

# Administrative Process: Second-Half Review

December 3, 2021

## **Overall structure**

- What agencies do
  - Adjudication versus rulemaking
  - Adjudication
  - Rulemaking
- How agency actions are reviewed
  - Substantive standards of review (i.e., Chevron)
  - Other requirements for review
    - Reviewability, timing, standing
- How agencies fit into the constitutional structure
  - Agencies and Congress
  - Agencies and the president

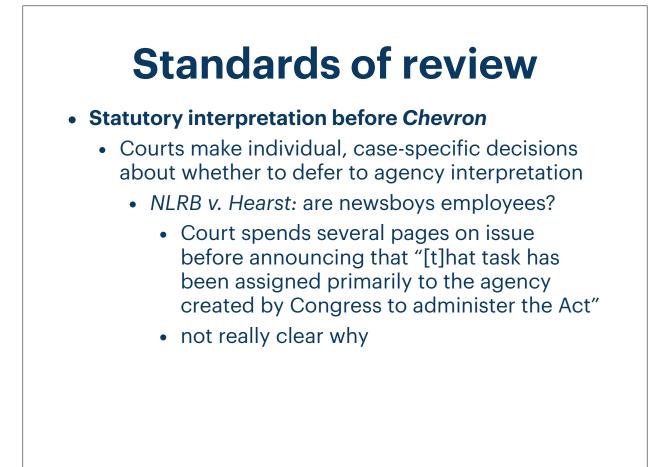
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# Standards of review Statutory interpretation before Chevron Courts make individual, case-specific decisions about whether to defer to agency interpretation Skidmore v. Swift & Co.: are employees entitled to overtime?

- statute doesn't provide for deference to Administrator's policies
- but they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"
- power to persuade, not to control?
- Skidmore makes a resurgence in Mead

# **Standards of review**

- Chevron Chevron Chevron Chevron, Chevron Chevron Chevron, CHEV-RON!!
  - Puts coherent framework on pre-*Chevron* cases that sometimes deferred and sometimes did not
    - frames issue as whether agency's action was "based on a reasonable construction of the statutory term"
    - announces two-step analysis

- Chevron Chevron Chevron Chevron, Chevron Chevron Chevron, CHEV-RON!!
  - Two steps:
    - 1. whether Congress has "directly spoken to the precise question at issue" or whether statute is silent or ambiguous on the question
    - 2. if statute is silent or ambiguous, "whether the agency's answer is based on a permissible construction of the statute"

# **Standards of review**

- Chevron Chevron Chevron Chevron, Chevron Chevron Chevron, CHEV-RON!!
  - Does this make any sense?
    - possibly inconsistent with APA
    - possibly a reasonable default rule against which Congress can legislate
    - possibly a reasonable use of agency expertise
    - possibly a reasonable separation-of-powers limitation on the power of the courts

### • Chevron step 1: text and other tools

- In analyzing the statutory questions, use traditional tools of statutory interpretation:
  - text
  - legislative history / intent
  - purpose / structure of the statute
  - canons of construction

# **Standards of review**

### • Chevron step 1: text and other tools

- Degrees of reliance on each tool, though, are variable and hard to predict
  - *HUD v. Rucker* (public-housing leases): plain text is plain text; nothing else is needed
  - General Dynamics v. Cline (age discrimination): legislative history, "social history," and purpose of the statute trump seemingly plain text
- Use cases as data points and arguments

### Chevron step 1: substantive canons of construction

- Canons of construction: useful tie-breakers when the statutory text isn't super-clear
- But there are dozens, often conflicting, so it's not clear how much weight to put on them
  - Whole-Text Canon: text must be construed as a whole
  - Presumption of Consistent Usage: word or phrase is presumed to have same meaning throughout a text

# **Standards of review**

- Chevron step 1: substantive canons of construction
  - Canons of construction: useful tie-breakers when the statutory text isn't super-clear
  - But there are dozens, often conflicting, so it's not clear how much weight to put on them
    - Surplusage Canon: every word / provision should be given effect
    - Harmonious-Reading Canon: provisions should be interpreted to render them compatible, not contradictory.

