Chevron Doctrine continues to haunt the courts

Thomas Berry and Isaiah McKinney

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In the grade school civics version of American government, it's the judiciary that interprets the law. But for decades, the reality has been much different. Under a 1984 Supreme Court case, Chevron v. Natural Resources Defense Council, judges are often *not allowed* to interpret the law using their best judgment. Instead, it's the executive branch that frequently has the last word on the meaning of the statutes that define its own authority. It's long past time for the Supreme Court to correct its error and end the Chevron–deference experiment.

When interpreting the meaning of statutes under Chevron, courts apply a two-step test. First, they must decide if the statute's meaning is "unambiguous." If the meaning is clear, the court applies that meaning. But if it is ambiguous, the court must defer to the agency's interpretation so long as it is reasonable. When the court and the agency disagree over the best interpretation of the statute, it is the *agency* that wins out, so long as its interpretation is deemed a permissible one.

There are two major constitutional problems with Chevron deference. First, it blatantly violates Article III of the Constitution, which grants all judicial power to the judicial branch. At the core of the judicial power is the authority to interpret statutes and determine their proper meaning and application, even when that work is hard. But under Chevron, courts are *forbidden* from interpreting the law as soon as the interpretive task becomes difficult. Inverting the separation of powers that the Framers designed, the executive branch often gets to both enforce and interpret the law, becoming in effect both prosecutor and judge.

Second, Chevron biases the judiciary in favor of the government. The Fifth and Fourteenth Amendments require that people receive "due process of law," and nothing is more fundamental to due process than an impartial judge and jury. But when courts are forced to defer to an agency's interpretation, they must put their thumb on the scale for the agency. A rule consistently mandating bias for one litigant and against another is not due process.

For these reasons, Chevron deference has been heavily criticized by many Supreme Court justices, appellate judges, and academics. And the Supreme Court may soon have an opportunity to heed the many calls for Chevronto be reexamined. A recent petition to the Supreme Court, in a case called Loper Bright Enterprises v. Raimondo, is asking the Supreme Court to finally overrule Chevron and let judges judge.

At issue in Loper Brightis whether an agency may require commercial fishers to pay for government monitors on their own boats. The relevant statute is silent on the issue. But the agency argues that the statute plausibly permits it to force the fishers to pay for the privilege of carrying their own inspectors. The D.C. Circuit deferred to that interpretation under Chevron, thereby exemplifying the harms of the doctrine.

As the D.C. Circuit's opinion in Loper Brightdemonstrates, there is an increasing disconnect between lower courts and the Supreme Court over the application of Chevron. Over the past seven terms, the Supreme Court conducted a Chevron analysis in ten cases but deferred to the agency's interpretation only once. In the other nine cases, the high court decided the actual meaning of the statute.

The federal courts of appeals, however, have not caught on to the Supreme Court's reluctance to defer under Chevron. In a recent Cato Institute study, we surveyed 142 circuit court cases conducting Chevron analysis during 2020 and 2021. Of these cases, 71—exactly half—found the statute ambiguous. Of these 71 cases, the courts deferred to the agencies' interpretations in 55, or 77 percent.

If the Supreme Court has attempted to send a signal to lower courts that they should be chary of finding ambiguity under Chevron, lower courts have not gotten the hint. Even if Chevronis almost as dead as a doornail at the Supreme Court, the ghost of Chevron still regularly gives citizens a shock in the lower courts. To put the ghost officially to rest, the Supreme Court should take Justice Neil Gorsuch's recent advice and erect "a tombstone no one can miss."

Thomas Berry is a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies, where Isaiah McKinney is a legal associate. They co-authored an amicus brief supporting Loper Bright's petition to the Supreme Court.