ADMINISTRATIVE LAW

WEEK TWELVE
Tuesday, Nov. 9, 2021
Professor Julia M. Glencer

QUESTION 5 (worth up to 4 points)

You have been asked to give a 5-minute lunch & learn-style presentation to a law student group on campus as part of a 1-hour program entitled FIVE THINGS EVERY INFORMED LAW STUDENT SHOULD KNOW IN 2020. Because you have taken an Administrative Law course, the group assigned you the following topic: *Enter Stage Right: The Unitary Executive Theory Now Affecting the Modern Administrative State*. **Please write a paragraph or two to use as the basis of your oral presentation**. (And you may propose a different title for YOUR presentation if you wish.)

QUESTION 4 (worth up to 4 points)

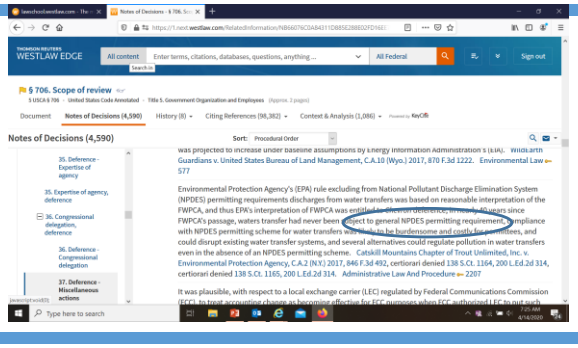
You have also applied for an Assistant Counsel position at the U.S. Department of Transportation (DOT). You are currently interviewing with DOT General Counsel Danielle Callens. She is pleased that you took an Administrative Law course. Leaning back in her large swivel chair, she says to you:

"I am a huge supporter of the movement to modernize the APA and I intend to have our new Assistant Counsel help me with my pro bono work as a member of an inter-agency work group tapped to recommend ways to modernize the APA. What does the word "ossified" mean to you in terms of the APA and can you give me an example of something in the APA that you consider to be 'ossified' and in need of modernization?"

Please answer DOT General Counsel Callens' question in an organized and substantively responsive fashion. Yes, you may write as if you are talking out loud, so long as you remember that this is a job interview and you wish to impress the listener.

AGENDA

Skidmore Deference
Chevron Deference
Reading Exercise . . .
----------*Break*----------
Mead (which impacts *Chevron* Deference)
Auer Deference
Reading Exercise . . .



AGENDA

Skidmore Deference (1944)
Chevron Deference (1984)
Mead (which impacts *Chevron* Deference) (2001)

Auer Deference (1997) [ghost of *Seminole Rock* (1944)]

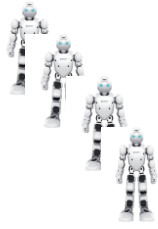
FIRST HALF

Background - operates like a good review!
Skidmore Deference
Chevron Deference
The *Chevron* Two-Step
Reading Exercise No. 1: Should *Chevron* Be Overturned? (Podcast Transcript)

BACKGROUND TO DEFERENCE

CONGRESS OFTEN CREATES SKELETAL ACTS

OURS IS A VAST, DIVERSE LAND IN AN INCREASINGLY COMPLEX WORLD



1. Statutory interpretation is a critical lawyering skill for ALL LAWYERS!

2. **Statutory interpretation is NOT the same as constitutional interpretation, although there *is* a good deal of overlay.**

3, To be *effective* with interpretation (whether constitutional or statutory), you must: know your own theoretical leanings & learn about all of the others!

4, Much of this material is learned on your own (by reading) and in practice.

5. **TONS of statutory interpretation occurs long before judges ever get involved (*if* they ever get involved).**

6. **Statutory interpretation can seem like an endless "thrust & parry" of theories and tools until someone makes a decision about what the statute means.**

7. *You* may come to the task of statutory interpretation with some background to draw upon.

