

CHEVRON'S CONFLICT WITH THE ADMINISTRATIVE PROCEDURE ACT

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“[T]he reviewing court shall . . . interpret . . . statutory provisions.”¹

“[T]he court does not simply impose its own construction on the statute.”²

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¹ 5 U.S.C. § 706 (2012).

² *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

I. INTRODUCTION

This article elaborates on one aspect of Steve Johnson's discussion in *Preserving Fairness in Tax Administration in the Mayo Era*,³ namely, his discussion of problems with the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴ and the two-part test that decision announced for evaluating the validity of agency interpretations of statutory provisions. In *Mayo*,⁵ the Supreme Court confirmed that *Chevron* applies in tax cases just as it does in all other areas of federal law. Consequently, the tax world must now come to terms with *Chevron*, nearly thirty years after everyone else.⁶

Johnson lists several significant problems with *Chevron*. One problem is that *Chevron* "lacks an adequate theoretical foundation" for its central premise that by leaving ambiguous gaps in statutory provisions, Congress implicitly gave agencies the authority to fill these gaps.⁷ Another problem is that *Chevron* "raises a substantial issue of legitimacy" by ignoring the statutory standards for judicial review of agency action set forth since 1946, long before *Chevron*, in the Administrative Procedure Act,⁸ such as the standard in section 706(2)(A) that requires a reviewing court to set aside agency action that is "arbitrary" or "capricious."⁹

I fully agree with these criticisms of *Chevron*. In addition, an even more fundamental conflict between *Chevron* and the APA is that *Chevron* also ignored the provision in section 706 of the APA requiring that, when a court reviews agency action, "the reviewing court shall . . . interpret . . . statutory provisions." By permitting agencies, under step two of *Chevron*'s two-part test, to adopt interpretations of statutory provisions that a court reviewing the agency's interpretation is required to accept, even if the reviewing court concludes the agency's interpretation is not the best reading of the statutory provision, *Chevron* is in direct and irreconcilable conflict with this APA requirement that "the reviewing court shall . . . interpret . . . statutory provisions." This APA requirement clearly assigns the

³ Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269 (2012).

⁴ 467 U.S. 837 (1984).

⁵ *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011).

⁶ For a discussion of the meaning of *Mayo*, see Patrick J. Smith, *Life After Mayo: Silver Linings*, 131 TAX NOTES 1251 (June 20, 2011).

⁷ Johnson, *supra* note 3, at 281.

⁸ *Id.* at 283.

⁹ 5 U.S.C. § 706(2)(A) (2012).

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responsibility for interpreting statutory provisions entirely to courts, and assigns no role in statutory interpretation to agencies.

This conflict between *Chevron* and section 706 of the APA is clear. Consequently, it might have been expected that this conflict would have received extensive discussion in commentary on *Chevron*, particularly in light of the substantial discussion other aspects of *Chevron* have received. However, this conflict between *Chevron* and section 706 of the APA has received surprisingly little serious discussion. This conflict has been acknowledged by various commentators on *Chevron*, but those commentators have almost invariably given this conflict little serious discussion and have instead chosen to focus on either criticizing, or, more frequently, defending, *Chevron* on other grounds, ordinarily policy grounds or constitutional grounds, or else on simply discussing the application of *Chevron* without considering the question of whether the case was correctly decided.

The few discussions of *Chevron* that have given more than cursory attention to this conflict with section 706 of the APA have not succeeded in resolving the conflict, but have instead mistakenly concluded the conflict is resolved by the existence of a general statutory authorization for the agency to adopt regulations having the force of law. However, the APA itself, in the provisions establishing notice and comment requirements for rulemaking, recognizes that agencies generally have such authority, in requiring that ordinarily agencies must follow these notice and comment procedures in issuing rules, in order for the rules to be valid, but exempts “interpretative rules” from those requirements, precisely because, under section 706, it is courts, rather than agencies, that have the exclusive authority to adopt interpretations of statutory provisions that have the force of law.

The few discussions of *Chevron* that have attempted to resolve this direct conflict between *Chevron* and section 706 of the APA have at best succeeded only in resolving a related, but much less direct, conflict between *Chevron* and another requirement in section 706, namely, the requirement that “the reviewing court shall decide all relevant questions of law.” This reconciliation contends that a court follows the APA requirement to “decide all relevant questions of law” by deciding, after applying the *Chevron* test, to accept the agency’s interpretation. While this way of reconciling *Chevron* with this general requirement in the APA is less than completely satisfying, nevertheless, resolution of that less direct conflict would in any event not resolve the conflict between *Chevron* and the much more specific requirement that “the reviewing court shall . . . interpret . . . statutory provisions.”

Despite the existence of this clear conflict between *Chevron* and section 706 of the APA, I agree with Johnson that the possibility the Supreme Court will completely overrule *Chevron* is remote,¹⁰ because of the substantial number of cases involving issues of statutory interpretation where *Chevron* has been applied, and because of the uncertainty that would be created regarding the issues decided in all those cases if *Chevron* were overruled. Nevertheless, even without a complete overruling of *Chevron*, it is possible that drawing judicial attention to the conflict between *Chevron* and this requirement in the APA might at least prompt a modification in the application of each of *Chevron*'s two steps that would bring each step closer to compliance with this requirement in the APA that "the reviewing court shall . . . interpret . . . statutory provisions" than is currently the case.

II. THE CONFLICT

Sections 701 through 706 of the APA contain various rules concerning judicial review of agency action. Section 706(2) lists six standards for such review, including the arbitrary and capricious standard in section 706(2)(A).¹¹ Before listing those six standards of review, however, section 706 begins as follows:

To the extent necessary to decision and when presented, *the reviewing court shall* decide all relevant questions of law, *interpret* constitutional and *statutory provisions*, and determine the meaning or applicability of the terms of an agency action.¹²

Thus, among other requirements, this provision requires that "the reviewing court shall . . . interpret . . . statutory provisions." There is a striking contrast between the standards for judicial review of agency action listed in section 706(2), such as the arbitrary and capricious standard in section 706(2)(A) or the substantial evidence standard in section 706(2)(E), which assign both agencies and reviewing courts some role in determining the outcome of cases, and the requirements in this first sentence of section 706, which clearly assign no role of any kind to agencies in deciding the types of issues covered by this sentence, including the interpretation of statutory provisions, but instead assign exclusive authority over those issues to the reviewing court.

¹⁰ See Johnson, *supra* note 3, at 283-284.

¹¹ The first four standards of review apply to judicial review of all agency action, while the last two standards of review are more limited in their application. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971).

