

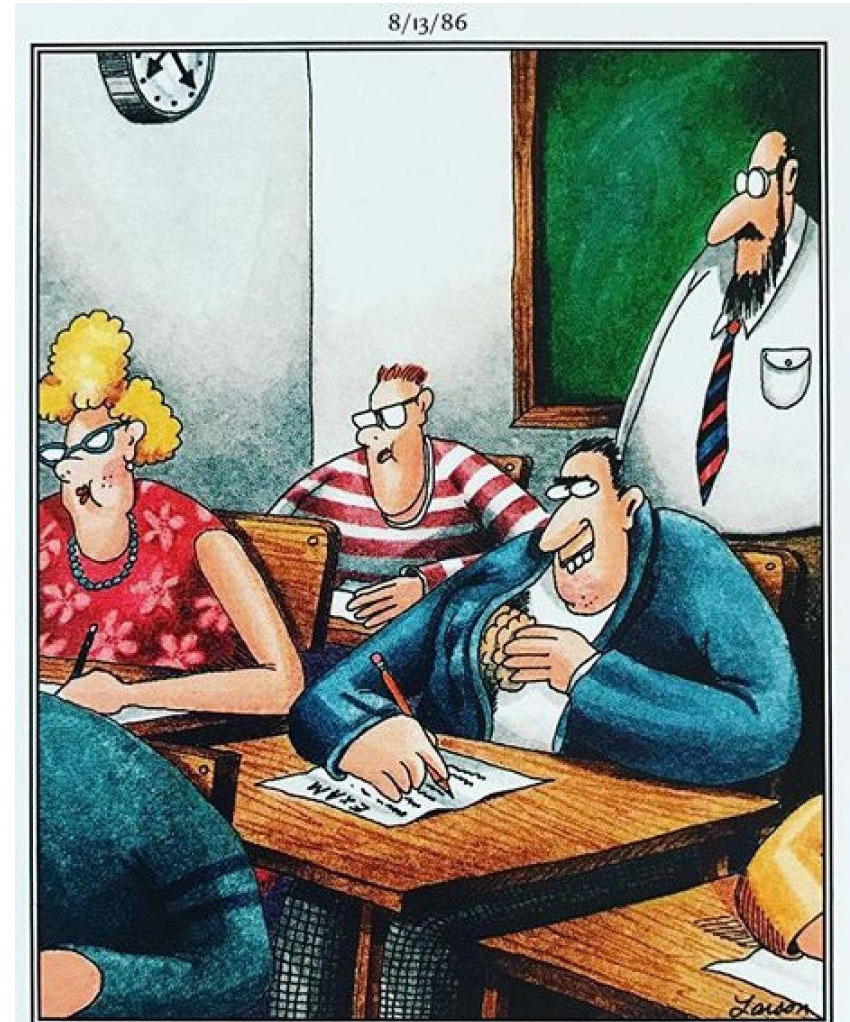
Judicial Review of Agency Statutory Interpretations (Mead and Kisor)

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University of Houston Law Center

Statutory Interpretation and Regulatory Practice
April 15, 2020

Announcements and Updates

- Practice Exam – answers now on website
- Review session for last day of class
 - Submit email questions for final by **Monday, April 27 by noon CDT**
 - Will distribute answers in a group reply and post to website
- Final exam
 - Week-long window to download starting at 9:00 am on Tuesday, April 28
 - 3-hours to take exam
 - 1 essay, 10 multiple choice – designed to take two hours



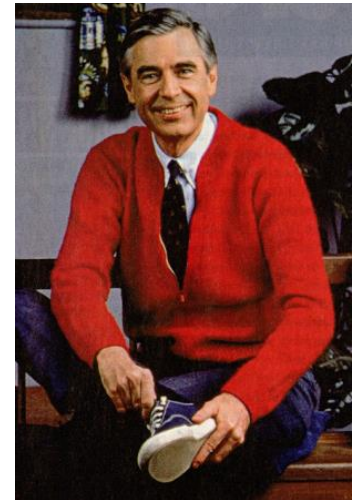
Midway through the exam, Allen pulls out a bigger brain.

