Issue Brief

The End of *Chevron*: *Loper Bright Enterprises v. Raimondo* and Its Impact on Virginia

July 2025

Prepared by Rebecca Anne Schultz, Attorney
Research and assistance by Matteo Murrelle, Legal Research Associate
Division of Legislative Services

Summary

In *Loper Bright Enterprises v. Raimondo*,[1] the United States Supreme Court, in an opinion written by Chief Justice John Roberts, overturned *Chevron v. NRDC*,[2] the case that laid out the foundational test for judicial review of agency actions taken pursuant to ambiguous statutory language. Over the past 40 years, the *Chevron* decision served as a framework for judicial review of agency actions. Although not initially seen as transformative, the case has been cited tens of thousands of times by lower courts.

The *Chevron* doctrine required federal courts to apply a two-step framework when reviewing an agency's interpretation of a federal statute. The courts would first need to determine whether Congress had directly spoken to the precise question at issue. If Congress's intent was clearly expressed, that intent would be applied. If, however, the courts found that the statute was silent or ambiguous and the agency's interpretation was reasonable, the courts were bound to defer to such interpretation, regardless of whether the court would have decided differently.

Loper, finding *Chevron* to be an unworkable test that unconstitutionally assigns a "core" function of the courts—the interpretation of laws—to the executive branch of government, reimposes the *Skidmore*[3] test of judicial interpretation in which courts impose their own interpretation of ambiguous statutes, regardless of whether an agency's differing interpretation is reasonable.

The dissent, written by Justice Elena Kagan, argues that the *Chevron* rule evolved out of a need to keep the courts from engaging in policymaking by recognizing the limited capacity for courts to fully understand rules that tend to require knowledge of complex and interdependent regulatory programs, particularly where highly scientific and technical subjects are involved.

This issue brief will begin with a summary of the court's reasoning for overturning *Chevron* in *Loper*, which will include background regarding the development of the administrative state that may be helpful in understanding the decision. Next, this issue brief will discuss the dissent in this case. Finally, this brief will provide insight into the impact that this federal decision may have on the Commonwealth and the questions left unanswered by the decision.

---

[1] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (hereinafter *Loper*).
[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[3] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The *Loper* Decision

The majority decision provides three reasons for overruling the *Chevron* doctrine, which will be laid out in detail below. First, the majority applies the separation of powers — finding that *Chevron* requires the judicial branch to take a back seat to performing its own core function, interpreting questions of law. Next, the opinion finds that the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., cannot be resolved in accordance with continuance of *Chevron*. And finally, the majority opinion addresses the concern of *stare decisis*—the judicial doctrine that requires courts to follow the rules and standards established by court precedent— finding that *stare decisis* does not require continued application of a doctrine that needs constant clarification and contains innumerable exceptions.

A. Chevron violates the separation of powers doctrine.

The separation of powers doctrine is a constitutional embedment premised on ensuring each branch of government—the judicial, the executive, and the legislative—exercises powers separate from those of the other branches. The idea is to prevent the development of a tyrannical government by ensuring that too much power does not fall into unchecked hands. While there is no single, correct separation of powers analysis, the underlying goal remains the same: to prevent tyranny and maintain a balance of power.

> "[N]o skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary."[4]

1. Separation of powers prohibits full delegation of core powers.

To determine whether one branch has violated the separation of powers doctrine, courts consider the functions and powers of that branch and the purpose behind the action taken. The powers of each branch are set out in the Constitution.[5] A power is "core" to a branch when such power defines "its essential attributes."[6] For example, a core power of the legislative branch is to make laws,[7] while a core power of the courts is to delineate the rights and obligations of the parties properly before it.[8]

Core powers may rely somewhat on powers of another branch, but the primary branch must maintain control of this power; it cannot be fully delegated.[9] Were one branch to engage in the core power of another branch, it would likely constitute an improper and tyrannical exercise of power. Therefore, core powers may not be fully delegated to another branch without violating the Constitution.[10]

---

[4] Federalist Papers No. 37. at 199-200 (Sterling Publishing Co., Inc. ed., 2021) (James Madison).
[5] *See, e.g.*, U.S. Const. Art. I § 1, Art. II § 1, and Art. III §1 (delineating the powers of the legislative, executive, and judicial branches of government, respectively).
[6] *SEIU, Local 1 v. Vos*, 393 Wis. 2d 38, 103 (2020).
[7] U.S. Const. Art. I § 1 and § 7 cl. 1.
[8] U.S. Const. Art. III §§ 1 and 2.
[9] *See, e.g., INS v. Chadha*, 462 U.S. 919, 963 (1983) (stating that separation of powers may be violated when one branch impermissibly interferes with the other's performance of its constitutionally assigned function or when one branch assumes a function that more properly is entrusted to another) (Powell, J., concurring).
[10] *See, e.g., SEIU, Local 1* , 393 Wis. 2d at 103-104.

Some powers are best satisfied by a combination of efforts of more than one branch of government. These are generally known as "shared" powers.[11] For instance, while legislating is a core function of the legislative branch, the legislature may choose to delegate certain rulemaking functions to the executive branch within certain established parameters. To share this function constitutionally, the legislature enacts enabling legislation, a statute that directs an executive branch agency or official to make rules on a particular subject.[12] To ensure the legislature is not shirking its obligation but instead is including the executive branch in carrying out the purpose elucidated in statute, the legislature must provide such agency or official with an "intelligible principle" from which it must act.[13] This intelligible principle is necessary for the legislature to maintain control of its primary rulemaking authority.[14] The idea is that the legislature is the ultimate rulemaker, while agencies are entrusted to use their subject matter expertise to best "fill up the details."[15] While the majority opinion in *Loper* does not explicitly lay out these separation of powers canons, understanding them is crucial to understanding the Court's view of *Chevron*'s unconstitutionality.

2. Interpretation of statutes is a core power of the courts.

The framers of the Constitution anticipated that final interpretation of the laws would be "the proper and peculiar province of the courts."[16] The Court found that in the years leading up to *Chevron*, a court would consider the interpretations of well-informed, executive branch subject-matter experts but always maintain its duty to exercise its own independent judgment in accordance with the Constitution.[17] For example, in 1803, the Court, in a foundational decision rendered in *Marbury v. Madison*, declared, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[18] The premise that interpretation of statutes is a core power of the courts is not a contested part of the Court's holding, as this understanding has been well settled. It is in those actions that push the judicial branch's interpretive power up against the executive branch's rulemaking power, as will be discussed in the next section, where great disagreement occurs.