¹² 5 U.S.C. § 706 (2012) (emphasis added).

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As the commentators that will be discussed below have noted, *Chevron* made no reference to this requirement in section 706 that “the reviewing court shall . . . interpret . . . statutory provisions,” or to any other provision of the APA, even though *Chevron* clearly involved precisely the same types of issues that are addressed by the judicial review provisions of the APA, particularly this requirement in the first sentence of section 706. In announcing its two-part test for evaluating the validity of agency interpretations of statutory provisions, *Chevron* stated that test 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 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.¹³

A footnote to the statement in the passage quoted above, which describes step one of the two-part test as being that “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress,” provides the following elaboration on that description of step one:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.¹⁴

Thus, under *Chevron*, when a court reviews an agency’s interpretation of a statutory provision, if the court, “employing traditional tools of statutory construction,” is not able to ascertain “that Congress had an

¹³ *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnotes omitted).

¹⁴ *Id.* at 843 n.9 (citations omitted).

intention on the precise question at issue” under step one of the test, then, under step two of the test, “the court does not simply impose its own construction on the statute.” Instead, the court is required by *Chevron* to accept the agency’s “permissible construction of the statute.”

Moreover, *Chevron* made clear that there may be more than one “permissible construction” of a statutory provision that a reviewing court is required to accept, under step two of the test, if the construction is adopted by an agency. Thus, the objective of *Chevron* step two is not to arrive at the *best* interpretation of the statutory provision, since there is necessarily *only one* best interpretation in any particular case, not multiple such interpretations. *Chevron* also made clear that a permissible agency interpretation of a statutory provision must be accepted, under step two, by a court reviewing the agency’s interpretation, even if the agency’s interpretation is not the interpretation the court would have adopted based on its own analysis:

The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.¹⁵

It is impossible to reconcile the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions” with *Chevron*’s holding that, under step two, a reviewing court must accept an agency’s “permissible construction of the statute” even if the agency interpretation is not “the reading the court would have reached if the question initially had arisen in a judicial proceeding.” If a reviewing court is required, as is the case under *Chevron*, to accept an agency interpretation that is reasonable, but that is not “the reading the court would have reached if the question initially had arisen in a judicial proceeding,” then the reviewing court is clearly not complying with the APA requirement that “the reviewing court shall . . . interpret . . . statutory provisions.”

Moreover, *Chevron* cannot be reconciled with this APA requirement that “the reviewing court shall . . . interpret . . . statutory provisions” by contending this APA requirement is inapplicable, or is satisfied, where the reviewing court concludes, under *Chevron* step one, that Congressional intent is not clear, or concludes, under *Chevron* step two, that the agency interpretation is reasonable. Section 706 of the APA does not say that a reviewing court interprets statutory provisions only in cases where Congressional intent is clear, or only in cases where the agency responsible for administering the statutory provision has not interpreted the provision in

¹⁵ *Id.* at 843 n.11 (citations omitted).

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a reasonable way. The APA does not attach any such qualifications, or any qualifications of any kind, to the requirement that “the reviewing court shall . . . interpret . . . statutory provisions.”

Where there has been no agency interpretation of a particular statutory provision, the reviewing court has no alternative but to interpret the provision based on the court’s own analysis, even though Congressional intent might not be clear. Section 706 does not suggest there is any difference in the application of the requirement that “the reviewing court shall . . . interpret . . . statutory provisions” depending on whether there has or has not been an agency interpretation of a particular provision.

Strong confirmation of the conclusion that section 706 of the APA means what it says in requiring that “the reviewing court shall . . . interpret . . . statutory provisions” is provided by the fact that the notice and comment requirements for rulemaking in section 553 of the APA provide an exemption from these requirements for “interpretative rules.”¹⁶ Ordinarily, under section 553, in order to adopt a rule, an agency must issue a notice of proposed rulemaking, must give interested persons an opportunity to submit comments on the proposed rule, and must give consideration to any such comments that are submitted before the agency issues a final rule.¹⁷ However, these requirements do not apply if the rule is an “interpretative” rule.

There is considerable confusion and uncertainty as to what rules are considered “interpretative rules” for purposes of this exemption from the APA’s notice and comment requirements. However, the issue of what rules constitute “interpretative rules” is illuminated by the relationship between the “interpretative rules” exemption in section 553 and the requirement in section 706 that “the reviewing court shall . . . interpret . . . statutory provisions.” An “interpretative” rule is, very straightforwardly, any rule that interprets a statutory provision. The confusion and uncertainty about the meaning of “interpretative rules” in section 553 are directly attributable to *Chevron*’s failure to follow the requirement in section 706 that it is *always* the reviewing court, not the agency, that has the exclusive authority and responsibility to interpret statutory provisions, so that, under section 706, agency interpretations of statutory provisions necessarily have no controlling force.

Since, under the plain meaning of section 706, agency interpretations of statutory provisions are *never* controlling on a reviewing court, it is appropriate that “interpretative rules” are exempt from the notice and comment requirements. There is no reason to require an agency to follow

¹⁶ 5 U.S.C. § 553(b)(3)(A) (2012).

¹⁷ 5 U.S.C. § 553(b), (c) (2012).

notice and comment procedures to adopt a rule when that rule could not, in any event, have the force of law. Even if an agency did follow notice and comment procedures in issuing an “interpretative” rule, nevertheless, in light of the section 706 requirement that “the reviewing court shall . . . interpret . . . statutory provisions,” the use of notice and comment procedures clearly could not make the agency interpretation reflected in such an “interpretative” rule controlling on a reviewing court.

The foregoing understanding of the significance of the notice and comment exemption for “interpretative” rules, and the relationship between that exemption and section 706, is confirmed by the legislative history of the APA. The Senate Judiciary Committee Print on the APA explained that one reason for exempting “interpretative rules” from the notice and comment requirements was that “‘interpretative’ rules – as merely interpretations of statutory provisions – are subject to plenary judicial review, whereas ‘substantive’ rules involve a maximum of administrative discretion.”¹⁸ Since “interpretative” rules are “subject to plenary judicial review” under section 706, there is no reason to subject such rules to the APA’s notice and comment requirements. Thus, it was not necessary for section 706 to say explicitly that “the reviewing court shall . . . interpret . . . statutory provisions, *even when the agency has issued a rule or regulation interpreting the provision,*” in light of the clear intent expressed in the section 553 exemption from the notice and comment requirements for “interpretative rules.”

