Consumer Finance Monitor (Season 7, Episode 10): The U.S. Supreme Court Hears Two Cases in Which the Plaintiffs Seek to Overturn the Chevron Judicial Deference Framework: Who Will Win and What Does It Mean? Part I

Speakers: Alan Kaplinsky, Kent Barnett, Jack Beermann, Craig Green, and Carter Phillips

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

For those of you who want even more information, either about the topic that we'll be discussing today or anything else in the consumer finance world, don't forget to consult our blog, consumerfinancemonitor.com. Goes by the same name as our podcast show. We've hosted the blog since July 21, 2011 when the CFPB became operational. So there is a lot of relevant industry content there.

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Also, please let us know if you have any ideas for any other topic that we should consider covering or speakers that we should consider as guests on our show. Finally, I'm very pleased to let our listeners know that our podcast show was recently ranked by Good2BSocial as the number one podcast show among law firm podcast show within the United States devoted exclusively to consumer financial services. Good2BSocial is a prominent law firm consulting firm owned by Best Lawyers. We're very gratified by this recognition from one of the country's leading social media consultants for law firms.

Today, our podcast show is part one of a two part series, which repurposes a webinar that we presented on February 15th entitled "The U.S. Supreme Court's Decision in the Two Cases Raising the Question of Whether the Chevron Judicial Deference Framework Will be Overturned: Who Will Win and What Does it Mean?"

Today I am very pleased to be joined by our speakers, Kent Barnett, Jack Beermann, Craig Green, and Carter Phillips. And let me just tell you a little bit about each of our presenters. Kent is the Associate Dean for Academic Affairs and the J. Alton Hosch Professor at the University of Georgia Law School where he teaches administrative law, consumer law, contracts, et cetera. He's very focused on the separation of powers and administrative law. His law review articles have been published in numerous law reviews, not just University of Georgia.

And before going into academia, Kent clerked for Judge John Rogers of the Court of Appeals for the Sixth Circuit, and he was in private practice prior to that. Next to Kent Barnett is Jack Beermann. Jack is the Philip S. Beck Professor of Law and Professor of Political Science at Boston University, where he is been on the faculty since 1984. His teaching and research interests lie in administrative law, civil rights litigation, and constitutional law.

He received his law degree from the University of Chicago Law School, and he has served as a visiting professor at DePaul and Harvard Law School. Before joining the Boston University Law School faculty, Jack clerked for the late Judge Richard Cudahy of the US Court of Appeals with the Seventh Circuit. And then the most interesting thing that Jack has done by far is

that while he was growing up in Chicago, he was a food and beer vendor at Chicago Cubs, White Sox, and Bears games and at Northwestern University Football.

That is quite an achievement, Jack. Congratulations. So Craig Green, Craig is the Charles Klein Professor of Law and Government at Temple University. He teaches administrative law, constitutional law, and federal courts. He received his JD degree from Yale Law School. And while teaching at Temple, he received a PhD in history from Princeton. And before joining academia, Craig clerked for Judge Lewis Pollock and Judge Merrick Garland.

He also was an appellate lawyer for several years at the Department of Justice. And last but certainly not least and really the only non-academic on the program today other than me is Carter Phillips. Carter is one of the most experienced Supreme Court and appellate lawyers in the country. He has argued 90 cases before the Supreme Court as a private practitioner, and he's argued more than 150 times before the US Court of Appeals, in several different Courts of Appeals. He was an Assistant to the Solicitor General from 1981 to '84.

And before that, he clerked for Judge Robert Sprecher on the US Court of Appeals of the Seventh Circuit and for Chief Justice Warren Burger on the US Supreme Court. And as you can see, all of our presenters today are extremely distinguished and very preeminent in their areas, and I'm really looking forward myself to hearing the discussion today.

