1. Some of my classmates and I have had questions about agency adjudication and would like to know the extent on knowledge that we will need. So far, I only have the two types of adjudication and the notes on Matthews v. Eldridge and Golden Globes. To what extent will we need to know those cases? Are there larger implications for adjudication and judicial review within those cases?

AND

When Professor Stevenson was here, we talked about the Matthews test under adjudications, but we weren’t assigned to read the case (I believe). Is that material something we are responsible for knowing for the final?

You’re correct – I did not assign Matthews because it focuses on basic Due Process requirements for hearing procedures, and it typically gets covered anyway in Property. You do not need to know or cite Matthews for our final exam, but you should know about the basic elements of rulemaking by adjudicatory hearings outlined in Chenery I and Chenery II (on p. 779) and the Golden Globes and Fox decisions in the following pages. The introductory discussion on Adjudication vs. Rulemaking on p. 777 is a useful summary of the key points that you’ll need to know about agency adjudication as a policy-making tool.

2. I’m just going through my outline for answering an agency action question, and I know I should definitely incorporate State Farm in there, but I’m not sure whether to include it in the beginning or the end of the analysis. Because with Mead-Skidmore-Chevron you can skip from one to the other pretty easily, but I feel like if I end the state farm analysis with the agency not being allowed to do something because it’s arbitrary and capricious I don’t know where to go. And if Mead-Skidmore-Chevron are satisfied but it fails on State Farm, does the agency action fail to be valid?

Frankly, it only makes a difference if a judge wants to issue an efficient opinion with as little dicta as possible. If a rule flunks the State Farm test, there’s little point in plumbing the depths of the Mead-Skidmore-Chevron analysis (and vice versa). For final exam purposes, though, you should definitely discuss both if they’re relevant. The order is largely unimportant, and up to your judgment on clarity and organization of your answer.

And, as my answer above hints, a rule that satisfies Mead-Skidmore-Chevron analysis but fails State Farm is still invalid at the end (and vice-versa).

3. Say you have a statute and you see that you can apply a textual canon, like ejusdem generis, to the statute to figure out if a term is included within the statute’s meaning. Is that statute considered "ambiguous"? And, if so, can we start the process of applying
other interpretive tools like Constitutional Avoidance etc.? OR is the meaning of the statute unambiguous when we can resolve the meaning simply through a textual canon?

For example, if a statute prohibited "desks, chairs, lamps and other items" and I wanted to know if cars were included in "other items," I could apply ejusdem generis to find that cars are not prohibited because they aren't furniture.

But is the statute actually "ambiguous"? or is the ease that a judge could interpret the statute mean that it is "unambiguous"?

Generally, textualist judges will use linguistic canons and substantive canons to see if the statute’s language has a clear and discernible answer. If you can get to an answer using noscitur a sociis or the Whole Act canon, the language is not ambiguous and you do not need to apply substantive canons that require ambiguity as a necessary first step (e.g., the constitutional avoidance canon). But, as your question hints, some judges will apply these textual canons and still find enough residual uncertainty to proceed nonetheless (especially with the rule of lenity).

4. With regards to Mead, I am confused with the precise difference between Mead and Chevron step 1.

Mead asks: has congress delegated to the agency the general authority to make rules that carry the force of law and has the agency exercised that authority?

Chevron 1 asks: whether congress has spoken to the issue in question.

The court in Mead lists circumstances in which Congress delegated authority to make rules carrying the force of law:

i. Adjudications
ii. Notice and comment rulemaking etc.

The court did not spell out what but did say some might get Chevron if no administrative formality given and none afforded.

My question is: Mead is looking for something more specific, whether the agency can make rules that carry the force of law, whereas Chevron is asking whether there is express delegation to fill in the gaps or ambiguity in the statute, in which case there is an implied delegation of authority to the agency?

I am trying to reconcile Chevron with the new idea that the delegation has to be authority to make rules that carry the force of law.

