# Judicial Deference to Agency Legal Interpretations after Chevron

# Learning Objectives for this Module

## Learn when an agency may use a rule to reverse a judicial decision

## Learn how the courts (theoretically) use the amount of process behind an agency ruling to determine the level of deference to accord the agency.

## Learn the standards for deference when the agency is interpreting its own legislative rules.

## Learn how Barnhart revitalizes Skidmore.

## Learn how you should argue to the court to increase your chance of getting Chevron deference.

# Reading Assignment

## Chapter 7 to 293

# Issues to be addressed

## Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001)

### The Family and Medical Leave Act (FMLA) entitles an eligible employee to as many as 12 weeks of unpaid leave per year for ''a serious health condition that makes the employee unable to perform the functions of the position of such employee.''

### The Act defines ''serious health condition'' as an ''illness, injury, impairment, or physical or mental condition that involves-(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.''

#### FMLA does not define treatment

### The agency makes a rule that finds that visits to the doctor that do not require specific treatment are covered by the act

### Did the court accept the agency interpretation?

#### How does this interpret treatment by a health care provider?

#### What would be the problem of not allowing visits to the doctor unless you were found to require treatment?

#### What if you are found to have a cold, which does not require treatment?

## Opinions in litigation

### Chevron was a rulemaking, with all the attendant process and review

### What if the agency takes a position for the first time during litigation?

### Why might the court not trust it?

### Why might an amicus brief in a case where the agency has no interest get more deference?

#### Auer v. Robbins, 519 U.S. 452 (1997)

## Which agency gets the deference?

### Courts will only defer to the agency with the primary responsibility for administering the law.

#### Why not defer to more than one agency?

### What does administering mean?

### EPA sets the standards for Superfund cleanups.

#### It gets deference for these standards.

### There is a statutory mechanism for determining liability, which is overseen by the courts

#### EPA only enforces the liability once it is determined.

#### Should it get deference for its opinions on who is liable?

## Should determinations of jurisdiction get the same deference as other agency interpretations of a statute?

### Some courts have questioned whether the agency’s jurisdiction over a subject should be subject to deference.

### Is this just a pure legal question, which courts are as able to resolve?

### Why might Scalia argue that deference on jurisdiction is as valid as any other area of Chevron deference?

#### Lower courts have agreed with Scalia.

## Gonzales v. Oregon, 546 U.S. 243 (2006)

### Controlled Substances and Illegal Drugs

#### FDA controls the labeling and interstate sale of drugs, but not their use.

##### The FDA can take action against someone selling unapproved drugs across state lines

##### The FDA can take action for the promotion of approved drugs for unapproved purposes or for selling them without approved labels.

##### The FDA cannot take action for prescribing or administering drugs, only interstate sale.

##### The states (sort of) regulate medical practice and establish state laws on the prescribing of drugs.

#### The federal Controlled Substances Act regulates drugs that have been determined to pose sufficient risks that they need federal regulation.

##### These are mostly things that get you stoned.

##### Enforced by DOJ/DEA and state police, not medical licensing boards or the FDA

##### Creates the pain doctor as legalized drug dealer

###### Rx painkiller deaths now #1 over illegal drug deaths.

#### For drugs that are not otherwise restricted by the CSA, DOJ regulations leave the determination of proper use and who can prescribe them to the states:

##### [prescriptions] 'be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.''

#### Marijuana, heroin, etc are specifically restricted by the CSA.

##### Schedule I Controlled Substances

###### Substances in this schedule have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.

###### Some examples of substances listed in Schedule I are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), peyote, methaqualone, and 3,4-methylenedioxymethamphetamine ("Ecstasy").

##### Can only be used on research protocols under federal control.

### The conflict between DOJ and the Oregon legislation

#### Oregon passes an assisted suicide law allowing physicians to write prescriptions for lethal amounts of drugs and to administer the drugs.