Additional support for a plain meaning interpretation of the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions” is that section 706 treats the interpretation of statutory provisions the same way it treats the interpretation of constitutional provisions. An agency receives no deference for an interpretation of a constitutional provision. Section 706’s lack of differentiation between the role of the reviewing court in interpreting constitutional provisions and the role of the reviewing court in interpreting statutory provisions confirms that, under section 706, agencies are given no greater authority in interpreting statutory provisions than they are given in interpreting constitutional provisions, and agencies are given no authority in interpreting constitutional provisions.

Additional perspective on this conflict between *Chevron* and section 706 of the APA is provided by the fact that another requirement in the first sentence of section 706 of the APA is equally in conflict with Supreme Court case law, namely, the requirement that “the reviewing court shall . . .

¹⁸ STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON ADMIN. PROCEDURE 18 (Comm. Print 1945).

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determine the meaning and applicability of the terms of the agency action.”¹⁹ This requirement is clearly in conflict with the rule applied by the Supreme Court, in cases such as *Auer v. Robbins*, that courts must accept an agency’s interpretation of its own regulations unless that interpretation is “plainly erroneous or inconsistent with the regulation.”²⁰

There is no way to reconcile this Supreme Court rule with the section 706 requirement that “the reviewing court shall . . . determine the meaning and applicability of the terms of the agency action.” A reviewing court clearly does not “determine the meaning” of agency regulations when the court is *required to accept the agency’s determination* of the meaning of those regulations. A detailed discussion of that other conflict between Supreme Court authority and the APA is beyond the scope of this article. However, the existence of that parallel and equally clear conflict between section 706 of the APA and Supreme Court authority illustrates that the Supreme Court’s disregard in *Chevron* for the first sentence of section 706 of the APA was not an isolated occurrence.

III. DISCUSSIONS OF *CHEVRON* THAT ACKNOWLEDGE A CONFLICT BETWEEN *CHEVRON* AND THE APA

It might have been expected that since *Chevron* is so clearly in conflict with section 706 of the APA, this clear conflict would have received extensive discussion in the voluminous commentary on *Chevron*. Alternatively, if it could be demonstrated that there is some reason why this conflict between *Chevron* and section 706 is not real, it might have been expected that there would instead have been extensive discussion supporting that position. However, neither of these alternative expectations is met. Instead, this conflict between *Chevron* and section 706 has received surprisingly little serious discussion in the otherwise voluminous commentary on *Chevron*. Administrative law professors are undoubtedly aware of this conflict, but this awareness does not seem to have extended very far outside that group.

The following discussion identifies some of the commentary that has acknowledged the possibility that there might be a conflict between *Chevron* and section 706 of the APA. The purpose of this discussion is to show not only that the conflict has sometimes been acknowledged as representing a significant potential problem with *Chevron*, but also that, despite this acknowledgment, and despite attempts by a few commentators to resolve this conflict, this conflict has not been resolved.

¹⁹ 5 U.S.C. § 706 (2012).

²⁰ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

A. Sunstein

Cass Sunstein's discussion of *Chevron* is an example of a discussion that clearly acknowledges the conflict between *Chevron* and the requirement in section 706 of the APA that "the reviewing court shall . . . interpret . . . statutory provisions," without making any serious attempt to resolve that conflict, and that instead chooses to focus on defending *Chevron* on other grounds, in Sunstein's case, policy grounds.²¹ The purpose of Sunstein's article is to demonstrate that there are supposedly important reasons why the approach adopted in *Chevron* is desirable from a policy perspective. However, the fact that *Chevron* might possibly be viewed by some as desirable from a policy perspective does not eliminate the problem that is created for *Chevron* by Congress's expression of a contrary policy choice in section 706 of the APA.

After quoting this requirement in section 706 of the APA, Sunstein notes: "At first glance, this provision appears to reassert the understanding that questions of statutory interpretation must be resolved by courts, not the executive."²² His only immediate attempt, after making this statement, to explain why that first impression might not be correct is to note that *Chevron* was not the first post-APA Supreme Court decision to ignore this requirement in section 706 of the APA.²³ However, the fact that an error has been made more than once does not mean it ceases to be an error.

Sunstein continues: "Strikingly, the Court did not discuss the language or history of the APA."²⁴ However, he makes no attempt to defend *Chevron*'s "striking" failure to even mention the APA, despite the clear relevance of the APA to the issue decided in *Chevron*. He comes closest to an attempt to resolve the conflict between *Chevron* and section 706 of the APA in the following discussion:

In the years since *Chevron*, a consensus has developed on an important proposition, one that now provides the foundation for *Chevron* itself: The executive's law-interpreting power turns on congressional will. If Congress wanted to repudiate *Chevron*, it could do precisely that. . . . The view that the executive may "say what the law is" results not from any reading of statutory text, but

²¹ See Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006).

²² *Id.* at 2585.

²³ See *id.* ("Although many post-APA decisions seemed to embrace this understanding, there were important contrary indications, in which courts suggested that agency interpretations would be upheld so long as they were rational.") (footnotes omitted).

²⁴ *Id.* at 2586.

from a heavily pragmatic construction, by courts, of (nonexistent) congressional instructions.

In terms of the standard sources of law, *Chevron's* fiction is not at all easy to defend. As noted, the text of the APA appears to contemplate independent review of judgments of law. . . . The claim that agency adjudicators (or rule-makers) have interpretive authority is certainly weakened by the absence of any contemporaneous suggestions to that effect within Congress itself. . . .

To say that *Chevron* rests on a fiction, and one that does not clearly track congressional instructions, is to acknowledge that the Court's decision on the deference question involves judicial policymaking – subject to legislative override, to be sure, but not rooted in actual legislative judgments.²⁵

Sunstein's statement that “[i]f Congress wanted to repudiate *Chevron*, it could do precisely that” is an extremely weak defense of the position that there is some way of resolving the conflict between *Chevron* and the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions.” The fact that Congress could overrule a Supreme Court decision that ignored a provision of the APA that was directly on point by saying again what it already clearly expressed in section 706 does not excuse the Supreme Court's error, or transform that error into anything other than an error, especially in the case of a statute as fundamentally important as the APA.

However, Sunstein then more candidly acknowledges that the conflict simply cannot be resolved when he says that “[i]n terms of the standard sources of law, *Chevron's* fiction is not at all easy to defend,” and that *Chevron's* “decision on the deference question involves judicial policymaking . . . not rooted in actual legislative judgments.” To say that, despite the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions,” *Chevron's* allocation to agencies of the power to adopt authoritative interpretations of statutory provisions was “*not rooted* in actual legislative judgments,” rather than acknowledging that it was in *open conflict* with “legislative judgments,” is a considerable understatement. Nevertheless, despite the understated way of expressing it, this does represent a clear acknowledgment by Sunstein that the conflict between *Chevron* and section 706 of the APA cannot be resolved.