3. *Chevron* required courts to fully delegate a core function.

The Court found that *Chevron* was a departure from the well-settled role of executive branch agencies in interpreting the laws they administer.[19] The Court points to several cases from the 1800s laying out the parameters of the respect that agency experts were granted during judicial

---

[11] *See, e.g., id.* at 83 (providing for example that control of at least the legislative space in the Capitol is a shared power between the legislature and executive branch).
[12] *Consumer Energy Council v. Federal Energy Regulatory Com.*, 673 F. 2d 425, 474 (1982).
[13] *See, e.g.*, *Chadha*, 462 U.S. at 985 (citing *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928)) (White, J., dissenting).
[14] The legislative branch also maintains control through its power to nullify such executive branch actions through future amendments and repeals of enabling legislation. *Loper*, 144 S. Ct. at 2267 (Kagan, J., dissenting).
[15] *Chadha*, 462 U.S. at 985 (White, J., dissenting).
[16] The Federalist No. 78 at 440 (Sterling Publishing Co., Inc. ed., 2021) (Alexander Hamilton). Alexander Hamilton, for example, described the entrustment of this power to the judiciary (as opposed to one of the political branches) as necessary to ensure the "steady, upright and impartial administration of the laws." *Id.* When the meaning of the law was unclear, the role of the judiciary was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur v. Paulding*, 39 U.S. 497, 515 (1840).
[17] *Loper*, 144 S. Ct. at 2258.
[18] *Marbury v. Madison*, 5 U.S. 137 (1803).
[19] *Id.* at 2250.

review of their actions. These cases led to a well-settled understanding that executive branch interpretations of the statutes they administer are accorded due respect but do not have the power to bind a court of justice.

In *United States v. Dickson*, the main controversy was the interpretation of the phrase "any one year" in the governing statute, as it pertained to the defendant's compensation for official duties.[20] The Treasury Department interpreted this phrase to mean the fiscal year, beginning on the first of January.[21] The defendant argued that the phrase should be interpreted to mean the year beginning on the date of the defendant's commission. The Court agreed that the construction given by the Treasury Department should be accorded a great deal of respect.[22] However, "if [such construction] is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice."[23] The Court went on to emphasize that the interpretation of laws was the "solemn duty" of the Court, which is "not at liberty to surrender or waive" such power.[24]

In *Decatur v. Paulding*, the Court noted that when the meaning of a statute is at issue, the role of the judiciary is to "interpret the act of Congress . . . to ascertain the rights of the parties."[25] Though the Court in *Decatur* appears to consider some deference permissible, [26] such as on issues left explicitly by Congress to the discretion of an executive branch official to discharge such duties, it also found that "[courts] certainly would not be bound to adopt the construction [of a statute] given by the head of a department."[27]

---

[20] *United States v. Dickson*, 40 U.S. 141, 161 (1841).

[21] The Treasury Department relied on this interpretation for over 20 years. *Id*.

[22] *Loper*, 144 S. Ct. at 2257.

[23] *Dickson*, 40 U.S. at 161.

[24] *Id*. at 162. This case involves an agency's interpretation of a phrase in statute, whereas *Loper* involves a quasi-law question of an agency's interpretation of the limits of its delegation. Had Congress clearly delegated to the Treasury Department the power to designate the beginning date of a year as it saw fit, the Court would have been bound to the interpretation of the Treasury Department under the *Chevron* and *Loper* doctrines. Where Congress sets a standard (here, "one year"), *Chevron* will defer but *Loper* will not.

[25] *Loper*, 144 S. Ct. at 2257. The Court went on, however, to refuse to direct the Secretary of the Navy to provide the petitioner with two pensions, explaining that, while courts are required to interpret the laws, courts also lack jurisdiction where Congress left it to the discretion of an executive branch official to discharge duties requiring the exercise of discretion. *Decatur v. Paulding*, 39 U.S. 497, 517 (1840).

[26] *Decatur* provides an excellent example of the nuances of judicial review of executive actions. While the majority thought it improper to "guide and control" executive branch judgment during the "ordinary discharge of . . . official duties," concurring Justice Henry Baldwin did not draw such strong distinctions between judicial review of executive versus "ministerial" functions. Justice Baldwin resorted directly to statutory interpretation tools to agree with the Court that the petitioner was not entitled to two pensions, referring to "the general principle of law, that where provision is expressly made by law for a particular case, it does not come within the general provisions of another law, which may embrace it by its general terms." *Decatur*, 39 U.S. 497 at 2542, 2556 (Baldwin, J., concurring). Even more interesting is the dissent of Justice John Catron, which seems to agree with the Court's lack of jurisdiction to compel a federal executive to interpret his duties in accordance with the Court's construction. He dissents to the direct holding in that he would not affirm the lower court's decision because the lower court, in his opinion, had no jurisdiction to start with, and he believes the case should have been dismissed. However, he elaborates upon the impropriety of the Court to take up the time of the Secretary of the Navy, to forestall the regular business of the Treasury, and to "submit[] the administration of its finances to the Courts of justice . . . [where] for nearly forty years this fearful claim to power has neither been exerted, nor was it supposed to exist; but now that it is assumed, we are struck with the peculiar impropriety of the Circuit Court of this District [of Washington] becoming the front of opposition to the executive administration." *Id.* at 518-522 (Catron, J., dissenting).

[27] More recent cases have since clarified that this decision was specific to the power to issue writs of mandamus and solely a consequence of the form of relief requested. Such cases have distinguished *Decatur* from cases in which the

In *Edwards Lessee v. Darby*, an act of the legislature of North Carolina in 1782 granted land to its officers and soldiers, such tracts of land to be allotted by appointed commissioners of the state. The Court found that such commissioners were authorized to conduct surveys of reservations not by the express terms of the applicable statute, but by the "necessary implication from the duties they were expressly required to perform . . ."[28] The Court quotes this opinion where it states that "'[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.'"[29]

Relying on *United States v. Moore*, the Court again notes that great respect is entitled to executive branch interpretations because the "officers concerned [were] usually able men, and masters of the subject, . . . [and n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret."[30]