ONE CONSTITUTION,
RATIFIED BY THE PEOPLE
Hundreds of statutes,
enacted by an elected Congress
Thousands of regulations, adopted by
politically responsible agency heads

Tens of thousands of interpretations and other guidance documents, issued by agency bureaus
COUNTLESS ADVICE LETTERS, PRESS RELEASES, AND OTHER STATEMENTS, OF UNDERSTANDING GENERATED BY INDIVIDUAL BUREAUCRATS

INTERPRETATION?

- Is there something TO INTERPRET?

Ambiguous
(and thus in need of interpretation)

Unambiguous
(and therefore simply in need of enforcement)

- Pay attention to how *this* is diagnosed.

STATUTORY INTERPRETATION

Three Theories

- Textualism
- Purposivism
- Pragmatic & Dynamic
- Is there a Fourth?
  - The Justice Roberts' Blend?

Tools

- Dictionaries
- Custom & Usage
- Statutory Structure
- Legislative History
- Canons of Construction
  - *Linguistic*
  - *Substantive*
  - *The Absurdity Doctrine*

NLRB

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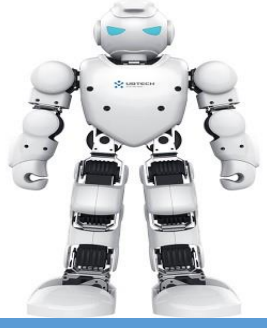

NLRB

NLRA).

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- Supreme Court explained the NLRA, *as federal act*, intended by Congress to be given "national uniformity."
- Whether the statutory term "employee" should be to interpreted to cover these "newsboys" "must be answered primarily from the history, terms, and purpose of the legislation" & to read in light of the "mischief to be corrected and the end to be obtained."
- Congress wished to find broad solution to bring industrial peace; didn't want to import a welter of technical definitions from "master & servant" brand of state law & common law.

"Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. **Some are within this Act, others beyond its coverage.** Large numbers will fall clearly on one side or on the other, by whatever test may be applied. ***But intermediate there will be many***, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

Hearst, 322 U.S. at 126–27.

"It is not necessary in this case to make a completely definitive limitation around the term 'employee.' **That task has been assigned primarily to the agency created by Congress to administer the Act.** Determination of 'where all the conditions of the relation require protection' involves inquiries for the [admin agency] charged with this duty. **Everyday experience in the administration of the statute gives it familiarity** with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of . . . disputes[.] **The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act.** Resolving that question, . . . 'belongs to the usual administrative routine' of the [NLRB]." *Id.* at 130.

". . . Congress entrusted to [the NLRB] primarily the decision whether the evidence establishes the material facts. Hence in reviewing the [NLRB's] ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the [NLRB's], when the latter have support in the record. . . . Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, *are for the courts* to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. . . . But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."

Id. at 130–31.

"[Just like the Longshoremen's Commissioner's determination that a man is not to be considered "member of a crew" and the FCC's determination that one company is under the "control" of another,] the Board's determination that specified persons are "employees" under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

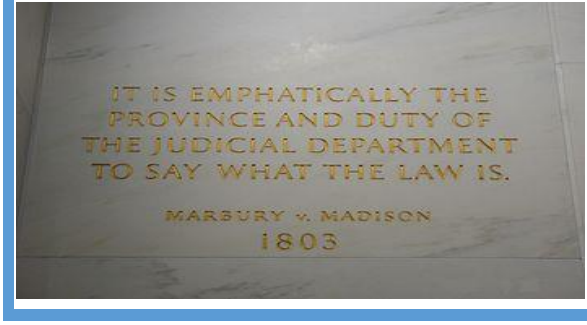
Id. at 131.

"The question who is an employee, so as to make the statute applicable to him, **is a question of the meaning of the Act** and, therefore, is a judicial and not an administrative question."

Hearst, 322 U.S. at 136 (Reed, J., *dissenting*).

"It is emphatically the province and duty of the judicial department **to say what the law is**. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

Marbury v. Madison, 5 U.S. 137, 177 (1803).



