem is also a case in which the agency would flunk *State Farm* review (and, of course, vice versa).

D. Prill

Despite not being compelled by *Chevron*, *Chenery I*, or *State Farm*, *Chevron* Step-One-and-a-Half is a firmly entrenched principle of D.C. Circuit law. Its origin is typically traced to the D.C. Circuit's decision in *Prill v. NLRB*, which announced the following rule: "[A]n agency regulation must be

⁸⁴ See 3 U.S.C. § 1. Or so we would think. Perhaps one might argue that "the Tuesday next" means "next Tuesday" as opposed to "this Tuesday," so if the first Monday in November is November 7, then "the Tuesday next" is November 15.

⁸⁵ 47 U.S.C. § 310(d).

declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress judgment that such [a regulation is] desirable.”⁸⁶ In operation, this means the court will “strike down an agency interpretation, not because the interpretation was inconsistent with the statute, but because the agency wrongly assumed that a particular interpretation was commanded by the statute.”⁸⁷ Thus, “[d]eference to an agency’s statutory interpretation ‘is only appropriate when the agency has exercised its own judgment,’ not when it believes that interpretation is compelled by Congress.”⁸⁸

The troubling facts of *Prill* illustrate the doctrine. A truck driver named Kenneth Prill was fired for complaining “about the unsafe condition of a company truck and trailer.”⁸⁹ Even though the truck *was* unsafe (indeed, state officials agreed with him), Prill was let go “because company officials decided that they could not have him ‘calling the cops all the time.’”⁹⁰ Upset, Prill sought relief from the National Labor Relations Board (NLRB), alleging that his firing was an unfair labor practice. Relevant here, an administrative law judge agreed that Prill’s safety complaint was protected under Section 7 of the National Labor Relations Act (NLRA) as a “concerted activity,”⁹¹ but the NLRB disagreed because, on its view of the NLRA, “an employee’s conduct is not ‘concerted’ unless it is ‘engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.’”⁹²

This issue then came to the D.C. Circuit, which concluded that the NLRB was wrong to say that it lacked discretion to consider Prill’s activity “concerted.” The agency, however, urged that its decision rejecting Prill’s position should nonetheless be upheld because the NLRB “has broad authority to construe the NLRA.” The D.C. Circuit, however, would have none of it,

⁸⁶ 755 F.2d 941 (D.C. Cir. 1985) (quoting *FCC v. RCA Communications*, 346 U.S. 86, 96 (1953)).

⁸⁷ Stuart Buck, *Salerno vs. Chevron: What to do About Statutory Challenges*, 55 ADMIN. L. REV. 427, 472 (2003); see also Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 482 n.54 (1986) (“[T]he court found that the National Labor Relations Board (NLRB) failed to recognize that the broad standard conferred executing and that the NLRB acted improperly by not exercising it . . . [T]he court was perfectly correct in instructing the agency of the boundaries of that discretion and compelling it to exercise that discretion according to the breadth of the legislative standard.”).

⁸⁸ *Arizona v. Thompson*, 281 F.3d 248, 253 (D.C. Cir. 2002) (quoting *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986)).

⁸⁹ *Prill*, 755 F.2d at 942.

⁹⁰ *Id.*

⁹¹ See 29 U.S.C. § 157 (“Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

⁹² *Prill*, 755 F.2d at 942.

explaining that “judicial deference is not accorded a decision of the NLRB when the Board acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress.”⁹³ Because the NLRB was wrong to conclude that its interpretation of the statute was “mandated” by the statute,⁹⁴ the court remanded “under the principles of *SEC v. Chenery Corp.*, so that the Board may reconsider the scope of ‘concerted activities’ under section 7.”⁹⁵ Since the agency’s mistake might have had some “bearing on the procedure used or the substance of decision reached,” the NLRB’s decision could not stand.⁹⁶

Prill, which was argued and decided just months after *Chevron*, never cites Justice Stevens’s now-canonical opinion; in subsequent cases, however, the D.C. Circuit has made the link between *Chevron* and *Prill* clearer. An illustrative example is *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration*.⁹⁷ *Peter Pan* concerned two competing budget bus lines: Peter Pan Bus Lines and Fung Wah Transportation, Inc. (known to a generation of East Coast college students as “the Chinatown bus”). Fung Wah filed an application with the FMCSA for a license to operate a passenger bus line between New York and Boston. Peter Pan objected to Fung Wah’s application because, Peter Pan said, “Fung Wah was unwilling or unable to comply with the requirements of the regulations [the Department of Transportation] has promulgated under the Americans With Disabilities Act.”⁹⁸ The agency, however, concluded that the licensing statute did not allow it to consider Fung Wah’s alleged Americans With Disabilities Act violations as part of the licensing proceeding.⁹⁹

⁹³ *Id.*

⁹⁴ *See id.* at 948 (concluding, *inter alia*, that “that the Board erred in assuming that the NLRA mandates its present interpretation of ‘concerted activities’”) (emphasis in original).

⁹⁵ *Id.* at 942 (citing 318 U.S. 80 (1943))

⁹⁶ *Id.* at 948 (internal citations and quotations omitted); *see also* Phillips Petroleum Co. v. FERC, 792 F.2d 1165, 1169 (D.C. Cir. 1986) (“This deference, however, is only appropriate when the agency has exercised its *own* judgment. When, instead, the agency’s decision is based on an erroneous view of the law, its decision cannot stand.”). On remand, the NLRB adhered to its position that *Prill*’s activity was not “concerted:” it acknowledged that its interpretation of the National Labor Relations Act “is not actually required by the NLRA but rather is the most responsive to the central purposes for which the Act was created.” *Prill v. NLRB*, 835 F.2d 1481, 1483 (1987). The D.C. Circuit affirmed the NLRB’s ruling the second time around. *Id.* at 1482.

⁹⁷ 471 F.3d 1350 (D.C. Cir. 2006).

⁹⁸ *Id.* at 103-04 (discussing 49 U.S.C. § 13902).

⁹⁹ *See id.* at 1352-53.

As in *Prill*, the D.C. Circuit disagreed with the agency’s view of the statute.¹⁰⁰ In the court’s view, the licensing statute did not unambiguously preclude the FMCSA from considering the Americans With Disabilities Act violations as part of the licensing proceeding. As Judge Karen Henderson wrote for the panel:

Under the *Chevron* two-step, we stop the music at step one if the Congress has directly spoken to the precise question at issue But if the statute is silent or ambiguous, we dance on and, at step two, defer to the Commission’s interpretation if it is based on a permissible construction of the statute. . . . In rejecting Peter Pan’s argument that [the licensing statute allowed for considering of alleged ADA violations], the FMCSA unequivocally declared: “This interpretation is not consistent with the plain language of the statute and the legislative history” To the contrary, we find the text of the statute to be ambiguous. . . . We therefore cannot uphold the FMCSA’s interpretation under step 1 of *Chevron*. Nor may we review it under step 2. . . . We must therefore remand for the FMCSA to interpret the statutory language anew.¹⁰¹

Peter Pan may be the clearest statement of how the *Chevron* Step-One-and-a-Half doctrine fits into the broader *Chevron* framework. In terms of its outcome, however, *Peter Pan* is not an outlier. To the contrary, the D.C. Circuit regularly invokes *Prill* and its progeny in *Chevron* cases—or at least relatively regularly. As Professor Bagley has noted, “examples abound” of the D.C. Circuit applying (and in Bagley’s view, misapplying) the *Prill* framework.¹⁰²

Other courts have also recognized *Chevron* Step-One-and-a-Half—including arguably the U.S. Supreme Court. In *Negusie v. Holder*,¹⁰³ the Justices confronted the “persecutor bar” in immigration law, which precludes anyone from receiving refugee status who has “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰⁴ The Board of Immigration Appeals (BIA), following what it believed judicial precedent to require, concluded that “that the persecutor bar

¹⁰⁰ See *id.* at 1353-54.

¹⁰¹ *Id.* at 1353-54 (alterations, citations, italics, paragraph breaks, and quotation marks omitted).

¹⁰² See Bagley, *supra* note 10, at ___ (collecting citations); *supra* note 22 (collecting additional citations).

¹⁰³ 129 S. Ct. 1159 (2009).

¹⁰⁴ 8 U.S.C. § 1101(a)(42).

applies even if the alien's assistance in persecution was coerced or otherwise the product of duress."¹⁰⁵ Although agreeing that the BIA would be eligible for *Chevron* deference on this question in the ordinary course, the Supreme Court did not defer to the agency's interpretation because, contrary to the agency's claim, the question was *not* foreclosed by judicial precedent.¹⁰⁶ Before the Supreme Court, lawyers for the BIA argued that even if agency's interpretation was not mandated, it was at least "reasonable and thus controlling."¹⁰⁷ Justice Kennedy, however, writing for the Court, rejected the applicability of *Chevron*, using language reminiscent of *Chevron* Step-One-and-a-Half: "The BIA deemed its interpretation to be mandated . . . and that error prevented it from a full consideration of the statutory question here presented."¹⁰⁸ Thus, favorably citing the D.C. Circuit, the Court remanded to "[t]he agency [to] confront the same question free of this mistaken legal premise."¹⁰⁹

Negusie goes a fair bit of the way toward establishing *Chevron* Step-One-and-a-Half as the law of the (entire) land. But it does not go all of the way. For one thing, the context of *Negusie* was peculiar. The agency did not engage in statutory interpretation as much as it engaged in judicial-decision interpretation. That may present a different type of analysis (whether it should be a question for another day). Likewise, *Negusie*'s analysis is quite cursory. If the Court was, in fact, adopting *Chevron* Step-One-and-a-Half, it did not really explain why it was making such an important doctrinal move, much less did it explain the scope of the doctrine. Given this cursory analysis, it is hardly surprising that lower courts do not appear to have taken the Justices' hint, if in fact the Justices were giving such a hint.

Indeed, *Chevron* Step-One-and-a-Half has not been adopted everywhere—even after *Negusie*. For instance, it appears that neither the Second nor Third Circuit has "yet addressed the question of whether [*Chevron*] deference is only appropriate when the agency has exercised its own judgment, not when it believes that its interpretation is compelled by Congress."¹¹⁰ Before *Negusie*,

¹⁰⁵ *Negusie*, 129 S. Ct. at 1162.

¹⁰⁶ *Id.* at 1164.

¹⁰⁷ *Id.* at 1166 (quoting Brief for Respondent 11).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1163; *see also id.* at 1167 ("[I]f an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see.") (quoting *Cajun Elec. Power Cooperative, Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991)).

¹¹⁰ *Martinez v. U.S. Attorney General*, 693 F.3d 408, 412 (3d Cir. 2012); *see also Murray v. UBS Secs., LLC*, 2013 U.S. Dist. LEXIS 71945, at *17 (S.D.N.Y. May 21, 2013) ("The Second Circuit has not yet addressed the question of whether deference is only appropriate

the Sixth Circuit deferred to the Department of Agriculture at *Chevron* Step Two even while holding that the Department had incorrectly concluded that its interpretation was compelled by Congress.¹¹¹ The Seventh Circuit seemed to take a different approach before *Negusie*: after holding that the Board of Immigration Appeals had incorrectly concluded it lacked discretion, the Seventh Circuit did not remand the case to the Board but instead decided the issue itself *de novo*.¹¹² Post-*Negusie*, the Seventh Circuit has not decided whether this remains good law. The Ninth Circuit appeared to adopt the doctrine in a 2013 case, but has not applied it since.¹¹³ And the Tenth and Federal Circuits have cited D.C. Circuit case law to the effect that an agency is ineligible for deference at *Chevron* Step Two if it believes that the statute is clear, though those courts have yet to remand a case on Step One-and-a-Half grounds.¹¹⁴

III. THE PUZZLE OF *CHEVRON* STEP ONE-AND-A-HALF

In the previous Part we discussed the murky doctrinal origins of *Chevron* Step One-and-a-Half. An even more perplexing puzzle is why these cases continue to crop up. The first few *Chevron* Step One-and-a-Half cases are easy enough to account for: in *Prill* and other early cases, the agency might not have known what was coming. But it is not 1985 anymore. Over time, we should expect agencies to become accustomed to Step One-and-a-Half and to

when the agency has exercised its own judgment, not when it believes that its interpretation is compelled by Congress.”) (internal quotation omitted).

¹¹¹ See, e.g., *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1354-55 (6th Cir. 1994) (“Because, as discussed above, the language of the Act and the legislative history are not unambiguous and the Secretary’s interpretation is neither unreasonable nor in conflict with Congress’ intent, we are bound by *Chevron* to uphold the Secretary’s interpretation.”).

¹¹² See *Barraza v. Mukasey*, 519 F.3d 388, 391 (7th Cir. 2008) (“[W]e do not give any special weight to the agency’s construction That’s not because we think the statute unambiguous But the Board (acting by a single member) asserted that the statute is clear, and by forswearing any exercise of administrative discretion the Board also disabled its counsel from invoking the principle of *Chevron*”). But see *Madison Gas & Elec. Co. v. EPA*, 25 F.3d 526 (7th Cir. 2004) (“The EPA knows more about it than we do and under *Chevron* has the primary responsibility for interpreting undefined terms. But it has not furnished a reasoned ground for denying these utilities’ requests for additional allowances and it therefore must, if it wants to adhere to its denial, try again.”).

¹¹³ *Gila River Indian Community v. United States*, 2013 U.S. App. LEXIS 13812, at *25 (9th Cir. July 9, 2013).

¹¹⁴ See *AFGE, Local 1592 v. FLRA*, No. 15-9542, 2016 U.S. App. LEXIS 16418, at *9 (10th Cir. Sep. 7, 2016) (citing *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004); and *Peter Pan Bus Lines v. FMCSA*, 471 F.3d 1350, 1354 (D.C. Cir. 2006)); *Nat’l Org. of Veterans’ Advocates v. Sec’y of Veterans Affairs*, 314 F.3d 1373, 1378-79 (Fed. Cir. 2003) (citing *Transitional Hosp. Corp. of La. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000)).

write their rules and orders to avoid being tripped up by the doctrine. After all, it usually should not take much effort to insulate a decision from any *Chevron* Step One-and-a-Half problem—a disclaimer combined with some analysis why the agency’s interpretation is good policy should be enough.¹¹⁵

And yet far from falling into desuetude,¹¹⁶ *Chevron* Step One-and-a-Half remains a vital doctrine—at least in the D.C. Circuit and the D.C. federal district court (with rarer appearances beyond¹¹⁷). What might account for the continued appearance of *Chevron* Step One-and-a-Half cases more than thirty years after *Prill*? Why haven’t agencies adapted by writing their rules with an eye towards sidestepping any potential *Chevron* Step One-and-a-Half issue?¹¹⁸

¹¹⁵ See, e.g., 75 Fed. Reg. 31514-01 (“We believe that this approach is both compelled by the statute and reflects the preferable policy approach.”); *Local Union 1261, United Mine Workers of Am. v. FMSHRC*, 917 F.2d 42, 43 (D.C. Cir. 1990) (upholding agency decision despite disagreement over whether the statute was “plain” because the agency also “adequately stated the practical and policy considerations ultimately motivating its interpretation”).