The Court reasons that even after the New Deal—a time when courts might be willing to accord greater reliance on agency knowledge—the Court did not relinquish any power over the interpretation of laws. The federal courts continued to grant the interpretations of agency experts the "[m]ost respectful consideration" regarding the laws they were entrusted to administer.[31] But where pure questions of law were involved, courts were not bound to deference.[32] The dissent points to a couple of cases from this time period as examples of judicial deference to the Executive Branch. However, the Court finds such deference to be limited to permissible agency actions taken "strictly within the confines of a proper Congressional delegation."[33]

For example, in *Gray v. Powell*, the Court was tasked with deciding whether a governing statute permitted the Director of the Bituminous Coal Division to make the determination that one company was not the "producer" of coal. First, the Court found that this matter was "left specifically by Congress to the determination of an administrative body."[34] For such matters, the Court stated, "the function of review placed upon the courts" is limited to a determination that there has been a fair hearing, notice, and an opportunity to be heard and a finding that the statute was applied in a "just and reasoned manner."[35] And where such delegation exists, "it is not the province of a court to absorb the administrative functions to such an extent that the executive or

---

main issue was the construction of its laws. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908 (2024) (arguing that *Chevron* misinterpreted 19th-century statutory interpretation cases "respecting" contemporaneous and customary interpretation as cases deferring to executive interpretation).

[28] *Edwards' Lessee v. Darby*, 25 U.S. 206, 209 (1827).

[29] *Loper*, 144 S Ct. at 2257 (quoting *Edwards' Lessee v. Darby*, 25 U.S. at 210 (1827)). Without describing what "respect" entails, the Court went on to note that the construction of the commissioners "seems to have received . . . the sanction of the legislature," as evidenced by a later act providing further authority for such officials. *Id*.

[30] *Id.* at 2258 (quoting *United States v. Moore*, 95 U.S. 760, 763 (1878)). Again, the Court went on to side with the government but found that the statute was not ambiguous. In addition to the majority's quoted portion, the Court emphasized that such respect "ought not to be overruled without cogent reasons." This provides further evidence of the lack of clarity as to what level of respect such executive branch interpretations are due. *Moore*, 95 U.S. at 763.

[31] *United States v. Moore*, 95 U.S. 760, 763 (1878).

[32] However, they were free to resort to the interpretations and opinions of the relevant agency for guidance. *See, e.g.*, *Skidmore*, 323 U.S. at 140.

[33] *Loper*, 144 S. Ct. at 2249.

[34] *Gray v. Powell*, 314 U.S. 402, 411 (1941).

[35] *Id.* at 411.

legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."[36]

Similarly, in *NLRB v. Hearst Publications*, the Court upheld the National Labor Relations Board's conclusion that one group of newspaper distributors were "employees" for purposes of establishing a collective bargaining unit as mandated by the National Labor Relations Act.[37] Congress, the Court explained, did not treat this term as a word of art having a definite meaning but rather a term that "takes color from its surroundings [in] the statute where it appears."[38] Recognizing that the varied economic relationships between employees and employers cannot fit neatly into categories as "law had [previously] shaped for different purposes," Congress delegated to the National Labor Relations Board the task of resolving those nuances and categorizing the appropriate collective bargaining unit accordingly.[39]

While *Gray* and *Hearst* acknowledge due respect for agency decisions on the applications of broad statutory terms to specific facts found by the agency, such respect, in the Court's view, never equated to the full deference provided for in *Chevron*.[40]

In 1984, *Chevron* instructed courts to defer to reasonable interpretations regardless of whether the Court itself would have decided differently, thereby nullifying the best interpretation in favor of upholding a permissible one.[41]

B. Chevron cannot be squared with the Administrative Procedure Act.

The Court finds that the APA is in direct conflict with the obligations imposed by *Chevron*. Finding that the APA was enacted as a codification of the already existing function of judicial review of executive branch actions and that the APA explicitly provides standards for judicial deference on non-legal questions, the Court holds that the APA reasserts a court's constitutional duty to independently interpret "what the law is."[42] Therefore, compliance with *Chevron* requires courts to ignore the clear Congressional mandate outlined in § 706 of the APA. Additionally, the Court points out, Congress is free to legislatively extend to agencies the job of determining the best interpretation through constitutionally permissible delegations in enabling legislation.

1. The APA codifies the role of courts to independently analyze legislative delegations of power.

Unlike *Chevron*, the Court asserts, the judicial review provisions of the APA reaffirm the role of courts as the final decipherers on questions of law.

In 1946, decades before *Chevron* was decided, Congress enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in

---

[36] *Id.* at 412.
[37] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).
[38] *Hearst*, 322 U.S. at 124 (1944).
[39] *Id.* at 126-128.
[40] "Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law." *Loper*, 144 S Ct. at 2259. In fact, it was not unusual that in working with the legislature, those executive branch experts were often "the [drafters] of the laws they [were] . . . called upon to interpret." Courts accorded agency determinations especially great respect and consideration "when . . . issued [close in time to] enactment of the statute" and also where such determinations "remained consistent over time." *Id*. at 2248-2249.
[41] *Id.* at 2264-2266.
[42] *Id.* at 2258 (quoting *Marbury*, 5 U.S. at 177).

legislation creating their offices."[43] Concerned that courts would be pressured by this great expansion of executive branch rulemaking to ignore their constitutionally assigned function, the majority finds that the APA was Congress's way of ensuring that courts maintained their adjudicative power even in the face of subject-matter expertise. The majority does not view the APA as a departure from historical court practice and implies that the APA—and § 706 in particular—came about as a response to court decisions attempting to avoid such longstanding role. The extension of executive branch rulemaking led to outcomes like *Auer*[44] deference and decisions like *Gray* and *Hearst*, in which the courts indicated that courts might step back and in some cases allow the interpretive work to be done by the administering agencies. In addition to outlining the procedures for different kinds of agency actions, § 706 of the APA provides the standards of review to be used by courts in assessing such actions.[45]

The Court points out that § 706 mandates deference to an agency's policymaking and fact-finding actions.[46] The inclusion of language in § 706 addressing deferential standards for such questions, combined with the lack of similar language regarding questions of law, obviates to the Court an intent by Congress not to require judicial deference in questions of law.[47] This distinguishing between non-legal and legal questions mirrors the practice of courts considering when and to what extent to rely upon executive branch administrators leading up to the enactment of the APA.[48]

Regarding the more complex questions implicating both law and fact, the opinion cites to Professor Bernard Schwartz's article, which states in relevant part that it is up to the reviewing court not only to determine all questions of law, but also to determine "in each case what are questions of law."[49] Even where application of a statutory term was sufficiently intertwined with the agency's fact-finding, such as in the cases of *Gray* and *Hearst*, courts were inconsistent in the standard of review applied. The Court finds it illuminating that it was only five years post-*Gray* and two years post-*Hearst* that Congress legislatively declared the traditional understanding that "courts must decide all relevant questions of law."[50]

Therefore, the Court reasons, enactment of the APA indicates an intent by Congress to affirm the role of the judiciary to independently interpret statutes, recognize constitutional delegations,

---

[43] *Id.* at 2260.