Quick look back: how courts defer when agencies interpret law

- *Skidmore* - how much should courts defer to agency guidance and legal opinions in general, including statutory interpretation?

T	Thoroughness
V	Validity
C	Consistency
P	Persuasiveness

- *Chevron v. NRDC*
 - Step One: did Congress speak clearly?
 - Step Two: is the agency's statutory interpretation reasonable?



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*?



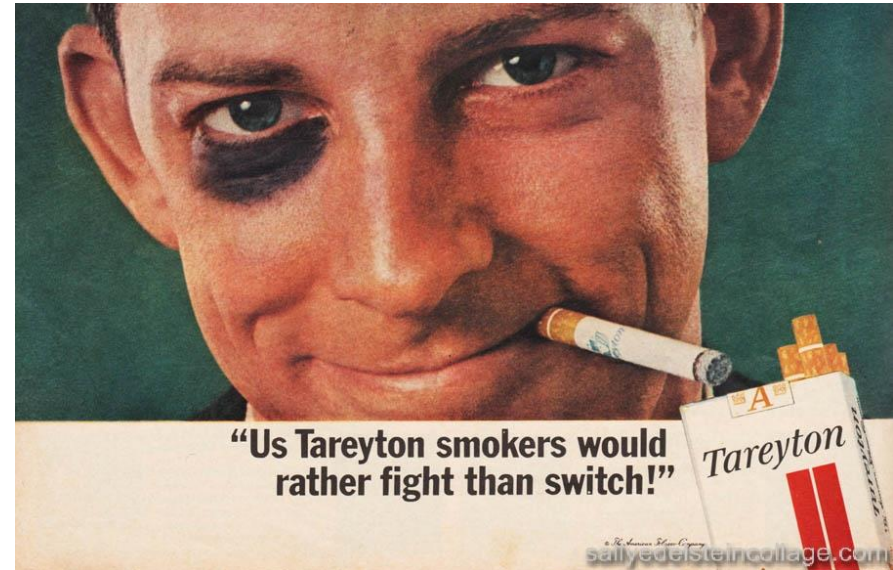


So Ask Yourselfes...

- 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?

Pushing back on *Chevron*

- Major Questions doctrine
 - *FDA v. Brown & Williamson*
 - Affordable Care Act (*King v. Burwell*)
 - Similar: “elephants in mouseholes”
- *U.S. v. Mead Corp.* (2001)



Pushing back on *Chevron*

- Major Questions doctrine
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U.S. Customs and Border Protection

NOTICE OF REVOCATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SELF-ADHESIVE SURGICAL DRAPES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of a ruling letter and revocation of treatment relating to the tariff classification of self-adhesive surgical drapes.

SUMMARY: Pursuant to section 625(e)(1), Tariff Act of 1930 (19 U.S.C. 1625(e)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning the tariff classification of self-adhesive surgical drapes. Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin and Decisions*, Vol. 49, No. 18, on May 6, 2015.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 19, 2015.

FOR FURTHER INFORMATION CONTACT: Laurence W. Frierson, Tariff Classification and Marking Branch: (202) 325-0371.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) ("Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are