²⁵ *Id.* at 2589-2591 (footnotes omitted).

While Sunstein thus acknowledges the irreconcilable conflict between *Chevron* and section 706 of the APA, nevertheless, his defense of *Chevron* is based entirely on policy grounds. He contends that for various policy reasons it is preferable for agencies rather than courts to resolve ambiguities in statutory provisions. However, that policy-based defense of *Chevron* is irrelevant when Congress has clearly expressed a contrary policy choice in the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions.”

B. Other Commentators

Various other commentators have acknowledged the possibility that there might be a conflict between *Chevron* and section 706 of the APA without making any serious attempt to evaluate how significant the conflict might be. For example, Elizabeth Garrett states, “[a]rguably, Section 706 of the Administrative Procedure Act is a broad statement delegating that authority [to interpret statutory provisions] to courts, contrary to the rule adopted in *Chevron*,”²⁶ but makes no attempt to address the merits of the issue. Cynthia Farina poses the question without specifically referring to *Chevron* but likewise makes no attempt to answer it:

Prompted by the perception that the New Deal’s regulatory fervor had bred a chaotic and unaccountable world of administrative power, the APA represented a conscious congressional determination to strengthen judicial control over the administrative system. Should we therefore take section 706 at face value, as reflecting a general legislative understanding that courts would independently resolve questions of statutory meaning? Or are we to attribute to the enactors of section 706 the far subtler expectation that a reviewing court would frequently “interpret . . . statutory provisions” to mean “The agency shall decide what this means?”²⁷

In a footnote to this passage Farina states:

That section 706 *appears* to contemplate de novo judicial determination of questions of statutory meaning is generally acknowledged. This reading is supported by the section’s failure

²⁶ Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2640 (2003) (alteration added).

²⁷ Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 (1989) (footnotes omitted).

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to distinguish in any way between the interpretation of constitutional and statutory provisions, the former of which has always been subject to independent judgment.²⁸

Most recently, Gillian Metzger notes:

Chevron's requirement that courts defer to a permissible interpretation of an ambiguous statutory provision offered by the agency charged with its implementation stands in tension with the APA's instruction that courts "shall decide all relevant questions of law" and "interpret constitutional and statutory provisions."²⁹

However, she makes no serious attempt to resolve this "tension," and even seems to celebrate it.

C. Duffy

By far the most extensive discussion of the conflict between *Chevron* and the requirement in section 706 of the APA that "the reviewing court shall . . . interpret . . . statutory provisions" is the discussion by John Duffy.³⁰ His discussion is almost the only one where this conflict is the primary focus of the *Chevron* discussion, rather than being merely incidental to some other aspect of *Chevron*, ordinarily whether *Chevron* is sound on either policy grounds or constitutional grounds, or a consideration of *Chevron's* application without regard to whether the decision was correct.

Duffy's discussion of the conflict between *Chevron* and section 706 of the APA is part of his broader discussion of the tendency of the courts, particularly the Supreme Court, after the APA was enacted, to ignore or minimize the *statutory* judicial review provisions of the APA in favor of applying *judicially* developed principles regarding the scope of judicial review of agency action. His discussion of that broader judicial tendency represents essential reading for anyone who is seriously interested in the development of the law regarding standards for judicial review of agency action. Moreover, his broader discussion is essential to understanding how it could have happened that the Supreme Court not only ignored but also effectively overruled the APA when it established the *Chevron* two-part

²⁸ *Id.* at 473 n.85 (citations omitted; emphasis in original).

²⁹ Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300-01 (2012) (footnotes omitted).

³⁰ See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189-203 (1998).

test. Nevertheless, despite those extremely valuable aspects of his article, his attempt to resolve the conflict between *Chevron* and section 706 of the APA is unsatisfactory and unsuccessful.

Duffy begins his discussion of *Chevron* by noting: “The *Chevron* Court did not trouble itself to consider the APA or any other statutory authority.”³¹ Elaborating on this point, he says:

[T]he Court ignored the APA, even though the statute clearly governed and even though Section 706’s “Scope of Review” provisions would seem like a logical place to begin any analysis of the scope of the judicial review.³²

He continues:

Chevron was an APA case, so any attempt to justify its rule should begin with the APA. The doctrine runs into trouble immediately.

The first sentence of Section 706 of the APA requires a reviewing court to “decide all relevant questions of law” and to “interpret constitutional and statutory provisions.” The legislative history of the APA leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it passed the bill, the provision “requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions.”³³

He also notes that the exemption of “interpretative rules” from the notice and comment requirements for rulemaking in section 553 is consistent with the concept that all authoritative statutory interpretations are performed exclusively by the reviewing court and not by an agency:

The legislative history also indicates that Congress excepted “interpretative” rules from the APA’s notice and comment rulemaking procedures because it believed that “‘interpretative’ rules – as merely interpretations of statutory provisions – are subject to plenary judicial review.”³⁴

³¹ *Id.* at 189.

³² *Id.* at 191.

³³ *Id.* at 193-94 (footnotes omitted).

³⁴ *Id.* at 194 n.406 (citation omitted).

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Duffy's mistake in the foregoing passage is to say Congress "believed" that "interpretative" rules are "subject to plenary judicial review." In enacting the APA, Congress did not simply "believe" that "interpretative" rules are subject to plenary judicial review. Congress instead clearly *required* that such rules be subject to plenary judicial review by enacting the requirement in section 706 that "the reviewing court shall . . . interpret . . . statutory provisions."³⁵

Duffy correctly notes that the fact that section 706 treats the interpretation of statutory provisions in the same way it treats the interpretation of constitutional provisions provides further support that section 706 means what it says: "[T]he statute places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution, and courts never defer to agencies in reading the Constitution."³⁶

Duffy identifies one argument that he contends might potentially resolve the conflict:

There is one argument that does avoid a conflict between *Chevron* and Section 706. Under this view, *Chevron* is a presumption that, when a statute contains an ambiguity, it should be interpreted as implicitly delegating, to the administrative agency with jurisdiction over the statute, the lawmaking authority necessary to resolve the issue.³⁷

As Duffy notes, although with surprisingly little emphasis, and without quoting the relevant passage in the opinion, this "theory has a basis in *Chevron* itself."³⁸ What *Chevron* says on this point is as follows:

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an

³⁵ It is particularly surprising that Duffy would make this mistake since he criticizes the Attorney General's Manual on the APA, which was issued shortly after the APA was enacted, for making claims that the APA judicial review provisions merely codified existing practices. See Duffy, *supra* note 32, at 131-34.