So let's move on to our agenda for today. I'm going to give you the brief overview of the question presented in these two cases, Loper Bright and Relentless, and the background of the cases. And then after I'm done, we'll go to Craig Green, who will talk about the history of judicial review of administrative action. And then we will go to Kent Barnett, who will talk about the main arguments for upholding the viability of Chevron. Then we will go to Jack Beermann, who will talk about the main arguments against the upholding that doctrine or overruling it. So let me give you the brief overview so that we can move ahead here.

On January 17th of this year, the Supreme Court heard oral argument in two cases in which the question is whether the court should overrule the 1984 decision in Chevron USA versus Natural Resources Defense Council. The precise question presented by the court needs to answer is whether the court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the underlying statute does not constitute an ambiguity requiring deference to the agency.

The Chevron decision established what has become known as Chevron deference or the Chevron deference doctrine or the judicial deference framework. And it requires courts, it's mandatory, that's the important thing to remember, requires courts to accept a federal agency's interpretation of federal law if indicated by the outcome of a two-step analysis that's set forth in the Chevron decision. In step one, the court looks at whether the statute directly addresses the precise question before the court.

If the statute is silent or ambiguous, the court will then proceed to step two and determine whether the agency's interpretation is reasonable. If it determines that it's reasonable, Chevron instructs the court to defer to the agency's interpretation. It is a mandatory doctrine dealing with judicial deference, and that is really what has made it quite controversial as our other speakers will tell you. So let me tell you about the two specific cases before the court. This is not an area of law that certainly I was familiar with.

I don't know if my co-presenters are familiar with, but they are Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce. Both cases involve a regulation of the National Marine Fisheries Service, or as I will refer to it, the NMFS, that requires certain fishing vessels to pay the salaries of the federal observers that they are required to carry on their boats. The regulation implements a statute which authorizes the NMFS to require fishing vessels to carry federal observers.

In three circumstances, not applicable to the facts in Raimondo or Relentless, the MSA goes further and requires vessels to pay the salaries of the federal observers, but there's nothing in the MSA that addresses the circumstances involved in Raimondo and Relentless as to whether they need to pay the salaries of the federal observers that they are required to carry on their vessels.

So the statutory question underlying they both serve petitions is whether the NMPS, the federal agency, can force a wide variety of other vessels like the vessels that Raimondo and Relentless were using to pay the salaries of the federal observers that the vessels are required to carry up to there is a limit on how much they have to pay. It's not going to exceed 20% of revenue. In both cases, the petitioners are owners of fishing vessels who challenge the NMFS regulation as exceeding the agency's authority under the MSA.

The district court in each case applied Chevron deference and upheld the NMFS regulation. In the Loper case, a divided DC Circuit panel affirmed the district court. And in Relentless, a unanimous First Circuit panel, again, relying on Chevron affirmed the district court. With the exception of Supreme Court Justice Jackson, all of the justices participated in oral argument in both cases. Justice Jackson recused herself from Loper because it arose out of the DC Circuit on which she previously served before becoming a Supreme Court Justice.

Solicitor General Elizabeth Prelogar argued on behalf of the government in both cases. The arguments were heard on the very same morning. They had taken well over two hours of argument, I think about two and a half hours of argument. In Relentless, Roman Martinez, a former assistant solicitor general and a law clerk to Chief Justice Roberts and to Justice Kavanaugh when he served on the DC Circuit, argued on behalf of the owners of the shipping vessels.

In the Loper case, Paul Clement, a former solicitor general and law clerk to Justice Scalia, argued on behalf of the owners of the shipping vessels. Well, actually I was wrong. I have a note here. There was three and a half hours of oral argument. And I would point out that the transcripts of the oral arguments, you will find them by going to the blogs that we have written about these two cases, and we did a blog about the oral argument and it will have a link to the two transcripts.

I'm going to turn the program over to Craig Green, who's going to give a very brief history lesson on administrative law and more specifically, Chevron and Brand X.