[44] *Auer v. Robins*, 519 U.S. 452 (1997) (holding that courts ought to defer to an agency's reasonable interpretation of its own ambiguous regulations).

[45] Administrative Procedure Act, 5 U.S.C. § 706.

[46] Section 706 of the APA directs agency actions to be set aside if determined to be "arbitrary, capricious, [or] an abuse of discretion" and directs fact-finding in an agency's formal proceedings to be set aside if "unsupported by substantial evidence." *Loper*, 144 S. Ct. at 2261. The Court cites to the House and Senate Reports on the legislation to show the intent of Congress in enacting § 706 was to "provide[] that questions of law are for courts rather than agencies to decide in the last analysis" and to restate the current scope of judicial review, not to expand it. *Id*. at 2262.

[47] *Loper*, 144 S. Ct. at 2261-2263.

[48] Agency determinations of fact were binding on the courts as long as there was evidence to support them. *Loper*, 144 S. Ct. at 2258 (citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936)). As for policymaking decisions, the courts respected clear delegations by Congress so long as the agency's decision constituted a sensible exercise of judgment and had a reasonable basis in law. *Id.* at 2259 (referring to *Gray v. Powell*, 314 U.S. 402, 411 (1941) and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944)).

[49] *Loper*, 144 S. Ct. at 2262 (citing Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 Ford. L. Rev. 73, 84-85 (1950)).

[50] *Id.* at 2260 (quoting the Administrative Procedure Act, 5 U.S.C. § 706).

fix the boundaries of such delegations, and ensure executive branch officials have engaged in reasoned decision-making within those parameters.[51]

2. Section 706 of the APA shows Congress's desire for courts to stop deferring on interpretive issues.

Congress is free to expressly delegate more authority to executive branch agencies. Compliance with the APA requires courts to interpret the relevant delegations of authority set out in an agency's enabling legislation.

While the Court in *Loper* finds that the APA clarifies that courts are to exercise independent judgment, it recognizes that more specific language in other statutes may properly authorize agencies to use a degree of discretion. For example, the opinion mentions statutes that expressly authorize an agency to give meaning to a particular statutory term, empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or use "flexib[le]" words, such as "appropriate" or "reasonable."[52]

Between the enactment of the APA and the *Chevron* decision, courts considered delegation on a statute-by-statute basis, meaning that the reviewing court looked at the statute being relied upon by the agency to see if its enabling legislation described the deference to be given to the agency action at hand. Where Congress has specifically left discretion to the executive branch, courts need not contemplate what may be the best interpretation of the intent of the legislature. The enabling legislation is clear.[53]

C. The principles of stare decisis are outweighed by Chevron's unworkable doctrine.

The Court found that the most relevant considerations for whether it should continue to adhere to precedent—the quality of the reasoning, the workability of the rule, and the reliance thereon—all weigh in favor of overturning the *Chevron* doctrine.[54] The Court held that the analysis underlying *Chevron* was seriously flawed; the doctrine has required continuous clarification and has failed to provide the public with readily foreseeable results. Therefore, adherence to *stare decisis* in this situation would require the courts to, again, re-clarify how the *Chevron* analysis works. And *stare decisis*, while important, is not an "inexorable command."[55]

1. The analysis under *Chevron* was flawed.

Chevron's flaws were "inherent from the start."[56] In addition to directly contradicting Congress's mandate in the APA, the Court holds that *Chevron* violates the separation of powers doctrine and leaves courts with an equally unclear rule that courts apply inconsistently. The opinion cites several scholarly works seeking to clarify the correct application of its doctrine and notes that, "Even Justice Scalia, an early champion of *Chevron*, came to seriously doubt whether it could be reconciled with the APA."[57]

---

[51] *Id.* at 2263.
[52] *Id.*
[53] *Id.* at 2259, 2263 (providing for example the Bituminous Coal Act of 1937, which the Court found in *Gray v. Powell* to contain language specifically granting to the agency the authority to determine whether a railroad was a coal "producer").
[54] *Id.* at 2270 (citing *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019)).
[55] *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).
[56] *Id.* at 2269.
[57] *Id.*

The opinion points out that *Chevron* was decided by a "bare quorum" of six Justices and lacked any consideration of the APA instruction on questions of law.[58] Under *Chevron*, courts interpreting statutes that had already been interpreted and relied upon by the executive branch were expected to defer to such interpretation unless it was unreasonable, while courts interpreting statutes that had no executive branch interpretation were free to use all statutory interpretation tools to identify the best interpretation of the statute's meaning. The Court sees this as inconsistent guidance that draws illogical distinctions.

2. *Chevron* requires constant clarification and creation of exceptions.

As noted in the Court's opinion, the defining feature of the doctrine is "the identification of statutory ambiguity," which the Court has admitted in the past is itself "a term that may have different meanings for different judges."[59] In addition to courts' different perspectives on whether any ambiguity in a statute exists, courts also differ in their perspectives on whether such ambiguity indicates an intentional delegation by Congress or lack thereof.[60]

Without explicitly identifying the exceptions created to assist *Chevron*, the opinion cites to several cases, noting that the original two-step framework has turned into a "dizzying breakdance."[61] Difficult threshold questions continued to arise regarding *Chevron*'s applicability and for decades the Court has refused to invoke *Chevron*, even where it seemed applicable. In more recent years, when *Chevron* has been invoked, the Court has avoided deferring to agencies.[62] Such judicial avoidance coupled with constant revisiting indicates to *Loper*'s majority that the courts themselves are unsure exactly when and how the doctrine applies.[63] In the Court's words, " . . . *Chevron* is a decaying husk with bold pretensions,"[64] has become unworkable, and is unable to produce readily foreseeable outcomes. *Stare decisis*, it says, does not require maintenance of a doctrine that undermines the very rule of law.[65]

The Dissent

This part of the issue brief will summarize the dissent in *Loper* authored by Justice Kagan in which Justice Sotomayor joined and Justice Jackson joined in part. The dissent responds to each of the Court's three main arguments that *Chevron* should be overturned. The dissent disagrees with the Court's reasoning that the decision violates the separation of powers doctrine—in fact, it argues proper separation of powers is better protected by the maintenance of *Chevron*. Nor does the dissent view the APA as inconsistent with *Chevron*. Finally, it argues that regardless of those two points, *stare decisis* weighs heavily in favor of maintaining the doctrine.