³⁶ *Id.* at 194 (footnote omitted).

³⁷ *Id.* at 197.

³⁸ *Id.* at 197 n.423.

agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.³⁹

It is surprising that Duffy would treat such a significant and unsupported aspect of the *Chevron* opinion so casually.

Duffy rejects this attempt to reconcile *Chevron* with section 706 of the APA on the basis of a supposed implicit delegation of interpretative authority for several reasons.

The implicit delegation theory . . . seems in tension with § 559, which states that another statute may not be held to supersede or modify the requirements of the APA “except to the extent that it does so expressly.”⁴⁰

To elaborate on Duffy’s point, it is clearly untenable to contend that the *explicit* requirement in section 706 that “the reviewing court shall . . . interpret . . . statutory provisions” could be overruled by subsequent entirely *implicit* delegations to agencies of interpretative authority that are supposedly created when Congress merely leaves ambiguous gaps in statutory provisions. “A further problem is that the implicit delegation theory lacks any solid basis in actual congressional intent.”⁴¹ “Congress has no trouble writing express delegations to agencies when it wants. . . . Given the prevalence of such statutory delegations, it may be a major error to treat any ambiguity as a delegation to an agency.”⁴²

After having clearly identified the conflict between *Chevron* and section 706 of the APA, and after having properly rejected the implied delegation rationale as a way of resolving that conflict, Duffy attempts to reconcile *Chevron* with the APA on a different basis. However, his attempt is unsatisfactory and unsuccessful. His attempted reconciliation is based on the fact that the agency in *Chevron* had *explicit* statutory rulemaking authority. “The rulemaking power reconciles the result in *Chevron* with the APA.”⁴³

³⁹ *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 843-44 (1984) (footnotes and citations omitted).

⁴⁰ Duffy, *supra* note 32, at 198 n. 427.

⁴¹ *Id.* at 198 (footnote omitted).

⁴² *Id.* at 199.

⁴³ *Id.* at 199-200.

This view not only provides a statutory home for *Chevron* but also reconciles the doctrine with the APA: A reviewing court does decide all questions of law (as required by Section 706), but it may find that the statute confers on the agency a lawmaking power. The *Chevron* principle is then just a corollary of the delegated lawmaking theory – which the APA itself expressly recognizes in defining agency rulemaking as the power to “prescribe law” – coupled with the “elementary” canon of statutory construction that courts should construe statutes to harmonize all of their provisions. Because the rulemaking power authorizes the agency to supplement the statute with rules, the canon requires the reviewing court to try to harmonize the statutory provisions and the agency’s rules. If the language of the statute is ambiguous or flexible enough to accommodate the agency rules, the court must construe the statute to make the accommodation. If statutory language cannot be reconciled with the rules, the rules must fall because rulemaking authorizations usually do not allow agency regulations to modify the statute.⁴⁴

This attempt to reconcile *Chevron* with section 706 of the APA is unsatisfactory and unsuccessful. This argument might perhaps reconcile *Chevron* with the more general section 706 requirement that the reviewing court must decide all questions of law (“A reviewing court does decide all questions of law (as required by Section 706)”) but it does not reconcile *Chevron* with the much more specific section 706 requirement that “the reviewing court shall . . . interpret . . . statutory provisions.” The fact that Congress delegates to an agency the authority to promulgate rules with the force of law does not override the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions.” The exemption from the notice and comment requirements in section 553 of the APA for “interpretative rules” makes it clear that the fact that an agency has the authority to issue rules with the force of law is not inconsistent with the principle that when such an agency instead issues “interpretative rules,” namely, rules that interpret statutory provisions, such rules are exempt from the section 553 notice and comment requirements precisely because, under section 706, it is always the responsibility of the reviewing court, not the agency, to interpret statutory provisions.

Duffy’s attempt to reconcile *Chevron* with the notice and comment exemption for “interpretative rules” is also unsatisfactory:

⁴⁴ *Id.* at 202 (footnotes omitted).

Finally, the statutory version of *Chevron* explains how the 79th Congress could simultaneously believe that, while the APA would require reviewing courts to decide all questions of law independently, only agency “interpretive” rules would be subject to “plenary judicial review.” This otherwise puzzling legislative history merely shows Congress’s understanding that a delegation of lawmaking power to an agency would effectively limit the judicial role in determining the meaning of general statutory language.⁴⁵

The crucial second sentence in this passage simply assumes a conclusion but provides no analysis to support that conclusion, and in fact bears no relationship to the statement in the legislative history that it purports to explain. This attempt to reconcile *Chevron* with the exemption from the notice and comment rulemaking requirements for “interpretative rules” ignores the fact that the notice and comment requirements in section 553 clearly contemplate that agencies with statutory rulemaking authority can promulgate rules with the force of law when the notice and comment requirements are followed but that nevertheless, “interpretative rules” are not subject to the notice and comment requirements, even when such rules are issued by agencies with such statutory rulemaking authority.

Section 553 clearly contemplates that there are subjects that regulations can address that do not represent interpretations of statutory provisions, and that regulations addressing such non-interpretative subjects will have the force of law provided the notice and comment requirements are followed, and provided the agency has been given the statutory authority to issue regulations having the force of law. However, when agencies with statutory rulemaking authorization issue “interpretative” rules, namely, rules that interpret statutory provisions, those rules are not subject to the notice and comment requirements precisely because those rules cannot have the force of law, even when the notice and comment requirements are followed, in light of the requirement in section 706 that “the reviewing court shall . . . interpret . . . statutory provisions.”

D. Anthony

Robert Anthony’s general subject is essentially the same as Duffy’s, namely, that the Supreme Court has frequently misinterpreted and misapplied the APA.⁴⁶ Moreover, Anthony’s discussion seems to be the

⁴⁵ Id. at 202-03 (footnotes omitted).

⁴⁶ See Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1 (1996).