¹¹⁶ We should mention that the most recent *Chevron* Step One-and-a-Half remand from the D.C. Circuit came more than four years before this article was written. See *Noble Energy v. Salazar*, 671 F.3d 1241 (D.C. Cir. 2012); see also Online Appendix. Arguably this indicates that agencies are adapting to the D.C. Circuit’s doctrine, though if that is the case, then recent opinions suggest that the adaptation has been less than complete. For example, in *Lubow v. U.S. Department of State*, 783 F.3d 877 (D.C. Cir. 2015), the majority noted a “potential” *Chevron* Step One-and-a-Half problem with the agency’s deference claim, but it declined to address the issue because the plaintiff had forfeited the argument. See *id.* at 884. Judge Sentelle, in a separate opinion, concluded that the agency was not entitled to Step Two deference because it had disclaimed statutory ambiguity. See *id.* at 889 (Sentelle, J., concurring). Moreover, in *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015), Judge Silberman concluded that the National Labor Relations Board’s bid for *Chevron* deference failed on Step One-and-a-Half grounds. See *id.* at 687 (Silberman, J., dissenting). While his colleagues evidently disagreed, *UC Health* certainly counts as a close call—a case in which the agency escaped a *Chevron* Step One-and-a-Half remand by only one vote. And recall that in the years since *Noble Energy*, agencies have lost cases on *Chevron* Step One-and-a-Half grounds elsewhere—namely, the Ninth Circuit and the D.C. federal district court. See *Gila River Indian Community*, 2013 U.S. App. LEXIS 13812, at *25; *Am. Petrol. Inst. v. SEC*, 953 F. Supp. 2d 5, 13 (D.D.C. 2013). Moreover, a four-year period without a *Chevron* Step One-and-a-Half remand is not unusual by historical standards: the D.C. Circuit has before gone several years without a *Chevron* Step One-and-a-Half remand, only then to invoke the doctrine in a cluster of cases. See Online Appendix (showing six-and-a-half year gap between *American Petroleum Inst. v. EPA*, 906 F.2d 729 (D.C. Cir. 1990), and *City of Los Angeles Dep’t of Airports v. Dep’t of Transp.*, 103 F.3d 1027, 1034 (D.C. Cir. 1997)). Accordingly, we think it is too soon to draw broad conclusions based on *Chevron* Step One-and-a-Half’s four-year D.C. Circuit drought.

¹¹⁷ See *supra* notes ___ - ___ and accompanying text.

¹¹⁸ We refer to “rules” in text but note that *Chevron* Step One-and-a-Half applies with equal force to agency statutory interpretations in adjudicative proceedings.

To be sure, some have. Sometimes an agency will argue that its reading is compelled by the statute while adding—in the alternative—that it would reach the same conclusion as a matter of discretion.¹¹⁹ Yet this practice, while apparently not uncommon, is not universal. And while the costs of drafting such a disclaimer are nonzero (especially because an agency still may run into a *State Farm* problem if it fails to justify its policy choice), an agency can circumvent *Chevron* Step One-and-a-Half as long as it clearly states that it would adopt the same policy even if it had another option.

Setting the drafting costs aside, why else might an agency say that its decision is compelled by Congress, without also saying that it would reach the same result as an exercise of discretion? We suggest six hypotheses¹²⁰:

1. Agency Ignorance. Perhaps the likeliest answer is that more than thirty years after *Prill*, many agency lawyers remain unaware of the *Chevron* Step One-and-a-Half doctrine. They probably would not have learned about it in law school, even if they graduated after the doctrine emerged in the mid-1980s. After all, no mention of *Prill* or its progeny appears in leading administrative law casebooks.¹²¹ While survey evidence indicates that agency drafters are generally aware of *Chevron*, their knowledge of other administrative law doctrines is not nearly as widespread (for example, 39% of drafters surveyed said they were unaware of *Mead*, and 47% said they were unaware of *Seminole Rock/Auer*).¹²² We have no similar data with respect to *Chevron* Step One-and-a-Half, but we expect that in at least some cases, the agency lawyers drafting rules and orders are simply unaware of the doctrine. Of course, however, ignorance is a less likely explanation for agencies that appear regularly before the D.C. Circuit.

2. Agency Ambivalence. Another possibility is that agency leaders—or the lawyers who work under them—genuinely believe that the relevant

¹¹⁹ See *supra* note 40.

¹²⁰ *Chevron* Step One-and-a-Half can be applied both to agency rulemakings and agency adjudications—it applies whenever an agency does not recognize that it has interpretative discretion. For purpose of this article, our analysis does not turn on this distinction. In the future, however, this may be a fruitful avenue of research. For instance, perhaps agencies are more “strategic” in rulemakings than adjudications, or vice versa. Such questions, while important, are beyond the scope of this article.

¹²¹ STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL HERZ, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS TEXT, AND CASES* (7th ed. 2011); JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FLORENTINO CUELLAR & NICHOLAS R. PARRILLO, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC SYSTEM: CASES AND MATERIALS* (7th ed. 2014).

¹²² See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 *STAN. L. REV.* 999 (2015).

statutory provision is unambiguous but are less than enthusiastic about that result as a policy matter. To return to the polar bear example, Fish and Wildlife Service officials might believe that the term “endangered” implies an imminent risk of extinction but still wish for authority to list the polar bear as an endangered species. Alternatively, agency officials might believe that the term “endangered” implies imminence but might be uncertain as to how they would resolve the issue if freed from statutory shackles. In either scenario, agency officials might decide to argue that the term “endangered” unambiguously means imminent risk of extinction, and if a reviewing court decides otherwise, then they will reverse (or at least reconsider) their position if and when they have to.

The first version of the “ambivalence” story—agency officials believe the statute unambiguously means X but wish they could do Y—strikes us as a strained explanation for the continued appearance of *Chevron* Step One-and-a-Half cases. Let’s say that the statutory provision either (i) unambiguously means X or (ii) is ambiguous and could mean X or Y. Let’s also say that agency officials would prefer result Y. If there is a credible argument that the statute is ambiguous, then we would expect agency officials who desire result Y to make that argument. For this first version of the ambivalence story to be true, there would have to be an argument as to why the statutory provision is ambiguous that the court recognizes but the agency officials do not. This is not impossible—agency officials sometimes overlook viable arguments in their favor—but we have trouble believing that this a frequent reason for *Chevron* Step One-and-a-Half remands. In a world in which agency officials are able to spot “ambiguities” that courts reject as nonexistent or borderline frivolous,¹²³ it is more than a bit strange to think that agency officials are unable to spot ambiguities that support the agency’s preferred policy and which the reviewing court can nonetheless identify.

Note, moreover, that in the first scenario—agency officials believe that the statute unambiguously means X but wish it weren’t so—the agency has an option other than simply failing to argue in the alternative. The agency can say “we think the statute unambiguously means X but we think that Y is the better policy.” Indeed, one can find quite a few examples in the Federal Register of agencies taking this tack.¹²⁴ This is similar to what judges do when they

¹²³ See, e.g., *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997) (rejecting agency interpretation as “senseless”).

¹²⁴ See, e.g., Library of Cong., Copyright Office, Copyright Arbitration Royalty Panels: Final Regulations, 59 Fed. Reg. 63,025, 63,032 (Dec. 7, 1994) (“The method of payment of the CARPs is a problem, especially given our lack of statutory authority to pay the arbitrators directly. Unfortunately, the legislative solution discussed in the Interim Regulations, failed for this Congress.”); Nat’l Credit Union Admin., Truth in Savings—Part II: Final Rule, 58 Fed.

criticize a law but state that they nonetheless must apply it.¹²⁵ Agencies, to be sure, sometimes may be reluctant to play the “blame game” for fear of irritating Congress. But if the agency feels strongly that it is being forced to act against the public interest, it can say so. It is perhaps telling that we can find no *Chevron* Step One-and-a-Half case in which an agency says that it is acting contrary to its view of the public interest because it believes Congress has mandated that result, and a reviewing court then concludes that the statute is in fact ambiguous.

The second version of the “ambivalence” story—agency officials believe that the statute unambiguously means X but have yet to decide whether they would choose X or Y if freed from statutory constraints—seems more plausible. This is especially true once we remember that “agencies are a ‘they,’ not an ‘it.’”¹²⁶ For example, the agency’s general counsel might take the view that the statute unambiguously means X, while other offices (and officers) within the agency are divided as to whether X or Y is the better policy. Under these circumstances, the path of least resistance might be for the agency to say that “we think the statute unambiguously means X,” and then if the court disagrees, competing constituencies within the agency can duke it out over whether the agency should take position X or position Y. In other

Reg. 50,394, 50,430 (Sept. 27, 1993) (“The Board has been very concerned over the potential adverse effect that TISA and part 707 will have on small credit unions that have insufficient computer capacity to provide the statement disclosures required under §707.6. . . . Unfortunately, Congress, when it enacted TISA, gave the Board little leeway to mitigate the statute’s impact on such credit unions.”); Dep’t of Justice, Redress Provisions for Persons of Japanese Ancestry, 54 Fed. Reg. 34,157 (Aug. 18, 1989) (“Unfortunately, however, the Civil Liberties Act of 1988 limits an ‘eligible individual’ in Section 108(2) specifically to ‘any individual of Japanese ancestry.’ Indeed, the focus throughout the Act is on those of Japanese ancestry and the discrimination they suffered based on their race. In light of the specificity with which Congress has spoken and its focus on the racial discrimination suffered, it must be concluded that the statute authorizes that compensation may be paid only to those of Japanese ancestry, and not to those who are of non-Japanese ancestry but who were nevertheless interned. . . . Therefore, the Department will submit legislation to the Congress to amend the Civil Liberties Act of 1988 to render eligible those non-Japanese family members who suffered the effects of the government’s internment policy by accompanying their spouses or children of Japanese ancestry through the evacuation and internment process.”).

¹²⁵ See, e.g., *Meshal v. Higgenbotham*, 804 F.3d 417, 431 (D.C. Cir. 2015) (Kavanaugh, J., concurring) (“If I were a Member of Congress, I might vote to enact a new tort cause of action to cover a case like Meshal’s. But as judges, we do not get to make that decision.”); *Caterpillar, Inc. v. UAW*, 107 F.3d 1052, 1066 (3d Cir. 1997) (Alito, J. dissenting) (“If I were a legislator, I would not vote to criminalize the payments to grievance chairmen that are at issue here. . . . Our job, however, is to interpret Section 302 as it is written.”).

¹²⁶ See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036 (2011).

words, an agency's failure to argue in the alternative may be part of an internal conflict-avoidance strategy.¹²⁷

3. Intra-Agency Politics. A third reason why *Chevron* Step One-and-a-Half cases continue to crop up may be that agency general counsels are using statutory interpretation to enhance their own power and the power of their patrons. According to former EPA general counsel Donald Elliott, lawyers in the general counsel's office at an agency can give advice on statutory meaning to other agency officials in one of two forms: (a) lawyers can give "legal advice as a point estimate, e.g., 'the statute means this,'" or (b) lawyers can describe the "policy space" that the statute allows—i.e., the "range of permissible interpretive discretion, within which a variety of decisions that the agency might make would be legally defensible to varying degrees."¹²⁸ Option (a) means much more power for the general counsel, who then gets to define the agency's position. Even if she selects option (a), the general counsel's word is not necessarily the last, but other agency actors are much more likely to defer to the general counsel's position if she says "you must do X or we will lose in court" than if she says "you can do X or Y, and I think X is the better choice."¹²⁹

To be sure, the general counsel could try to thread the needle by telling other agency officials: "We must do X or else we will lose in court, but it would help us win in court if we say in our preamble that 'we would do X even if we had the option to do Y.'" But such a tack would, we assume, raise eyebrows, especially if some officials in the agency most assuredly would *not* choose X if Y were an option and don't see why they should have to say otherwise in support of a policy with which they disagree. The larger point, moreover, is that preambles are written for multiple audiences—and not just for courts. One of those other audiences comprises agency officials beyond the general counsel's office. A general counsel familiar with *Chevron* Step One-and-a-Half might decide that the added litigation risk from failing to argue in the alternative is worth it in order to maintain control of policymaking within the agency. In other words, agencies are "coalitions of

¹²⁷ To be sure, the officials within the agency who favor position Y might also challenge the general counsel's view that the statute unambiguously means X. On agency general counsels as "keepers of what the statute means," see E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 41 VILL. ENVTL L.J. 1, 11 (2005).

¹²⁸ See *id.* at 11-12.

¹²⁹ On the role of general counsels within administrative agencies, see generally Magill & Vermeule, *supra* note 126, at 1059-61; and Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 445-47 (2015).

diverse participants who have somewhat different motives” and who sometimes work at cross-purposes.¹³⁰

Dynamics of this sort might be particularly likely in an agency at which the preferences of the general counsel diverge from other actors’. At the Equal Employment Opportunity Commission, for example, the President appoints the general counsel but some of commissioners may have been appointed by a prior president or be from a different political party.¹³¹ The general counsel may have an incentive to say “the statute unambiguously means X” while knowing full well that a good chunk of the commission would prefer position Y. Of course, the commissioners of the opposing party may challenge the general counsel’s statutory interpretation, but the general counsel may decide that her best bet of winning the X-vs.-Y fight is to say that the statute requires outcome X.¹³² And note that the relevant actor need not be the general counsel: at agencies in which other offices wield control over the regulation-writing process, staffers in those offices may state that an interpretation is statutorily compelled as a way to exert influence over the final product.¹³³

4. Intra-Executive Branch Politics. Just as agencies are a “they,” not an “it,” so too for the Executive Branch more broadly.¹³⁴ And these different parts of the Executive Branch may have different missions and goals.¹³⁵ In some cases, these intra-Executive Branch conflicts may lay the foundation for *Chevron* Step One-and-a-Half cases. For instance, an agency that foresees disagreement with OIRA as to a particular policy may have incentives to argue that the agency’s preference is compelled by *Chevron* Step One, and so it cannot do what OIRA would prefer. (Of course, the White House also is

¹³⁰ JAMES Q. WILSON, *THE POLITICS OF REGULATION* 373-74 (1980); *see also* Magill & Vermeule, *supra* note 126, at 1038 (“[T]he basic points are simple: agencies contain identifiable constituencies that affect policymaking, and these constituencies can, and do, come into conflict over the proper functioning of the agency.”).

¹³¹ 42 U.S.C. § 2000e—4(a), (b)(1).

¹³² Of course, a *Chevron* Step One-and-a-Half issue only arises if the EEOC passes *Chevron* Step Zero. Some EEOC regulations—but not all—are considered *Chevron*-eligible. *Compare* *Smith v. City of Jackson*, 544 U.S. 228, 243-44 (2005) (opinion of Scalia, J.) (*Chevron* deference to EEOC regulation under the Age Discrimination in Employment Act), *with* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (no *Chevron* deference to EEOC guidelines under Title VII).

¹³³ On the influence of career staffers over agency rules, *see generally* Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 132 (2013).

¹³⁴ *See, e.g.*, Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It,”* 96 MINN. L. REV. 194 (2011).

¹³⁵ *See, e.g.*, Daniel Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX L. REV. 1137, 1139 (2014) (explaining how agencies and the White House may disagree on policy).

“they,” not an “it,” so the real world is even more complicated than this discussion lets on.¹³⁶ For purposes of our analysis here, however, it is sufficient to lump the White House and OIRA together.)

For readers unfamiliar with the process of presidential review, a bit of background may be helpful.¹³⁷ In recent decades, the White House has attempted to assert greater control over the regulatory efforts of agencies.¹³⁸ One of the key ways it has done so is through a series of executive orders vesting OIRA with the responsibility for reviewing agency actions. Among the first things that President Ronald Reagan did in office was issue Executive Order 12,291, which required agencies to submit proposed and final rules to the Office of Management and Budget (wherein OIRA is housed).¹³⁹ The order also required agencies to prepare a regulatory impact analysis for “major rules” assessing the benefits and costs of the contemplated action.¹⁴⁰ Thereafter, later presidents issued a number of other additional executive orders on the subject—the most notable of which was President Clinton’s Executive Order 12,866,¹⁴¹ which retained “the most important features of President Reagan’s oversight system” and further formalized OIRA’s regulatory review role. The most recent iteration is Executive Order 13,563, issued by President Obama in January 2011, which “reaffirms” and supplements President Clinton’s order.¹⁴²

Relevant to *Chevron* Step One-and-a-Half, Executive Order 13,563 declares that “*to the extent permitted by law, each agency must . . . select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits.*”¹⁴³ The italicized language is important. If an agency concludes that approach Y would maximize net benefits but the statute allows only approach X, then Executive Order 13,563 permits the agency to proceed with approach X.¹⁴⁴ If the agency concludes, though, that the statute allows

¹³⁶ See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840, 1854, 1858 (2013)

¹³⁷ For a more comprehensive overview, see Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

¹³⁸ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

¹³⁹ Exec. Order No. 12,291 § 3, 3 C.F.R. 127 (1981). President Reagan later issued Executive Order 12,498, which built upon the earlier order. See Exec. Order No. 12,498, 3 C.F.R. 323 (1985).