A. Chevron does not violate the separation of powers doctrine.

The dissent does not contest that the interpretation of laws is a core function of the judiciary. Rather, it disagrees that *Chevron* deprives the courts of such power. Instead, it argues, *Chevron*

---

[58] *Id.* at 2264.
[59] *Id.* at 2269 (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J. dissenting)).
[60] *Id.*
[61] *Id.* at 2271.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 2272.
[65] *Id.*

provides better protection for separation of powers because it prevents the courts from engaging in policymaking.

1. *Chevron* does not deprive the judiciary of its core interpretive power.

The Court, the dissent argues, does not deprive itself of its power by respecting proper delegations of Congress. It agrees that such core power requires federal courts to resolve the best interpretation of the statutes concerned. However, the responsibility for statutory construction where Congress has delegated rulemaking authority to an executive branch agency is properly shared between courts and the administering agency. Therefore, resolving the best interpretation involves reliance upon the understanding of the administering agency.[66]

Under *Chevron*, a court used all of its normal interpretive tools to determine first whether Congress's intent regarding the action of the agency at issue is clear.[67] Where it is not, content must still be given to effectuate the statute.[68] After all, writing perfectly clear legislative delegation on regulatory matters is improbable. This is why Congress delegated flexible authority to agency experts to make the relevant findings of fact and to present policy choices based thereon. Where ambiguities and gaps occur, the dissent believes the presumption should be that Congress prefers the responsible agency, not the courts, to fill in the details. This, it says, is how to give effect to the best interpretation of the statute and intent of Congress.[69]

The dissent provides several examples of situations in which courts are unlikely to resolve the best interpretation of statutory terms through mere reliance on interpretive tools, including the determination of when an amino acid polymer qualifies as a "protein" or when one squirrel population becomes "distinct" from another.[70] The dissent advises the Court to show humility for such specialized expertise.[71] The fact that a court may come to a different result does not indicate that the court has arrived at the best interpretation.

While courts may rely on executive branch experts and accord weight to their evidence, the research and time required for courts to make truly well-informed conclusions in these areas will only cause delay to the courts' already full dockets.[72] The dissent stresses that Congress recognizes agencies' capacity for these tasks.[73] In fact, these agencies work so closely with Congress that they are often the drafters of their own enabling legislation.[74] Rather than shirking its interpretive obligation, the dissent views the judiciary as upholding its responsibility to identify the best and proper interpretation by showing the respect for agency expertise that *Chevron* requires. "Just as a common-law court makes better decisions as it sees multiple variations on a theme, an agency's construction of a statutory term benefits from its unique exposure to all the related ways the term comes into play."[75]

---

[66] *Id.* at 2298-2299.
[67] *Chevron*, 467 U.S. at 842.
[68] *Loper*, 144 S. Ct. at 2294 (Kagan, J., dissenting).
[69] *Id.* (Kagan, J., dissenting).
[70] *Id.* at 2298 (Kagan, J., dissenting).
[71] *Id.* (Kagan, J., dissenting).
[72] *Id.* at 2295 (Kagan, J., dissenting).
[73] *Id.* at 2301 (Kagan, J., dissenting).
[74] *Id.* (Kagan, J., dissenting).
[75] *Id.* at 2299 (Kagan, J., dissenting).

2. *Chevron* evolved out of a need to prevent the judiciary from engaging in policymaking.

In addition to the dissent's disagreement with the Court regarding *Chevron*'s respect for the Court's interpretive power, it brings up an issue not much addressed by the majority: the need for courts to refrain from policymaking. To illustrate this point, the dissent first describes why *Chevron* came to be.

To begin, the dissent describes that resolving legislative ambiguities has been "less [a task] of construing a text than of balancing competing goals and values."[76] Congress leaves ambiguities and gaps in the legislation it passes for several reasons. Some ambiguities are intentional, some are accidents, and many result from the mere limits of language that make it difficult, if not impossible to "capture [certain subjects in their] every detail."[77] When a term is ambiguous, agencies can leverage their expertise and understanding of good policy to make informed decisions. *Chevron's* deference rests on a presumption about legislative intent: that Congress would want the agency it entrusted with administration of a provision to exercise the "degree of discretion" that the statute's lack of clarity or completeness allows.[78]

In one illustrative example about returning the Grand Canyon to its state of natural quiet, the dissent explains that a court would not be as well-equipped as the Department of the Interior and the Federal Aviation Administration to "provide for substantial restoration of [such] natural quiet" from aircraft flying over the Grand Canyon.[79] Nor would the court be better able to tell the U.S. Fish and Wildlife Service whether it ought to define a population of squirrels as "distinct" based on a geographic or a genetic methodology.[80]

The dissent cites several other policy questions the Court faced where *Chevron* ensured the policy decision remained with the agency. Those questions included (i) how the Department of Health and Human Services should measure a "geographic area" to comply with its legislative mandate to ensure that Medicare reimbursements reflect the differences in hospital wage levels across "geographic areas";[81] (ii) how the Food and Drug Administration should determine when an alpha amino acid polymer qualifies as a protein in accordance with the mandate of the Public Health Service Act to regulate "biological products, [including] protein[s]";[82] and even (iii) *Chevron* itself, where Congress instructed states to require permits for modifying or constructing "stationary sources" of air pollution.[83]

As discussed earlier in this brief, the legislature's core power to enact laws may be shared within constitutionally defined limits but cannot be fully abrogated. The dissent uses these cases to highlight the fact that there is no "single, best meaning" to some questions and that legislative delegations made to the executive branch within constitutionally permissible bounds properly balance this shared policymaking, while the legislature maintains ultimate control.