HISTORICAL CASES

- *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (**1944**) (court to accept statutory interpretation of admin agency given task of interpreting terms in act it administered if "has warrant in the record and a reasonable basis in law").
- ***Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)**
- *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (**1947**) (court refused to defer to admin agency on a "naked question of law")

***Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).**

- Question: whether supervisory foreman were "employees" entitled to rights of unionization under NLRA (same act as in *Hearst*).
- NLRB said were employees, employer refused to bargain.
- Supreme Court said the question came down to ***how to put two statutory terms together*** -- "employee" and "employer" – and **that** was a "naked question of law" to which interpretation of the admin agency was irrelevant.
- Supreme Court affirmed, explaining that it was *not deferring* to the NLRB's statutory interpretation but rather **agreeing** with it (in other words, the Supreme Court reached the same statutory interpretation decision as the admin agency).

KEY DISTINCTION

- *Deference* and *agreement* are two VERY DIFFERENT THINGS.
  - The deference doctrines, when they apply, dictate how a court must handle a admin agency interpretation.
  - But even when a deference doctrine does not apply and a court has FULL AUTHORITY to interpret the statutory provision itself, the court may still agree with the admin agency's interpretation.

SKIDMORE DEFERENCE

***Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)**

- 7 packing plant employees waiting in the fire-hall for alarms; provided sleeping quarters, pool table, domino table, radio . . .
- Was this waiting time also "working time" under the federal Fair Labor Standards Act (FLSA)?
- "Congress did *not* utilize the services of an administrative agency to find facts and determine" coverage of the FLSA in the first instance . . . [i]nstead, it put this responsibility on the courts."
- But Congress DID create the office of the Administrator of the Wage & Hour Division in the Dept. of Labor . . .

"[In] pursuit of his duties [the Administrator] has accumulated a **considerable experience** in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. **He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings.** They provide **a practical guide to employers** and employees as to how the office representing the public interest in its enforcement will seek to apply it."

Skidmore, 323 U.S. at 137–38.

They [these interpretative bulletins] are not . . . conclusive, . . . They do not [offer a binding interpretation such as a higher court's might do.] But [they] . . . are *made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case*. They do determine the policy which will guide applications for enforcement . . . [by] the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. **The . . . Administrator's policies and standards [are] entitled to respect.** This Court has long given considerable and [even] decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

Skidmore, 323 U.S. at 139-40.

Is it *a due process problem* that employers would have no opportunity to influence creation of a bulletin like this?

- It's not a rule which must go thru notice & comment.
- It's not policy built like common law thru adjudication before the agency.

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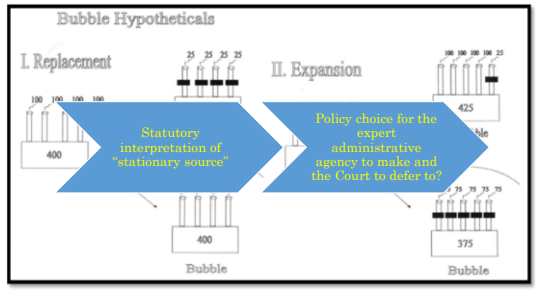
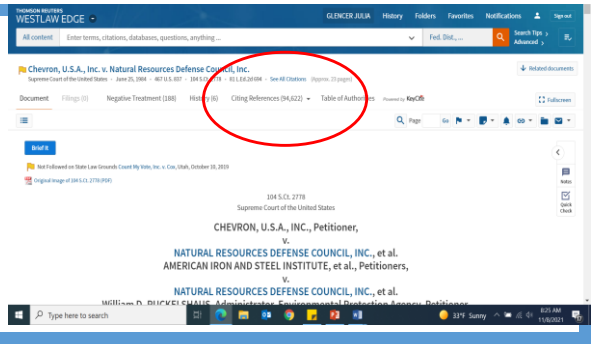