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only one other than Duffy's whose primary focus in discussing *Chevron* is the conflict between *Chevron* and section 706 of the APA. Anthony strongly criticizes *Chevron* for its failure to address section 706. After quoting the portion of section 706 that requires that "the reviewing court shall decide all relevant questions of law, [and] interpret ... statutory provisions," Anthony asks:

How can the *Chevron* doctrine be squared with § 706? This question glaringly confronted the Court in *Chevron*, but the Court just didn't get it. Whatever may be the merits of its doctrine, the Court irresponsibly made no effort to explain how its decision could stand alongside § 706. Indeed, it made no mention of § 706 whatsoever. In a democracy ever striving to achieve a rule of law, the Court's laconic stance seems arrogant and dysfunctional.⁴⁷

Despite this strong criticism of *Chevron* for failing to address section 706, Anthony nevertheless follows the same unsatisfactory path as Duffy in mistakenly concluding that *Chevron* can be reconciled with section 706:

In my opinion, the way to reconcile *Chevron* with § 706 is to recognize in each case that other statutes may bear upon the court's decisional duties under § 706. Since Congress in the APA has directed generally that the reviewing court interpret the statute, that court must interpret the statute unless Congress has directed otherwise through other statutes pertinent to the case. Statutes direct otherwise if they have delegated lawmaking authority to the agency and the agency has exercised it. Then the court under § 706 interprets those statutes and determines the effect of the agency's action under them.⁴⁸

The manner in which Anthony attempts to resolve the conflict is the same as Duffy's and fails for the same reasons Duffy's fails.

E. Manning

John Manning's discussion of *Chevron* is incidental to his primary focus, which is not the fact that reviewing courts are required under *Chevron* to accept agency interpretations of statutory provisions but rather the fact that, under a separate line of Supreme Court cases, reviewing courts are required to accept agency interpretations of the agency's own

⁴⁷ *Id.* at 24.

⁴⁸ *Id.*

regulations.⁴⁹ His brief discussion of *Chevron* is focused primarily on defending *Chevron* as constitutionally justified. It is surprising that even though he strongly contends that requiring courts to accept agency interpretations of the agency's own regulations is unsound, he says almost nothing about the provision in section 706 that confirms that it is courts, rather than agencies, that are to make the authoritative determinations of the meaning of agency regulations, and of all other types of agency action, namely, the provision requiring that "the reviewing court shall . . . determine the meaning and applicability of the terms of the agency action."

Manning's acknowledgment of section 706 comes in the context of his discussion of *Marbury v. Madison*:⁵⁰

Commentators have frequently observed that *Chevron*'s concept of "binding deference" is in apparent tension with the understanding, announced in *Marbury v. Madison*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is." If law interpretation "is the proper and peculiar province of the courts," why should a court ever decide a case or controversy based on a reading of the law with which it disagrees? In particular, why would a court do so in the administrative context, when the APA further instructs reviewing courts to "decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action"?⁵¹

Like Duffy, Manning believes the conflict between *Chevron* and section 706 is resolved by the fact that Congress has given the agency authority to prescribe rules implementing the statute:

When a statute merely confers authority upon an agency, a reviewing court interprets the statute by determining the scope of the authority assigned If a court refuses to accept (defer to) the agency's reasonable interpretation . . . it usurps the norm-elaboration responsibility that Congress has committed to the agency's "judgment."⁵²

⁴⁹ See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

⁵⁰ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁵¹ Manning, *supra* note 51, at 621 (footnotes omitted).

⁵² *Id.* at 622-23 (footnotes omitted).

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However, he stacks the deck by using as an example a statute where “Congress instructs the EPA to reduce hazardous pollution to a level that ‘in [its] judgment provides an ample margin of safety to protect the public health.’”⁵³ This is clearly not the type of case encompassed by *Chevron*’s principle that Congress *implicitly* delegates to agencies authority to interpret statutory provisions merely by leaving ambiguous gaps in those provisions. Instead, Manning’s example involves a statutory provision that *explicitly* gives an agency the authority and responsibility to make a specified determination based on the agency’s “judgment.” A statute that is drafted in this way clearly gives the agency broader authority to determine what is an “ample margin of safety” than would be the case if there were no statutory reference to the agency’s “judgment.” A statute that directs an agency to determine what, “in its judgment,” produces a certain result clearly prescribes that it is the agency, and not a reviewing court, that is to make the specified determination, subject to judicial review under the arbitrary and capricious standard of section 706(2)(A), but not subject to the same degree of judicial review under the requirement in section 706 that “the reviewing court shall . . . interpret . . . statutory provisions” as would be the case if there were no statutory reference to the agency’s “judgment.”

The problem with Manning’s use of this example to resolve the conflict between *Chevron* and section 706 of the APA is that the overwhelming majority of the statutes to which *Chevron* applies are not drafted in this way. It is simply untenable to use an example like this to justify *Chevron*’s mandate that a reviewing court must accept agency interpretations of statutory provisions in the very different situation where the agency is merely given general authority to provide rules to implement the statute, and where there is simply an ambiguity in a particular substantive provision of the statute that says nothing explicit about the agency’s authority to provide a resolution of the ambiguity. The fact that it is possible to draft a provision that explicitly prescribes that it is the agency, rather than the court, that has the authority to make a specified determination based on the agency’s “judgment” clearly does not mean that provisions that *are not* drafted in that way have the same meaning as if they were.

F. Seidenfeld

Mark Seidenfeld’s discussion of *Chevron* focuses on the question of how *Chevron* can be justified on constitutional grounds.⁵⁴ As a preliminary to that discussion, he rejects the possibility that *Chevron* can be justified as

⁵³ *Id.* at 622 (footnote omitted).

⁵⁴ See Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273 (2011).

a matter of Congressional intent. In that part of his discussion, he notes the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions.” The most significant aspect of Seidenfeld’s discussion for purposes of the present issue is that he correctly identifies why Duffy is wrong to conclude that *Chevron* can be reconciled with this requirement in section 706 on the basis of an explicit delegation to an agency of the authority to adopt rules having the force of law. The most significant weakness in his discussion for purposes of the present issue is the fact that his justification of *Chevron* on constitutional grounds fails to explain how that justification can be reconciled with the clear expression of Congressional intent in section 706 that is in direct conflict with *Chevron*.

Seidenfeld recognizes the conflict between *Chevron* and section 706:

One might contend that by failing to attend to this issue Congress implicitly means to give agencies primary responsibility for clarification of statutory meaning when the statute assigns agencies the responsibility to make decisions that require resolving statutory gaps and ambiguities. But, prior to *Chevron*, Congress legislated against a background understanding that the courts have ultimate judicial responsibility to say what the law is. Thus, this contention is difficult to maintain for pre-*Chevron* statutes.