---

[76] *Id.* at 2299 (Kagan, J., dissenting).
[77] *Id.* at 2296 (Kagan, J., dissenting) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 566 (plurality opinion) (2019)).
[78] *Id.* at 2297 (Kagan, J., dissenting) (referring to *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996)).
[79] *Id.* at 2299 (citing *Grand Canyon Air Tour Coalition v. FAA*, 154 F. 3d 455 (1998)).
[80] *Id.* at 2298 (Kagan, J., dissenting) (citing *Northwest Ecosystem Alliance v. United States Fish and Wildlife Serv.*, 475 F. 3d 1136 (2007)).
[81] *Id.* at 2300 (Kagan, J., dissenting) (citing *Bellevue Hospital Center v. Leavitt*, 443 F. 3d 163 (2006)).
[82] *Id.* at 2296 (Kagan, J., dissenting) (citing *Teva Pharmaceuticals USA, Inc. v. FDA*, 514 F. Supp. 3d 66 (2020)).
[83] *Id.* at 2296 (Kagan, J., dissenting) (citing *Chevron*, 468 U.S. at 840).

Additionally, agencies, unlike courts, are ultimately accountable to the public by virtue of presidential oversight.[84] Each law enacted is reviewable by the public, ensuring political accountability for both the legislative and the executive branches. And, the dissent reminds us, Congress can always amend or repeal its delegations.[85]

Courts, the dissent points out, offer no such accountability and have no proper basis for making policy. Not only do courts lack the subject matter expertise necessary to comply with Congress's instructions, courts are also not answerable to Congress, nor to the president, but only to themselves. Therefore, to allow courts to engage in the creation of rules applicable to the public at large would be to create a branch of government capable of pursuing unchecked power, the telltale sign of a government capable of tyranny.[86]

B. Chevron does not conflict with the Administrative Procedure Act.

In contrast to the Court's view that the APA directly conflicts with the *Chevron* doctrine, the dissent views the APA as reflecting the traditional balance of power between the judicial branch and the executive branch agencies regarding statutes that are administered by the latter. To the dissent, the APA neither mandates nor prohibits courts from involving the *Chevron* framework. Rather, had Congress found issue with the court practice of respecting reasonable interpretations of the agencies, it would have clarified that all questions of law are to be decided independently of such interpretations according to a *de novo* standard of review.

1. The APA codifies the role of courts to determine when it is appropriate to defer on interpretations of legislative delegations of power.

The dissent agrees with the majority that the APA codifies the longstanding historical practice of courts with respect to interpreting legislative delegations to the executive branch. The dissent disagrees, however, with the Court's perception of what that longstanding historical practice is and its corresponding interpretation that § 706 of the APA imposes a mandatory *de novo* (or independent) standard of judicial review of executive branch interpretations.[87]

As previously mentioned, the dissent does not contend that courts are not the final arbiters of law. It is clear that Congress recognizes this power of the courts in § 706 of the APA where it states clearly that courts decide "all relevant questions of law."[88]

In the dissent's view, however, the practice of courts interpreting Congress's delegations of power to executive branch agencies did not consist of only *de novo* review. Where the underlying agency has taken action pursuant to a reasonable interpretation of its legislative obligation, courts have often opted to defer to the underlying interpretation rather than relying

---

[84] *Id.* at 2299 (Kagan, J., dissenting).
[85] *Id.* at 2297 (Kagan, J., dissenting) (indicating that the exercise of such power ensures that the legislative branch maintains ultimate control over its core rulemaking power).
[86] Courts do engage in limited rulemaking but typically only insofar as necessary to carry out their own internal duties. *See, e.g.*, *Miranda v. Ariz.*, 384 U.S. 436 (1966) (establishing the precedent, now known colloquially as "*Miranda* rights," that a defendant must be told of his rights to counsel prior to being questioned).
[87] Traditionally, *de novo* refers to the power of a reviewing court to consider an issue as if it were the first impression. While courts usually use this term in reference to the underlying procedural posture of litigation (usually an appellate court considering whether the lower court arrived at the correct conclusion, particularly on questions of law), the dissent seems to be referring to the power of courts to consider whether the agency made a correct interpretation.
[88] 5 U.S.C. § 706.

only on their interpretive principles to come up with their own best guesses as to Congress's intent.

As the Court explained, such respect for those interpretations is warranted because implementing agencies are the subject matter experts, familiar with the larger regulatory schemes involved, and are often the drafters of their own enabling legislation. Such close involvement with Congress indicates to the dissent the need for judicial humility when considering who—the agency or the reviewing court—Congress actually intended to interpret and fill in the gaps left, intentionally or otherwise, in the statutes it passed.

The dissent mentions several pre-New Deal era cases in which deference was found to be permissible in cases of statutory ambiguity.[89] However, believing that judicial review practices in the 1940s better "restate[d] . . . the present law" at the time of the APA's enactment, the dissent argues that these cases are more important to understanding how deference increased, as did the administrative sphere.[90]

To further demonstrate its point, the dissent points to the *Gray* and *Hearst* decisions.[91] Recall that in *Gray*, the Court found that Congress clearly delegated to an executive branch agency the task of determining the criteria required for a company to be considered a "producer" of coal. Judicial humility was evident in this case as the Court acknowledged that the agency was most capable of ensuring that such criteria consisted of "a better informed, more equitable, adjustment of the conflicting interest[s]" involved. In fact, in *Hearst*, the Court concluded that the agency was much better suited to answer the mixed question—whether the statute at issue had assigned primarily to the National Labor Relations Board the role of determining the limits applicable to the definition of the term "employee"—because the agency better understood the factors considered when Congress wrote the governing statute.[92]

Finally, the dissent finds the majority's view illogical. As deference was clearly a permissible tool leading up to the enactment of the APA, then either the APA merely restated the current practice of deference at the time (and thus the APA permits deference) or the APA reflected an intent to alter the current state on deference and sought to limit deference in some way (and thus the APA does not restate the present law).

Had Congress intended to depart from this understanding of judicial humility and to instead ensure that courts imposed their own interpretation even when it differed from the reasonable interpretation of the agency, the dissent argues, Congress could have made that intent clear in the enactment of § 706 by stating that "'all relevant questions of law'" should be decided with a *de novo* standard of review.[93]

Believing that the majority takes § 706 out of context, the dissent quotes the statute:

---

[89] *See Loper*, 144 S. Ct. at 2304, n.5 (Kagan, J., dissenting) (referring to *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210 (1827), *National Lead Co. v. United States*, 252 U.S. 140, 145 (1920), *Schell's Executors v. Fauche*, 138 U.S. 562, 572 (1891), *United States v. Alabama Great Southern R. Co.*, 142 U.S. 615, 621 (1892), and *Jacobs v. Prichard*, 223 U.S. 200, 214 (1912)).

[90] *Id*. at 2304, n.5 (Kagan, J., dissenting).