THE BASIC *CHEVRON* TWO-STEP



THE *CHEVRON* TWO-STEP

When a court reviews an agency's construction of the statute which it administers, it is confronted with **two questions**. **First**, always, is the question **whether Congress has directly spoken to the precise question at issue.** If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] **If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation**. Rather, if the statute is silent or ambiguous with respect to the specific issue, the **[second] question for the court is whether the agency's answer is based on a permissible construction of the statute.**[11]

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

THE *CHEVRON* TWO-STEP

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." . . . **If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute**. Sometimes the legislative delegation to an agency on a particular question is **implicit** rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a **reasonable** interpretation made by the administrator of an agency.

Id. at 843–44.

BREAKING THE BASIC *CHEVRON* TWO-STEP INTO SMALLER PIECES . . .

AUDIENCE FOR JUDICIAL OPINIONS

- Opinions will likely be read and studied by many different audiences.
- The writer must identify those audiences in advance and structure the opinion to both inform and persuade those audiences.
- These audiences cannot respond in real time, so their responses/objections must be anticipated and addressed during the writing process.

AUDIENCE FOR JUDICIAL OPINIONS

Original/Primary Audience

- The writer (the Judge) and his Chambers staff (initial editors)
- Other judges (if panel or full court at appellate level)
- Litigants
- Litigants' counsel

Ultimate/Secondary Audience

- Judicial: the reviewing judges above or the "instructed" judges or agencies below
- Public: lawyers, legislators, special interest groups (business, labor, service providers, etc.), academics, law students, the general public

CHEVRON STEP ONE . . .

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CHEVRON STEP ONE . . .

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DOIN' THE *CHEVRON* TWO-STEP

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, *implicitly* or **explicitly**, by Congress." . . . If Congress has **explicitly** left a **gap** for the agency to fill, there is an **express delegation of authority** to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative **delegation** to an agency on a particular question is *implicit* rather than **explicit**. In such a case, a court may not substitute its own construction of a statutory provision for a **reasonable interpretation** made by the administrator of an agency.

CHEVRON: Analytical Questions

Doin' the *Chevron* Two-Step!

- Is there a clear *delineating line* between Step One and Step Two?
- Exactly *what is* analyzed in each step?
- How much of the language used in the opinion was meant to be given effect in how the test works?

CHEVRON: Analytical Questions

- What does it mean for an admin agency to "*administer*" a statute or statutory scheme?
  - Sometimes called *Chevron* Step Zero
  - How do we identify the kind of "*administering*" that the *Chevron* court meant? (no accepted test)
  - Are admin agencies sometimes called upon to interpret acts they do not "*administer*"? (yes)

CHEVRON: Analytical Questions

- The *Chevron* Court identified a lot of seeming conditions for its application

  -- statutory scheme as technical & complex, the need for reconciling policy choices, delegation to the admin agency from Congress, court's lack of expertise, the President's electoral responsibility for agency action, the fact that judges have no constituency –

  but do these have to be present (which or how many) for *Chevron* to apply?

CHEVRON: Analytical Questions

***Chevron* Step One**: Is the language of Congress clearly such that it captures Congress's clear? If so, that's it!

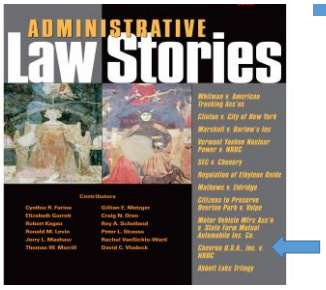
- But language is almost always arguably ambiguous.
- What if there's disagreement on the existence of ambiguity?
- What if there's disagreement over the tools to use in discerning ambiguity?

***Chevron* Step Two**: Is the admin agency's answer based on a permissible construction of the statute? If so, deference!

- But doesn't this just ask for the outer limits of what Congress might have *meant* (which the agency now sees as within its delegated authority), thereby repeating Step One?
- Does Step Two also invite a *State Farm* analysis for arbitrary and capricious behavior?