### Chevron step 1: substantive canons of construction

- Puzzle: if canons are tie-breakers when statute is ambiguous, should they be applied at *Chevron* step 1, which asks if a statute is unambiguous?
  - SWANCC v. Army Corps of Engineers ("navigable waters" / constitutional avoidance): if Congress is going to go to the limits of its authority, it must be clear
  - Babbitt v. Sweet Home Chapter of Communities for a Great Oregon ("taking" wildlife / rule of lenity): broad interpretation is reasonable
  - Use cases as data points and arguments

# **Standards of review**

### Chevron step 2

- When is a statute ambiguous, but an interpretation of it unreasonable anyway?
  - often treated as synonymous with hard-look review: is an interpretation arbitrary and capricious or permissible under the statute?
    - in both cases: basically a reasonableness inquiry

### Chevron step 2

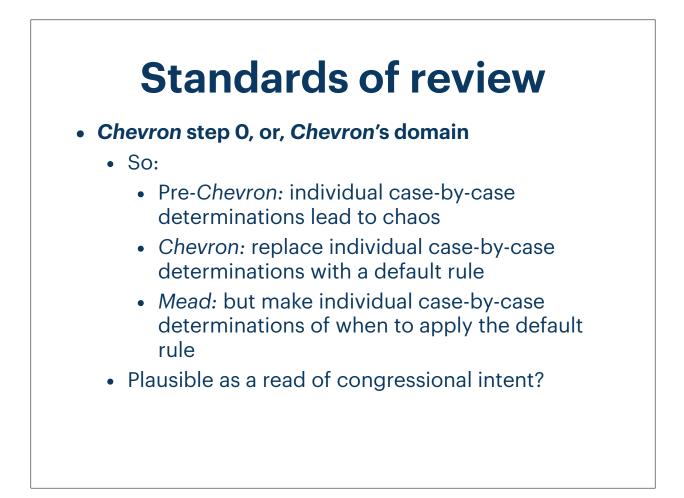
- AT&T v. Iowa Utilities Board
  - uses same tools of statutory interpretation as step 1
    - text, history/intent, purpose/structure, canons
  - analysis looks a lot like hard-look review
    - whether agency considered factors from statute, engaged in reasoned decision making, &c

# **Standards of review**

### Chevron step 2

- Encino Motorcars v. Navarro
  - no deference when rule had procedural defect, i.e. when it would fail hard-look review
  - ...but why?
    - maybe regulation is effectively void, so there's nothing to defer to
    - maybe just as it can be unreasonable to construe a statute for substantive reasons, it might be possible to construe it using an unreasonable procedure

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### Chevron step 0, or, Chevron's domain

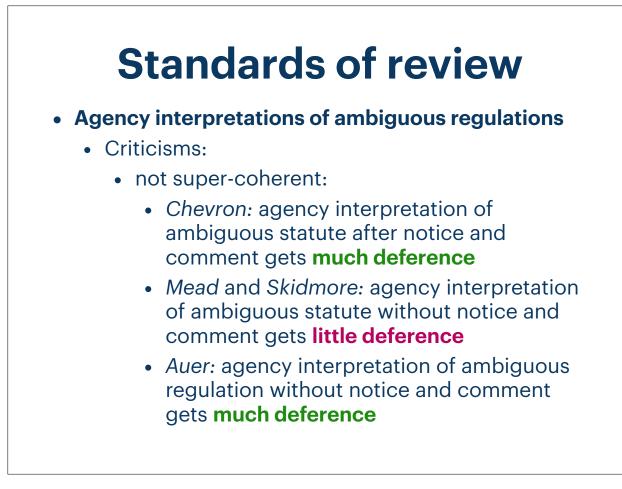
- Exceptions:
  - occasional cases find congressional intent to defer to agency based on features of individual agency actions
  - occasional cases say that a particular decision is too important to the country for the agency to get deference
- One potential way to summarize these cases: *Chevron* is less a rule than a canon of statutory interpretation

