



Judicial Review of Agency Statutory Interpretations (Chevron/Skidmore)

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Announcements and Updates

- Practice Exam – answer posted today
- Review session for last day of class
 - Submit email questions for final by
 - Will distribute group reply and post to website
- Final exam
 - Week-long window to download
 - 3-hours to take exam
 - 1 essay, 10 multiple choice

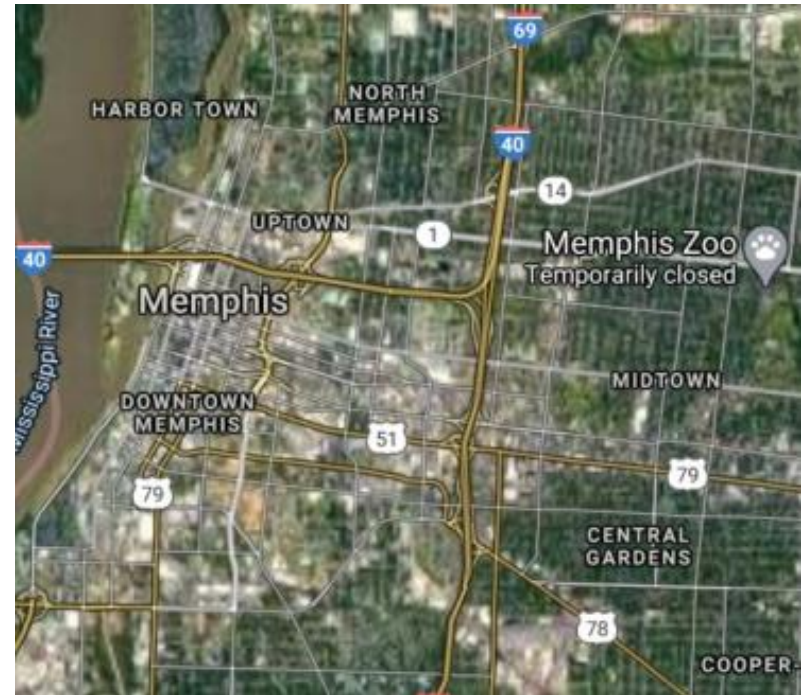
Quick look back: Other Forms of Agency Action

- Majority of agency action isn't rules or orders, but specific decisions and informal directions
- Judicial review of informal agency action
 - Presumption of judicial review still applies
 - BUT -- APA 701(a) "committed to agency discretion by law"
 - BUT -- statutory prohibition on judicial review (it happens)
- No notice-and-comment process for "interpretative rules" or "general statements of policy"



Overton Park and Heckler v. Chaney

- *Overton* – the dead-end highway case
 - Judicial review available for informal agency decision
 - Not “committed to discretion”
 - No statutory exclusion
 - Standard of review: arbitrary and capricious under APA 706(2)
 - Meeting this standard requires contemporaneous record, connection of facts in record to decision set out in transparent rationale
 - Justice Marshall’s tactically clever solution
- *Heckler v. Chaney* – Dead Man Walking case
 - Judicial review of agency decision not to act
 - Presumption against judicial review
 - Narrow exceptions for
 - Denial of action based on jurisdiction
 - Agency consciously and expressly adopts a general policy so extreme that it amounts to abdication of statutory responsibilities



Massachusetts v. EPA

- *Brown v. Board of Education* for environmental law
- Focus on its admin dimension:
 - Why not *Heckler*?
 - What statutory interpretive tools did the Court use to read Section 202(a)(1)?
 - What's the remedy for agency inaction here?
 - What does EPA have to do differently here?
- Secret ingredient - standing



Chevron and Skidmore doctrine

- Judicial review of agency statutory interpretations
- Hugely contentious and likely target of new Supreme Court majority



Don't forget the baseline: *Skidmore*

- How much should courts defer to agency guidance and legal opinions in general?
- How much should courts defer to agency *interpretations of statutes* they administer?
 - Why a court would approach this review differently from any other agency action?
 - Who decides?
 - Does it matter *how* the agency announced its opinion?
 - Amicus briefs
 - After-the-fact letter written specifically for litigation