#### Bush II administration opposed assisted suicide

#### The AG issues an interpretive rule that assisted suicide is not proper medical purpose

#### Is this a proper use of an interpretative rule?

##### Who gets to define legitimate medical purpose under the legislative rule?

## Example - Court/Agency Conflicts in Interpretation

## FCC Regulations on Telecommunications

### Why is federal regulation and preemption necessary for radio and broadcast TV?

### Definitions in the Telecommunications Act of 1996

#### "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”

#### "Information services" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”

## What is the Internet under the FCC?

### The broadband provider - your connection to the Internet backbone.

#### May also be your ISP

### Are broadband internet providers telecommunications or information services?

#### The FCC has not chosen to regulate information services, thus no preemption of state action.

## National Cable & Telecommunications Association et al. v. Brand X Internet Services et al., 545 U.S. 967 (2005)

### Background

#### Portland wants to regulate broadband providers

##### Why might a locality want to regulate broadband?

#### Industry says they are telecommunications providers, thus not subject to local regulation

#### 9th Cir agrees that they are telecommunications providers

##### AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000)

### National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005)

#### FCC then promulgates a rule defining broadband providers as information services.

#### This was then appealed to the 9th cir.

#### The 9th circuit then overruled the FCC, based on its previous decision.

#### Did the United States Supreme Court agree that it was the 9th Cir's call?

#### Why didn't the earlier case bind the agency and prevent the rule?

### How did this come back to bite the FCC on net neutrality, requiring a new rule to change the old rule?

## Leading up to Mead: Christensen v. Harris County, 529 U.S. 576 (2000)

### What did the court rule?

#### “Here . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant Chevron-style deference.”

### Why is this consistent with our definition of a guidance document?

## When does Chevron Apply? - United States v. Mead, 533 U.S. 218 (2001)

### Chevron was a notice and comment rule

#### Why does the notice and comment process better assure that an agency legal interpretation is sound?

### Mead is a letter ruling on the classification of a product for tariff purposes (Daytimer calendars)

#### No notice and comment, thus no vetting

#### Can be changed at a later date without notice and comment - does not bind the agency

#### Should this letter ruling get Chevron deference?

### The Mead Test

#### ...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.

#### Remanded for Skidmore analysis.

#### What would you look for to decide if Mead applied?

## Back to Persuasiveness (Skidmore)? - Barnhart v. Walton, 535 U.S. 212 (2002)

### Background

#### This is a SSA interpretation of a statute that is in various guidance documents.

#### This is post-Mead, so the court is now fleshing out how to do Skidmore analysis when the it decides that Chevron does not apply.

### The Barnhart Factors

#### The importance of interpretation to agency policy;

#### The period that the agency has held the view;

#### The legal expertise of the agency;

#### The complexity of the problem;

#### This is persuasiveness analysis

#### What can the agency due to strengthen its case for deference under Barnhart?

### Applying Barnhart

#### HUD issues guidance on construction of the anti-kickback provisions in a real estate act

##### Published in the register, but no notice and comment

#### Should the court defer to these under Barnhart?

##### Yes, according to the Second and Ninth Circuits; no, according to the Seventh Circuit.

##### You are not the only person who is confused

## Public Citizen v. U.S. Dept. of Health and Human Services, 332 F.3d 654 (D.C. Cir. 2003)

### Is the Medicare Manual a notice and comment regulation?

#### Did the agency have the authority to make law on this issue?

#### Does this look more like Mead or Chevron?

### Did the court find that the manual was a regulation with the force of law as to a third party?

### How can the Medicare Manual be binding on providers if it does not have the force of law?

### If it does not have the force of all, does Chevron matter?

## Whitman v. American Trucking Assns., 531 U.S. 457 (2001)

### Chevron Step One

#### The court found that the Clean Air Act was ambiguous on the point

### Chevron Step Two

#### The court found that the agency had stepped outside of the ambiguity and overreached its authority.

## Interpretation of an Agency's Own Rules

### “‘‘a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

#### Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), upheld by Auer v. Robbins, 519 U.S. 452 (1997)

### Implications of Seminole Rock /Auer

#### Should interpretation of rules and statutes be the same standard?

##### Does Seminole Rock /Auer look like Chevron?

#### What perverse incentives does this give the agency if it gets to resolve ambiguous rules?

#### What if it just repeats the statute in the rule?

##### Does this transform the statute into a regulation entitled to more deference?

### What has changed Since Seminole Rock?

#### “In reaffirming Seminole Rock deference in recent years, the Court has not acknowledged that one of the underlying reasons for the original adoption of the Seminole Rock doctrine no longer exists. That is, in Seminole Rock the Court assumed that besides the regulatory language itself there would be no guide to the meaning of the rule other than administrative practice, because in 1945 agencies did not have preambles for rules, much less today’s extensive preambles, explaining what the rule does and why it is adopted.”

## Do the Courts Really Follow Chevron/Mead?

### Scholars have studied the actual behavior of the appeals courts and the United States Supreme Court in applying these tests

### The courts are more likely to use Chevron when there is notice and comment or formal adjudications, and more likely to use Mead/Barnhart for less formal actions.

### However, there are a lot of cases where formal actions get Mead and some cases in which less formal actions get Chevron.