# **Standards of review**

### Chevron and stare decisis

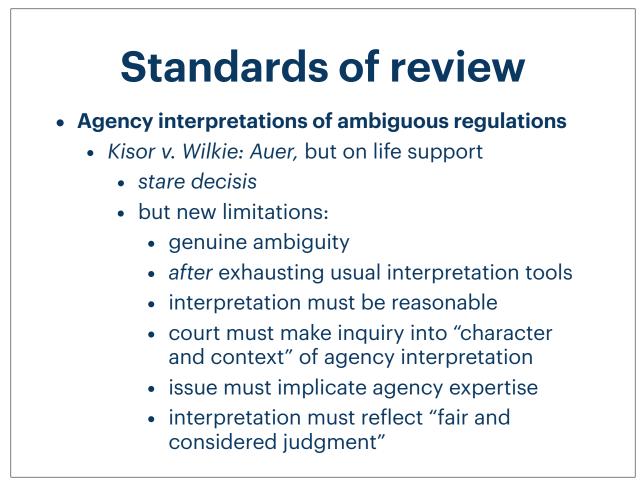
- What happens if a court interprets a statute to mean "X," but later the agency says it means "Y"?
  - *Brand X:* the agency can do that; the court's interpretation doesn't lock it in
    - follows from theory of *Chevron*: Congress has delegated to the agency the power to make that choice
    - therefore, agency can change interpretations
    - note that this gives agencies a lot of power
  - Baldwin: Justice Thomas changes his mind

# Standards of review Agency interpretations of ambiguous regulations What happens if an agency interprets its own regulation to mean "X," and a court reviews that interpretation? Auer: the agency's interpretation is entitled to deference regulation is a creature of the agency, so the interpretation is entitled to deference unless plainly erroneous agency has expertise and context



### Agency interpretations of ambiguous regulations

- Criticisms:
  - Justice Scalia in *Talk America*: separation-of-powers problems
    - agencies interpreting statutes are interpreting something from a different branch
    - here, not so much
  - incentives to write deliberately vague regulations
    - though courts might police that



- Agency interpretations of ambiguous regulations
  - So now we have an Auer step zero
    - 😳
  - Fallback: was the interpretation reasonable under *Skidmore?* 
    - though that will turn on the same sorts of issues the court analyzes deciding whether to defer under *Auer!*

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    - Reviewability, timing
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# Other requirements for review

- Reviewability
  - Which agency actions can be reviewed in court?
- Timing
  - When can those agency actions be reviewed in court?

# Reviewability

- Which agency actions can be reviewed in court?
  - Two relevant sources of law: APA and organic act
  - APA § 701(a): "This chapter [on judicial review] applies ... except to the extent that—
    - "(1) statutes preclude judicial review; or
    - "(2) agency action is committed to agency discretion by law."
  - So agency actions are reviewable unless:
    - the organic act precludes it, or
    - the agency action is committed to agency discretion by law

# Reviewability

### • Preclusion

- When the organic act precludes review
- Can be express or implied
  - express preclusion, oddly, can be treated more skeptically by the courts
    - Johnson v. Robison (review of veterans' benefits)
  - implied preclusion can be found based on the statutory structure and purpose
    - Block v. Community Nutrition Institute (milk market orders)

# Reviewability

### Committed to agency discretion

• Puzzle: How can something committed to agency discretion be unreviewable, when under § 706 courts review agency actions for abuse of discretion?

# Reviewability

### Committed to agency discretion

- Overton Park: this is a "very narrow" exception, for when there is "no law to apply"
  - here, the statute told the Secretary the policy to follow, even if it involved some discretion
  - but see Webster v. Doe (CIA officer)
    - (though more demanding standard for constitutional claims, because reasons)
- Lincoln v. Vigil (Indian Children's Program): presumption for lump-sum distributions

# Reviewability

### Agency inaction

- What counts as an agency action in the first place?
  - APA § 551(13): "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"
  - APA § 706: "The reviewing court shall

     (1) compel agency action unlawfully withheld
     or unreasonably delayed..."
  - so when is failure to act reviewable?

# Reviewability

### Agency inaction

- Bottom line: courts will review inaction, but it takes a lot for them to overturn it
  - *Dunlop v. Bachowski* (union election): when statute requires action after a finding, court can compel action
    - pretty unusual statute
    - also note narrow scope of review

# Reviewability

### Agency inaction

- Bottom line: courts will review inaction, but it takes a lot for them to overturn it
  - *Heckler v. Chaney* (FDA / death penalty): presumption against review of inaction
    - despite Overton Park
    - agencies have limited resources, many competing priorities, expertise, &c
  - American Horse Protection Association (horse protection): but presumptions can be overcome
    - see also *Massachusetts v. EPA:* Supreme Court ratifies this approach (for now)

- When can agency actions be reviewed in court?
  - Several distinct timing doctrines:
    - final agency action
    - ripeness
    - duty to exhaust administrative remedies
  - A lot of overlap and inconsistencies

