

Banking and Finance Law Daily Wrap Up, EQUAL CREDIT OPPORTUNITY —U.S.: Majority overrules ‘dizzying breakdance’ and ‘decaying husk’ that was Chevron, (Jun. 28, 2024)

Banking and Finance Law Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

The majority emphasized that the Administrative Procedure Act by its terms bars federal courts from deferring to an agency interpretation of a law merely because that law is ambiguous.

A 6-3 majority of the Supreme Court today overruled the long-used but often criticized *Chevron* doctrine in a pair of cases that directly posed the question of whether that precedent should be overruled. The now defunct *Chevron* doctrine set forth the approach federal courts have followed for decades in cases in which an executive branch agency interpreted ambiguities in the agency's governing statute. *Chevron* was controversial because of the deference courts must accord to a federal agency under a two-step test: first, is the statute ambiguous, and second, if so, is the agency's interpretation of the statute permissible or reasonable. The majority said the Administrative Procedure Act (APA) by its terms bars federal courts from deferring to an agency interpretation of a law merely because that law is ambiguous. A lengthy dissent argued that the majority engaged in yet another judicial power grab. The judgments in the two underlying cases were vacated and remanded for further proceedings consistent with the Court's opinion. Language included in the majority opinion suggested, however, that prior cases relying on *Chevron* may still be good law ([Loper Bright Enterprises v. Raimondo](#), No. 22-451 (U.S. June 28, 2024)).

In both underlying cases, a federal law that required in certain circumstances that third party monitors be present on commercial fishing vessels was interpreted by an agency to require vessel owners to pay for these monitors. The cases presented several questions for the Court, but the justices limited the grant of certiorari in both instances to a single question: Whether the Court should overrule *Chevron* [*U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (U.S. 1984)] or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute at issue did not constitute an ambiguity requiring deference to the agency. Justice Jackson did not participate in the consideration or decision of the *Loper* case in either the appeals court or the Supreme Court because of her intervening nomination to be an associate justice of the U.S. Supreme Court; Justice Jackson heard oral argument in *Loper* in the court below but was replaced by another judge for purposes of that court's [opinion](#).

History, APA show primacy of courts. Writing for the majority, Chief Justice Roberts recounted the historical role of courts in the U.S. and the response legislatively and judicially to the exponential growth in federal administrative law in the years before and after the Court's opinion *Chevron*. First, the majority explained that Article III of the U.S. Constitution grants federal courts the power to hear cases and controversies. That power was interpreted in *Marbury v. Madison* to include the power of courts to say what the law is. Thus, from the majority's viewpoint, courts have historically resolved ambiguities in the law by declaring what the law is. The question for the majority, then, was whether circumstances, the law, or both had changed such that the approach in *Chevron* could still be justified.

Here, the majority spent much time explaining the workings of the APA, especially Section 706, which the majority said codified *Marbury*'s expansive interpretive role for the court, and which statutorily assigned to the courts the task of deciding all relevant questions of law. The Court said the APA, however, did not prescribe a standard for court review but that omission was "telling" because the APA nevertheless contains deference-like language, which counsels against overturning an agency action unless that action was arbitrary, capricious, or an abuse of discretion. The lack of an APA standard for court review, said the Court, meant that federal courts

retain their pre-APA authority to review agency actions. According to the majority, the *Chevron* doctrine cannot be squared with the APA.

“The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions,” wrote justice Roberts.

Having found an expansive role for courts to independently review agency actions, the Court addressed arguments made by the government in support of *Chevron* and the basis for departing from *stare decisis* to overrule *Chevron*, an opinion that, in the words of the majority, was decided by a bare quorum of six justices and which departed from long standing practice.

The government had [argued](#), among other things, that court deference to agencies recognizes the subject matter expertise possessed by agencies, promotes uniformity in federal law, and properly emphasized policy choices made by officials from the political (i.e., elected) branches of the government. The Court rejected each of these arguments. First, the majority said that while an agency’s views are informative, Congress cannot simply give an agency power to authoritatively interpret laws. Put another way, the Court said it is not necessary to delegate statutory interpretation to an agency in order to ensure the well-informed resolution of statutory ambiguities.

According to Justice Roberts, “[p]erhaps most fundamentally, *Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”

With respect to uniformity, the majority explained that the inconsistent application of *Chevron* was an ongoing problem. Moreover, the Court said that there would be no point in adhering to a uniform statutory interpretation that is wrong because courts do not presume that Congress wants uniformity merely for the sake of uniformity.

Lastly, regarding the role of the political branches, the Court said the government’s argument “rests on a profound misconception of the judicial role.” Here, the Court argued that the resolution of statutory ambiguity requires legal interpretation. The majority also emphasized that the Framers sought to ensure judicial independence from the political branches of the government (citing Federalist No. 78).

As result, having found a historical role for the courts in independently reviewing agency actions and a statutory confirmation of that role in the APA, the majority next considered whether to continue to accord *stare decisis* to *Chevron*. By way of background, the decision to overturn precedent can reference a number of factors and the Court does not necessarily use exactly the same factors each time it mulls whether to overturn a precedent. For purposes of *Chevron*, the majority appeared to focus on factors showing that *Chevron* was unworkable.

For example, the majority said *Chevron* was “fundamentally misguided” and unworkable, citing how later attempts to clarify *Chevron* failed to do so to the extent that *Chevron* had become an impediment (not an aid) in saying what the law is. The Court also noted that it last relied on *Chevron* to defer to an agency in 2016 and that in the intervening years many courts had refused to engage with *Chevron*. Moreover, the majority added that *Chevron* tended to destroy rather than safeguard reliance interests and that *Chevron* had undermined the rule of law values sought to be protected by *stare decisis*.

Immediate impact may be blunted. A key portion of oral argument in the twin *Chevron* cases focused on what the impact of potentially overturning *Chevron* would be. In other words, would the abandonment of *Chevron* result in prior opinions relying on *Chevron* to no longer be good law. Justice Roberts sought to address and allay these concerns.

“By doing so [i.e., overturning *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework,” said Justice Roberts. “The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology.”

Dissent sees another power grab by Court. The dissent, led by Justice Kagan, herself a noted scholar on administrative law prior to joining the Court, and joined by Justices Sotomayor and Jackson (but not the latter regarding *Loper*), viewed the majority opinion as yet another power grab by the Court not unlike the asserted power grab the same trio of justices objected to yesterday when a majority of the Court [struck down](#) the SEC’s

ability to choose between bringing certain securities fraud cases where civil penalties are at stake via in-house proceedings or in federal court.

According to the dissent, *Chevron* had become a “cornerstone of administrative law” during its 40-year existence. During that time, the dissent argued that *Chevron* ensured political accountability by placing agency action within the oversight of a president who in turn is accountable to the people. By contrast, the dissent said the courts, whose members are appointed rather than elected, have no similar accountability. The dissent also said the majority’s reliance on the APA was inapt because the APA does not command what the dissent characterized as a “choice” by the majority to reclaim judicial primacy in saying what the law is for purposes of ambiguous agency statutes.

“This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court.”

With respect to *stare decisis*, the principle that the Court will adhere to its previous decisions even if in some instances they may be wrong, the dissent argued that given the fact that Congress could have but never legislatively overruled *Chevron* and the strong reliance interests built up under *Chevron*, the majority needed a “supercharged version” of *stare decisis* to overrule *Chevron* and it failed to articulate such a strong theory.

The case is [Nos. 22-451 and 22-1219](#).

Judge: Roberts, J.

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Companies: Loper Bright Enterprises; Relentless, Inc.

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