Craig Green:

Thank you so much, Alan, and it's really a pleasure to be here, especially with these other extraordinary panelists, Kent and Jack and Carter. I think I have 10 minutes to cover almost 200 years of history. I'm going to do three points. One of them is the origins of deference altogether. For a very long time, at least since the 1820s and maybe farther back, Congress followed one basic pattern for creating administrative agencies.

Congress would pass a statute creating an agency, the agency would go and do things, and that would raise questions about whether the agency was within the scope of some ambiguous or broad statute that they had been sent forth to administer and enforce. Since the 1820s until 1984, courts that heard challenges to things that agencies did applied a wide range of different kinds of deference. The agency would be thought to be an expert in the statute in the field they were supposed to administer.

They would have the primary responsibility for going out and doing the thing, whatever it is they're supposed to do, not a court. And time and time again, the Supreme Court of the United States expressed variable forms, variable language describing the kind of deference that a court should do in checking the agency's homework, seeing whether the agency was doing what it was supposed to do as opposed to something else that was illegal. I have done a law review article on this subject.

I've collected about a little over 60 different cases from 1827 to 1984 and matched up the different language. I think the shortest thing to say about the level of deference that was assigned during this era, it was very variable, ad hoc, not very consistent. Fine. Second point concerns Chevron itself. So Chevron comes out of a particular historical moment, the Reagan Revolution.

Anne Gorsuch is the EPA head at the time, and the fight is over the definition of the word source in the Clean Air Act, and whether stationary source is an entire facility or whether it's polluting spots inside a facility. So the bubble concept is the way they're referred to the whole facility, and I make up the term the stinker concept for smokestack by smokestack.

The DC Circuit had addressed this question as a matter of judicial precedent previously and so had prior agencies, and they had ruled in favor of the stinker concept, stinker by stinker, and rejected in another context the bubble concept. But Anne Gorsuch and the Reagan Revolution and the conservative approach to the Clean Air Act wanted to have the more business friendly bubble concept. The then very junior circuit Judge Ruth Bader Ginsburg followed DC Circuit precedent. And when that case was appealed to the US Supreme Court, they reversed the Chevron case.

Justice Stevens writes the majority opinion. And the shortest form, just to add to what Alan I think very usefully said, is the Supreme Court said that a decision of bubbles versus stinkers, the decision of whether the source is the whole facility or smokestack by smokestack, that decision is in the agency's discretion, not the court's judgment. And the agency can change its mind over time within a realm of ambiguity and as long as it has a reasonable interpretation.

So that idea of changing its mind, of that flexibility, which is a fundamental premise of the conservative shift in government that accompanies the Reagan Revolution, that's all what Chevron is about. And at that point, the Chevron case really does solidify the two steps and makes it much more transparent, or perhaps at least rhetorically more formalized, if you want to call it that.

This longer, longer tradition that had gone back to the 1820s, in 1984, there's all of a sudden almost like a formula that law students could learn this kind of thing, the Chevron deference two-step, as they might call it. Fine. A couple of points about that before moving on. There had been a big debate in the Reagan administration. They came in, wanted to do very conservative things. Some people wanted to repeal the Clean Air Act or revise or repeal, but really repeal, and they failed to do it.

So the way that the Reagan Revolution happened, including in the Chevron case and the Clean Air Act, is that they had a bureaucracy, the administrative state, that steered the governmental wagon to the right, that lurched interpretive judgments toward the right, toward pro-business and this kind of a thing. In Chevron, the Supreme Court affirmed that whole project in a certain kind of way, consistent with prior things that have been...

But that's the idea, is that they had shifted the government to the right and the Supreme Court approved. Justice Scalia wrote lectures. And before that, before he was on the bench, he wrote an article for a conservative publication. He loved Chevron. All of us should be looked at someday on Valentine's Day the way Nino Scalia looked at Chevron, he loved that doctrine. He thought that conservatives need to get on board with deference because deference was what was delivering the Republican revolution. He said, "If you resist administrative state and deference and so forth in this era... " He said, "You're scoring points for the other team." So anyway, he was very into it. He remained into it in his published writings, his whole career. And that's something just to note as we move to the third moment. The third moment is close to now. Now conservative judges and jurists and organizations like the Federal Society and a range of other conservative opinion makers and policymakers and think tanks, they were very against Chevron deference.