# Timing

- Final agency action
  - APA § 704
    - agency action is reviewable if:
      - it's made reviewable by statute (i.e. the organic act), or
      - it is "final agency action for which there is no other adequate remedy in a court"
    - "preliminary, procedural, or intermediate agency action or ruling not directly reviewable" can be reviewed later "on the review of the final agency action"
    - default rule that Congress can change in a particular context

### Final agency action

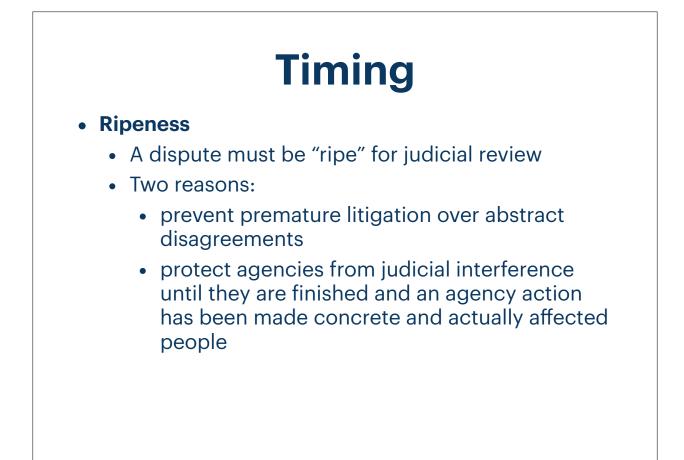
- So what counts as a "final agency action"?
  - not defined in APA
- Franklin v. Massachusetts (census): must be sufficiently direct and immediate to have direct effect on day-to-day business
  - note: no final agency action here, ever, because the president isn't an agency!

# Timing

### Final agency action

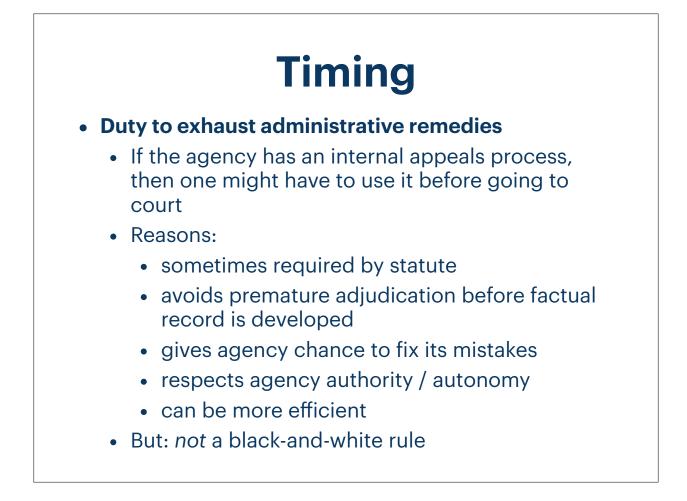
- So what counts as a "final agency action"?
  - not defined in APA
- *Bennett v. Spear* (Fish & Wildlife biological opinions): two things must be true
  - consummation of agency's decision-making process, and
  - legal consequences must flow from action
    - here, those consequences are largely practical in nature since agencies treat them as binding

- Final agency action
  - So what counts as a "final agency action"?
    - not defined in APA
  - Army Corps of Engineers v. Hawkes Co. (jurisdictional determinations): alternatives that cost a lot of money and create a lot of risk aren't adequate alternatives
    - dubious, but maybe the whole point of a jurisdictional determination is to know without having to pay all that money or take on that risk



### • Ripeness

- Two ways a dispute can fail to be ripe:
  - **fitness:** when review would turn on factual record developed during enforcement
  - **hardship:** when waiting until enforcement wouldn't impose any particular hardship
- Abbott Labs v. Gardner: makes pre-enforcement review <u>much</u> easier to obtain
  - pure legal question (drug labeling)
  - immediate hardship (destroying existing labels)



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### Congressional delegation of policy making

- Vesting clause of Article I, Section 1:
  - "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
- So does agency rule making violate this provision?

