Judicial Deference to Agencies' Interpretations of Their Own Regulations post-*Kisor*

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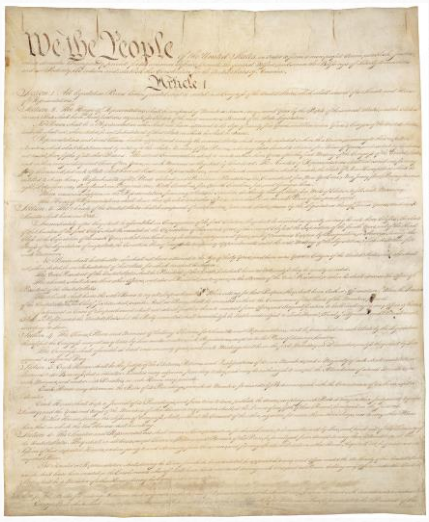
The Nondelegation Doctrine

Nondelegation doctrine: "[T]he integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. U.S.*, 488 U.S. 361, 371-72 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).



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The Evolution of Administrative Deference

- *Wayman v. Southard*: Holding that Congress, in nonlegislative subjects of "less interest," could delegate the power to "fill up details" of a broad statute to other bodies it designated to act under the provision.
- *U.S. v. Grimaud*: Congress could delegate nonlegislative powers to administrative agencies acting under the Executive: "[T]he authority to make administrative rules is not a delegation of legislative power."
  - (Upholding Secretary of Agriculture's regulations pursuant to the Forest Reserve Act of 1897).

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Deference to agency interpretations of statutes they administer

- *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944): weight given an agency's interpretation of a statute it administers should depend upon (1) the thoroughness evident in its consideration, (2) the validity of its reasoning, (3) its consistency with earlier and later pronouncements, and (4) all those factors which give it power to persuade, if lacking power to control.
  - Retains role of judiciary in interpreting statues., overturns Administrator's interpretation.
- *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984): "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress…[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."
- *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001): An agency's interpretation of a statute it administers only 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." Applying *Skidmore* factors where decision does not meet that test.

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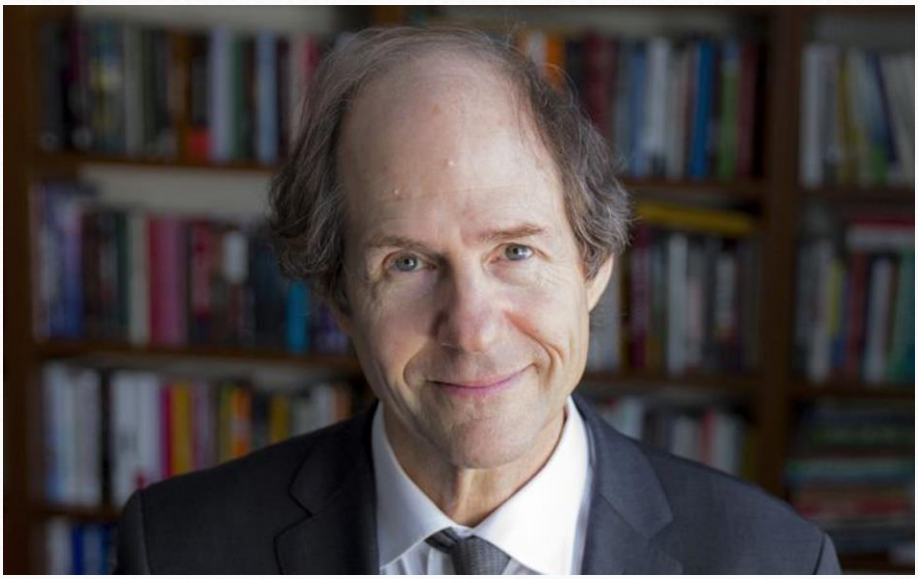

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Chevron test

- Step Zero: Does *Chevron* apply?
  - I.e., did Congress delegate to the agency, expressly or implicitly, the authority to interpret the statute at issue?
    - The presumption is generally yes, although courts look to different factors. *See Mead.*
      - Should this be a case-by-case inquiry, looking at the intent of Congress to delegate authority?
      - Or should a court presume that statutory ambiguities were intended to be resolved by administrative agencies?
    - Does this create a danger that a court might have to uphold an agency interpretation of a statute that it disagreed with?
- Step One: Has Congress spoken on the precise question at issue?
- Step Two: Is the agency's interpretation based on a permissible construction of the statute?