For post-*Chevron* statutes, the contention is still difficult to support because Congress specifically provided in the Administrative Procedure Act (APA): “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions” Hence, even statutes enacted post-*Chevron* would seem to be bound by Congress vesting ultimate interpretive authority in the reviewing court, unless the statute explicitly specified that the agency was to have such authority. Virtually no statutes do so.⁵⁵

However, he makes no attempt to resolve this conflict.

On the issue of whether *Chevron* can be justified as a matter of Congressional intent, Seidenfeld criticizes the Supreme Court’s decision in *United States v. Mead Corp.*⁵⁶ for confusing Congressional intent that an agency has the authority to issue regulations having the force of law with Congressional intent that an agency has the authority to adopt binding

⁵⁵ *Id.* at 278-79 (footnotes omitted).

⁵⁶ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

interpretations of statutory provisions.⁵⁷ While I completely agree with Seidenfeld that Congressional intent on these two points must be considered distinct, and that when Congress authorizes an agency to issue regulations with the force of law, Congress does not thereby also authorize the agency to adopt controlling interpretations of statutory provisions, nevertheless, I do not agree with his reliance on this distinction as a basis for such a strong criticism of *Mead*.

Mead took as its starting point *Chevron*'s erroneous holding that some agency interpretations of statutory provisions can have the force of law by reason of an implicit delegation of interpretative authority through the existence of ambiguous gaps in the statutory provision. By limiting the circumstances in which an agency interpretation of a statutory provision can have the force of law to those circumstances where Congress has given the agency the authority to act with the force of law in applying the statute, and where, in addition, the agency, in adopting the particular interpretation of a statutory provision that is at issue, intended to exercise its authority to act with the force of law, and followed the procedures necessary to exercise that authority, *Mead* at least moved in a better direction than where the law had previously been, even if not to a correct ending point. The possibility that an agency could adopt an interpretation of a statutory provision that would have the force of law under *Chevron* even though Congress has not given the agency the authority to act with the force of law, or even though an agency to which Congress has given that authority has not followed the procedures necessary for its actions to have the force of law, is unquestionably far less justifiable than what *Mead* prescribed, even though what *Mead* prescribed still falls far short of attaining consistency with section 706 of the APA.

Seidenfeld criticizes another commentator, Thomas Merrill, on the same ground he criticizes *Mead*, namely, for "substituting intent to authorize the agency to act with the force of law for intent to grant the agency interpretive primacy to resolve ambiguities and gaps in the statute, and the two intents do not necessarily coincide."⁵⁸ Seidenfeld likewise criticizes Duffy on the same grounds that he criticizes Merrill:

⁵⁷ See Seidenfeld, *supra* note 56, at 279 ("*Mead* speaks of actual congressional intent to authorize an agency to act with the force of law as a proxy for intent to designate the agency as the primary interpreter of ambiguous statutes.>").

⁵⁸ *Id.* at 283. The commentary by Merrill and a co-author that Seidenfeld criticizes is not discussed here because it does not refer to the requirement in section 706 of the APA that "the reviewing court shall . . . interpret . . . statutory provisions" but only to the more general requirement that "the reviewing court shall decide all relevant questions of law" and because it explicitly disavows any consideration of whether *Chevron* might not be correct. See

The fundamental problem with both Merrill's and Duffy's inferences – that statutory ambiguity along with authorization for agencies to act with force of law evidences intent to grant agencies interpretive primacy – is that they depend on an oversimplified set of choices for legislative intent. . . .

First, it is not only possible, but in most instances quite likely that Congress simply has no intent about which institution enjoys interpretive primacy over any particular issue. Because Merrill and Duffy rely on an affirmative congressional intent to override the explicit provision of the APA granting interpretive primacy to courts, on judicial review, a simple lack of intent is not sufficient to support their justification for invoking *Chevron*.⁵⁹

Seidenfeld's conclusion as to why this approach cannot provide a proper justification for *Chevron* is entirely correct:

One can read authority to act with the force of law as implying a designation of interpretive primacy only if one engages in the semantic sleight of hand of equating creating policy within the bounds of the statute with resolving gaps and ambiguities in the statute. But they are not the same. Filling in gaps and clarifying ambiguities means resolving issues about what the statute requires and prohibits, while creating policy-based rules means adding legal requirements that neither permit what the statute prohibits nor prohibit what the statute requires.⁶⁰

Having concluded that *Chevron* cannot be justified on the basis of Congressional intent, relying in part on the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions,” Seidenfeld then devotes the majority of his discussion to the contention that *Chevron* can instead be justified on the basis of constitutional principles. Nowhere in that discussion, however, does he attempt to reconcile his position on this point with this requirement in section 706 of the APA. That failure might perhaps be excusable if he contended that *Chevron* is *required* on constitutional grounds. However, he clearly does not make that contention, noting instead that his “understanding of *Chevron* does not prohibit Congress from taking

Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 834-35 (2001).

⁵⁹ *Id.* at 285-86 (footnotes omitted).

⁶⁰ *Id.* at 288 (footnotes omitted).

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interpretive primacy from agencies and giving it back to the courts.”⁶¹ The fact that *Chevron* might be justified on *constitutional* grounds, *in the absence* of Congressional direction to the contrary, does not eliminate the *statutory* problem caused for *Chevron* by the fact that it is in conflict with the Congressional intent to the contrary expressed in section 706 of the APA.

Perhaps Seidenfeld has some way of reconciling the clear requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions” with his contention that *Chevron's* assignment of interpretive authority to agencies is proper on constitutional grounds because of the supposed absence of a clear Congressional statement that the courts have that authority. However, any such potential reconciliation is not presented in his discussion of the supposed constitutional justification for *Chevron*.

IV. APPLYING *CHEVRON* IN LIGHT OF THE APA

Thus, *Chevron's* holding that under step two of its two-part test, a court reviewing an agency interpretation of a statutory provision must accept that interpretation if it is reasonable, even if the reviewing court concludes the agency's interpretation is not the best interpretation, is clearly in conflict with the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions.” Moreover, the commentary that has attempted to resolve this conflict has not succeeded in that attempt.

Nevertheless, in light of the very large number of cases that have applied the *Chevron* test, and the uncertainty that would be created regarding the issues resolved in all those cases if *Chevron* were overruled, it seems unlikely that the Supreme Court would be receptive to an argument that *Chevron* should be overruled because of this conflict between *Chevron* and section 706 of the APA. However, it is possible the Court might be more receptive to an argument that this requirement in section 706 of the APA should at least be taken into account in determining how each of the two steps in the *Chevron* test is applied.