# **Agencies and Congress**

### Congressional delegation of policy making

- Three possibilities:
  - Agencies exercise legislative powers, validly delegated by Congress
  - Agencies exercise legislative powers, illegitimately delegated by Congress
  - Agencies don't exercise legislative powers, but do something else

### Congressional delegation of policy making

- Schechter Poultry: nondelegation doctrine
  - National Industrial Recovery Act gave president authority to adopt "codes of fair competition" governing behavior in particular industries
  - one of two cases in which the Court struck down a statute on nondelegation grounds
    - both in 1935

# **Agencies and Congress**

### Congressional delegation of policy making

- Schechter Poultry: nondelegation doctrine
  - "intelligible principle" test: does the statute contain some standard constraining the exercise of delegated authority?
    - this is the "essential legislative function" Congress must not delegate
  - "fair competition" fails this
    - but: many vaguer statutes have been upheld
      - e.g., "the public interest"

### Congressional delegation of policy making

- A useful framework: two axes along which a statute might delegate legislative authority
  - subject-matter limits or scope limits
    - "the poultry industry"
    - "disability benefits"
  - means limits or mechanism limits
    - "minimum wages"
    - "price controls"

# **Agencies and Congress**

### • Congressional delegation of policy making

- A useful framework: two axes along which a statute might delegate legislative authority
  - Schechter Poultry: statute had neither
  - a statute with subject-matter limits would almost certainly be fine
    - e.g.: Natural Gas Act
  - a statute with means limits would almost certainly be fine
    - e.g.: National Labor Relations Act

### Congressional delegation of policy making

- Renewed interest in the 1970s and 1980s
  - *Benzene*: several justices express nondelegation concerns
    - Rehnquist: gives three reasons for the doctrine
  - Mistretta: Supreme Court backs away

# **Agencies and Congress**

### Congressional delegation of policy making

- Renewed interest in the 1990s and 2000s
  - Whitman v. American Trucking: DC Circuit forces the issue
    - Supreme Court: "requisite to protect public health from the adverse effects of the pollutant" is plenty specific
    - also: asking EPA to constrain its own authority as a solution is nonsensical

### Congressional delegation of policy making

- Renewed interest in the 2010s and 2020s
  - Gundy v. United States: divided Court punts
    - Kagan, Ginsburg, Breyer, Sotomayor: this is fine
    - Alito: *stare decisis,* but would reconsider the issue if a majority of the Court was interested
      - plus Kavanaugh in Paul
      - plus Barrett??
    - Gorsuch, Roberts, Thomas: revive the doctrine now



### Congressional delegation of policy making

- Renewed interest in the 2010s and 2020s
  - Gundy v. United States: divided Court punts
    - Gorsuch et al. dissent:
      - broad and unconstrained delegation
      - separation of powers isn't flexible and functionalist; it's a formal tool to constrain government power and protect individual rights and sovereignty
      - would still allow agencies to fill gaps
  - West Virginia v. EPA: stay tuned!

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- Agencies have a wide array of structures:
  - some are headed by a multi-panel commission that typically serve fixed terms, have limits on party composition, and can only be fired for cause
    - Federal Trade Commission
    - Federal Election Commission
    - Securities and Exchange Commission
  - some are just weird
    - Consumer Financial Protection Bureau

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# **Agencies and the president**

- Appointments clause of Article II, Section 2, clause 2, provides two rules of appointment:
  - **principal officers:** "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law," are nominated by the president with the advice and consent of the Senate

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# **Agencies and the president**

- Issues:
  - who counts as an officer
    - as opposed to an employee
  - what kind of officer
    - principal officer
    - inferior officer
  - who else can appoint
    - heads of departments
    - courts of law
  - what effect does this have on removal



- What kind of officer: principal versus inferior
  - *Morrison v. Olson* (independent counsel): factors
    - subject to removal (but only for cause)
    - certain, limited duties (but broad powers)
    - limited in jurisdiction (but so are others)
    - limited in tenure (but no time limit)
  - but then, Edmond v. United States: now we have a rule
    - inferior officers must be subordinate to another officer below the president



- What effect does this have on removal?
  - vesting clause of Article II, Section 1:
    - "The executive power shall be vested in a President of the United States."
  - take-care clause of Article II, Section 3:
    - "The President shall take care that the laws be faithfully executed...."
  - one possible implication: the president must have some power to remove officers



- What effect does this have on removal?
  - *Myers v. United States:* president has the exclusive power to remove officers
  - *Humphrey's Executor v. United States:* but this can be limited to firing cause for FTC commissioners
    - legislative intent
    - political independence is necessary
    - quasi-legislative (reports) and quasi-judicial (adjudications)
    - does not exercise executive power