And so, this raises another question for me as a scholar, what happened? How did it happen? When did it happen? And I tried really hard to study exactly when it happened. It's hard to pin down a 100%, but the date that I had was 2013. At that moment, chief Justice Roberts expresses real concern about Chevron deference against Scalia as it happens. Justice Thomas somewhere in there, very close to then does a radical shift. He had been like the most pro-Chevron person in a case called Brand X. And then he now is the most emphatically anti-Chevron. And by the way, he's never actually explained that other than to say, "You change your mind, oops." Other than to say that. And so I think that that shift is something that's very important among conservative jurists, Neil Gorsuch is on the Supreme Court singularly because he was the most outspoken Court of Appeals judge in the country, in the history of the country against Chevron deference. And that put him on the top of the pile. That's a very big part of why he's on the Supreme Court.

So I think those are the three historical moments I think to keep in mind, there's this longer tradition, pre-Chevron of more flexible deference that now survives in a different context under names like Mead or Skidmore, which we may talk about down the road. Chevron itself was a victory for presidential politics, a victory for administrative state in a conservative direction at the time. And there were conservatives who loved it forever, and Justice Scalia was one of those. But somewhere around 2013 and then accelerating and heightening over time, this opposition, including constitutional opposition to Chevron comes around in the 21st century. And that's the moment that carries us forward to the cases that Alan was describing this pivotal moment in the history of Chevron deference.

Alan Kaplinsky:

Okay, well, thank you very much, Craig. And now we're going to go to the main arguments for Chevron, and I believe we're going to Kent. Am I right?

Kent Barnett:

Yes. Thanks, Alan. And thank you for inviting me to join you all once again, this is a great program. And like Craig, I'm just ecstatic to be with this wonderful group of scholars and with Carter, one of the best Supreme Court advocates of his generation. So if we look at Chevron itself and think, well, why would we want to promote Chevron? What's the argument for keeping it? I'll start with some of just the basic normative arguments or why we think it's doing good things theoretically. First,

the argument is that it recognizes agency expertise in matters that concern policy. So when interpreting a statute, there may be various policy concerns that are part of the equation for determining how to resolve an ambiguity. And as Craig indicated, part of the understanding of Chevron is that an agency may change its interpretation within a reasonableness space that we give the agency based on different political theories or policies it may have, different facts on the ground that may alter how it thinks it is best to interpret an ambiguity in a statute.

The second is that it recognizes congressional delegation to those agencies. And the understanding is that Congress would prefer the expert agencies as opposed to the inexpert court to resolve these policy-laden determinations that are part of statutory interpretation. And the third component, and all three of these reasons were mentioned in Chevron itself, is a separation of powers rationale, that the courts themselves recognize that this is a political space and it's not good for them to determine if they don't have to, what the political resolution of something that is really better left within the kin of another expert unit, the agency in particular.

Aside from that, there is this idea that there is just inevitable deference given to agencies. And this is somewhat of a pragmatic argument, that there are so many cases that have agency regulations or agency interpretations at issue that a court simply can't review them all, De novo. Indeed the last empirics I saw in the citation count was that Chevron has been cited 17,000 times since it was decided. And the idea is this is a bit of docket control as well, that courts are going to have to come up with somewhat quicker ways of resolving cases.

And it's also a recognition as part of this inevitability that courts are often going to be faced with an issue they just don't know very much about. And Justice Kagan has actually kind of gone to lengths to show the different kinds of cases where they usually have a scientific question in some way where courts would not have as much expertise as agencies would, whether when reviewing a statute in the case of Chevron or a regulation in the case of a deference doctrine called Auer deference, that applies to the judicial deference to an agency's interpretation of its own rule.