¹⁴⁰ *Id.*

¹⁴¹ Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

¹⁴² See Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

¹⁴³ Exec. Order 13563, § 1(b) (2011) (emphasis added).

¹⁴⁴ See Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1100 (2006) (“From the beginning . . . , it has been clear that, in reviewing the

either X or Y, then Executive Order 13,563 generally requires the agency to explain why X maximizes net benefits or else to choose Y. Thus, if an agency prefers X, it potentially has an incentive to say that the statute unambiguously requires X.

To see how the strictures of Executive Order 13,563 might give rise to *Chevron* Step One-and-a-Half cases, imagine the following scenario: EPA prefers approach X over approach Y but strongly suspects that the OIRA Administrator thinks that approach Y maximizes net benefits. (These sorts of disagreements are not uncommon, especially between EPA and the White House.¹⁴⁵) EPA can either (i) try to convince the OIRA Administrator that the statute requires approach X or (ii) try to convince the OIRA Administrator that in fact X is the benefit-maximizing course. EPA may decide that (i) is the more promising strategy—perhaps because the OIRA Administrator’s views on cost-benefit analysis are more fixed than her views on statutory interpretation.¹⁴⁶ Accordingly, EPA may represent to OIRA that it is choosing X because the statute requires that result, even though, in reality the agency believes the statute is ambiguous.

OIRA may still disagree with EPA’s statutory interpretation and instruct the agency to adopt approach Y. If so, there may not be a *Chevron* Step-One-and-a-Half scenario by the time the issue comes to court. And in theory, EPA could tell OIRA that the statute requires X while also inserting a statement into its preamble that the agency would choose X even if the statute were ambiguous. But we imagine that the latter course once more would be difficult to pass by OIRA—especially if OIRA most certainly would not approve of X if it had a choice. Again, the agency’s challenge is that it has to write a preamble for multiple audiences. What the agency needs to say to get past OIRA review may not be the same as what it would say if it were strictly maximizing its chances of winning in court.

regulatory initiatives of its sister agencies, OIRA may not interfere with the agencies’ compliance with statutory directives.”).

¹⁴⁵ See, e.g., Lisa Heinzerling, *Inside EPRA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 348 (2014) (“OIRA, in any event, lavishes skeptical attention on EPA’s estimates of regulatory costs. . . . And in my experience, OIRA personnel keep an eagle eye on EPA—on its public announcements, website, etc.—to make sure EPA does not sneak something past it. From OIRA’s perspective, the system appears to work: EPA receives more sustained attention from OIRA than any other federal agency. Most often, EPA is the agency with the largest number of rules under review at OIRA.”).

¹⁴⁶ Indeed, it is worth noting that that several OIRA administrators in the past have been non-lawyers, including James Miller (1981), Wendy Gramm (1985-1988), John Graham (2001-2006), and Susan Dudley (2007-2009) (though, of course, all have had the counsel of lawyers on OIRA’s staff).

5. Inter-Branch Politics. Agency leaders, like anyone else,¹⁴⁷ also presumably like to take credit for popular policies and avoid being blamed for unpopular ones. This may be true for personal reasons (the agency head cares about her own legacy and post-office career prospects), institutional reasons (the agency head doesn't want her institution to be dragged through the mud in the media or in congressional hearings), or partisan reasons (the agency head wants her actions to reflect well on the President who appointed her). When an agency head feels that, for whatever reason, a policy is the best course even though it is unpopular, she might say “don't look at us; we're just doing what Congress required.” That is, an agency may announce in a preamble to a regulation that “the statute unambiguously means X”—with no argument in the alternative—because outcome X is widely disliked among favored constituents or the general public, and the agency head—who nonetheless thinks X is the right policy—wants *both* X to go into effect *and* to pass the buck for it.

Here, return again to the polar bear example. Prior to the D.C. federal district court's November 2010 remand decision, the Fish and Wildlife Service could have said that it would adopt the same interpretation of “endangered” whether or not Congress compelled that interpretation. As it turns out, that would have been a useful weapon for the agency's lawyers to wield in the inevitable litigation. But the agency said no such thing, at least until it was forced to do so by the district court. Might the Service's reluctance to take ownership of the interpretation until it was forced to do so be explained by the fact that many of the Obama Administration's supporters, particularly in the environmental law community, wanted the agency to take a more aggressive position?¹⁴⁸ The agency, already under attack by groups who could be political allies, quite likely had an incentive to say, in effect, “don't

¹⁴⁷ See, e.g., Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 477 & n.281 (1999) (“[L]egislators will try to shift blame to the IRS for the embarrassment of Congress's own making.”).

¹⁴⁸ See, e.g., *Activists Slam Salazar's ESA Decision*, CLEAN AIR REPORT (May, 14, 2009) (“Activists and Democrats are criticizing Interior Secretary Ken Salazar's just-announced decision to uphold a controversial Bush administration rule on polar bear protections that limits the government's ability to use the Endangered Species Act (ESA) to regulate greenhouse gases.”). Note that the polar bear listing rule was initially promulgated by the Bush Administration, which was less reliant on environmentalist constituencies. Our political explanation accounts for why the Obama Administration stuck to the Bush Administration's course—though not necessarily why the Bush Administration framed the statute as unambiguous in the first place. As to the latter point (or chronologically the former point in time), see the next subsection discussing inter-administration politics.

blame us, we were just following the law,” rather than accepting responsibility for a controversial policy decision.

To be sure, a buck-shifting agency could say “don’t look at us; Congress made us do X; and oh by the way if Congress hadn’t made us do X we would have done X anyway.” But for obvious reasons, we doubt that this would be an effective blame-minimization strategy. Thus the agency leader may face an unenviable choice: (a) minimize blame by attributing X entirely to Congress, or (b) minimize litigation risk while taking some ownership of the X result. When agency heads take the former course, they run the risk of a *Chevron* Step One-and-a-Half remand. But if X is sufficiently unpopular, or if the prospect of litigation is sufficiently unlikely/distant, then that may be a risk they are willing to take.¹⁴⁹

6. Inter-Administration Politics. Finally, *Chevron* Step One-and-a-Half cases may sometimes arise because agency leaders are trying to bind their successors.¹⁵⁰ Let’s say that an agency head prefers policy X but is worried that a future administration may choose Y. The agency head may want a rule’s preamble to say “the statute unambiguously means X”—without any argument in the alternative—for two reasons. First, the agency head may worry that arguing in the alternative will alert future agency leaders to the possibility of choosing a policy other than X. We doubt the efficacy of this strategy though: if the successor is reasonably sophisticated, then the successor will presumably notice that the statutory language is not so clear-cut.

Second, and more effectively, the agency head may realize that the best way of preserving policy X is to secure a court decision holding that the statute unambiguously means X. As the Supreme Court stated in *National Cable & Telecommunications Association v. Brand X Internet Services*, “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”¹⁵¹ That is, if the court says that the statute unambiguously means X as a *Chevron* Step One matter, then the agency later in time lacks the option of changing its policy to Y (unless, of

¹⁴⁹ Of course, there are other possible inter-branch political dynamics. For instance, perhaps Congress—if it dislikes what the agency has done—may seize on a *Chevron* Step One-and-a-Half decision to castigate the agency; losing is not popular. Needless to say, how the branches interact is a complicated subject that merits careful examination.

¹⁵⁰ On efforts by agencies to entrench their policy preferences before the handover to a new administration, see generally Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

¹⁵¹ 545 U.S. 967, 982, (2005).

course, it also can convince a later-in-time court to overrule the earlier court's decision—itself a particularly difficult task in light of the “enhanced force” of *stare decisis* in statutory interpretation cases¹⁵²). Yet if the agency offers an argument in the alternative, then a reviewing court could more easily sidestep the *Chevron* Step One issue and jump straight to *Chevron* Step Two.¹⁵³ In that event, the agency head would not get what she is hoping for: a precedent on the books saying that X is the agency's only option.

By maintaining that the statute unambiguously means X and refusing to argue in the alternative, the agency forces—or at least pushes—the court to decide the *Chevron* Step One question. And if the agency thinks that it is likely to face a relatively sympathetic court in the near term, then this strategy may be a rational one. Even if the composition of the relevant court changes over time, the holding by today's court that the statute unambiguously means X carries *stare decisis* effect. The agency's refusal to argue in the alternative may thus be part of a bet with a large potential upside. If the agency faces what it perceives to be a sympathetic court in the present period, then pressing that court towards a *Chevron* Step One resolution may mean that the current agency's views of good policy will end up being locked in, even if the agency's personnel (and policy preferences) were to change, and even if the court's personnel and preferences were to change. That is a valuable asset—one almost as good as an act of Congress enshrining the current agency's preference.

And note that while the potential upside is large, the downside may be minimal. If a court remands the rule to the agency on *Chevron* Step One-and-a-Half grounds, then the agency always has the option of coming back and saying that it chooses X as a matter of discretion. Or, at least, almost always: near the end of an administration, there may not be time for the agency to supplement its initial preamble in the event of a *Chevron* Step One-and-a-Half remand. Then again, if the administration is in its waning days and its successor is unsympathetic to policy X, then policy X may not be long for this world anyway. Thus one can see why this “bet” is potentially attractive: At worst, the agency that adopts this strategy allows a court to strike down a rule that would have been rescinded by the next administration in any event. At best, the agency wins a *Chevron* Step One ruling that binds subsequent administrations for the foreseeable future.

¹⁵² See *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

¹⁵³ See, e.g., *Styker v. SEC*, 780 F.3d 163, 166 (2d Cir. 2015) (“We need not, however, decide if Congress clearly intended to bar a whistleblower award to petitioner at *Chevron* Step 1 because even if Dodd–Frank is ambiguous, we defer to the SEC's interpretation of Dodd–Frank at Step 2.”).

IV. THE BENEFITS OF CHEVRON STEP ONE-AND-A-HALF

The previous Part listed several hypotheses as to why *Chevron* Step One-and-a-Half cases might continue to arise. And we have argued that at least sometimes, agency actors may have an incentive to maintain that a statute is unambiguous even when such a claim harms the agency in litigation. On this view, the fact that *Chevron* Step One-and-a-Half cases continue to arise is hardly nonsensical. Agencies may have good strategic reasons for doing what they do.

Even so, an important question lingers: does the *Chevron* Step One-and-a-Half doctrine make sense? Professor Bagley, for instance, argues not: “the norm in *Prill* cases,” he says, is “needless punishment” for agencies guilty of nothing more than a foot fault.¹⁵⁵ Indeed, writes Professor Bagley:

Rigid adherence to *Prill* won’t make agencies better at spotting latent ambiguities. In all likelihood, agencies will carry on much as they would in the absence of *Prill*, deaf to its marginal incentive effects. To the extent agencies do pay attention, their decisions will become bloated with boilerplate legal analysis. *Chenery* does not demand—and should not be read to demand—that kind of waste.¹⁵⁶

We are sympathetic toward Professor Bagley’s position insofar as he argues that “*Chenery* does not demand” that *Chevron* deference be limited to cases in which the agency acknowledges ambiguity. As we observe above, *Chevron* Step One-and-a-Half is compatible with, but perhaps not compelled by, *Chenery I*. And yet we are not convinced that the doctrine is a “waste.” In particular, here we show that *Chevron* Step One-and-a-Half can serve a useful purpose—or, rather, that it can serve useful *purposes*, with the purpose depending on the different reasons why agencies might insist that ambiguous statutes are clear. Whether these benefits outweigh the costs of additional remands and further litigation is a harder question—one that we cannot claim to resolve here. What we can say, though, is that the purposes served by *Chevron* Step One-and-a-Half ought not be ignored in the calculus.

A. *Chevron* Step One-and-a-Half as a Response to Agency Ignorance

¹⁵⁵ Bagley, *supra* note 10 (manuscript at 58).

¹⁵⁶ *Id.* (manuscript at 59).

The case for *Chevron* Step One-and-a-Half is perhaps the hardest to make when the issue arises due to the agency's ignorance of the doctrine. Imagine that an agency genuinely prefers position X over position Y but says that it is adopting position X because "the statute compels X," when in fact the statute merely permits X but could also be read to mean Y. In this scenario, what good does it do for the court to remand to the agency just so that the agency can promptly turn around and jot off a supplemental document explaining why it hews to position X as an exercise of discretion?

Even in this most difficult scenario, however, we can think of at least two reasons for applying the *Chevron* Step One-and-a-Half doctrine. First, even if the agency general counsel understands that the statute can be read to mean X or Y—and even if the statement that "the statute compels X" was simply an ill-advised way to explain that X is the agency's chosen policy—one might be concerned that other actors within the agency lack the same knowledge as the general counsel. Other agency officials might believe that the general counsel's statement—"the statute compels X"—is an indication that anything other than X would be unlawful. Indeed, it strikes us as unlikely that (a) the general counsel would lack the administrative law knowledge to understand that the statement "the statute compels X" sets the agency up for a *Chevron* Step One-and-a-Half problem but (b) agency actors outside the general counsel's office (including non-lawyers) would be so sophisticated on matters of administrative law as to understand that the statement "the statute compels X" actually means that X and Y are both options. Put differently, our worry is that even if the agency's *Chevron* Step One-and-a-Half error was entirely innocent, actors within the agency will fail to understand that the statute actually allows option Y. Under these circumstances, *Chevron* Step One-and-a-Half serves to ensure that the general counsel does not short-circuit the agency's internal policymaking process with an erroneous assertion that the statute is clear.

Even if one is not persuaded by this first justification, however, the second is perhaps stronger: Instances of agency ignorance will be difficult to distinguish from instances of agency ambivalence or strategic maneuvering. As we argue below, the argument in favor of *Chevron* Step One-and-a-Half is strongest under those latter circumstances. And applying *Chevron* Step One-and-a-Half in cases of agency ignorance may be necessary so that the court does not also uphold the agency in cases of ambivalence or strategic maneuvering.

Concededly, *Chevron* Step One-and-a-Half remands in cases of agency ignorance may lead to "waste" in some instances. It is entirely possible that the X-vs.-Y decision was fully vetted by relevant actors within the agency, and that the general counsel—failing to understand the *Chevron* Step One-

and-a-Half doctrine—approved a preamble that characterized the choice of X as compelled by Congress. Yet we would hope (and, indeed, expect) that such an occurrence would be a one-off event, and that agency lawyers would quickly learn to draft their preambles more carefully. If *Chevron* Step One-and-a-Half cases recur (and especially if the same agency runs afoul of the doctrine on multiple occasions), then one should begin to suspect that agencies are failing to acknowledge ambiguity for reasons other than innocence or ignorance. If so, then—as discussed below—the case for *Chevron* Step One-and-a-Half grows significantly stronger.

B. *Chevron* Step One-and-a-Half as a Response to Agency Ambivalence

The second possible cause of *Chevron* Step One-and-a-Half cases that we mentioned above is agency ambivalence: while agency officials believe that the statute compels X, those officials have yet to decide whether they would prefer X or Y if freed from statutory constraints (or, perhaps, they actually prefer Y). The case for *Chevron* Step One-and-a-Half under these conditions is straightforward: if the agency selected policy X because it misinterpreted the relevant statute, and if the agency would not (or might not) hew to X if liberated from its misapprehension, then why allow the agency’s choice of X to carry the force of law? Even then-Judge Roberts, a *Chevron* Step One-and-a-Half skeptic, acknowledges that a remand is appropriate in these circumstances:

[W]hen an agency erroneously concludes that a statutory interpretation is required by Congress, we should remand to give the agency an opportunity to interpret the statute in the first instance. That course is consistent with principles of *Chevron* deference, and with the respect due Congress’s delegation of interpretive authority to the agency.¹⁵⁷

Professor Bagley argues that cases of this sort are as rare as unicorns: he notes that he has “found only one *Prill* case where the agency changed its decision on remand.”¹⁵⁸ We have found a handful of others. For example, in

¹⁵⁷ *PDK Labs. Inc. v. U.S. Drug Enforcement Agency*, 362 F.3d 786, 808 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

¹⁵⁸ Bagley, *supra* note 10 (manuscript at 59 n.254) (citing *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997), and *In re Enforcement of 275(A)(2)*, 13 FCC Rcd. 10946 (FCC 1998)).

