# Introduction to Judicial Review

# Learning Objectives for this Module

## Learn that in theory the court defers to the agency unless the law is clear.

## Learn that the courts can choose their standard after they decide whether they are going to defer to the agency.

## Learn that this all argumentation, there are no bright lines.

# Reading Assignment

## Chapter 7 to 281

# Issues to be addressed

## "The rules governing judicial review have no more substance at the core than a seedless grape."

### This is a very unsettling chapter if you are looking for a bright-line test for standards for judicial review. I have heard very respected federal appeals court judges say in public lectures that they have no idea where these tests begin and end.

## Key Questions

### Is the court interpreting a law - something that is clearly within its expertise?

### Does the legal interpretation have policy implications where the court is stepping into political question territory?

### Is the court reviewing a factual determination by the agency?

### Is the court reviewing the application of the law to specific facts, i.e., a mixed question?

## Types of review

### Pure review of law

#### The court can do this, but Chevron and the other standards govern how much it defers to the agency.

### Pure review of facts

#### Like an appeals court overturning a factual finding in any state but LA, i.e., very deferential.

### Mixed

#### The hard calls - The more you can convince the court that facts predominate in the review, the more deference the agency gets.

## Review of Rulemaking and Formal APA Proceedings

### APA § 706. Scope of review

### http://biotech.law.lsu.edu/Courses/study\_aids/adlaw/706.htm

## Deference - NLRB v. Hearst, 322 U.S. 111 (1944) (Newsboys)

### 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. . . . [T]he 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.

## Persuasion - Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)

### 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.

## Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)

### Background

#### 1980 - EPA did not allow the bubble – treating all of the sources of pollution within a given chemical plant as one source - for nonattainment areas

#### 1981 - EPA allowed the bubble for non attainment areas as well.

##### What would be the advantage of this for EPA and industry?

##### Why would environmentalists oppose it?

#### The statute did not give clear guidance

##### What should the court do?

### Chevron Step One

#### If the statute speaks clearly to the point, then you have to follow the statute

##### This assumes that the statute is constitutional

##### As we see in the tobacco case, sometimes clear language is not so clear

#### If the agency action is clearly within the statute, it is OK.

#### If it is clearly outside the statute, what happens?

### Chevron Step Two

#### If the statute is silent or ambiguous

##### This is frequently the case on controversial issues

#### If the agency’s interpretation is just one of many allowable interpretations, what should the court do?

##### Decide which is the best interpretation?

#### Defer to the agency – if so, why?

##### Why is deference to the agency the key to political control of agencies?

### What does it Mean to Be Silent or Ambiguous?

#### Do you just look at the statute itself?

##### Scalia, usually.

#### Do you include legislative intent?

##### Breyer, usually.

### Political Control of Agencies

#### How does Chevron deference fit with the political control of agencies?

#### Is this a liberal/conservative view?

## Classes of Confusion

### The statute gives broad and general authority and the agency must fill in the details.

#### Chevron

### The statutory language is clear, but the result was not anticipated when the act was passed.

#### Mass. v. EPA

### The statutory language is clear, but the result is contrary to other laws and practice.

#### FDA versus Brown and Williamson (tobacco)

## Go to Mass. v. EPA.

# Evaluation Questions

## This introduction sets up the basic framework for judicial review of agency legal decisions made in adjudications or through rulemaking.

## How would you use *Skidmore* and *Hearst* in argumentation over the applicable standard for a court to review the agency’s finding in a given case?

## *Chevron* then comes along as a way for the court to decide where on the *Skidmore* and *Hearst* continuum the case falls on.

### How do you use the two *Chevron* steps in arguing a case?

### What is step one in the court’s analysis in *Chevron*?

### What is step two in the court’s analysis in *Chevron*?

### How does *Chevron* deference fit with the political control of agencies?

## (Mass v. EPA module is next)