[91] *Id*. at 2305 (Kagan, J., dissenting).

[92] In fact, the majority opinion in *Hearst* relied upon reasoning akin to that proposed in *Chevron* decades later. *Hearst*, 322 U.S. at 130–131 (providing that where questions of statutory interpretation arise first in the courtroom, such ambiguities are for the court to resolve, but where such questions have been resolved by the administering agency, the reviewing court's function is limited and some deference must be allowed).

[93] *Loper*, 144 S. Ct. at 2302 (Kagan, J., dissenting) (emphasis added) (quoting 5 U.S.C. § 706).

> "*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*."[94]

This legislative statement, the dissent says, does not resolve the question of deference posed by *Chevron* in which courts are asked to interpret Congress's intent on matters left specifically to another branch of government.[95] Thus, the text of the APA neither prescribes a deferential standard nor a *de novo* standard of review. Congress's reference to the substantial evidence standard of review for agency fact-finding, arbitrary and capriciousness standard for policymaking, and mention of *de novo* review in § 706(2)(F) implies its familiarity with different judicial standards of review. Therefore, it posits, the absence of a specific standard for reviewing an agency's construction of a statute seems telling of Congress's understanding that courts are well-equipped to find a proper balance on such issues.

A court, in the dissent's view, complies with § 706 when it determines whether the agency has reasonably construed the statute at hand. When a court determines whether an agency reading is reasonable, it "just as much" decides the relevant question of law.[96] The court determines as part of its constitutional requirement to exercise independent judgment *whether* deference is authorized by the relevant statute.[97] The dissent notes that several respected law scholars share this view of § 706.[98]

Therefore, the dissent asserts that the APA reflects the historical practice of respecting delegations left properly by Congress to the administering agencies and officials of the executive branch.

2. Congress did not amend the APA post-*Chevron*, thus accepting *Chevron*-style deference.

Though the *Gray* and *Hearst* decisions took place prior to the enactment of the APA, the dissent points out that the federal courts continued to emphasize judicial humility and respect for executive branch interpretations following the enactment of the APA. For example, *Chevron* itself enforced the idea that courts need not consume the administrative functions better left to the agencies involved in the particular policies at issue.[99]

That Congress refrained from amending § 706 of the APA after *Chevron* was decided and after it was relied upon in leading administrative law cases for decades strongly indicates to the dissent Congress's acceptance of this judicial framework.

The dissent again points out that most "respected commentators"[100] understood § 706 as allowing, even if not requiring, deference. Professor Louis Jaffe, for example, said that courts must first "decide as a 'question of law' whether there is 'discretion' in the premises"[101] and that requiring courts to decide all questions of law as if no agency were in the picture is "unsound."[102]

---

[94] *Id.*
[95] *Id.* at 2302 (Kagan, J., dissenting) (referring to Sunstein, *Chevron As Law*, 107 Geo. L. J. 1613, 1642 (2019)).
[96] *Id.* (Kagan, J., dissenting).
[97] *Id.* (Kagan, J., dissenting) (referring to Louis Jaffe, *Judicial Control of Administrative Action*, 570 (1965)).
[98] *Id.* (Kagan, J., dissenting) (referring to Jaffe, Manning, Sunstein, and Vermeule as examples).
[99] *Id.* at 2299 (Kagan, J., dissenting).
[100] *Id.* at 2303 (Kagan, J., dissenting).
[101] *Id.*
[102] *Id.*

The dissent also notes that not a single Supreme Court Justice advanced the view that the APA prohibited courts from deferring to agency interpretations of law, instead opting to defer numerous times after the enactment of the APA.[103] Though it acknowledges that deference looked different leading up to the *Chevron* decision, the Court "came nowhere close to accepting the majority's view of the APA."[104]

According to the dissent, "[] 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter."[105] Finally, the dissent points out, Congress remains free to respond to each court interpretation of its statutes by amending or repealing the same.[106] Therefore, Congress has at the very least acquiesced to the *Chevron* framework.

C. Chevron is entitled to stare decisis.

Stare decisis is the longstanding doctrine of the courts to adhere to precedent in issuing new decisions. The dissent writes that *stare decisis* enables "people to order their lives in reliance on judicial decisions."[107] Respecting prior decisions promotes consistency among the courts and contributes to the actual and perceived integrity of the judicial process.[108]

The dissent goes on to outline three reasons why *Chevron* is entitled to the strictest adherence to *stare decisis*: (i) Congress has accepted the *Chevron* framework, (ii) the *Chevron* exclusions and exceptions are simple and workable, and (iii) overruling *Chevron* would cause what it calls a "jolt to the legal system."

1. Congress has accepted the *Chevron* framework.

Arguing that *Chevron* is entitled to a particularly strong form of *stare decisis*, the dissent notes that Congress has been free to voice its opposition to the decision for decades but has not done so. It points out that Congress could have amended the APA to clarify that deference to executive branch interpretations was not intended or could have eliminated deferential review in discrete areas by amending old laws or drafting new laws to include anti-*Chevron* provisions. Congress has had ample time and opportunity to do so; *Chevron* itself has been cited in "thousands upon thousands" of cases.[109]

To the Court's assertions that *Chevron* has not been relied upon by the Court for several years, the dissent responds that the doctrine has been ignored because the Court has been "preparing to overrule *Chevron* since [about 2016]."[110]

---

[103] *Id*.
[104] *Id.* at 2304 (Kagan, J., dissenting).
[105] *Id.* at 2301 (Kagan, J., dissenting).
[106] *Id*.
[107] *Id.* at 2307 (Kagan, J., dissenting).
[108] *Stare decisis*, Legal Information Institute (2021), https://www.law.cornell.edu/wex/stare_decisis (last visited Oct 17, 2024).
[109] *Loper*, 144 S. Ct. at 2307 (Kagan, J., dissenting). *Chevron* has been cited in more than 18,000 federal court decisions, according to the dissent, and the Court upheld an agency's reasonable interpretation of a statute "at least 70 times." *Id*.
[110] *Id*. "The majority's argument is a bootstrap . . . That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; 'throw some gratuitous criticisms into a couple of opinions'; issue a few separate writings 'question[ing the decision's] *premises*'; give the whole process a few years . . . and voila!—you have a justification for overruling the decision." *Id.*