Step one of the *Chevron* test provides a particularly appropriate place to use section 706 to resolve uncertainty about the proper application of the test. This uncertainty exists because *Chevron* used a variety of different and seemingly inconsistent formulations to describe step one. *Chevron's* use of these different formulations has created uncertainty about how step one should be applied. Some of these formulations of step one could be read to suggest that a high degree of certainty about Congressional intent is

⁶¹ *Id.* at 292 (footnote omitted).

required in order to resolve an issue of statutory interpretation at step one. For example, *Chevron* said step one asks whether “Congress has directly spoken to,”⁶² or “directly addressed,”⁶³ “the precise question at issue” and whether there is an “unambiguously expressed intent of Congress”⁶⁴ or whether instead “the statute is silent or ambiguous with respect to the specific issue.”⁶⁵ Some courts have read these formulations as requiring something like an explicit statutory statement directly addressing the point at issue as a prerequisite to deciding an issue of statutory interpretation at step one.

In contrast, however, *Chevron* also described step one in different terms that suggest explicit statutory statements are not required to resolve an issue at step one. *Chevron* said step one asks whether “Congress had an intention on the precise question at issue” that a court can “ascertain” by “employing traditional tools of statutory construction.”⁶⁶ It would not be necessary to apply “traditional tools of statutory construction” if it were the case that *Chevron* requires an explicit statutory statement on the point at issue in order to decide an issue at step one.

The reference to “traditional tools of statutory construction” occurs in a footnote to the phrase “the unambiguously expressed intent of Congress.” Consequently, *Chevron*’s use of the terms “ambiguous” and “unambiguous” to characterize the two possible conclusions of the step one inquiry about the nature of the statutory language at issue should be viewed simply as shorthand terms to describe the conclusion reached by an inquiry that involves careful application of “traditional tools of statutory construction” rather than as conclusions that can be reached by simply examining the statutory language in isolation.

If the application of step one of the *Chevron* test is informed by an awareness of the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions,” that awareness would clearly counsel against requiring a court to have anything like complete certainty about Congressional intent before reaching the conclusion that a particular issue of statutory interpretation should be resolved at step one. That awareness would counsel instead in favor of requiring courts to make a robust and careful effort to decide *every* issue at step one, before reluctantly reaching the conclusion, in rare cases, that it is impossible to determine Congressional intent with respect to the particular issue.

⁶² *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842 (1984).

⁶³ *Id.* at 843.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 843 n.9.

Applying step one with an awareness of section 706 is clearly consistent with the requirement in *Chevron* that “traditional tools of statutory construction” must be applied at step one in the attempt to determine Congressional intent. For example, twenty years after *Chevron*, the Supreme Court emphasized that step one of the *Chevron* test requires a vigorous effort to determine Congressional intent:

Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.⁶⁷

Thus, application of *Chevron* could be brought closer to compliance with section 706 of the APA, without completely overruling the decision, by clarifying that step one requires a considerably more robust and careful interpretative effort from the reviewing court than has been applied by some courts, and that *Chevron* does not require anything like complete certainty about Congressional intent in order to decide an issue at step one.

While step one is the part of the *Chevron* test where an awareness of the requirement in section 706 of the APA that “the reviewing court shall . . . interpret . . . statutory provisions” would be most appropriate, nevertheless, application of step two of the *Chevron* test could also be made more robust by such an awareness. One potential clarification of step two that would be helpful would be for the Supreme Court to endorse the rule applied by the D.C. Circuit that where an agency adopts a particular interpretation of a statutory provision based on the agency’s conclusion that this interpretation is required by the statute, but the reviewing court disagrees with that conclusion, the agency’s interpretation must be rejected by the reviewing court at step two because it is based on incorrect reasoning.⁶⁸

In addition, while the Supreme Court’s recent confirmation, in *Judulang v. Holder*, that step two should be viewed as equivalent to the APA’s arbitrary and capricious standard⁶⁹ is a move in the right direction

⁶⁷ *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004).

⁶⁸ *See, e.g.*, *United States Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263, 1266-67, 1268 (D.C. Cir. 2011); *Sec’y of Labor, Mine Safety and Health Admin. v. Nat’l Cement Co. of Calif., Inc.*, 494 F.3d 1066, 1073, 1074-75 (D.C. Cir. 2007); *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1352, 1354 (D.C. Cir. 2006); *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 797-98 (D.C. Cir. 2004); *Arizona v. Thompson*, 281 F.3d 248, 254, 259 (D.C. Cir. 2002); *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000); *Alarm Indus. Comme’ns Comm. v. FCC*, 131 F.3d 1066, 1072 (D.C. Cir. 1997); *Prill v. NLRB*, 755 F.2d 941, 956-57 (D.C. Cir. 1985).

⁶⁹ *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011).

for step two, nevertheless, there remains room for additional improvement in the rigor of step two to bring it closer to compliance with section 706 of the APA. The arbitrary and capricious standard requires only that the agency explain its reasoning at the time the decision is made and that the explanation must demonstrate that the agency employed a reasoned decision-making process in arriving at its conclusion.⁷⁰ In order to bring *Chevron* step two closer to giving proper recognition to section 706 of the APA, step two should not be limited to a consideration of the propriety of the agency's reasoning process but should also involve an evaluation of the propriety of the result. Thus, for example, while *Chevron* might continue to be applied as permitting more than one "reasonable" interpretation at step two, step two could be strengthened by making clear that the same "traditional tools of statutory construction" that are applied at step one are also applied at step two to determine that the agency's interpretation is not outside the narrow permissible range.

V. CONCLUSION

In holding that courts are required to accept agency interpretations of ambiguous statutory provisions provided the agency interpretation is reasonable, *Chevron* ignored the requirement in section 706 of the APA that "the reviewing court shall . . . interpret . . . statutory provisions." However, despite the clear conflict between *Chevron* and this requirement in the APA, it seems unlikely that the Supreme Court would be receptive to an argument that this error should be corrected by completely overruling *Chevron*. Nevertheless, the application of the *Chevron* two-part test could be brought closer to compliance with the APA by requiring a more robust interpretative effort by the reviewing court in each of the two steps of the *Chevron* test, informed by an awareness of this requirement in section 706.

⁷⁰ See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., Inc.*, 463 U.S. 29 (1983). For discussions of the arbitrary and capricious standard in a tax context, see Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271 (July 16, 2012); Patrick J. Smith, *The APA's Reasoned-Explanation Rule and IRS Deficiency Notices*, 134 TAX NOTES 331 (Jan. 16, 2012).