Part of the argument too, and this is a bit of a response to the counterarguments, is similar to what Craig said earlier, that this is consistent with history. So generally the precursor to Chevron, as he knew, this was going all the way back to the founding of Marbury versus Madison of using a writ of mandamus. And the way mandamus was used is if the executive had no discretion, instead had a duty that was defined as ministerial, then the court would make the executive do that. But if there was more than a ministerial duty, instead it was a discretionary duty, then the court would stay its hand and allow the executive to proceed within that discretionary space. Well, as you might intuit, that's somewhat similar to Chevron's steps one and two. Step one, telling us whether Congress has a clear intent, so there's no discretion, then we will make the executive do whatever it is Congress said.

And then step two, if there isn't clear intent, and there is a discretionary space, then we will allow the executive to continue as long as the executive continues reasonably. Part of the argument that's come back is whether or not whatever may have happened as mandamus practice, whether Chevron is consistent with the Administrative Procedure Act, which was enacted in 1946. And I think the best way of trying to summarize it very tightly is that there were deference doctrines that looked similar to Chevron immediately before the APA was enacted, and the court continued on with those. So it looks like in practice it all stayed the same. The argument as I'm sure Jack will tell us a little bit more about is that the APA in 706 says that courts shall review questions of law and it appears to be that they're going to review them de novo.

So the question is, is that 706 statement that courts will review issues of law inconsistent with this deference regime under Chevron? And one of the leading arguments here for Chevron is from Cass Sunstein, which said, "Well, the courts kept doing what was the precursor to Chevron right after the APA." And as he said, "There's a dog that didn't bark problem." No one was concerned about this despite the court mentioning other instances in which the APA changed something. Similarly, one argument against Chevron is that it violates the Constitution and the pro-Chevron argument is, nothing requires the courts to decide all legal issues de novo, for instance, courts review state habeas matters, so state criminal convictions that are heard in federal habeas through a discretionary lens. And there are other areas where the court does not review a question de novo, sometimes it doesn't even have the ability to review a legal question. Indeed, Congress routinely puts no review provisions in statutes. And so, part of the argument is if having a no review statute is constitutional, it's hard to see how reasonable this review would be unconstitutional under Article III.

Moving past this, we also have arguments based on congressional acquiescence and use. Congress has understood Chevron to be the backdrop rule, as Justice Scalia referred to it when drafting. In some of my research, I go through the few limited

instances, the only instances, where Congress has really talked about Chevron, and there are times when it will say we don't want Chevron to apply. It famously did so in Dodd-Frank about preemption like Alan was mentioning. And it did so in a series of other provisions that transferred certain regulatory power or certain statutory schemes from one agency to another. Likewise, the Congress has repeatedly entertained proposed bills that would overturn Chevron, it has never enacted any of those. And those go back even to before Chevron was Chevron in 1984. But in all cases, they haven't made it through Congress.

Probably two final things are that one, it helps mitigate political decision-making in courts. And the idea is, if we've got these politically-loaded issues because agencies are deciding sensitive matters, you would anticipate that a liberal judge is going to favor liberal policy positions and vice versa for a conservative judge. And an empirical work that a co-author of mine and I did quite a while ago, his name is Chris Walker at the University of Michigan. We worked with a political scientist, Christina Boyd here at University of Georgia with me. We looked at the data and what we saw is exactly what you would expect. When Chevron doesn't apply, liberal judges are much more likely to agree with a liberal policy position and the same thing for conservatives and conservative policy positions.