2. The *Chevron* exclusions and exceptions are simple and workable.

Unlike the majority, the dissent views *Chevron*'s exceptions (or "refinements")[111] as relatively straightforward and consistent with the underlying rationale of the doctrine. The three major refinements, according to the dissent, instruct courts to not defer to the agency's interpretation when the agency construing a statute has not been charged with administering that law, has not used deliberative procedures, or is intervening in a "major question" of great economic and political significance.[112] All of these indicate that Congress likely did not want the agency views to govern on such issues. The first two involve simple inquiries, such as whether the statute enables the agency to administer the statute or whether the agency followed the proper notice-and-comment process mandated in promulgating regulations. The third, regarding major questions, involves more complexity in thought. However, the dissent says, "that disagreement concerns, on everyone's view, a tiny subset of all agency interpretations."[113] Therefore, it argues, such refinements do not involve a "dizzying breakdance," any more than removing the *Chevron* framework will.[114]

3. Overruling *Chevron* will cause a "jolt to the legal system."

By removing the *Chevron* framework, courts will be forced to grapple with many complex questions with the former *Skidmore* framework that courts used prior to *Chevron*. Under *Skidmore*, agency interpretations are "entitled to respect,"[115] and as discussed throughout this brief previously, judges are no more likely to find consensus as to what respect entails than as to whether an ambiguity exists. Without arguing that *Chevron* provides perfect clarity or foreseeability in outcomes, the dissent notes that the predictability created by the framework is "unquestionably better" than the "statute-by-statute" analysis prescribed before the deference type of respect was patterned.[116] *Chevron* provided the public with a presumption that an agency knows what it is talking about, whereas its removal may upend previously settled expectations about the validity of all kinds of rules. That those rules that were upheld under *Chevron* are not hereby overruled and will require some "special justification" to be challenged, the dissent argues, does not alleviate concerns that those rules remain subject to the political preferences of judges.[117] The *Loper* decision, therefore, is likely to cause widespread disruption to federal agency regulations and, the dissent argues, give policymaking power improperly to the courts.

Implications for Virginia

The federal government is likely to see an increase in challenges to federal agency actions due to the Court's recent decision in *Loper*.[118] However, the Commonwealth of Virginia is

---

[111] *Id.* at 2309 (Kagan, J., dissenting).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* (quoting *Skidmore*, 323 U.S. at 140 (1944)).
[116] *Id.* at 2310 (Kagan, J., dissenting) (quoting A. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 516).
[117] *Id.* at 2310 (referring to the fact that the majority opinion does not nullify agency actions previously upheld under *Chevron* but need only look to today's opinion to see how a "special justification" can be created).
[118] The Supreme Court continues to see challenges to interpretations of different APA provisions. *See, e.g., Loper*, 144 S. Ct. 2244 (opening the door for challenges to agency actions made pursuant to "ambiguous" statutes). *See also Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024) (extending the statute of limitations for challenges to agency actions to the "time of injury" on a plaintiff-by-plaintiff basis).

unlikely to see a similar shift. Many questions that remain unanswered by *Loper* regarding judicial review of federal agency actions were clarified by 2013 legislation of the Virginia General Assembly regarding judicial review of the actions of Virginia agencies.[119]

Virginia has its own version of the federal APA called the Virginia Administrative Process Act (VAPA), Va. Code Ann. § 2.2-4000 et seq. Like the APA, the VAPA authorizes judicial review of agency decisions, such as the promulgation of a regulation or the issuance of an agency case decision.[120]

The VAPA instructs Virginia courts considering the actions of agencies to follow a substantial evidence standard of review[121] regarding issues of fact while giving "due account" to the experience, competence, and purpose behind the agency and legislation authorizing such action.[122] For years, the VAPA (like the APA) did not prescribe a specific standard for such questions of law. However, Chapter 619 of the 2013 Acts of Assembly added express language to the VAPA requiring courts to review agency interpretations of law *de novo*. Though such statutory clarity was absent prior to this enactment, Virginia courts have consistently held that this language was not a departure from the practice of its courts around that time.[123] In fact, Virginia courts use *de novo* review for mixed questions of fact and law.[124]

While this appears to mirror the Court's interpretation of the APA, the dissent would argue that codifying mandatory *de novo* review of statutory interpretation does not necessarily clarify the level to which a court is able to supply a best interpretation for a regulation. It is not clear, for example, whether a court is able to require an agency to adopt a specific definition for a term or whether the court is strictly limited to telling the agency that its own definition is with or without legal merit. The federal APA appears to be silent on this question. The VAPA, on the other hand, prohibits courts from undertaking to "supply agency action committed by the basic law to the agency."[125] It seems this language may be included to ensure that the judiciary does not use its *de novo* review power as a means for rulemaking.[126] Therefore, while it remains to be seen how Congress will respond to the *Loper* decision, courts in Virginia have already begun to grapple with the fine line between applying *de novo* review of executive branch functions and overstepping into the policy world.

---

[119] 2013 Va. Acts Ch. 619.

[120] Va. Code Ann. § 2.2-4027. The VAPA requires complaints against the promulgation of regulations to be treated as separate actions from complaints against agency case decisions.

[121] In other words, if the court determines that substantive evidence existed to support the agency decision, the court will uphold such decision.

[122] Va. Code Ann. § 2.2-4027. *See also Caskey v. Dan River Mills, Inc.*, 225 Va. 405, 411 (1983) (clarifying that where there is evidence to support the findings of the commission, the court is bound to uphold even though there may be evidence in the record to support a contrary finding).

[123] *See, e.g., Women's Healthcare Assocs. v. Mucci*, 64 Va. App. 420 (2015) (reviewing the Virginia Workers' Compensation Commission decision at issue *de novo* because it poses a question of law; citing *NiSource, Inc. v. Thomas*, 53 Va. App. 692, 711 (2009)).

[124] *See id.* (citing *Young v. Va. Birth-Related Neurological Injury Comp. Program*, 46 Va. App. 558, 569 (2005) (looking at the application of facts to law).

[125] Va. Code Ann. § 2.2-4029. Juxtaposed against the *de novo* standard added to the VAPA in 2013, it is arguable that this language, which has existed since at least 1975, provided a stronger basis for judicial deference akin to that imposed by *Chevron*.

[126] *See, e.g., Loper*, 144 S. Ct. at 2298-2299 (Kagan, J., dissenting) (viewing *Chevron* as ensuring that courts did not engage in policymaking).

For more information, contact the Division of Legislative Services staff:

Rebecca Schultz, Attorney, DLS
rschultz@dls.virginia.gov
804-698-1863