1997 the FCC determined that section 254(g) of the Communications Act—which requires certain providers of telecommunications services to offer uniform rates to customers across states—applies to providers of commercial mobile radio services. In 2000, the D.C. Circuit vacated the FCC’s order because the agency erroneously believed that section 254(g) unambiguously applied to commercial mobile radio services providers.¹⁵⁹ The FCC then reversed itself: “Exercising our authority to interpret this ambiguous provision,” the Commission said, “we find that the approach more faithful to the spirit of the statutory rate integration requirement is that . . . the requirement does not apply to CMRS providers.”¹⁶⁰ Also in 1997, the FCC determined that it was barred by Congress from collecting a regulatory fee from the congressionally chartered satellite communications provider Comsat. Another operator of telecommunications satellites, PanAmStat, challenged Comsat’s exemption; the D.C. Circuit determined that “the FCC was mistaken in its conclusion that the statute compelled an exemption for Comsat”;¹⁶¹ and on remand the FCC, exercising its newfound discretion, decided to charge Comsat \$1.6 million in fees.¹⁶² Still elsewhere, a *Chevron* Step One-and-a-Half remand has spurred an agency to make substantive changes to a prior rule without reversing course 180 degrees.¹⁶³

Likewise, the mere fact that agencies tend to wind up with the same policy on remand does not mean that the remand itself was worthless. Even if an agency reaches the same result on remand, while doing so it may also gain additional knowledge that will have spillover effects on other policies. For instance, imagine an agency that is ambivalent about its preferred policy when it first announces its view that the statute is unambiguous (*e.g.*, it tentatively thinks that if it had discretion, it would choose X, but it is not sure). Forcing the agency to drill down and really decide for sure that it wants X rather than Y increases the agency’s knowledge of what it is regulating, and so its expertise. And the fact that the agency has been given this discretion suggests, under the implied delegation theory of *Chevron*, that Congress wants the agency to undertake that learning process rather than simply “freeride” on the statute.¹⁶⁴ To a reviewing court (or a skeptical professor), it may look like

¹⁵⁹ *GTE Serv. Corp. v. FCC*, 224 F.3d 768, 775-76 (D.C. Cir. 2000).

¹⁶⁰ *In the Matter of South Seas Broadcasting, Inc.*, 26 FCC Rcd 4164, 4167, 2011 FCC LEXIS 934, *11 (2011).

¹⁶¹ *PanAmSat Corp. v. FCC*, 198 F.3d 890, 896 (D.C. Cir. 1999).

¹⁶² *See Comsat Corp.*, 283 F.3d 344, 346-47 (D.C. Cir. 2002).

¹⁶³ *See, e.g.*, *Coal. for Common Sense in Gov’t Procurement v. United States*, 671 F. Supp. 2d 48, 56 (D.D.C. 2009); *Coal. for Common Sense in Gov’t Procurement v. United States*, 821 F. Supp. 2d 275, 279 n.4 (D.D.C. 2011).

¹⁶⁴ *See, e.g.*, *PKD Labs., Inc. v. DEA*, 362 F.3d 786, 797 (D.C. Cir. 2004) (explaining at

nothing has changed—the agency ended up in the same place it began. Yet only now the agency knows for certain what it thinks because it has done its homework.¹⁶⁵

Even so, we obviously agree with Professor Bagley that in most cases, an agency that says in the first instance that “the statute compels X” will, following a *Chevron* Step One-and-a-Half remand, adopt position X as an exercise of discretion. Yet we doubt that courts can separate out these cases from ones in a remand will indeed cause the agency to change course, either with regard to the same rule or with regard to another rule altogether. Reliance on the agency’s representations in litigation is itself an unreliable approach: the positions adopted by attorneys who represent the agency in court—oftentimes Justice Department lawyers rather than agency employees—may not reflect the views of all the agency actors who might have the opportunity to weigh in on remand. In any event, even if agency leaders do sign off on the litigators’ strategy, the agency’s learning process would still be short-circuited because the process of “signing off” on a lawyer’s call is not the same one as deliberately considering a policy through a more structured rulemaking process.

C. *Chevron* Step One-and-a-Half as a Response to Strategic Behavior

In Part III, we suggested that an agency’s failure to argue in the alternative that it would arrive at the same position as an exercise of discretion does not necessarily reflect ignorance or ambivalence. We proffered four potential strategic explanations—rooted in intra-agency, intra-Executive Branch, inter-

Chevron Step Two requires that the agency “must bring its experience and expertise to bear in light of competing interests at stake.”).

¹⁶⁵ Given “logrolling” within an agency (i.e., “trading” votes across issues), *Chevron* Step One-and-a-Half may affect outcomes on the ground in further ways. See, e.g., Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1753 n.32 (1998); Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 170. An agency general counsel’s assertion that a statute is unambiguous may take the relevant issue off the table for purposes of intra-agency bargaining, whereas if the issue were the subject of bargaining, the agency’s position not on that particular issue but on other issues might change. Imagine that on Issue 1, the agency chooses between options X and Y, while on Issue 2, the agency chooses between options P and Q. If the agency general counsel says that the statute compels X, then the forces in favor of P may prevail in the P-versus-Q debate. If, however, a court remands on the ground that the statute allows for X or Y, relevant actors within the agency who favor X over Y may agree to support option Q over P in return for others within the agency coming around to the X position. The court’s *Chevron* Step One-and-a-Half remand on the X-versus-Y question may have no effect on that particular issue, but may sway the outcome from P to Q.

branch, and inter-administration politics—that might account for the observed phenomenon. Here, we argue that if indeed *Chevron* Step One-and-a-Half cases arise because of any of these first three strategic reasons, then the justification for the doctrine is especially sound. (We address the possibility of inter-administration strategic behavior in Section IV.D.)

Start with the first of these strategic explanations: an agency’s general counsel may maintain the statute compels X so as to exert greater control over the intra-agency decisionmaking process. For adherents to the implied delegation theory of *Chevron*, this is an obvious problem. Congress generally delegates authority to agency leaders or to the agency as a whole,¹⁶⁶ not to the agency general counsel. We struggle to see any reason why it is normatively desirable—or acceptable—for lawyers within an agency to use their privileged positions to impose policy preferences to which other agency actors might object. *Chevron* Step One-and-a-Half helps deter this sort of behavior, although in an admittedly messy way: it imposes a cost on the agency as a whole (the cost of responding to a remand) when actors within the agency attempt to paper over the possibility that the statute allows for other options.

The notion of agency lawyers asserting that a statute is unambiguous in order to squeeze other actors out of the decisionmaking process is equally problematic—if not more so—under the expertise account of *Chevron*. The Supreme Court has said that “practical agency expertise is one of the principal justifications behind *Chevron* deference”¹⁶⁷; such practical (and often technical) expertise is likely to be found in parts of the agency beyond the general counsel’s office. Courts have reason to doubt that such expertise will be brought to bear on a policy question when the general counsel comes out of the gate saying that a particular result is legally required.

Next, consider the possibility that *Chevron* Step One-and-a-Half cases arise as a byproduct of agencies attempting to avoid reversal by OIRA. Critics of OIRA’s role in the regulatory process might be willing to countenance this outcome.¹⁶⁸ Adherents to the accountability theory of *Chevron*, however, will find it perturbing. The accountability theory of *Chevron* is based on the twin premises that agencies are accountable to the Chief Executive and that the Chief Executive is accountable to voters. OIRA review of agency action justifies the first of these twin premises.¹⁶⁹ Agency circumvention of OIRA review undermines that same premise. The more we take the accountability

¹⁶⁶ See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201.

¹⁶⁷ *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990).

¹⁶⁸ See, e.g., Heinzerling, *Statutory Interpretation in the Era of OIRA*, *supra* note 144.

¹⁶⁹ See Kagan, *supra* note 138, at 2376.

discussion in *Chevron* seriously, the stronger the argument for Chevron Step One-and-a-Half thus becomes.

In a similar vein, adherents to the accountability theory of *Chevron* might be concerned about agency preambles attributing to Congress policy decisions that agency officials have made themselves. If the theory undergirding *Chevron* is that voters should be the judges of the Executive Branch's policy choices, then presumably the Executive Branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit). To be sure, we doubt whether citizens are consulting the Federal Register along with the League of Women's Voter Guide before they head to the polls.¹⁷⁰ And yet accountability theories need not rely on electoral accountability as the exclusive transmission belt. We might take a more pluralistic approach and imagine interest groups, media organizations, and other sophisticated actors attributing credit and blame across branches based in part on agencies' characterizations of their own degrees of freedom.¹⁷¹ If this is the case, then an agency's assertion that the relevant statute is unambiguous may serve an accountability-deflecting function. Granted, this argument depends on those who evaluate agencies (1) being sophisticated enough to distinguish, based on a preamble or similar document, whether the agency believes its action to be compelled by Congress, but (2) not being so sophisticated as to arrive at their own conclusion as to whether the agency's action is congressionally compelled. These two conditions may strike some readers as implausible. Yet when the stakes are high and many people are watching, an agency may be happy for any blame it can avoid, even if it cannot avoid all of it.

For all these reasons, we might be concerned about an agency (or the rule-writing lawyers within an agency) characterizing a statute as unambiguous when a fairer reading is that the statute affords the agency substantial discretion. And yet there is one more step in the logic before these concerns lead to a justification for *Chevron* Step One-and-a-Half. Arguably, a court could mitigate at least some of these concerns with a thorough opinion explaining that the relevant statute is ambiguous and yet upholding the agency's interpretation as permissible. Assuming that the relevant individuals—non-lawyers within the agency, staffers at OIRA, and the external actors assigning credit/blame to Congress/the Executive Branch—read the opinion as well as the preamble (or read synopses of each), then the court could at least alert these individuals that X is *not* compelled and that Y

¹⁷⁰ For a broader critique of accountability arguments in administrative law, see Nicholas O. Stephanopoulos, *Discounting Accountability* (forthcoming).

¹⁷¹ See, e.g., Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1271-77 (2009) (explaining "Partial, Proxy, and Direct Political Accountability" theories).

remains an option. And an opinion would do so without the disruption of a remand, thus partially addressing then-Judge Roberts's and Professor Bagley's concern about "waste[ful]" rounds of "ping pong."¹⁷²

There are, however, two reasons to doubt the corrective power of an opinion that identifies a statutory ambiguity but does not come with a remand to the agency. First, the agency's initial selection of X over Y sets the status quo to X, and the status quo may be a sticky one. Actors within the agency who would prefer Y may be in a weaker position to advocate for their preference once X is in place than when the X-vs.-Y decision is incipient. This is not unlike what happens within Congress; because (by design) it is so hard to run the lawmaking gauntlet, there is a heavy status-quo bias.¹⁷³ So too with agencies; in a world of "ossification" for significant rules,¹⁷⁴ it can be difficult to do all the work that is required to unwind an administrative decision. It thus is quite unlikely, for instance, that language in a judicial opinion—language not backed up by a judgment—will restart the OIRA review process and force the agency to justify X over Y on the basis of cost-benefit analysis and presidential priorities. In short, an after-the-fact judicial opinion announcing that the relevant statute is ambiguous will not entirely negate the ability of agency officials (and in particular, agency lawyers) to impose their preferences in ways not contemplated by *Chevron*.

Second, many agency actions do not result in litigation, and in all but the most exceptional cases, the probability of litigation is less than unity. (And even if the probability of litigation is 1, there is no guarantee that the plaintiffs will raise and properly preserve a *Chevron* Step One-and-a-Half argument.) If an agency can assert that a statute is unambiguous and only face the consequence of a judicial slap-on-the-wrist, then the incentive for agencies (and agency lawyers) to take this tack will be stronger. If agency leaders (or agency lawyers) prefer X and know that there is no real sting from telling intra-agency constituencies, OIRA, and the public that X is the only option allowed by the statute, then—well—why not? Critical language in a judicial

¹⁷² See *supra* notes __, __, and accompanying text.

¹⁷³ See Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 936-37 (2008) ("The future legislature can always repeal or alter the program, but once regulations have been implemented, some form of status quo bias may make it marginally harder to eliminate them—especially during periods of divided government."); John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 199 (2007) ("The cumbersomeness of the process seems obviously suited to interests that contradict the 'more is better' attitude that has come to be almost an unconscious assumption of public law.").

¹⁷⁴ See, e.g., Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to "Testing the Ossification Hypothesis,"* 80 GEO. WASH. L. REV. 1493, 1493 (2012).

opinion may be embarrassing to the agency, but at the same time, the odds of that language being written are long; there must be (1) litigation (no foregone conclusion) and (2) the court must resolve the case against the agency on *Chevron* Step One-and-a-Half grounds (as opposed to any other outcome-determinative issue). If judicial review amounts to nothing more than a chance—not even a certainty—of harsh words, it is easy to imagine the cost-benefit analysis cutting against acknowledging statutory ambiguity. Hence one of the key benefits of *Chevron* Step One-and-a-Half: remands under Step One-and-a-Half impose a cost on agencies that is borne in part by the agency leaders and lawyers likely to make the decision whether to acknowledge ambiguity in a preamble.

So what then Judge Roberts referred to as “ping-pong” and Professor Bagley considers a “waste” might instead be a necessary element of an optimal deterrence approach: yes, *Chevron* Step One-and-a-Half remands impose costs on agencies, but those are costs meant to discourage agencies from ascribing policy choices to Congress that Congress has delegated to the agencies. This point is especially forceful when one remembers that agencies and courts are repeat players. Given this dynamic, a remand in one case may very well have beneficial systemic effects for a host of other cases.¹⁷⁵

This raises the question: how costly should *Chevron* Step One-and-a-Half remands be? When an agency says in the preamble to a rule that the statute compels X rather than Y and the court concludes that X and Y are both permissible interpretations of the statute, then the court could:

¹⁷⁵ So far, we have been operating under the assumption that other actors within the agency are unaware of the *Chevron* Step One-and-a-Half doctrine. Relaxing this assumption leads to a further argument in *Chevron* Step One-and-a-Half’s favor. This is because even if other actors within the agency are sufficiently sophisticated to understand the contours of *Chevron* Step One-and-a-Half, it may still be the case that the agency general counsel, by virtue of the legal expertise at her disposal, remains the agency actor best able to predict how a court will interpret a statute. For this reason, other agency actors may value the general counsel’s opinion as to whether a statute unambiguously means X. But in the absence of *Chevron* Step One-and-a-Half, the general counsel’s assertion that “the statute unambiguously means X” is cheap talk: other actors within the agency have little reason to credit the general counsel’s assertion, given that the assertion is costless from the general counsel’s perspective. With *Chevron* Step One-and-a-Half in the background, other agency actors may be more likely to believe the general counsel’s assertion that “the statute unambiguously means X,” because if the reviewing court concludes otherwise, a remand will impose costs on the agency general counsel (e.g., the costs of further rulemaking proceedings and potential litigation). Thus by attaching a cost to the general counsel’s assertion regarding a statute’s unambiguous meaning, the *Chevron* Step One-and-a-Half doctrine potentially allows for more efficient intra-agency information sharing. That is, *Chevron* Step One-and-a-Half may allow the general counsel to communicate her interpretation of the statute’s meaning to other agency actors—and to do so credibly.

- (1) Do nothing, so long as the agency represents in litigation that it in fact prefers X (the Roberts/Bagley approach);
- (2) Remand to the agency but leave the rule in place for the time being;
- (3) Remand to the agency and vacate the rule;
- (4) Impose Y as a penalty for the agency's failure to acknowledge ambiguity.

We will explore in Section V.B the advantages and disadvantages of each of these options. But before addressing the question of remedy in *Chevron* Step One-and-a-Half cases, we take up the last of the strategic reasons why agencies might put themselves in a *Chevron* Step One-and-a-Half box: the “inter-administration politics” possibility.

D. *Chevron* Step One-and-a-Half as an Invitation for Strategic Agency Behavior

We noted above that agencies might insist that a statute unambiguously means X so as to secure a holding that the statute indeed means X (and only X). If the agency can get a reviewing court to say that the statute means X, that locks X in place against modification by future agencies.¹⁷⁶ Of course, this gambit might in some cases result in a remand should the court conclude that the statute could mean X or Y. And yet in one sense *Chevron* Step One-and-a-Half actually aids the agency's strategy in these sorts of cases, because the doctrine prevents the reviewing court from skipping to *Chevron* Step Two.