But when you use Chevron, and there is some deference to an agency's reasonable interpretation, it neutralizes those partisan effects that we see. Not completely, but it's significantly mitigates them. Meaning it's less important who the judge is that's hearing the case, especially in what can often be politically-loaded decisions. And finally, I would say the argument that we saw come up quite a bit at oral argument, and it was in the briefing, including in the amicus brief that I filed with Professor Walker, is that there is a strong stare decisis effect for Chevron. The court has cited it since 1984. It's been in numerous decisions. The Court of Appeals rely on it routinely. And again, usually if we are trying to do something such as discerning what congressional intent is as to Chevron, we would leave it to Congress to decide whether it disagrees with the court by enacting a statute to overturn the court's decision.

And as I mentioned earlier, that hasn't happened yet. In this area dealing with judicial deference, the Supreme Court recently reaffirmed a sister doctrine to Chevron Deference called Auer Deference, which works essentially the same way. And in that case, in a part of the majority opinion that Justice Kagan wrote, they took an extremely heightened view of the effect of stare decisis in the judicial deference space. And I would expect something similar to occur here if the court maintains the same precedent for its precedent on how to determine whether or not stare decisis should apply.

Alan Kaplinsky:

Yeah. Well, thank you very much, Kent. I guess, the only thing I would add to what you had to say, I think in general, industry would like to see Chevron remain as-is. Even if they're not happy with some of the regulations that they have to comply with, at least it provides more certainty, I think, than a non-Chevron world. And it's a trade-off that I think if you were to question companies that are very heavily regulated at the federal level, while they would complain plenty about all the regulations they have to comply with, there's still certainty. And therefore, a non-Chevron world I think makes them quite anxious. Well, anyway, let's turn to Jack right now to give us a quick review on the main arguments against Chevron, that is, overruling Chevron.

Jack Beermann:

Okay, great. Thank you, Alan, and thanks very much to the other panelists and thank you all for listening. And I don't know how many of you remember when Chevron was decided. I actually can remember it because I was clerking at the time at the US Court of Appeals, and I had a discussion with it with Judge Cady who was very interested in administrative law. He was an energy lawyer, and I remember talking to him about how odd he thought it was, but how great he thought it was for regulation in the long run. Because if you recall when Chevron was first... If for those of you that are old enough to recall or who tuned in at the time when Chevron was decided, it was attacked from the left on a bunch of different bases. And the legal basis seemed to be inconsistent with separation of powers. It was inconsistent with the proper judicial role in administrative law, inconsistent with the APA, and basically that it was like a gerrymandered doctrine in order to approve the Reagan administration's deregulatory changes.

It seemed really odd that the court, that just a few years before had seemed to be on the verge of reinvigorating the Nondelegation doctrine, which would have vastly restricted agency discretionary authority was now backing the most

deferential standard of review since the enactment of the APA. There were obviously elements of deference to agency discretion in the years between the APA's passage and the Chevron decision. It didn't spring from nowhere. And there was a parallel doctrine in the labor law area, which seemed very similar in some senses to Chevron. And it had to do with a lot of deference to the NLRB's application of the labor laws, of mainly the National Labor Relations Act and the Taft-Hartley Act.

But it really seemed to be a throwback. And it was interesting to me that Kent mentioned prior law about mandamus. Once upon a time, that is, before the APA, agency action was basically if it was discretionary, it was basically unreviewable. That is the basic understanding was you had the writs like prohibition to mandamus against agencies, and if they did something which was clearly beyond their statutory authority, and it was sort of nondiscretionary agency action, that the courts would issue the writ. But if it was anything within the discretion of the agency, and even Marby versus Madison talked about this, if it was an area that was sort of left to the political branches, then the courts wouldn't intervene. And the APA was designed to basically overrule that prior understanding. The whole reason for the APA was on the one side of fear of agency overreach and too much regulation, and the other side a need to sort of regularize what was going on. So there'd be more certainty and a better structure so that people understood where the law took them in the administrative law area.

