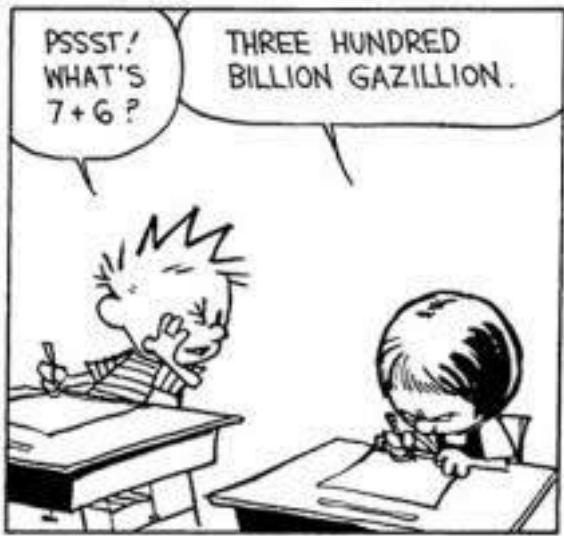


# *Judicial Review of Agency Statutory Interpretations (Brand X and Gonzalez)*

Prof. Tracy Hester  
University of Houston Law Center

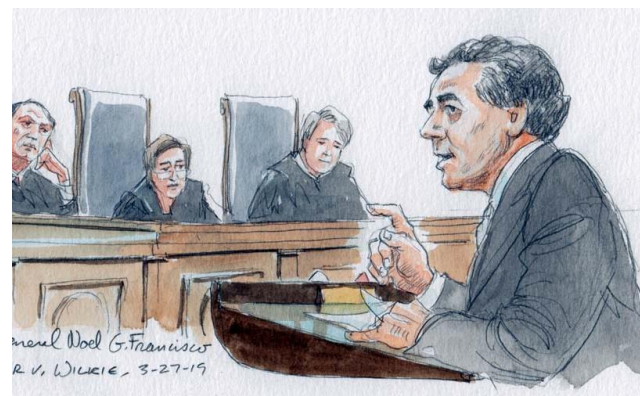
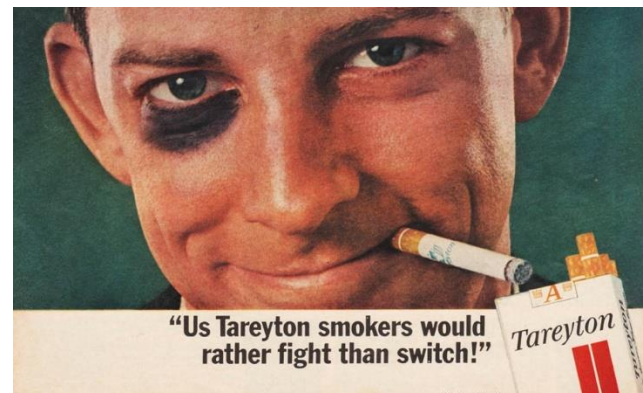
# Announcements and Updates



- Review session for last day of class
  - We'll review one more sample essay and several multiple choice questions
  - 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

# Quick review: *Mead* and *Kisor*

- Major Questions doctrine
- *U.S. v. Mead Corp.* (2001)
  - Did Congress delegate the power to make binding determination?
  - And did the agency actually use it?
  - Notice-and-comment rulemaking and formal orders – gold standard, but deference allowed for less
- *Kisor v. Wilkie* – neutering *Auer* deference





Review  
question: so  
when do you  
use *Auer*  
instead of  
*Chevron*?



# The final class

- 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?




## Brand X – How to Regulate the Internet?




# *National Cable & Telecommunications Association v. Brand X Internet Services*

- Statutory interpretation question at issue
- How did the FCC make its policy ruling?
- Why wasn't this case an *Auer* fight?
- Who gets to make the call – the agency or the judiciary?
- What implications for agency strategy and tactics after decision?



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Bringing it  
all together:  
*Gonzales v.  
Oregon*



## Who's Deferring to Whom?



## Who's Deferring to Whom?

- Which statute(s)? How does this system normally operate?



# Who's Deferring to Whom?

- Which statute(s)? How does this system normally operate?
- What exactly is an “Interpretive Rule”? How was it used here?



# Who's Deferring to Whom?

- Which statute(s) at issue? How does this system normally operate?
- What exactly is an “Interpretive Rule”? How was it used here?
- Who gets deference here ultimately? (and, of course, who won?)
- What Ever Happened to ....
  - *Auer*?
  - *Heckler v. Chaney*?
  - *Overton Park* and *State Farm*?
- A great review – tally the statutory interpretive doctrines at play





In today's world...



Photo # NH 41730 15L aircraft hull in Liberty Loan parade in Philadelphia, 28 Sept. 1918





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