To elaborate: Imagine that a statute might mean X or Y, that the agency prefers X over Y, and the agency fears that a future administration might prefer Y over X. The agency also thinks that the relevant reviewing court is generally minimalist, and so will rule (in the agency's favor) on *Chevron* Step Two grounds if given the option. Finally, the agency thinks that the reviewing court, as currently composed, is likely to rule in favor of the agency at *Chevron* Step One today if forced to confront the Step One issue—but that if a future administration switches to position Y, the reviewing court later in time might not strike down the future agency's action on *Chevron* Step One grounds. (This could be because the agency believes that the composition of

¹⁷⁶ Cf. Gersen & O'Connell, *supra* note 173, at 936 (noting tension between present and future versions of the agency).

the court might change, or because the agency believes that all else equal the court is more likely to go along with the agency's position than go against it.)

Under these circumstances, the agency might want to force a *Chevron* Step One decision today. But in the absence of the *Chevron* Step One-and-a-Half doctrine, the agency would have trouble doing so. Even if the agency insists that the statute unambiguously means X, a court in a world without Step One-and-a-Half would have the option of skipping straight to *Chevron* Step Two. And that, of course, would thwart the agency's entrenchment strategy.

Should the possibility that *Chevron* Step One-and-a-Half might facilitate this sort of strategic behavior curb our enthusiasm for the doctrine? Perhaps—but probably not by much. While we believe that some amount of strategic behavior by agencies might explain some number of *Chevron* Step One-and-a-Half cases, the amount of plotting involved in this last scenario strikes us as *House of Cards*-esque. This is not to rule out the possibility that Frank Underwood-types might be found in some agency general counsel's offices (and, indeed, we suspect that agency lawyers are engaged in strategic maneuvering to some extent, especially for high-profile decisions¹⁷⁷). But although it is imperfect, we think the better response to this last gambit would be for the reviewing court to reject the agency's attempt to force a *Chevron* Step One ruling unless the court believes that the statute is in fact unambiguous—in which case a ruling to that effect strikes us as entirely appropriate.

E. *Chevron* Step One-and-a-Half as an Invitation for Strategic Judicial Behavior

Our analysis would not be complete without mentioning one last concern: the possibility that *Chevron* Step One-and-a-Half might add to the power of courts, potentially in undesirable ways. So far our analysis has discussed the strategic reasons (among others) why an agency may say that a statute is unambiguous while a court later concludes that the same statute is ambiguous. But might not *Chevron* Step One-and-a-Half open up new strategic opportunities for the court as well? Imagine that the agency prefers to read a statute to mean X, while a court prefers for the same statute to mean Y. If the agency says that the statute unambiguously means X, then without *Chevron* Step One-and-a-Half, the court would have two statutory-interpretation options: (1) to uphold the agency's interpretation, or (2) to say that the

¹⁷⁷ See Nielson, *supra* note __, at __ (listing examples of strategic behavior).

agency's interpretation is not a "permissible" reading.¹⁷⁸ The second option may be costly for the court, perhaps because the claim that "X is an impermissible reading of the statute" is difficult to make with a straight face (and thus the assertion damages the court's reputation and perceived legitimacy). *Chevron* Step One-and-a-Half gives the court an option (3): to say that the statute is ambiguous, and thus that the matter must be remanded to the agency. This third option may be a low-cost course from the court's perspective, because what constitutes ambiguity can itself be ambiguous;¹⁷⁹ the reputational consequences for the court are thus less severe than the ramifications of option (2). In this way, *Chevron* Step One-and-a-Half gives a court with ideological preferences at odds with an agency's an easy way to throw sand in the agency's gears.

We are mindful of this concern and understand why those who are skeptical of judicial review may believe that this risk cuts against enforcement of *Chevron* Step One-and-a-Half. That said, we are not especially moved. If an agency, for instance, is worried about this sort of strategic judicial behavior, it can always argue in the alternative (i.e., both assert that the statute is unambiguous, but also explain why it would reach the same result even if the statute were ambiguous). In other words, although this concern about judges should not be understated, it also should not be overstated; agencies have a "self-help" mechanism, even though they do not always opt to use it. Moreover, this third option availed to courts by *Chevron* Step One-and-a-Half is a strategy of questionable efficacy: if the agency prefers reading X to reading Y, it still can adopt reading X as an exercise of interpretive discretion on remand. Perhaps a court in the last few months of an administration may view this third option as a way to run out the clock, in the hope that a different administration—with ideological preferences closer to the court's—will take the reins before the remand proceedings are complete. We should note, though, that none of the *Chevron* Step One-and-a-Half cases from the D.C. Circuit identified in our Online Appendix plausibly fit this pattern.¹⁸⁰

¹⁷⁸ *Chevron*, 467 U.S. at 842-43.

¹⁷⁹ See, e.g., Kavanaugh, *supra* note ____.

¹⁸⁰ One such case, *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000), was handed down less than six weeks before the end of the Clinton administration and the beginning of the presidency of George W. Bush. We doubt, though, that *Jacoby* is an example of strategic behavior by a court that was ideologically adverse to the agency and stalling for time. First, the relevant agency—the National Labor Relations Board—is an independent agency whose members serve five-year terms, and Clinton-appointed Democratic members continued to constitute a majority of the Board for months after President Bush's inauguration. (Indeed, the Board did not become majority Republican until January 2002.) See John D. Schulz,

V. IMPLEMENTING *CHEVRON* STEP ONE-AND-A-HALF

Thus far we have argued that *Chevron* Step One-and-a-Half is a distinct doctrine—consistent with, but not dictated by, the justifications proffered in (and for) *Chevron* itself. We have also argued that *Chevron* Step One-and-a-Half cases may continue to arise even if agency lawyers are aware of the doctrine: there are reasons rooted in ambivalence as well as strategy why agency actors may insist that a statute is unambiguous even though such insistence works to the agency’s disadvantage in litigation. Finally, we have argued that *Chevron* Step One-and-a-Half is an appropriate response to agency protestations of statutory clarity—though with the consequence that in some cases the doctrine may give agencies the option of forcing a judicial decision at *Chevron* Step One.

Here we address three ancillary questions. First, in what circumstances should *Chevron* Step One-and-a-Half be triggered? Second, what sort of remedy is appropriate in *Chevron* Step One-and-a-Half cases? And third, even if *Chevron* Step One-and-a-Half is sensible prudentially, can it be justified jurisprudentially? Our views on the first two questions remain tentative—and the D.C. Circuit itself has yet to arrive at a firm answer to either. As to the third question, we acknowledge that *Chevron* Step One-and-a-Half is—for better or worse—“administrative common law,” without a firm anchor in the text of the Administrative Procedure Act. And yet so too (and no less) is *Chevron* itself. So long as we have a *Chevron* doctrine, we think that *Chevron* Step One-and-a-Half plays an important role in preventing the *Chevron* framework from being flipped on its head.

Changing Faces, JOC.COM (Oct. 20, 2002), http://www.joc.com/trucking-logistics/changing-faces_20021020.html; *Board Members Since 1935*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Oct. 24, 2016). This was thus not a case in which delaying a resolution for a few months until a new administration took power was likely to change the result. Second, *Jacoby* is a case that does not map easily onto ideological lines: unlike an employee-versus-employer case (in which one might expect the Board’s more liberal members to be more sympathetic toward the employee), and unlike a union-versus-employer case (in which one might expect the Board’s more liberal members to be more sympathetic toward the union), *Jacoby* was an employee-versus-union case. The agency’s decision had the support of one of its two Republican members at the time, see *Steamfitters Local No. 342 (Contra Costa Electric)*, 329 N.L.R.B. 688 (1999), and the D.C. Circuit’s unanimous opinion was issued by an ideologically diverse panel including two Reagan appointees (Judge Stephen Williams and Judge David Sentelle) as well as one Clinton appointee (Judge Judith Rogers).

A. Ambiguity About Ambiguity

The easiest *Chevron* Step One-and-a-Half cases are the ones in which an agency says “the statute unambiguously means X” or says “the statute is ambiguous—it allows both X and Y—and we choose X as a matter of discretion.” Such cases are not uncommon.¹⁸¹ Nor, however, are such cases universal: oftentimes an agency’s preamble or decision will lie somewhere between these two extremes.¹⁸²

One possible response is for the court to apply a “magic words” approach: Unless the agency explicitly says that the statute is ambiguous, or explicitly says that it would reach the same result if the statute were ambiguous, then the court will not afford deference to the agency at *Chevron* Step Two. At the other extreme, the court could apply a “benefit of the doubt” approach: unless the agency explicitly says that the statute is unambiguous, then the court will assume that the agency is exercising its discretion. A third possibility is a “mind-reading” tack: if the agency is ambiguous as to whether it thinks the statute is ambiguous, then the court will do its best to divine the agency’s view. A fourth route is an “ask the attorney” approach: when in doubt, the court can ask the agency’s lawyer at oral argument whether the agency would hew to its position if the statute were ambiguous.

We think there is much to be said for the “magic words” approach, which would encourage the authors of agency preambles to make it clear to other

¹⁸¹ See, e.g., 81 Fed. Reg. 50,416, 50,418 (Aug. 1, 2016) (EPA) (“EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.”); 81 Fed. Reg. 49,360, 49,386 n.351 (July 27, 2016) (SEC) (“We acknowledge that the statutory interpretation arguments we identify do not demonstrate an unambiguous Congressional intent to require public disclosure. . . . We believe that, at a minimum, Congress provided the Commission with discretionary authority. As such, based on our assessment of the record evidence and our weighing of the various policy considerations, we have determined to exercise that discretion by requiring public disclosure of each issuer’s annual report on Form SD.”); 81 Fed. Reg. 43,266, 43,278 (July 1, 2016) (Nuclear Regulatory Commission) (“[T]he statutory language is not clear and unambiguous . . .”).

¹⁸² In the polar bear case, for example, counsel for the Fish and Wildlife Service “conceded at oral argument that the agency does not seek deference to its interpretation of the definition of an endangered species under step two of the *Chevron* test and instead relies exclusively on a plain-meaning interpretation of the ESA.” In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig., 748 F. Supp. 2d 19, 29 (D.D.C. 2010). The district court noted, though, that absent this concession it would have been difficult to determine whether the Service considered the statute to be clear or whether it considered the statute to be ambiguous and adopted its interpretation as an exercise of discretion. See *id.* at 29 n.16.

agency officials, OIRA, and the public when the agency is exercising policy discretion. We think there is much less to be said for the “ask the attorney” approach, which would do little to deter the sort of strategic behavior discussed above. Agencies (and agency lawyers) would then be able to say in their preambles that a particular policy is compelled by Congress, and only in the event of litigation (and even then only in the event that a *Chevron* Step One-and-a-Half argument arises) would the agency have to take ownership of its choice.

Ultimately, the choice among triggering rules comes down to how we want to allocate interpretive and explanatory burdens. The “magic words” approach imposes a burden on preamble writers to say at the outset that the agency is exercising its discretion. The “benefit of the doubt” approach imposes a burden on other actors—within the agency, elsewhere within the Executive Branch, and outside the government—to understand that anything other than an unambiguous statement of unambiguity amounts to an exercise of discretion. The “mind reading” tack places the burden on the court to divine the agency’s intent—but also on the other actors within and outside the agency to determine whether the agency is or is not exercising interpretive discretion. The “ask the attorney” approach places an even heavier burden on the other actors within and outside the agency, who now must divine the agency’s intent not on the basis of the past statements, but on the basis of future ones.

In some cases, the D.C. Circuit appears to follow something like the “benefit of the doubt” approach. For instance, in *Braintree Electric Light Department v. FERC*, the court rejected a *Chevron* Step One-and-a-Half attack by stating that so “long as the text is ambiguous and the agency *does not insist that it is clear*, a reasonable interpretation will warrant our deference.”¹⁸³ This raises the obvious concern that the preamble to an agency rule may suggest to non-lawyers within and outside the agency that the statutory language is clear, while still leaving the agency wiggle room in the event of a *Chevron* Step One-and-a-Half challenge. In other cases, the D.C. Circuit appears to impose a higher bar: for example, the court in *Peter Pan* says that “*Chevron* step 2 deference is reserved for those instances when an agency *recognizes* that the Congress’s intent is not plain from the statute’s

¹⁸³ 667 F.3d 1284, 1288–89 (D.C. Cir. 2012) (emphasis added); *see also* *Sec’y of Labor v. Nat’l Cement Co. of Cal.*, 494 F.3d 1066, 1074 (D.C. Cir. 2007) (focusing on agency assertion that “the definition of ‘coal or other mine’ plainly includes a road such as the one at issue”); *Arizona v. Thompson*, 281 F.3d 248, 253 (D.C. Cir. 2002) (focusing on agency assertion that “the TANF legislation . . . does not permit it being designated as the . . . primary program”).

face.”¹⁸⁴ Our modest suggestion is that the D.C. Circuit should clarify the ambiguity as to how it will treat ambiguity about ambiguity. If the “benefit of the doubt” approach is the governing regime, then relevant actors within and outside the agency should know that any time the agency doesn’t say the statute is clear, the agency is eligible for *Chevron* Step Two deference. Such a bright-line rule—clearly stated by the courts—would go some way toward reducing opportunities for agency actors to suggest one thing in the rulemaking process and another in litigation.

B. Choosing a Remedy

A second question in the implementation of *Chevron* Step One-and-a-Half is the choice of remedy: if an agency runs afoul of the Step One-and-a-Half doctrine, should a reviewing court (1) let it go, (2) remand without vacatur, (3) remand with vacatur, or (4) impose the opposite of the agency’s preferred rule? For all the reasons explained above, we think option (1) is a bad one. Choosing between options (2) and (3), however, is more complicated.

Administrative remedies have been largely overlooked in the scholarly literature—to the detriment of the field.¹⁸⁵ In short, section 706 of the APA says that “[t]he reviewing court shall . . . hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁸⁶ Despite this language, the D.C. Circuit has concluded—albeit not without controversy¹⁸⁷—that not all unlawful agency actions must be vacated. Instead, sometimes a court will remand without vacating under what has come to be known as the *Allied-Signal* doctrine.¹⁸⁸

Under the *Allied-Signal* doctrine, “[t]he decision whether to vacate depends on ‘the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.’”¹⁸⁹ The facts of *Allied-Signal*

¹⁸⁴ *Peter Pan Bus Lines v. FMCSA*, 471 F.3d 1350, 1354 (D.C. Cir. 2006).

¹⁸⁵ See Bagley, *supra* note 10, at __ (noting “systematic inattention to remedial questions in administrative law”).

¹⁸⁶ 5 U.S.C. § 706(2)(A).

¹⁸⁷ See, e.g., *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) (“I continue to believe that whenever a reviewing court finds an administrative rule or order unlawful, the Administrative Procedure Act requires the court to vacate the agency’s action.”); Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599 (2004).

¹⁸⁸ See *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146 (D.C. Cir. 1993)

¹⁸⁹ *Id.* at 151 (quoting *Int’l Union, UMW v. FMSHA*, 920 F.2d 960, 966-67 (D.C. Cir. 1990)).

illustrate how the doctrine works. The U.S. Nuclear Regulatory Commission promulgated a rule to recoup some of the costs incurred when the agency provides services to regulated parties. Allied-Signal challenged that regulation as arbitrary and capricious and contrary to the statute because the agency did not adequately consider the ability of certain types of companies to “pass through” charges to consumers. The Commission had exempted certain nonprofit institutions from the rule because they could not readily pass through charges to consumers, but did not consider whether other entities were similarly restricted—which rendered the rule a violation of the “reasoned decision-making” requirement.¹⁹⁰ The D.C. Circuit concluded, however, that vacatur was not required. After all, it was possible that the Commission *could* “explain how the principles supporting an exemption for educational institutions do not justify a similar exemption” for other types of entities.¹⁹¹ And “[a]t the same time, the consequences of vacating may be quite disruptive,” especially because “the Commission would need to refund all . . . fees collected from those converters; in addition it evidently would be unable to recover those fees under a later-enacted rule.”¹⁹² The *Allied-Signal* doctrine has also been adopted beyond the D.C. Circuit.¹⁹³ The Supreme Court has not addressed its legality.¹⁹⁴

The *Allied-Signal* doctrine could be combined with *Chevron* Step One-and-a-Half. For instance, in *Coalition for Common Sense in Government Procurement v. United States*,¹⁹⁵ the court confronted a Department of Defense regulation involving “Federal Ceiling Prices” (i.e., the highest amount federal agencies can pay contractors) that the agency claimed was mandated by Congress. The court disagreed with the agency that the agency did not have discretion and, per *Prill*, concluded that the court could not determine whether the agency’s regulation could nonetheless be upheld.¹⁹⁶

¹⁹⁰ See *Allied-Signal*, 988 F.2d at 150.