CHEVRON: Analytical Questions

- Few courts ever reach Step Two; thus, little case law on Step Two and how to assess it properly.
- Some interpret this as proof that *Chevron* really only has ONE Step and the division into two steps was always artificial.
  - But might Step Two somehow influence admin agency psychology?
    - Is Step Two a form of "Big Brother"?
    - Step Two does seem to require an analysis of the admin agency's reasoning within a permissible zone of action (akin to *State Farm*)

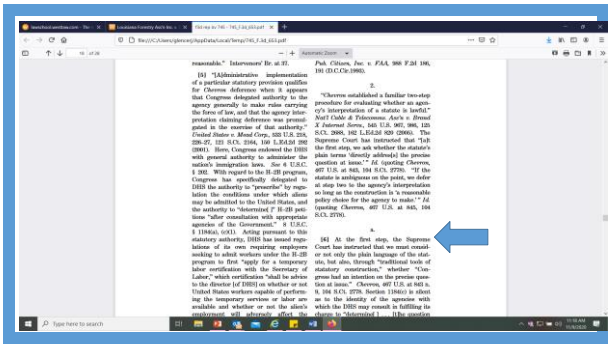


CHEVRON: Analytical Questions

- D.C. Cir. tried to add "Step 1 ½"
  - Did the admin agency itself recognize the statute as ambiguous? If not, the D.C. Cir. was remanding . . .
  - Does raise the intriguing question of whether the admin agency should get deference for an interpretative choice when it *didn't know* it was making an interpretative choice.
    - Can a choice be reasonable if it wasn't actually a choice?
    - But even if the admin agency thought it was clear and its "choice" was later deemed reasonable, doesn't that satisfy Step Two?

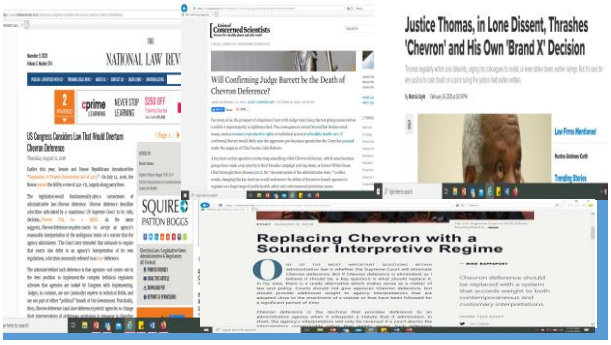
"*Chevron* established a **familiar two-step procedure** for evaluating whether an agency's interpretation of a statute is lawful." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 . . . (2005). The Supreme Court has instructed that "[a]t the first step, we ask whether the statute's plain terms 'directly addres[s] the precise question at issue.' " *Id.* (quoting *Chevron*, 467 U.S. at 843 . . .). "If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.' " *Id.* (quoting *Chevron*, 467 U.S. at 845 . . .).

Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor, 745 F.3d 653, 670 (3d Cir. 2014)



WHAT DO I EXPECT YOU TO KNOW ABOUT *CHEVRON*?

- First of all, we need to talk *Mead* . . .
- The *Chevron* two-step test itself
- Handing *Chevron* requires careful examination of the surrounding statutory scheme
- How Congress' tendency to create skeletal frameworks for expert administrative agencies to fill-in is what *Chevron* is built overtop of . . .
- And that the fate of *Chevron* is currently uncertain . . .



Reading Exercise No. 1: Podcast Transcript
"*Should Chevron Be Overturned?*"

Philip Hamburger – YES!

Gillian Metzger – NO!

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BREAK

SECOND HALF

Mead (which impacts *Chevron* Deference)
Auer Deference

Reading Exercise No. 2: The Future of *Chevron* (Foreword to a Recent Symposium)

***MEAD* –**
and Its Impact
on *Skidmore* & *Chevron*

QUESTION . . .