## ABA Adlaw Conference 2008 - Justice Garland on Chevron:

### If you have an ambiguous statute, and need Chevron deference, do not say that the interpretation is clear and there is no other way to construe the law. Say it is ambiguous and you are making a reasonable interpretation based on your knowledge of the statute and the regulatory circumstances.

## The Implications of Ambiguous Standards

### Assume you are agency council.

#### Assume you have an ambiguous statute and the agency wants to propose a new rule

#### Also assume that you want to avoid reversal in the courts because of the delay and cost

### How does your advice differ if you are sure you will get Chevron, versus if there is a significant chance you will get Mead?

# Evaluation Questions

## We read *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (U.S. 2000) as a counterpoint to Mass v. EPA and Chevron. This is a case where the statute looks clear on its face and appears to support the agency action, but the court ultimately finds that it does not mean what it says.

### Why does the plain language of the Food and Drug Act appear to give the agency jurisdiction over tobacco?

### Why does the Food and Drug Act seem to require that tobacco would have to be banned if it was under the authority of the FDA?

### How did the FDA and Justice Breyer's argue that the agency could avoid banning tobacco and still fit within the Act?

### What does it mean to say that the court used a *Chevron* step zero in this case, i.e., what does the Court look to before it analyzes what the plain language means?

### How would use *Brown & Williamson* in arguing other statutory interpretation cases, such as what the ACA means?

## Post-*Chevron*

### What was the agency action in *Mead*?

#### How much process and finality is involved with the *Mead* action?

#### How did the court explain why this lead to a different result from *Chevron*?

#### What is the general principle in *Mead* that you can use in other cases?

### What are the *Barnhart* Factors for evaluating agency persuasiveness?

### How do you use the series of cases we have discussed on from *Skidmore* to *Barnhart* as tools for arguing either side of any statutory interpretation case?

### What is the key to a successful argument by the agency?

## How can an agency bind a regulated party without using a notice and comment regulation, meaning without giving the party a chance at judicial review? (Hint - *Public Citizen v. DHHS*)

### In this situation, what are the only grounds for attacking the provisions?

### What is the party's recourse if it does not like the terms?

### How is this used by federal agencies without regulatory powers to get states to do what the feds want?

### Does this bind third parties, such as patients?

## Agency interpretation of its own regulations

### What does *Seminole Rock* tell us about defer to an agency’s interpretation of its own regulations?

### If the courts defer to the agency on interpretation of regulations in the same say was as statutes, how can the agency use this to extend it regulatory power beyond what it might be able to do based only on the statute?

### How would you argue that the world of rulemaking has changed since the *Seminole Rock* decision in 1945 and that the case should be overruled?

### What should the standard be?

## Does going first matter? (*Brand X*)

### Assume that a court interprets a statute before an agency promulgates regulation under the statute.

### What would the court need to say about the interpretation to preempt a subsequent regulation by the agency that would conflict with the court’s interpretation?

### Assuming that the court did not say this, must the court defer to the agency if the agency goes against the court’s original ruling when it promulgates the regulation?

## Agency conflicts

### In areas where more than one agency has legal authority over a regulated activity, which one, if any, does the court defer to?

## Opinions in ligation

### How do you analyze the deference issue when an agency first raises an interpretation during litigation?

### When might an agency’s views during litigation might be entitled to some deference?

## Lawyering statutory interpretation cases

### If you represent the agency, how do you present your arguments to persuade the court to support the agency interpretation?

### If you are opposing the agency, how do you present your arguments against deference to the agency?

### An agency promulgates a rule that is appropriate for most workplaces, but one industry segment cannot comply because of the structure of their workplaces. (Assume the agency must conform its rules to the workplaces, rather than force employers to restructure their workplaces.)

#### Can the agency avoid having the court finding the rule is arbitrary and capricious by promising not to enforce the rule against these employers?

#### Challenging a rule can be expensive – what would you advise your client if the agency makes this offer?

#### What would you want from the agency?

## Congressional Direction to the Agency

### The Americans with Disabilities Act is very detailed and does not leave the enforcement agencies much room for discretion in setting standards in many areas.

#### Why did Congress write the law this way?

#### How does this effectively limit the court's deference to the agency?

### In contrast, many laws gave very broad authority to agencies with few specific details. This gives the agencies broad discretion.

#### What are the reasons, good and bad, why congress might not want to give specific direction to agencies?

#### How does this broaden the court's deference to the agency? (Think *Chevron*)

#### What is the limit on broad delegations of authority, i.e., what does the court need to be able to properly review agency action?