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# Deference 101:

# Judicial Review of Agency Interpretations

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Professional Practice Seminar:
**The Supreme Court Revisits *Chevron* Deference to Agencies**

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# Judicial Review of Agency Interpretations

## Is the Agency's interpretation of the law entitled to deference and, if so, how much?

- Courts afford different levels of deference depending on the nature of the Agency interpretation under review, and the source of the law being interpreted.
  - *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)
  - *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)
  - *Auer v. Robbins*, 519 U.S. 452 (1997)

# *Chevron*

- In *Chevron*, the Supreme Court considered an Environmental Protection Agency (EPA) rule that allowed states to treat all devices within an industrial grouping as a "single source."
- In the Clean Air Act (CAA), Congress defined "single source" as "any building structure, facility, or installation" that emitted pollutants. CAA § 111(a)(3).
  - The Court found the Act to be ambiguous. *Chevron* at 865.
  - And the Court held that EPA's interpretation was "a reasonable choice within a gap left open by Congress." *Id.*

# *Chevron* "two-step" test

1. If Congress "has directly spoken to the precise question at issue" the agency must do as Congress intended.
    - Plain Language
    - Legislative History

2. If Congress is silent or ambiguous on the issue, the court defers to a permissible construction of the statute.

# *Chevron* step zero: Does *Chevron* deference apply?

1. The agency must be "charged with administering the statutory provision at issue." Chevron at 842.
2. And the agency action must have the "force of law."

- A statutory interpretation 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." *United States v. Mead*, 533 U.S. 218, 226-27 (2001).

# *Skidmore*

- For interpretations that lack the force of law, such as opinion letters or policy statements.
- *Skidmore* "respect," depends on:
  - the "'thoroughness evident in [the agency's] 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.'" *Mead* at 228 (quoting *Skidmore* at 140).
- In short, if an agency's interpretation is persuasive, it may be accorded *Skidmore* respect.

# *Auer*

- Courts afford agencies a greater level of deference when agencies interpret their own regulations.
- Courts will defer to an agency's interpretation if:
  - The regulation is ambiguous, AND
  - The interpretation is not plainly erroneous or inconsistent with the regulation. *Auer* at 460.
  - (Format of the interpretation does not matter.)
- If the regulation parrots the statute, it is not entitled to *Auer* deference. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).
- Changes to prior interpretations of regulations are entitled to deference as long as they do not create an "unfair surprise." *Long Island Care at Home v. Coke*, 127 S. Ct. 2339, 2349 (2007).

# *Auer*, *Chevron*, and *Skidmore*

- What is the practical difference?
  - *Auer* is similar to arbitrary and capricious review: The agency interpretation only needs to be rational.
  - *Chevron* requires an interpretation that is "permissible" or "reasonable." This is something more than rational, but does not invite the Court to ask whether it can identify a "more reasonable" interpretation.
  - *Skidmore* likely requires that the agency have the more reasonable interpretation.

# Three Decades of Applying *Chevron*

Many nuances have developed over time.

- The ambiguity of ambiguousness
- The occasional conflating of *Chevron*'s two steps