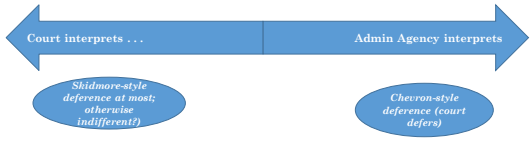
- Is *Skidmore* even a "deference" doctrine?

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, **do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance**. The *weight* of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it **power to persuade, if lacking power to control**."

Skidmore, 323 U.S. at 140.

QUESTION . . .

- Do you see deference to administrative agency statutory interpretations as some sort of a *sliding scale*?



QUESTION . . .

- What did *Mead* do to *Chevron*?
  - More specifically, did it add a ½ step somewhere between *Chevron* Step 1 & *Chevron* Step 2?

"We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore v. Swift & Co.*, 323 U.S. 134, . . . (1944), the ruling is eligible to claim respect according to its persuasiveness."

U.S. v. Mead Corp., 533 U.S. 218, 221, (2001).

"We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."

Mead, 533 U.S. at 226-227.

"We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference **when** it appears that **Congress** [(1)] **delegated authority** to the agency generally to make rules *carrying the force of law*, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of **that authority**. **Delegation of such authority** may be shown in a variety of ways, as by [(a)] an agency's power to engage in adjudication or [(b)] notice-and-comment rulemaking, or [(c)] by some other indication of a comparable congressional intent."

Mead, 533 U.S. at 226-227.

WWCW?

What Would Congress Want?

Reading Exercise: Podcast Transcript
"*Should Chevron Be Overturned?*"

Philip Hamburger – YES!

Gillian Metzger – NO!

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"[I]t's not an Article [III] problem . . . You only defer once the court has determined that in fact **Congress has given** this question to the agency. . . . **[T]he critical factor here is Congress** . . . **Congress, using its constitutional power, has delegated authority to an agency** to implement and determine policy in an area subject, of course, to a governing statute. When courts defer to an agency's interpretation of a statute that is ambiguous, they are acknowledging th[e] agency role in policy setting **that Congress has instructed the agency to undertake** . . ."

"We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference **when** it appears that **Congress** [(1)] **delegated authority** to the agency generally to make rules *carrying the force of law*, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of **that authority**. **Delegation of such authority** may be shown in a variety of ways, as by [(a)] an agency's power to engage in adjudication or [(b)] notice-and-comment rulemaking, or [(c)] by some other indication of a comparable congressional intent."

Mead, 533 U.S. at 226-227.

WWCW?

"We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that **Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.**"

Mead, 533 U.S. at 229-230.

WWCW?

"On the face of the statute, to begin with, the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."

Mead, 533 U.S. at 231-32.

WWCW?

- From there, the Court started looking at how Customs treated its own authority to issue classification rulings:
  - It didn't consider these classification rulings to bind any third party – just Customs itself and the importer.
  - Other importers are warned that they CANNOT rely on these things.

WWCW?

"The reality that 46 different Customs offices issue 10,000 to 15,000 of them each year, Any suggestion that rulings intended to have the force of law are being ***churned out*** at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting. . . . [N]one of the relevant statutes recognizes this category of rulings [i.e., a Headquarters' Letter] as separate or different from others; there is thus no indication that a more potent delegation might have been understood as going to Headquarters . . ."

Mead, 533 U.S. at 233–34.

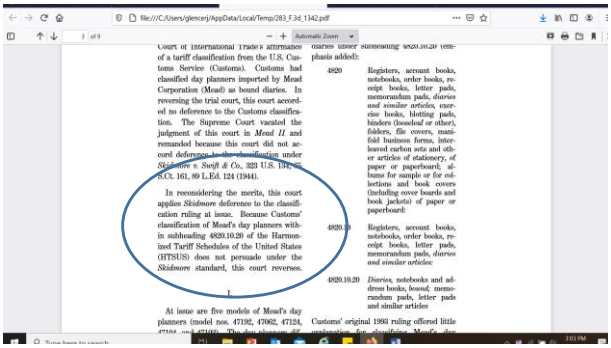
"In sum, classification rulings are best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines." . . . They are beyond the *Chevron* pale.