¹⁹¹ *Id.* at 151.

¹⁹² *Id.*; see also Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 *Duke L.J.* 291, 374–75 (2003); Kristina Daugirdas, *Evaluating Remand Without Vacatur*, 80 *N.Y.U. L. REV.* 278 (2005).

¹⁹³ See, e.g., Bagley, *supra* note 10, at 67 (“Other circuits—including the First, Third, Fifth, Eighth, Ninth, Tenth, and Federal—have followed the D.C. Circuit’s lead.”) (collecting citations); *NRDC v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (remand only); *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (“A flawed rule need not be vacated.”).

¹⁹⁴ See, e.g., Bagley, *supra* note 10 (manuscript at 67-68).

¹⁹⁵ 671 F. Supp. 2d 48 (2009).

¹⁹⁶ See *id.* at 55 (explaining that “[h]aving concluded that the statutory language does not speak to precisely how the Department should implement the statute, the Court ordinarily would move to *Chevron* step two,” but that it could not “do so here because the rule’s preamble reveals that the agency mistakenly believed that Congress mandated the requirement

Rather than vacate the regulation, however, the court applied *Allied-Signal* to conclude it should be remanded only.¹⁹⁷ Likewise, in the polar bear illustration presented above, the court concluded that the agency wrongly disclaimed discretion, but rather than vacate the agency's rule, the court simply remanded for additional proceedings.¹⁹⁸

There is much to be said for this sort of approach—making an agency start the regulatory process anew imposes massive costs, and perhaps the disciplining effects of *Chevron* Step One-and-a-Half can be achieved without the need for such costs, at least sometimes. Thus, a reviewing court, as matter of its equitable judgment, could determine whether the case-specific costs or the broader institutional values should win out. The problem, however, is that courts may not be well positioned to strike that balance, especially because much of what happens during the rulemaking process occurs in a “black box.”¹⁹⁹ Hence, it may be difficult to know just how innocent a mistake is.

Moreover, the costs imposed by vacatur are arguably part of the deterrence effect of *Chevron* Step One-and-a-Half. Indeed, courts could go a step further and establish a rule of the following sort: If a statute could mean X or Y, and the agency insists that the statute unambiguously means X, then the penalty for the agency's failure to acknowledge ambiguity is that the court will impose Y. We anticipate that under such a regime, agencies would much more readily acknowledge their own discretion. Indeed, the total costs of *Chevron* Step One-and-a-Half remands may decline as such remands become rarer and rarer.²⁰⁰ Yet this “super penalty” approach makes much more sense on a white board than in the real world. If an agency promulgates an 80-page rule on a complicated subject based on its view that a statute means X, would a court be competent to write its own version of the rule on the view that the statute means Y? We are doubtful.²⁰¹

of a manufacturer refund”).

¹⁹⁷ See *id.* at 59.

¹⁹⁸ See *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 748 F. Supp. 2d 19, 30 (D.D.C. 2010) (“[T]he Court hereby remands the Listing Rule to the agency for the limited purpose of providing additional explanation for the legal basis of its listing determination, and for such further action as it may wish to take in light of the Court's finding that the definition of an ‘endangered species’ under the ESA is ambiguous.”).

¹⁹⁹ See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 514–15 (2002).

²⁰⁰ See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

²⁰¹ Consider too that the higher the cost to the court of a *Chevron* Step One-and-a-Half remand, the more reluctant the court will be to invoke the doctrine. For that reason, a variant of *Chevron* Step One-and-a-Half that forces the court to rewrite the agency's rule on its own may be a less effective deterrent than a milder version.

At bottom, we think the remedy question defies easy answer. Our intuition is that given the high costs of vacatur, a context-dependent approach makes the most sense here—with vacatur reserved for cases that cannot be chalked up to innocent agency error. And yet we acknowledge that the high costs of vacatur might also counsel in favor of invoking that remedy more readily so as to achieve optimal deterrence.

C. *Chevron* Step One-and-a-Half as Administrative Common Law

At last we come to a question that arguably should have come much earlier: even if *Chevron* Step One-and-a-Half makes sense as a prudential matter, can courts justify the doctrine as a jurisprudential matter? After all, *Chevron* Step One-and-a-Half is a judge-made doctrine, not derived from the text of the APA or any other statute. Do courts have the authority to make up a doctrine like this on their own?

The reality is that for these higher order questions of administrative law, textual sources often do not have much to say. For instance, although both *Chenery* and *State Farm* could, in a pinch, be tied to the APA's bar on arbitrary and capricious agency action, the nexus is far from self-evident. At the same time, however, what agencies are allowed to do has also expanded. *Chevron* itself, for instance, is hardly compelled by any statutory source, and, indeed, it may be in some tension with the APA.²⁰² In short, one cannot be asymmetric about these things: if deference doctrines are allowed to expand, then doctrines that help police those deference doctrines must also be allowed to expand. There no doubt is a bit of “administrative common law” in *Chevron* Step One-and-a-Half, but that is not necessarily a reason to reject the doctrine.²⁰³ If agencies are to be trusted with *Chevron* powers for reasons of political accountability and expertise, then *Chevron* Step One-and-a-Half—which forces agencies to take accountability for their actions and pushes them to employ their expertise—protects the integrity of the *Chevron* framework.

Our tentative defense of *Chevron* Step One-and-a-Half still leaves the doctrine open to attack on grounds that it violates the principle that reviewing courts are “generally not free” to impose procedural requirements on agencies unless those requirements stem from the APA or some other statutory source. This principle—known as “the *Vermont Yankee* rule” for the case in which it

²⁰² See, e.g., *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, (2015) (Scalia, J., concurring).

²⁰³ See Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

was announced²⁰⁴—would seem to be in some tension with *Chevron* Step One-and-a-Half. After all, the requirement that an agency acknowledge ambiguity in the relevant statute as a prerequisite for deference at *Chevron* Step Two might be described as an additional procedural requirement ginned up by the D.C. Circuit and found nowhere in any statutory source.

We have no knock-down rebuttal to the *Vermont Yankee* objection, though we do have at least two responses. First, *Chevron* Step One-and-a-Half is at least arguably justified on the basis of *Chenery I*, which predates *Vermont Yankee* by several decades.²⁰⁵ And second, *Chevron* Step One-and-a-Half is at least arguably a logical extension of *Chevron*'s holding that courts should defer in instances when an agency enjoys a relative advantage in terms of electoral accountability and expertise. If judges can decide that agencies will receive deference under certain circumstances, then presumably the same judges can decide in what circumstances such deference ought not be forthcoming. Our modest suggestion is that deference-limiting doctrines should be designed with a view to the values that motivated *Chevron* in the first place. And by our lights, *Chevron* Step One-and-a-Half meets that criterion.

CONCLUSION

Chevron Step One-and-a-Half is an important element of judicial review of agency statutory interpretations in the D.C. Circuit—and there are at least signs of it taking hold in courts beyond the District of Columbia's "ten Miles square."²⁰⁶ And yet so far the doctrine has largely escaped academic attention: casebooks and (with few exceptions) commentators have passed over the gap between *Chevron* Step One and *Chevron* Step Two. We seek to fill this void by presenting the first comprehensive treatment of *Chevron* Step One-and-a-Half. We ask: Why does the doctrine exist, and are *Chevron* Step One-and-a-Half's critics correct that the doctrine's application "outstrips its rationale"?²⁰⁷

²⁰⁴ *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

²⁰⁵ See *supra* Section II.B. Of course, some may grumble that this defense of *Chevron* Step One-and-a-Half just kicks the can down the road. After all, why is *Chenery* consistent with the APA? See, e.g., Bagley, *supra* note 10, at ___ (questioning whether a broad view of *Chenery* comports with the APA's instruction that courts apply harmless-error principles). Yet *Chenery* has a very strong claim to *stare decisis*—it has been the law for more than 70 years. Equally important, it also predates the APA, so presumably Congress legislated against the *Chenery* backdrop. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) ("Our evaluation of congressional action . . . must take into account its contemporary legal context.").

²⁰⁶ Cf. U.S. CONST. art. I, § 8, cl. 17.

²⁰⁷ See *PKD Labs. Inc. v. U.S. Drug Enforcement Agency*, 362 F.3d 786, 809 (D.C. Cir.

On our view, before one can answer those questions, it is essential to confront the puzzle at the heart of *Chevron* Step One-and-a-Half: why do these cases still arise? One might have expected that *Prill* would be a “one-off,” and that agencies would quickly learn to insulate their rules from Step One-and-a-Half attacks. And yet the last thirty years have proven that expectation to be incorrect. Perhaps the reason is that agencies are slow to learn (in which case they would have to be very slow indeed!). We believe, though, that any explanation sounding in agency ignorance is incomplete. Agency actors have strategic reasons to assert that statutes are unambiguous even when such assertions increase the likelihood of a remand. Central to our argument is the fact that reviewing courts are not the only relevant veto players in the administrative process: actors within and outside the agency are too. Moreover, agency actors are not only trying to maximize their probability of success in litigation; they also may care about the allocation of credit and blame between themselves and Congress, as well as the durability of their policies once their successors grab the reins.

We are, of course, not the first to observe that agencies are themselves multifaceted bodies, that agencies are concerned not only about courts but also about OIRA, and that agencies seek to entrench their preferred policies so that their work is not undone by successors. We are, however, the first to explain how these considerations interact with *Chevron* Step One-and-a-Half. And these strategic considerations not only help to explain why *Chevron* Step One-and-a-Half cases continue to arise, but also may help to justify the doctrine’s continued existence.

2004) (Roberts, J., concurring in the judgment).

APPENDIX: D.C. Circuit *Chevron* Step One-and-a-Half Cases

<i>Noble Energy v. Salazar</i>		671 F.3d 1241 (D.C. Cir. 2012)	
Initial agency decision:	Sep. 1, 2009	D.C. Circuit	Mar. 4, 2012
Agency decision on remand:	Apr. 9, 2014	Later D.C. Circuit	Apr. 29, 2016
Language at issue	“Interior’s regulations require that lessees ‘promptly and permanently plug’ their temporarily-abandoned oil wells if the government so orders. 30 C.F.R. § 250.1723. Lessees must in any event ‘permanently plug all wells on a lease within 1 year after the lease terminates.’ <i>Id.</i> § 250.1710.		
Agency view	The “plugging” obligations apply even though the federal government materially breached its lease agreement with Noble Energy.		
D.C. Cir. reasoning	The agency’s letter to Noble Energy does not expressly indicate that it considered the common law doctrine of discharge, nor any “hint of the agency’s reasoning or the factors that it took into account. We therefore cannot be sure whether [the agency’s] letter embodied an interpretation of the regulations’ applicability after breach.” 671 F.3d at 1245.		
Vacate / remand?	Remand.		
Concurrence	“I concur in the court’s opinion and judgment but write separately to express doubt whether the Interior Department, on remand, will be able to offer an interpretation that is both reasonable and supportive of its action here.” 671 F.3d at 1246–49 (Williams, J., concurring).		
Post – remand history	On remand, the agency “interpreted the regulations in question and determined that [the plugging duties] were independent of the obligations of the lease and were, therefore, not discharged by the government’s material breach of the lease.” <i>Noble Energy, Inc. v. Jewell</i> , 110 F.Supp.3d 5, 9 (D.D.C. 2015). Based on this interpretation, and applying <i>Chevron</i> deference, the district court granted the government’s motion for summary judgment. The D.C. Circuit affirmed. <i>See Noble Energy, Inc. v. Jewell</i> , --- Fed. App’x ---, 2016 WL 3039397 (D.C. Cir. 2016).		

<i>U.S. Postal Serv. v. Postal Regulatory Comm’n</i>		640 F.3d 1263 (D.C. Cir. 2011)	
Initial agency decision:	Sep. 30, 2010	D.C. Circuit	May 24, 2011
Agency decision on remand:	Sep. 20, 2011	Later D.C. Circuit	Jun. 5, 2015
Language at issue	The agency may “establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances.” 39 U.S.C. § 3622(d)(1)(E).		
Agency view	The plain meaning of “due to” requires the proposed rate adjustments be “tailored to offset the specific effects of the claimed exigency.” 640 F.3d at 1264.		
D.C. Cir. reasoning	The statutory language “due to” does not necessarily mean that the proposed rate adjustment may only offset those specific costs caused by the extraordinary or exceptional circumstances identified. Saying that the proposed increase is “due to” extraordinary circumstances does not necessarily mean that there could not be other motivations as well. 640 F.3d at 1267–68.		
Vacate	Remand.		

e / remand?	
Post – remand history	After notice and comment proceedings, the agency maintained the same interpretation. <i>See Order Resolving Issues on Remand: Rate Adjustment Due to Extraordinary or Exceptional Circumstances</i> , Order No. 864 at 30–46, Docket No. R2010-4R (Sep. 20, 2011). “No party challenged Order 864 when it came out.” <i>Alliance of Nonprofit Mailers v. Postal Regulatory Comm’n</i> , 790 F.3d 186, 191 (D.C. Cir. 2015).

<i>Prime Time Int’l Co. v. Vilsack</i>		599 F.3d 678 (D.C. Cir. 2010)
Initial agency decision:	Feb. 8, 2006	D.C. Circuit Mar. 26, 2010
Agency decision on remand:	Nov. 6, 2011	Later D.C. Circuit Jun. 10, 2014
Language at issue	The Fair and Equitable Tobacco Reform Act requires tobacco companies to pay assessments, which are allocated “on a pro rata basis, based on each manufacturer’s or importer’s share of gross domestic volume.” 7 U.S.C. § 518d(d)(e)(1).	
Agency view	7 U.S.C. § 518d(g)(3)(A) requires the agency to measure the volume of cigars by mere number of cigars, with no differentiation based on size of cigar.	
D.C. Cir. reasoning	“The plain text . . . does not self-evidently vindicate USDA’s . . . assessment method [of determining volume].” 599 F.3d at 683. There are multiple possible meanings based on interplay between sections, and the Secretary must ensure that “each manufacturer and importer pays only its correct pro rata share of total gross domestic volume.” 7 U.S.C. § 518d(i)(4)(B).	
Vacate / remand?	Remand.	
Post – remand history	The agency “commenced notice and comment rulemaking on its . . . calculation method. <i>See</i> 76 Fed. Reg. 15859 (AR 11–16). The [agency] received five sets of comments in response to its notice, and issued a final determination on November 6, 2011 concluding that the existing . . . method will remain in place.” <i>Prime Time Int’l Co. v. Vilsack</i> , 930 F.Supp.2d 240, 246 (D.D.C. 2013). The agency brought a cross-claim for unpaid assessments, and the district court granted summary judgment for the agency on <i>Chevron</i> grounds. The D.C. Circuit affirmed. <i>See Prime Time Int’l Co. v. U.S. Dep’t of Agriculture</i> , 753 F.3d 1339 (D.C. Cir. 2014).	