And the APA itself provided, forgetting for a minute about the more specific language about review of questions of law. The APA provided that agency action could be overridden if it was arbitrary or capricious or an abuse of discretion, which is much, much more nondeferential review than what mandamus would've allowed. So it's really, Chevron as it became understood in the years immediately following it, was really a throwback to pre-APA law, but in a sort of an odd and difficult to understand way. So it seemed to many of us that it was just inconsistent with the entire idea of the APA. Now, politically speaking, the reason that the left and Democrats were so against it was because it was used to approve deregulation.

And the Reagan administration was sort of gearing up for a big attempt to deregulate, and they would have to get their deregulatory actions through the Supreme Court. And we saw the best example of this is in the air bags case where the Supreme Court did overrule the Reagan administration, but it's still applying a pretty deferential standard that the Reagan administration basically had no explanation for what it did, no rational explanation whatsoever. Now get back to one of the primary criticisms of Chevron that's been leveled over the decades, which is that it was inconsistent with the APA sort of explicitly the text of the APA, and now it's important to recognize. And in the Loper Bright and other argument, it wasn't until the very end of the argument that Paul Clement mentioned, oh, by the way, the APA didn't apply in the Chevron case, Chevron was decided under the Clean Air Act's judicial review provisions, which is very similar to 7062, but don't include the beginning of 706, which has some key language.

Now that's not that important in the bottom line, but it's one of the things is that people say that when people say it didn't apply the APA, well, there's a good reason why Chevron itself didn't apply the APA because the APA didn't apply. But once it got applied to APA cases, it seems to be inconsistent with the text of the APA, which says that the reviewing court, "Shall decide all relevant questions of law, interpret constitutional and statutory provisions." Now, the Clean Air Act and the APA also say that the reviewing court should set aside agency action that's, "Otherwise not in accordance with law." So it's very similar. And in Chevron itself, the court paraphrased that phrase and said, manifestly contrary to law, as opposed to otherwise not in accordance with the law. And anytime a court rewrites a statute that it's supposed to be following, it gives you a clue that they're not actually following the statute that governs what they're doing because otherwise they would have not paraphrased, they would've read it as written.

So it seemed to a lot of people that it was pretty much inconsistent with the APA. Now that isn't really my problem so much because there is a way to justify Chevron in light of the APA because we recall, the main justification for Chevron was that Congress intended to delegate the power to interpret the law to the agencies first with just sort of reasonableness review left for the courts. If you believe that, which even Justice Scalia who loved Chevron admitted it was really a fiction. But if you believed that, then they weren't violating the APA because the APA was telling them to basically follow what Congress wanted. And according to Chevron, what Congress wanted was deference to agency legal determinations. But that really was a fiction. It wasn't really true. And in my view, the Chevron doctrine as it became known and applied, really defeated the terms of the APA and the modern administrative law bargain by making agencies too unaccountable.

Congress depends on the courts to keep agencies within the term of their statutory authority. That was the primary basis for the court upholding agency rulemaking at all. And if you look at an opinion that was not on this subject, the Chadha opinion, which is one of the more famous opinions in administrative law, one argument that Congress made in favor of preserving the

legislative veto is that agencies make discretionary decisions all the time without going through bicameralism and presentment. And yet it's perfectly fine for agencies to do that. And what the court said in footnote 16 of Chadha, which again is exceedingly important, what the court said was that, well, agencies are always bound by the terms of the delegation. They can't do anything that Congress hasn't authorized them to do. And in fact, if you look back even at the steel seizure case where the Supreme Court rejected President Truman and the Secretary of Commerce's effort to seize the steel mills during a labor dispute, the court basically has consistently said that agencies cannot act without authority granted by Congress.