Mead, 533 U.S. at 234.

AND OTHER STATEMENTS, OF UNDERSTANDING GENERATED BY INDIVIDUAL BUREAUCRATS

TRY *SKIDMORE* INSTEAD!

- Why were these tariff classifications potentially eligible for *Skidmore*-style deference?
  - Customs DID HAVE expertise
  - Customs routinely conducted investigations and had useful information available to it
  - And there is value in uniformity – federal courts always want to foster national consistency.
  - The regulatory scheme was highly specialized.
  - The classification ruling were highly detailed and subtle.



of a tariff classification from the U.S. Customs Service (Customs). Customs had classified day planners imported by Mead Corporation (Mead) as bound diaries. In reversing the trial court, this court accorded no deference to the Customs classification. The Supreme Court vacated the judgment of this court in *Mead II* and remanded because this court did not accord deference [illegible] under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

In reconsidering the merits, this court applies *Skidmore* deference to the classification ruling at issue. Because Customs' classification of Mead's day planners within subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States (HTSUS) does not persuade under the *Skidmore* standard, this court reverses.

I.

At issue are five models of Mead's day planners (model nos. 47192, 47062, 47124,

phasis added):

4820 — Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for sample or for collections and book covers (including cover boards and book jackets) of paper or paperboard:

4820.10 — Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*:

4820.10.20 — *Diaries*, notebooks and address books, bound; memorandum pads, letter pads and similar articles

Customs' original 1998 ruling offered little

WWCW? *Loosey, goosey*

- The majority's approach is based on a recognition of the great variety in our Administrative State:
  - Great variety of ways in which Congress delegates law-making authority
  - Great variety in the way that authority can be structured.
  - Great variety in the vehicle used to capture the statutory interpretation embraced by the admin agency.
- "The Court's choice has been to tailor deference to variety" and "different statutes present different reasons for considering respect for the exercise of administrative authority of deference to it."

PREDICTED PROTRACTED CONFUSION!

Why?
Two MAJOR reasons

Backdrop against which Congress legislates?

COMPLICATING CASE . . .

***Barnhart v. Walton*, 535 U.S. 212 (2002).**

- SSA's statutory interpretation embraced in many documents (rulings & manuals) over many years
- Court gave the SSA's interpretation *Chevron* deference based on factors (now known as "Barnhart Factors"):
  - Interstitial nature of the legal question
  - SSA's expertise
  - Importance of the question to the SSA's ability to administer the statute
  - Complexity of SSA's administration
  - SSA's careful consideration of the question over time

AUER DEFERENCE

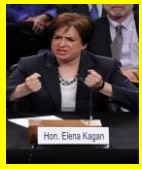
AUER DEFERENCE

"This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. [*Auer* (1995) and *Seminole Rock* (1945).] The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations . . ."

Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

- "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous."
- "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction."
- "If genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable.'"
- "Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. . . . [I]n applying *Auer*, . . . a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. . . . [W]e give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to." [citing *Mead*]

- "To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's view."
- "Next, the agency's interpretation must in some way implicate its substantive expertise."
- "Finally, an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference."



Justice Kagan *rockin*' the topic sentence!

WHY MIGHT A REGULATION BE AMBIGUOUS?

- Careless drafting – dangling modifier, awkward word, opaque construction
- Well-know limits of expression or knowledge about the underlying situation
- Might elude the agency's ability to capture every detail
- A new problem may arise that was not foreseen

(i) Single site of employment.

. . .

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

. . .

WHAT'S TROUBLING ABOUT *AUER*?

Reading Exercise No. 2: *The Future of* Chevron