

Thirty-six years ago today, the Supreme Court decided the *Chevron* case. The case gives leeway to agencies when their governing statutes are unclear or have gaps. It's probably the most frequently cited Supreme Court opinion ever. But now the *Chevron* doctrine is under fire from conservatives, who used to be its strongest advocates.

Here's how the doctrine works. The *Chevron* doctrine is a rule about court review of agency actions that many scholars consider central to modern administrative law. That doctrine calls for judges to accept reasonable interpretations of a statute by an administrative agency, even if the judges might have favored different interpretation themselves. The Supreme Court has cited two reasons to give agencies the power to interpret ambiguous statutes: (1) agencies are more democratically accountable than courts, and (2) Congress has given the agency the main responsibility for implementing the statute.

Even before *Chevron*, courts agreed that an agency's statutory arguments were entitled to respectful consideration, given an agency's expertise about the statute it administers and the practical and technical issues involved in implementing the law. (This is now known as Skidmore deference.) But *Chevron* upped the level of deference to agencies. It created a two-step test:

Step One. Is the statute's meaning clear? If so, that meaning controls.

Step Two. If the statute is ambiguous, the agency's interpretation will be upheld by the court provided it is reasonable, even if the court would have chosen an alternative interpretation.

The Court has added some bells and whistles since then, but the core of the doctrine remains the same.

Conservatives have two major legal arguments against *Chevron*. One is that it conveys some of the judicial power to interpret the law to the executive branch, in violation of the separation of powers. The other is that the Administrative Procedure Act calls for the court to make its own judgment as to whether an agency is violating the law. Both of these come down to the idea that the court is surrendering some of its power to interpret the law. On the other hand, there's an argument that every statute requires the executive branch to interpret it, including issues that will never come before a court. So maybe interpretation isn't exclusively a judicial function after all.

Many people in administrative law care passionately, one way or the other, about the *Chevron* doctrine. Like Justice Stevens, the author of *Chevron*, I've never been convinced

that the case was that big a deal. It probably allows administrative agencies to win somewhat more cases in court than they would otherwise, which isn't insignificant. But we had a powerful regulatory state before *Chevron* came along, and we'd continue to have it if *Chevron* goes away.