Chevron seemed to sort of completely abandon that balance between agency power and congressional power by saying, basically, we're going to presume that the agency has been delegated the authority to do anything that Congress wants it to do, or that anything that Congress leaves it open to do, subject to this vague check that they can't do something which is an impermissible or unreasonable construction. So that's part of the principle problems with Chevron. My main focus has been on the practical problems with Chevron, which is that Chevron was incoherent, and it was impossible to apply in any sort of consistent manner. And I have to disagree with Kent here where he says, and I have to disagree with Kent here, where he says that it helped judges avoid imposing their partisan views on things, it helped prevent them. In my opinion, it helped judges. The main thing it did was it helped them sort of skip the hard work of answering complex statutory questions in lower courts. And so they basically abdicated that role and they ended up sort of punting that to the Supreme Court, which would only take a small number of cases. And once a case got to the Supreme Court, the Supreme Court would very often decide the question in Chevron Step One, because the Supreme Court felt that it was its responsibility to engage with the difficult statutory issues.

But also Chevron was so uncertain and so impliable that when a lower court wanted to impose its view, it could easily within the language of Chevron do whatever it wanted. And in fact, at the Supreme Court, it was pretty clear that basically after Chevron got going and it got a little bit more controversial that the liberals on the Court would defer when the agency did something liberal, the conservatives would defer when the agencies did something conservative. And the two sides would basically rarely join each other's opinions, deferring. There was justices in the middle, justices like Kennedy, Souter and O'Connor who would flip a little bit in terms of whether they were going for the conservative view or the liberal view on any particular agency action. And so basically what you had was a situation where, for example, Justice Scalia, the biggest champion of the Court on Chevron, deferred the least in cases that were decided under Chevron because most of the time those cases came up, it was based on liberal-favored regulatory actions.

So the problem is that it allowed the Supreme Court to pretend to apply a doctrine of deference without ever actually applying it. Now one of the defenses of Chevron has been, "Well, it's okay. The lower courts could apply and keep them consistent and the Supreme Court can continue to ignore it." But there's something really wrong with a legal doctrine announced by a court that doesn't apply it and expects other courts to apply it. And some people say that the lower courts should stop applying Chevron maximalism, as we call it when the Court immediately jumps to deference that they should stop applying Chevron maximalism because the Supreme Court's not applying it anymore. But the Supreme Court has told lower courts time and again that unless it overrules one of its own cases, the lower courts are bound to follow it. And so I don't see any virtue in Chevron in terms of a practical doctrine. It's so unclear that you don't even know whether Chevron is about policy deference or about deference to statutory interpretation.

Kent also said that one of the virtues of Chevron is that it allows the agencies with policy expertise to make the important decisions. But that's already covered by the State Farm arbitrary capricious standard of review for agency action. That is when an agency is making a decision of policy like whether to require airbags in cars or whether to allow for a greater concentration of ownership for media outlets, it applies the arbitrary capricious standard and it's relatively deferential. The recent Prometheus case, which some of you may be familiar with, the Supreme Court basically told the Third Circuit, "Stop being so harsh when the FCC is trying to change its rules here. You need to be more deferential under the arbitrary capricious standard as announced in State Farm and in Overton Park."

So to me, the deference ought to come in when we're talking explicitly about policy, that I haven't heard any good argument for deference when it comes to statutory interpretation. Of course, if there's a technical statute and the agency has expertise for how it ought to apply under pre-Chevron law, there's room for the Court to listen carefully to that, but not, I think, to do the sort of bend over backwards and allow agencies to do anything which is in the realm of rationality way that we allow Congress to do. I'll finish with that.

Alan Kaplinsky:

Well thank you, Jack. To make sure that you don't miss our future episodes, subscribe to our show on your favorite podcast platform, be it Apple Podcasts, Google, Spotify, or wherever you obtain your podcast shows. And please don't forget to check out our blog, consumerfinancemonitor.com, which goes by the same name as our podcast show. On our daily blog, we provide daily insights into the consumer finance industry. There is a lot of content there. You certainly will want to consult it every day. And if you have any questions or suggestions for our show, please email them to us at podcast, that's singular, podcast@ballardspahr.com. And stay tuned each Thursday for a new episode of our show. And in particular, you'll want to download, listen to, our show next week because that will be part two of our repurposed webcast. Thank you for listening and have a good day.