U.S. Customs and Border Protection
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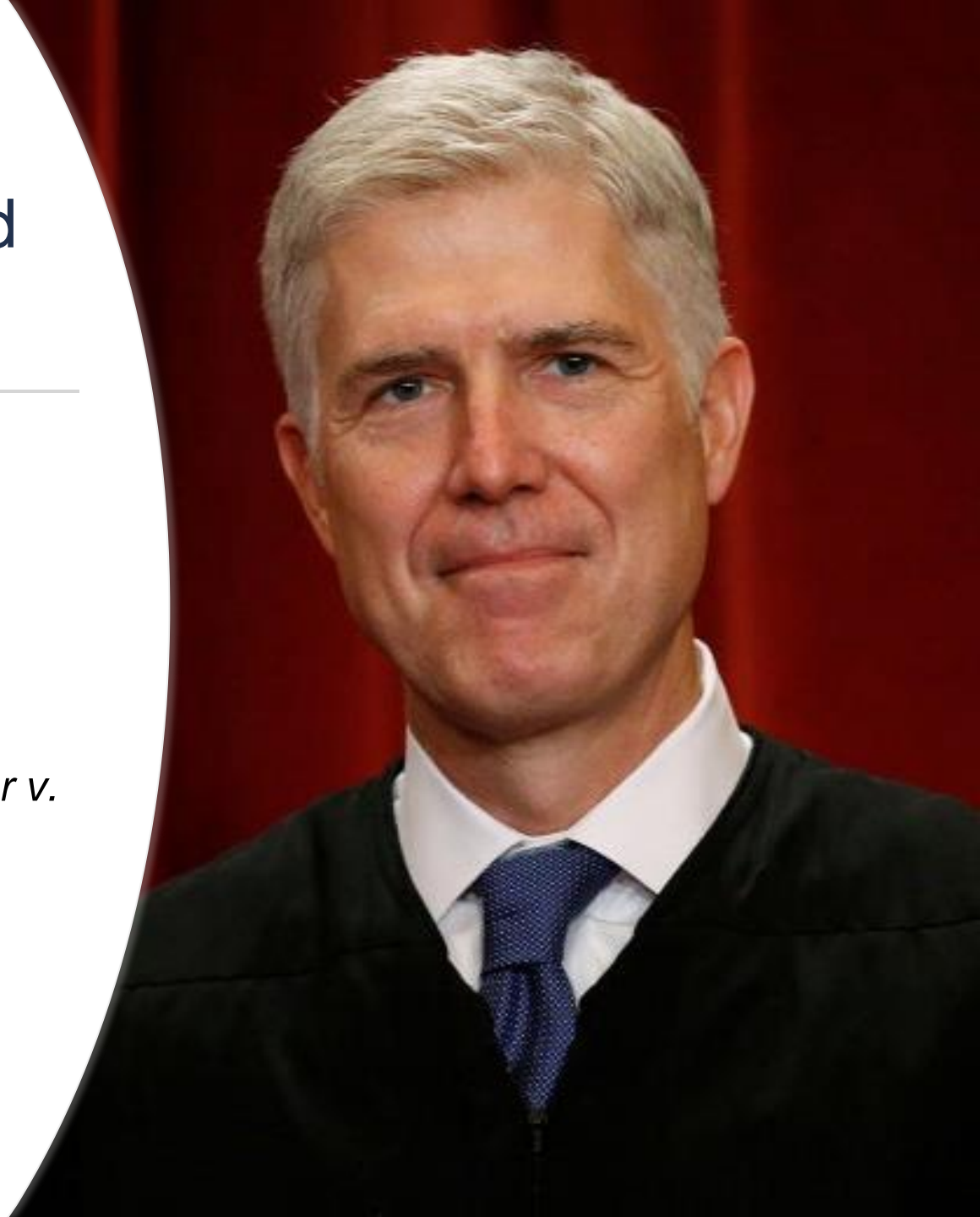
Mead Corp.

- *Chevron Step Zero*
 - Did Congress delegate the power to the agency to issue binding interpretation of ambiguous statutory language?
 - Note the “express delegation” carve-out
 - Power to undertake notice-and-comment rulemaking or issue orders – gold standard
 - And agency uses those procedures
 - Customs Department had rulemaking power
 - But not enough for deference here – why?



Auer deference and *Kisor v. Wilkie*

- Superdeference to agency interpretations of their own regulations
 - *Auer*
- The Art of Overturning Without Overturning – *Kisor v. Wilkie*
 - How did Justice Kagan limit *Auer*?
 - Is *Auer* still a dead doctrine walking?



Next class – the final lap



- What happens when you extend *Chevron* to –
 - Agency statutory reinterpretations that conflict with prior court interpretations?
 - Statutory interpretations by multiple agencies?
 - Who gets to make the call?
 - Role of expertise and power?



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