<i>Sec’y of Labor v. Nat’l Cement Co. of Cal.</i>		494 F.3d 1066 (D.C. Cir. 2007)
Initial agency decision:	Feb. 9, 2004	D.C. Circuit Jul. 20, 2007
Agency decision on remand:		Later D.C. Circuit Jul. 21, 2009
Language at issue	Facilities subject to the Mine Safety and Health Act include a “coal or other mine” and “private ways and roads appurtenant to such area.” 30 U.S.C. § 802(h)(1).	
Agency view	The statutory language must cover a road owned by a third party, over which the cement company has been granted a non-exclusive easement.	
D.C. Cir. reasoning	The dictionary defines “private” as “not freely available to the public,” but also defines “private” as “belonging to or concerning an individual person, company, or interest.” 494 F.3d at 1074. Similarly, the dictionary defines “appurtenant to” as “annexed or belonging legally to some more important	

	thing,” or as “incident to . . . [or] used [by] easements.” <i>Id.</i>
Vacate / remand?	Vacate.
Dissent	“The court improperly relies upon policy considerations to find ambiguity where there is none,” even though the agency officials determined that the statute was unambiguous. 494 F.3d at 1077–80 (Rogers, J., dissenting). The purpose of the Mine Act and the legislative history both indicate that the common legal meanings of both “private” and “appurtenant” are obviously used here. <i>Id.</i>
Post – remand history	The agency interpreted the statute such that the road in question fell within the classification “private ways and roads appurtenant to such area.” <i>Sec’y of Labor v. Nat’l Cement Co. of Cal., Inc.</i> , 573 F.3d 788, 791–92 (D.C. Cir. 2009). An independent commission “again found the Secretary’s interpretation unreasonable and vacated the citation. . . . The Secretary . . . again petitioned for review, arguing that her interpretation . . . is reasonable.” <i>Id.</i> at 792. The D.C. Circuit held that “[h]er interpretation is reasonable,” vacated the commission’s decision, and remanded. <i>Id.</i> at 797.

<i>Menkes v. Dep’t of Homeland Sec.</i>		486 F.3d 1307 (D.C. Cir. 2007)		
Initial decision:	agency decision on	2003–2004	D.C. Circuit	May 15, 2007
Agency decision on	remand:	Jun. 2, 2008	Later D.C. Circuit	Mar. 8, 2011
Language at issue	“The Secretary may authorize the formation of a pool by a voluntary association of United States registered pilots to provide for efficient dispatching of vessels and rendering of pilotage services.” 46 U.S.C. § 9304(a). Furthermore, “[w]hen pilotage service is not provided by the association authorized under 46 U.S.C. § 9304 because of a physical or economic inability to do so, . . . the Director may order any U.S. registered pilot to provide pilotage service.” 46 C.F.R. § 401.720(b).			
Agency view	The statute and regulations allow the agency to require pilots to be part of a pilotage association.			
D.C. Cir. reasoning	The agency has not offered reasons for its determination that it may prefer associations over independent pilots, and the statute does not speak clearly to the question at issue.			
Vacate / remand?	Vacate the agency’s decision and remand for interpretation.			
Post – remand history	On remand, the agency maintained the same interpretation. <i>Agency Decision on Remand from the Court of Appeals for the District of Columbia and the District Court for the District of Columbia in the Case of Richard J. Menkes v. Dep’t of Homeland Sec., et al.</i> (Jun. 2, 2008) (reprinted in 637 F.3d 319, 340–55 (Appendix)). The district court granted summary judgment for the agency. The D.C. Circuit affirmed. <i>See Menkes v. U.S. Dep’t of Homeland Sec.</i> , 637 F.3d 319 (D.C. Cir. 2011).			

<i>Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.</i>		471 F.3d 1350 (D.C. Cir. 2006)		
Initial decision:	agency decision on	Oct. 26, 2005	D.C. Circuit	Dec. 19, 2006
Agency decision on	remand:	Dec. 16, 2008	Later D.C. Circuit	Aug. 26, 2008
Language	The Secretary of Transportation “shall register a person to provide			

age at issue	transportation subject to jurisdiction under . . . this title as a motor carrier if the Secretary finds that the person is willing and able to comply with . . . this part and the applicable regulations of the Secretary and the Board,” and other specified laws and regulations. 49 U.S.C. § 13902(a)(1).
Agency view	The agency may not reject an application for failure/unwillingness to comply with the American with Disabilities Act (ADA) because the statute specifically identifies the regulations upon which the FMCSA may predicate approval. To interpret so as to allow ADA considerations would render part of the statute superfluous.
D.C. Cir. reasoning	Interpreting “the applicable regulations” to include the ADA makes § 13902(a)(1)(B) and (C) superfluous. However, interpreting “the applicable regulations” to not include the ADA makes § 13902(a)(1)(C) superfluous. “Thus, section 13902 contains surplusage under either reading and, as a result, we cannot say that either proffered construction reflects the Congress’s unambiguously expressed intent.” 471 F.3d at 1353–54.
Vacate / remand?	Vacate.
Concurrence	Expressing doubt that the agency’s interpretation, if it maintains the same interpretation, “could survive <i>Chevron</i> step two” analysis. 471 F.3d at 1355 (Tatel, J., concurring).
Post – remand history	Just two days after the D.C. Circuit decision, the agency issued a notice of proposed rulemaking that effectively reversed course and required ADA compliance for new entrants. <i>New Entrant Safety Assurance Process</i> , 71 Fed. Reg. 76730, 2006 WL 3740581 (Dec. 21, 2006). Peter Pan moved for dismissal (ostensibly because of the proposed rule) and the D.C. Circuit dismissed the case. <i>Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Admin.</i> , 2008 WL 4356826 (D.C. Cir. 2008). The final agency rule implemented the proposed rule. <i>New Entrant Safety Assurance Process</i> , 73 Fed. Reg. 76472, 2008 WL 5210536 (Dec. 16, 2008).

<i>Teva Pharms. USA, Inc. v. FDA</i>		441 F.3d 1 (D.C. Cir. 2006)
Initial agency decision:	Jun. 28, 2005	D.C. Circuit Mar. 16, 2006
Agency decision on remand:	Apr. 11, 2006	Later D.C. Circuit decision:
Language at issue	The statute gives a marketing exclusivity period to a generic drug manufacturer, which begins on “the date of a decision of a court . . . holding the patent to be invalid or not infringed, whichever is earlier.” 21 U.S.C. § 355(j)(5)(b)(iv). This provision was further interpreted in <i>Teva Pharms. USA, Inc. v. FDA</i> , 182 F.3d 1003 (D.C. Cir. 1999) (“ <i>Teva I</i> ”) and <i>Teva Pharms. USA, Inc. v. FDA</i> , 254 F.3d 316 (D.C. Cir. 2000) (“ <i>Teva II</i> ”).	
Agency view	The <i>Teva I</i> and <i>Teva II</i> decisions establish binding precedent that the district court’s “stipulation and [dismissal] order” constituted a “decision of a court.”	
D.C. Cir. reasoning	The agency misunderstood the precedent, which only held that the agency in those cases had insufficiently explained its determinations regarding which orders were and were not a “decision of a court” under the statute.	
Vacate / remand?	Vacate district court decision, and remand with instructions to vacate the agency decision.	
Post – remand history	In an April 11, 2006 letter, the agency “reversed itself.” <i>Apotex, Inc. v. FDA</i> , 449 F.3d 1249, 1251 (D.C. Cir. 2006); Letter from Gary Buehler, Dir., Office of	

	Generic Drugs, at 15 (Apr. 11, 2006), available at http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/ucm119197.pdf .
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<i>PDK Labs, Inc. v. U.S. Drug Enforcement Admin.</i>		362 F.3d 786 (D.C. Cir. 2004)
Initial agency decision:	Dec. 19, 2002	D.C. Circuit Mar. 26, 2004 decision:
Agency decision on remand:	Nov. 22, 2004	Later D.C. Circuit Feb. 24, 2006 decision:
Language at issue	The statute grants to the agency the authority to block the importation of a substance if “the chemical may be diverted to the clandestine manufacture of a controlled substance.” 21 U.S.C. § 971(c)(1)	
Agency view	The language plainly means that the language “the chemical” may refer to the raw chemical itself or products made from that chemical.	
D.C. Cir. reasoning	The agency’s regulations “distinguish between a ‘drug containing ephedrine’ [in other words, a finished product] and ‘a listed chemical’ [the raw chemical].” 362 F.3d at 795. Furthermore, the timeline of the legislative history makes the argument, that “chemical” refers to both the raw material and finished products, tentative.	
Vacate / remand?	Vacated and remanded to agency.	
Concurrence	The Court should vacate and remand on the ground alone that the DEA did not follow its own regulations (which the agency effectively conceded), and should not address the broader <i>Chevron</i> question. If addressing the <i>Chevron</i> question, the agency should win on <i>Chevron</i> step one grounds because the statute is not ambiguous (does not explicitly limit its application to only raw chemicals). We should not remand because the DEA does not believe the statute mandated a certain result, but rather that it granted discretion to DEA. 362 F.3d at 799–810 (Roberts, J., concurring). And even if the statute were ambiguous, there is “no reasonable and genuine doubt” what the agency will do on remand, and “[i]n the absence of such doubt, a <i>Prill</i> remand outstrips its rationale.” <i>Id.</i> at 809.	
Post – remand history	On remand, the agency maintained its broad interpretation. <i>See PDK Labs., Inc. v. U.S. Drug Enforcement Admin.</i> , 438 F.3d 1184, 1188 (D.C. Cir. 2006) (quoting 69 Fed. Reg. 67,951-03 (Nov. 22, 2004)). The D.C. Circuit affirmed on <i>Chevron</i> grounds. <i>Id.</i> at 1189–93, 1197–98.	

<i>Arizona v. Thompson</i>		281 F.3d 248 (D.C. Cir. 2002)
Initial agency decision:	Sep. 30, 1998	D.C. Circuit Mar. 5, 2002 decision:
Agency decision on remand:	Jul. 23, 2008	Later D.C. Circuit decision:
Language at issue	Earlier welfare legislation did not prohibit “primary program” cost allocation (wherein all common administrative costs for multiple welfare programs are assigned to a single primary program). The new 1996 welfare legislation, 42 U.S.C. § 601 <i>et seq.</i> , likewise did not explicitly prohibit the “primary program” cost allocation.	
Agency view	States may not allocate all administrative costs for Temporary Aid for Needy Families, Medicaid, and Food Stamps, to a single program for accounting/reimbursement purposes (“primary program” designation).	

D.C. Cir. reasoning	There is no statutory provision that prohibits primary program allocation, and there was no such statutory provision in the previous welfare regime either. It is incorrect to interpret the silence as mandatory prohibition, and the agency must exercise discretion.
Vacate / remand?	District court decision reversed, remanded with directions to remand to agency.
Post – remand history	The agency filed a notice of proposed rulemaking maintaining the same interpretation. <i>Cost Allocation Methodology Applicable to the Temporary Assistance for Needy Families Program</i> , 71 Fed. Reg. 56,440 (Sep. 27, 2006). The final rule was promulgated on July 23, 2008. <i>Cost Allocation Methodology Applicable to the Temporary Assistance for Needy Families Program</i> , 73 Fed. Reg. 42,718. It appears this was not challenged.

<i>ITT Indus. v. NLRB</i>		251 F.3d 995 (D.C. Cir. 2001)	
Initial decision:	agency decision on	May 10, 2000	D.C. Circuit Jun. 5, 2001
Agency decision on	remand:	May 13, 2004	Later D.C. Circuit Jun. 28, 2005
Language at issue	“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities.” 29 U.S.C. § 157.		
Agency view	The term “employee” includes employees of the same company who work at different plants than the one in question, and therefore such employees have access rights for union activities on any company property, even if the specific employee does not work at a specific facility.		
D.C. Cir. reasoning	Prior federal court cases have not resolved this question, and the agency did not acknowledge the ambiguity in whether “employee” access rights only extend to the facility at which such employees work, or to all employer properties.		
Vacate / remand?	Vacate.		
Post – remand history	In a separate, subsequent case, the agency interpreted the statute to give employees of the same company who work at different plants nonderivative, freestanding access rights for union activities. <i>See First Healthcare Corp. d/b/a Hillhaven Highland House</i> , 336 N.L.R.B. No. 62 (Sep. 30, 2001). Applying <i>Hillhaven Highland House</i> ’s interpretation in this case, the NLRB “reaffirm[ed] the Board’s original [2000] order.” <i>ITT Indus., Inc.</i> , 341 N.L.R.B. No. 118 at *7 (May 13, 2004). The D.C. Circuit affirmed. <i>ITT Indus., Inc. v. NLRB</i> , 413 F.3d 64 (D.C. Cir. 2005).		

<i>Jacoby v. NLRB</i>		233 F.3d 611 (D.C. Cir. 2000)	
Initial decision:	agency decision on	Sep. 30, 1999	D.C. Circuit Dec. 12, 2000
Agency decision on	remand:	Sep. 28, 2001	Later D.C. Circuit Apr. 11, 2003
Language at issue	Labor unions owe employees “the duty of fair representation,” as used in <i>United Steelworkers of Am. v. Rawson</i> , 495 U.S. 362 (1990), and <i>Air Line Pilots Ass’n, Int’l v. O’Neill</i> , 499 U.S. 65 (1991).		
Agency view	<i>Rawson</i> and <i>O’Neill</i> , “read together, mandate that merely negligent conduct can never breach the duty of representation in any context, including that of the hiring hall.” 233 F.3d at 616.		
D.C. Cir. reasoning	The D.C. Circuit’s holding in <i>Plumbers & Pipe Fitters Local Union No. 32 v.</i>		

Cir. reasoning	<i>NLRB</i> , 50 F.3d 29 (D.C. Cir. 1995) contradicts the agency's view that the agency must be deferential to the union's hiring hall procedures. <i>Rawson</i> and <i>O'Neill</i> did not deal with hiring hall procedures.
Vacate / remand?	Remand.
Post – remand history	The agency “reaffirm[ed] the Board’s earlier [1999] holding” and explained its interpretation. <i>In re Steamfitters Local Union No. 342</i> , 336 N.L.R.B. No. 44, *1–*8 (Sep. 28, 2001). The D.C. Circuit affirmed on <i>Chevron</i> grounds. See <i>Jacoby v. NLRB</i> , 325 F.3d 301 (D.C. Cir. 2003).

<i>GTE Serv. Corp. v. FCC</i>		224 F.3d 768 (D.C. Cir. 2000)
Initial decision:	agency Jul. 30, 1997	D.C. Circuit Jul. 14, 2000
Agency decision on remand:		Later D.C. Circuit decision:
Language at issue	The statute required that all “provider[s] of interstate interexchange telecommunications services,” 47 U.S.C. § 254(g), charge the same rates to customers in all states.	
Agency view	“The language of section 254(g) . . . on its face unambiguously applies to all providers of interstate, interexchange services. Thus, section 254 (g) applies to the interstate, interexchange services offered by [wireless] providers. If Congress had intended to exempt [wireless] providers, it presumably would have done so expressly as it did in other sections of the Act.” <i>In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace</i> , 14 FCCR 391 at ¶ 10 (Dec. 31, 1998); see also <i>Policy and Rules Concerning the Interstate, Interexchange Marketplace</i> , 12 FCCR 11812 at ¶ 18 (Jul. 30, 1997).	
D.C. Cir. reasoning	“[W]e cannot agree with either the [agency] or the petitioners that the Congress spoke unambiguously on the precise issue that divides them.” 224 F.3d at 774. Since the statute was meant to incorporate pre-1996 telecommunications policy (which did not bring wireless providers within this category), it is not reasonable to require an explicit exemption—such an exemption could certainly have been presumed. <i>Id.</i> On the other hand, the broad definition of “exchange service” does bring in wireless providers, so “it is not clear that the Congress was referring only to wireline service when it used the word ‘interexchange.’” <i>Id.</i> at 775.	
Vacate / remand?	Vacate.	
Post – remand history	The agency dismissed as moot the wireless providers’ petitions for enforcement forbearance, because (by virtue of the D.C. Circuit’s decision) “there is currently no rate integration rule to apply to CMRS carriers and no rule to forbear from applying.” <i>In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace</i> , 15 FCCR 21,066, 21,068 (Aug. 23, 2000). The agency also stated that “[p]ursuant to the Court’s order, we will further consider the matter of whether [wireless] carriers are covered under section 254(g).” <i>Id.</i> The agency on September 8, 2000 stated that it was in the process of considering the issues. <i>In re Forbearance from Applying Provision of Communications Act to Wireless Telecommunications Carriers</i> , 15 FCCR 17,414 at ¶ 15. It is unclear whether there was additional litigation.	