Skidmore's Standard

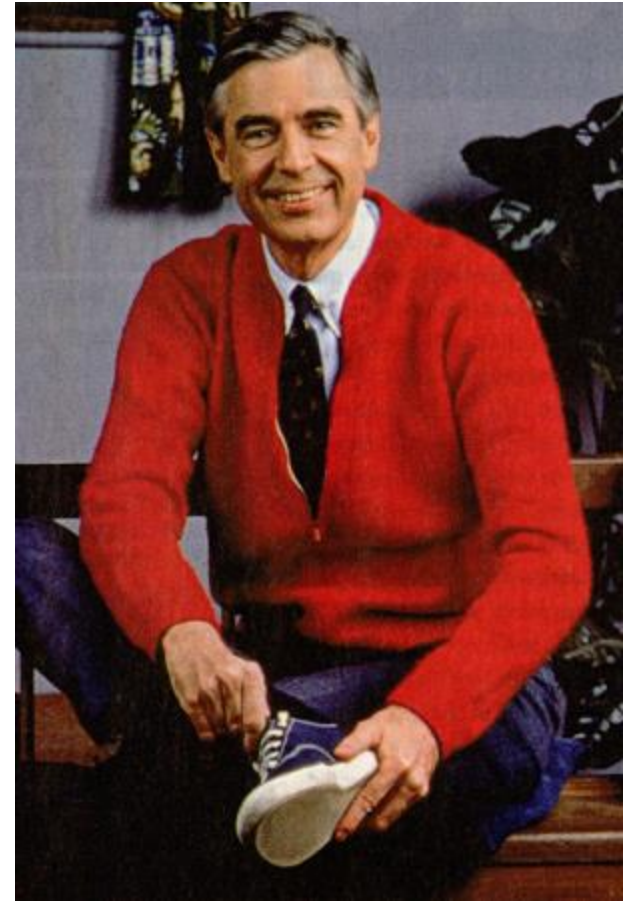
The Very Clear Power to persuade

T Thoroughness

V Validity

C Consistency

P Persuasiveness



Chevron v. NRDC

- “Bubbles” and permits
- Don’t forget the procedural prerequisites
- Chevron Step One
 - How to determine if “ambiguous”?
 - Statutory tools
- Chevron Step Two
 - Quirky aside: standard for *intentional* ambiguity
 - If language is ambiguous or silent, then court must defer if agency interpretation is “reasonable”
- What benefits does *Chevron* offer over *Skidmore*?



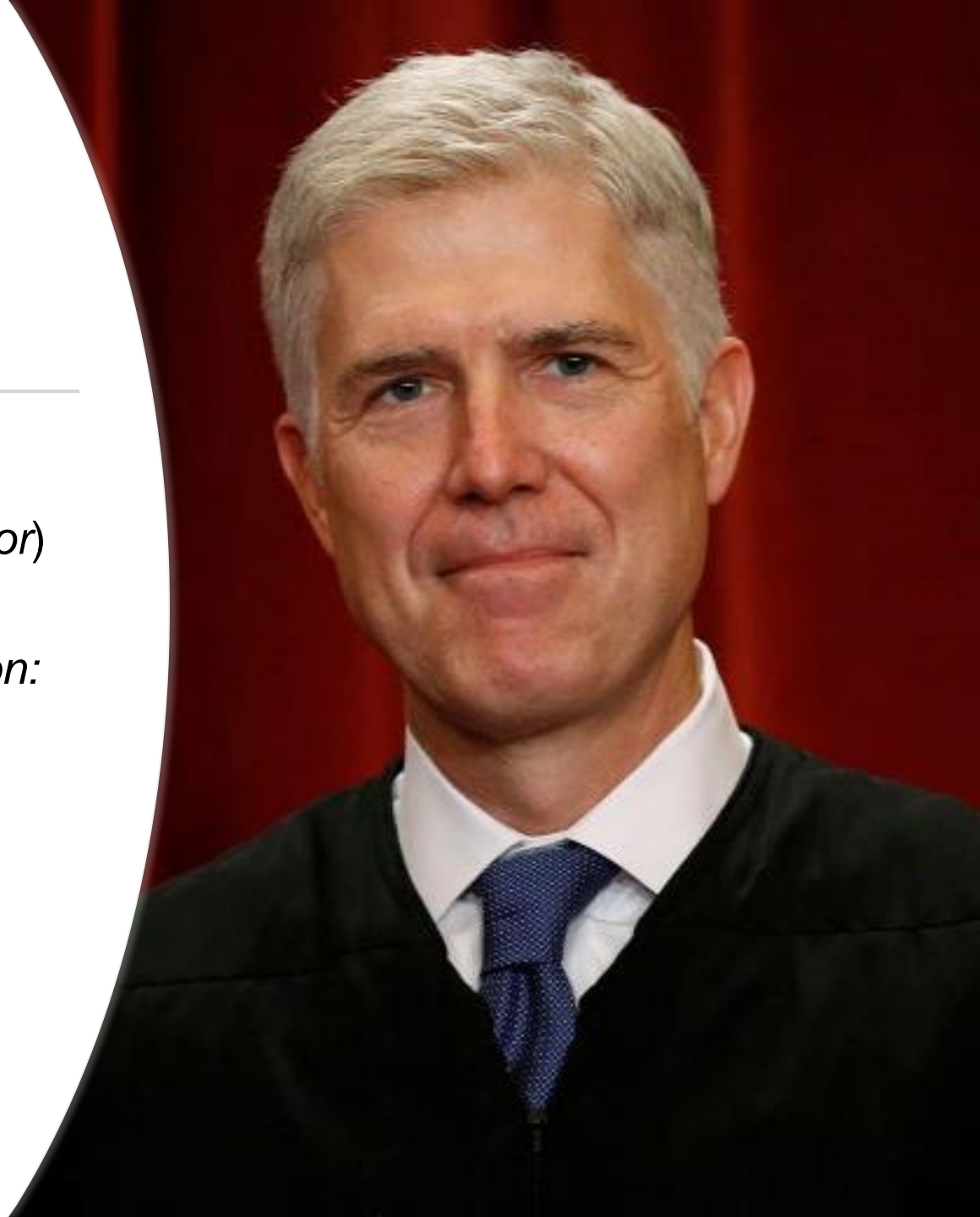


So Ask Yourselves...

- Remember our *Skidmore* questions
 - Who decides?
 - Does it matter *how* the agency announced its opinion?
- What if an agency interprets its own regulations?
- Should agencies use judicial canons of construction? What happens if they don't?

Next class...

- Extending *Chevron* to regulations (*Auer* and *Kisor*)
- Trimming back on *Chevron*: *U.S. v. Mead Corp.*
 - *Chevron* Step Zero
 - Integrating *Mead* with *Skidmore*





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