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Justice Scalia: "One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for Chevron deference exists."

Cass Sunstein, Chevron Step Zero, 92 Va. L. Rev. 187, 203 (2006), quoting Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517.

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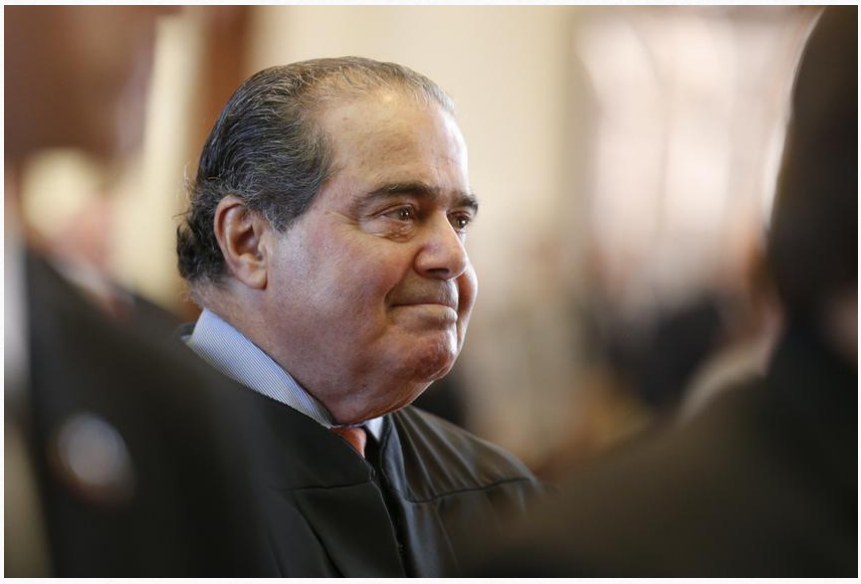

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Deference to agency's interpretation of its own regulation

- *Bowles v. Seminole Rock & Sand Co.*, 533 U.S. 218, 226-27 (2001): "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."
- *Udall v. Tallman,* 380 U.S. 1, 3-17 (1965): "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."
- *Auer v. Robbins,* 519 U.S. 452 (1997) (Scalia, J.): "Secretary's interpretation of his own regulations was due deference "unless plainly erroneous or inconsistent with the regulation."
  - Essentially *Auer* deference is *Chevron* for agency interpretations of regulations; however, the test set forth in *Auer* seems to begin at Step 2.

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Justice Scalia recedes from *Auer* deference

- *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J. concurring): "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." (quoting Montesquieu). Basically, deference to agency interpretation of its own regulations creates an incentive for the agency to write vague regulations.
- *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326 (2013) (Scalia, J., dissenting): "The Court there gives effect to a reading of EPA's regulations that is not the most natural one, simply because EPA says that it believes the unnatural reading is right…Enough is enough."

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Kisor v. Wilkie, 139 S. Ct. 2400 (2019)

- *Kisor* re-examines *Auer* deferenec
- "[A] court must exhaust *all* the 'traditional tools' of construction" and must "carefully consider the text, structure, history, and purpose of the regulation" in order to determine whether a rule is genuinely ambiguous.
  - This encourages Courts to resolve deference questions regarding agency regulations at *Chevron* Step One.
  - But, note that *Auer* essentially skips a Step One inquiry.
  - Inserting Step One may constrain application of *Auer* deference.
- "[T]he Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity. As we have explained, that is not always true. A court must assess whether the interpretation is of the sort that Congress would want to receive deference."
  - *Chevron* Step Zero inquiry.

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Auer remains alive, but cabined

- When, after exhausting the canons of statutory interpretation, a court finds a regulation ambiguous, a court may defer to an agency's reasonable interpretation if (1) it is the agency's "authoritative" or "official" position on the matter, (2) the interpretation implicates the agency's substantive expertise, and (3) the interpretation reflects the agency's fair and considered judgment. *Kisor*, 139 S.Ct. at 2416-18. (Similar to *Mead* factors).
- If these indicia are absent, a court may nevertheless defer to an agency's construction of an ambiguous regulation "to the extent it has the power to persuade." *Kisor*, 139 S.Ct. at 2414 (quotation and citation omitted).

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Effect of *Kisor* decision?

- Courts less likely to defer to agency constructions of regulations they administer; more likely to find regulatory language unambiguous.
- Brings *Auer* more in line with *Chevron*.

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Questions?

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