<i>Transitional Hosps. Corp. of La. v.</i>	222 F.3d 1019 (D.C. Cir. 2000)
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Shalala	
Initial decision:	agency Dec. 24, 1992 D.C. Circuit Aug. 22, 2000
Agency decision on remand:	Aug. 1, 2001 Later D.C. Circuit decision:
Language at issue	For Medicare reimbursement purposes, a hospital can receive higher payments if the hospital is classified as a “long-care hospital,” which is defined as “a hospital which has an average inpatient length of stay (as determined by the Secretary) of greater than 25 days,” 42 U.S.C. § 1395ww(d)(1)(B)(iv)(I)
Agency view	“[A]n initial data-collection period is statutorily required” before classifying any hospitals as “long-term care hospitals.” 222 F.3d at 1020.
D.C. Cir. reasoning	“Although it does establish a criterion based on average length of stay, the statute is silent as to how and when that length should be calculated. . . . Nor does the statute’s use of the present tense verb ‘has’ definitively resolve the question.” 222 F.3d at 1024.
Vacate / remand?	Remand to district court, with instructions to remand to the agency for interpretation.
Post – remand history	On May 4, 2001, the agency initiated notice and comment proceedings on a proposed rule that would maintain the interpretation. <i>See Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2002 Rates</i> , 66 Fed. Reg. 22,646 (May 4, 2001). The agency promulgated that final rule on August 1, 2001. <i>See Medicare Program: Changes to the Hospital Inpatient Prospective Payment Systems and Rates and Costs of Graduate Medical Education</i> , 66 Fed. Reg. 39,828, 39,917–19. Apparently, the plaintiff in this case did not pursue further litigation. In a separate case, the district court upheld the agency’s regulation on <i>Chevron</i> grounds. <i>See Select Specialty Hosp. of Atlanta v. Thompson</i> , 292 F.Supp.2d 57 (D.D.C. 2003).

PanAmSat Corp. v. FCC	
Initial decision:	agency Jun. 16, 1998 D.C. Circuit Dec. 21, 1999
Agency decision on remand:	Jul. 10, 2000 Later D.C. Circuit decision:
Language at issue	The statute grants agency authority to “assess and collect regulatory fees to recover the costs of . . . regulatory activities,” including between \$65,000.00 and \$90,000.00 annually per “space station.” 47 U.S.C. § 159(a)(1), (g).
Agency view	The statutory language’s “plain legislative history” compels the agency to exempt Comsat, a competitor to PanAmSat, from “space station fees” under the statute, because Comsat does not own its own telecommunications satellite, but rather is the U.S. user of internationally-owned satellites. 198 F.3d at 894. “[T]he Conference Report for the 1993 amendments . . . explicitly incorporated by reference, ‘to the extent applicable, the appropriate provisions of’ an earlier House Report connected to a “virtually identical bill that passed the House in 1991 but failed to be enacted.” <i>Id.</i> at 895–96. The earlier House Report for the earlier failed bill stated that “[f]ees will not be applied to space stations operated by international organizations.” <i>Id.</i> at 896.
D.C. Cir. reasoning	There is no explicit exemption in the statute, nor even any “obvious hook in the language on which to hang an exemption.” 198 F.3d at 895. “Given the ambiguity of the legislative history, and more importantly the absence of any clear exemption in the statute, the [agency] was mistaken in its conclusion that the statute compelled an exemption for Comsat.” <i>Id.</i> at 897.

Vacate / remand?	Remand to agency for further consideration.
Post – remand history	The agency ultimately reversed itself and stated that “it would unreasonably frustrate the intent of Congress to suppose that it framed the fee schedule in a way that made a category of costs . . . unrecoverable . . . without creating an express exemption.” <i>In the Matter of Assessment and Collection of Regulatory Fees for Fiscal year 2000</i> , 15 FCCR 14,478, 14,488 (Jul. 10, 2000). The D.C. Circuit affirmed on <i>Chevron</i> grounds. <i>Comsat Corp. v. FCC</i> , 283 F.3d 344 (D.C. Cir. 2002).

<i>Sea-Land Serv., Inc. v. Dep’t of Transp., et al.</i>		137 F.3d 640 (D.C. Cir. 1998)
Initial decision:	agency decision on	Dec. 10, 1996
Agency decision on		Later D.C. Circuit decision:
remand:		Mar. 13, 1998
Language at issue	Maritime shippers are prohibited from entering into certain shipping arrangements “except as otherwise required by the law of the United States.” 46 U.S.C. app. § 1709(c)(6).	
Agency view	“Without specific authorization,” the agency does not have authority to exempt carriers from the statute by issuing orders allowing the prohibited shipping arrangements. 137 F.3d at 646. Such orders are not “the law of the United States” under the statute.	
D.C. Cir. reasoning	Administrative orders may certainly be considered “law” in other contexts, and therefore the text does not per se restrict the agency’s authority to issue orders exempting carriers. And the “erroneous belief [that the agency did not have the authority] was the sole basis for the modification of the orders.” 137 F.3d at 644–46.	
Vacate / remand?	Vacate the modification orders, thus reinstating the original agency orders.	
Post – remand history	No further litigation.	

<i>Alarm Indus. Communs. Comm. v. FCC</i>		131 F.3d 1066 (D.C. Cir. 1997)
Initial decision:	agency decision on	Mar. 25, 1997
Agency decision on		Later D.C. Circuit decision:
remand:		Dec. 30, 1997
Language at issue	The statute prohibited Ameritech Corporation from “acquir[ing] any equity interest in, or obtain[ing] financial control of, any unaffiliated alarm monitoring service entity” for a certain period of time. 47 U.S.C. § 275(a)(2).	
Agency view	The agency “thought the word ‘entity’ in this clause had a clear and precise meaning—it included only an object with a separate legal existence such as a corporation.” 131 F.3d at 1067. “Ameritech therefore could . . . purchase alarm monitoring assets organized and operated in an unincorporated division of Circuit City Stores, Inc.” <i>Id.</i>	
D.C. Cir. reasoning	The agency based its “plain meaning” argument on the <i>Black’s Law Dictionary</i> definition of “entity,” but “[w]hen the purported ‘plain meaning’ of a statute’s word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity.” 131 F.3d at 1068. Interpreting the	

	statute in this manner “render[s] the statute senseless,” <i>id.</i> , because this would allow regulated companies to purchase alarm services divisions of larger companies, but not the larger companies themselves. Other dictionaries indicate definitions that “lead to different or uncertain outcomes.” <i>Id.</i> at 1069. The statute “presents a puzzle, and the wooden use of a dictionary cannot solve it.” <i>Id.</i> at 1070.
Vacate / remand?	Vacate.
Post – remand history	On remand, the agency interpreted the statute broadly to “include[] any organizational unit such as Circuit City’s Home Security Division,” which interpretation “is more consistent with the Congressional purpose underlying section 275(a)(2).” <i>In the Matter of Enforcement of Section 275(a)(2) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Against Ameritech Corp.</i> , 13 FCCR 19,046 at ¶¶ 10–18 (Sep. 25, 1998). The agency therefore “f[ou]nd that Ameritech’s transaction with Circuit City violated section 275(a)(2).” <i>Id.</i> at ¶ 31.

<i>City of Los Angeles Dep’t of Airports v. U.S. Dep’t of Transp.</i>		103 F.3d 1027 (D.C. Cir. 1997)			
Initial decision:	agency	Jun. 1995	D.C.	Circuit	Jan. 17, 1997
Agency decision on remand:	decision	on Dec. 23, 1997	Later decision:	D.C. Circuit	Feb. 5, 1999
Language at issue	A state may charge “reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.” 49 U.S.C. § 40116(e)(2).				
Agency view	The statute “mandates the use of historic cost valuation to the exclusion of every other method of valuing land that is to be included in the landing fee base rate.” 103 F.3d at 1032.				
D.C. Cir. reasoning	“[T]he Court [has n]ever held that historic cost represents the only true measure of cost. . . . Nothing in the [statute] . . . prescribes an accounting rather than an economic conception of cost in airport ratemaking.” 103 F.3d at 1032.				
Vacate / remand?	Remand.				
Post – remand history	“As before, the [agency] held that the 1993 and 1995 fees should be set aside because it was unreasonable for the City to recover its claimed ‘opportunity cost.’ . . . But this time the [agency] rested its decision explicitly on policy grounds.” <i>City of Los Angeles, et al. v. U.S. Dep’t of Transp., et al.</i> , 165 F.3d 972 (D.C. Cir. 1999) (citing <i>Los Angeles Int’l Airport Rates Proceeding and Second Los Angeles Int’l Airport Rates Proceeding (Remand Decision)</i> , Order 97-12-31 (December 23, 1997)). The D.C. Circuit denied the City of Los Angeles’ petition for review, <i>City of Los Angeles</i> , 165 F.3d at 980, and denied the petition for rehearing en banc. <i>City of Los Angeles v. U.S. Dep’t of Transp.</i> , 179 F.3d 937 (D.C. Cir. 1999). The Supreme Court denied the City’s petition for certiorari. <i>City of Los Angeles v. Dep’t of Transp.</i> , 120 S.Ct. 786 (2000).				

<i>Am. Petr. Inst. v. U.S. Environmental Protection Agency</i>		906 F.2d 729 (D.C. Cir. 1990)			
Initial decision:	agency	Aug. 17, 1988	D.C.	Circuit	Jun. 26, 1990
Agency decision on remand:	decision	on Aug. 19, 1991	Later decision:	D.C. Circuit	Jul. 8, 1994

remand:	decision:
Langu age at issue	The statute gives the agency the authority to establish treatment standards for “solid waste,” which is “any garbage, refuse, sludge from a waste treatment plant . . . and other discarded material.” 42 U.S.C. § 6903(27).
Agen cy view	“K061, a zinc-bearing listed hazardous waste that emanates from the primary production of steel in electric furnaces,” 906 F.2d at 734, “ceases to be a ‘solid waste’ when it arrives at a metal reclamation facility because at that point it is no longer ‘discarded material.’” <i>Id.</i> at 740. Therefore, the agency “determined that it lacked authority to establish any treatment standards for the . . . residue that results from the metals reclamation process,” <i>id.</i> at 734, based on <i>American Mining Congress v. EPA</i> , 824 F.2d 1177 (D.C. Cir. 1987).
D.C. Cir. reasoning	The agency “mistakenly concluded that our case law left it no discretion to interpret the relevant statutory provisions[.]” 906 F.2d at 741.
Vacat e / remand?	Vacate and remand to agency for consideration.
Post – remand history	The agency interpreted the statute so as to “bring K061 slag within the regulatory scope” of the statute. <i>Steel Manufacturers Ass’n v. EPA</i> , 27 F.3d 642, 643–44 (D.C. Cir. 1994) (citing <i>Land Disposal of Electronic Arc Furnace Dust (K061)</i> , 56 Fed. Reg. 41, 164 (Aug. 19, 1991)). The D.C. Circuit affirmed. <i>Steel Manufacturers Ass’n</i> , 27 F.3d at 644, 649.

<i>Baltimore & O. R. Co. v. Interstate Commerce Comm’n</i>		826 F.2d 1125 (D.C. Cir. 1987)
Initial decision:	agency decision on	Jun. 26, 1986 Jan. 19, 1988
remand:		D.C. Circuit Later D.C. Circuit decision:
Langu age at issue	To approve a railroad abandonment, the ICC must “find[] that the present or future public convenience and necessity require or permit the abandonment or discontinuance.” 49 U.S.C. § 10903(a).	
Agen cy view	ICC not allowed to consider, in making required abandonment findings, whether there are potential buyers/subsidizers who could continue operation of the track.	
D.C. Cir. reasoning	There is “broad delegation language” in the statute, and “[n]othing in the legislative history . . . suggests a congressional intent so to restrict the Commission’s abandonment decision.” 826 F.2d at 1128. The ICC also misinterpreted an ICC precedent.	
Vacat e / remand?	Vacate.	
Post – remand history	The ICC initiated notice and comment proceedings on these questions. The abandonment proceeding was eventually dismissed because “the line involved in this abandonment was sold to a new entity for continued rail operations.” <i>Buffalo, Rochester and Pittsburgh Railway Company and the Baltimore and Ohio Railroad Company—Abandonment and Discontinuance of Service in Indiana County, PA</i> , 1989 WL 239582 (I.C.C.).	

<i>Phillips Petr. Co. v. Fed. Energy Regulatory Comm’n</i>		792 F.2d 1165 (D.C. Cir. 1986)
Initial decision:	agency	Aug. 27, 1985
		D.C. Circuit Jun. 13, 1986
		decision:

Agency decision on remand:	Aug. 10, 1987	Later decision:	D.C. Circuit	Feb. 24, 1989
Language at issue	The statute establishes the natural gas price ceiling as “the just and reasonable rate . . . established by the Commission which was (or would have been) applicable to . . . such natural gas on April 20, 1977.” 15 U.S.C. § 3314(b)(1)(A)(i) (1982).			
Agency view	The holding in <i>Public Serv. Comm’n of N.Y. v. Mid-Louisiana Gas Co.</i> , 463 U.S. 319 (1983) bound the agency to apply national rates to both pipeline- and independently-produced natural gas.			
D.C. Cir. reasoning	The <i>Mid-Louisiana</i> passage on which the agency relied was dicta, and mandates neither rate parity nor Phillips’ preferred interpretation. 792 F.2d at 1171.			
Vacate / remand?	Remand.			
Post – remand history	On remand, the agency issued an order interpreting the statute and “reaffirm[ing] the Commission’s [1985] conclusion that pipeline production previously priced on a cost-of-service basis is now subject to the same ceiling price as gas sold by independent producers.” <i>First Sales of Pipeline Production Under Section 2(21) of the Natural Gas Policy Act of 1978: First Sales by Affiliates</i> , 40 FERC P 61174, 1987 WL 117821 (Aug. 10, 1987). FERC denied the petition for rehearing. <i>First Sales of Pipeline Products Under Section 2(21) of the Natural Gas Policy Act of 1978: First Sales by Affiliates</i> , 42 FERC p 61145, 1988 WL 243722 (Feb. 3, 1988). The D.C. Circuit affirmed on <i>Chevron</i> grounds. <i>Midwest Energy, Inc. v. Fed. Energy Regulatory Comm’n</i> , 870 F.2d 660 (D.C. Cir. 1989).			

<i>Prill v. NLRB</i>		755 F.2d 941 (D.C. Cir. 1985)		
Initial agency decision:	Jan. 6, 1984	D.C. decision:	Circuit	Feb. 26, 1985
Agency decision on remand:	Sep. 30, 1986	Later decision:	D.C. Circuit	Dec. 31, 1987
Language at issue	The statute gives employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities.” 29 U.S.C. § 157.			
Agency view	The statutory language mandates that “concerted activities” be those “engaged in with or on the authorization of other employees, and not solely by or on behalf of the employee himself.” 755 F.2d at 946.			
D.C. Cir. reasoning	The agency had discretion to interpret “concerted activities” broadly.			
Vacate / remand?	Remand to the agency for interpretation.			
Dissent	The agency’s interpretation is compelled by the plain meaning of “concerted,” and even if not textually required, the agency’s “interpretation of the provision is reasonable and should be upheld without hesitation.” 755 F.2d at 957–66 (Bork, J., dissenting).			
Post – remand history	The Supreme Court denied Meyers Industries, Inc.’s petition for certiorari. <i>Meyers Indus., Inc. v. Prill</i> , 106 S.Ct. 313 (Nov. 4, 1985). On remand, the agency interpreted the statute narrowly, so as to have the same effect as the original 1984 decision. <i>Meyers Industries, Inc. and Kenneth P. Prill</i> , 281 NLRB No. 118 (Sep. 30, 1986). Based on <i>Chevron</i> , the D.C. Circuit affirmed the agency’s interpretation. <i>Prill v. NLRB</i> , 835 F.2d 1481 (D.C. Cir. 1987). The U.S. Supreme			

	Court again denied the petition for certiorari. <i>Meyers Indus., Inc. v. NLRB</i> , 108 S.Ct. 2847 (1988).
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