It is a blurry line, but the key distinction between Mead and Chevron Step One is that Mead focuses on whether Congress gave the agency a general power to issue a binding interpretation of statutory terms in the first place. This question is broad, and covers any issue, any topic, any time that the agency wants to address it. By contrast, Chevron asks whether Congress spoke to the direct substantive issue at hand which the agency is trying to answer. For example, Congress
may have clearly given the Internal Revenue Service the general power to promulgate rules that have the binding force of law, and the agency may exercise those powers by passing a particular rule (satisfying *Mead*). But if Congress has clearly spoken about the exact issue that the IRS has passed a rule to address, Congress’ express direction on that specific issue prevails over the IRS interpretation (*Chevron* Step One).

5. With regards to agency stare decisis, *Brand X* only applies when it’s from a lower court? In *Concrete Supply* the U.S. Supreme Court did not apply it because it found that the case has been decided before *Mead*. What happens if the case was decided after *Mead* by the SCOTUS?

To clarify a bit, *Brand X* holds that a federal court’s interpretation of a statute must give way to an agency’s subsequent interpretation if that agency promulgates a reasonable interpretation within its *Chevron* Step Two authority as granted by Congress. Justice Stevens’ concurrence carves out an exception for statutory interpretations by the U.S. Supreme Court, but remember – his opinion is just a concurrence, and Justice Thomas’ majority opinion had six justices behind it (i.e., it isn’t a plurality opinion).

And you’ve touched on the exact question that everyone is wondering about – what happens if the Court must address this issue for a decision that interprets a statute after *Mead* and *Brand X*? To my knowledge, we’re still waiting for the answer on that one.

6. Quick question: in my notes, I have written down "scripted colloquies – planting seeds for interpretation in the record"...none of my skimming/Googling is helping me figure out what that means. Could you shed a little light?

A scripted colloquy is essentially legislative performance art. Members of Congress will take the floor during a debate, and essentially read a script to each other that expressly asks and answers particular questions that might arise in later attempts to interpret the bill’s language. Essentially, they’re seeding the legislative record with information that they hope will influence a future court or agency that will interpret or apply that law.

7. In your outline to the agency question we went over in class, you list presumption of reviewability and hard look doctrine as part of the State Farm procedural analysis. When we went over *State Farm* with Professor Stevenson, he didn’t really go over the hard look doctrine by name. The book mentions Justice White’s opinion reflecting a hard look review. Is it the idea that formal agency actions must be supported by substantial evidence? Is it just formal agency action or any agency action?

Also, I’m not sure what presumption of reviewability has to do with *State Farm*. I thought the presumption of reviewability of every agency action came out of *Overton Park*. Is it just the general idea of reviewability from APA 701?

Not to imply a false sense of precision, but you can cite either *State Farm* or *Overton Park* for the notion of a “hard look” doctrine, which simply means that the court will give a searching review to the way that an agency made a decision and the contemporaneous record that the
agency created when it made its decision. The court will not, however, substitute its own preferred outcome for the agency’s decision when it conducts a hard look at the agency’s conclusion. The hard look doctrine applies to informal agency actions such as notice-and-comment rule making.

The presumption of reviewability occurs in *State Farm* because the agency initially argued that its decision to withdraw the rule was the same as a decision not to issue it in the first place, which would be presumptively lie outside the court’s power to review. The *State Farm* court rejected that argument. But you’re correct that *Overton Park* said it earlier.

While Section 701 of the APA also provides for judicial review of administrative action, the presumption of reviewability theoretically extends to all statutes in other subject areas. But Section 701 tends to cover most of the same ground for administrative agency actions.

8. I had a question about the "bubble step" between Chevron Step 1 and Step 2. My notes from you in class say that when Congress has explicitly delegated an agency the authority to decide an issue, but do not provide any guidance as to the answer, the agency interpretation is subject to arbitrary and capricious review. You determine whether the agency interpretation is arbitrary and capricious instead of moving to Step 2 of Chevron - reasonableness. Is this arbitrary and capricious determination the same as it is in the "procedure review process" that you have to work through, before even reaching Mead and Chevron (e.g. State Farm or Nova Scotia; looking at the administrative record and any agency response to comments, or lack thereof)?

It’s the same highly deferential standard of review in favor of the agency, but you’re looking at different things at each stage. The *State Farm/Nova Scotia* review looks to the process by which the agency reached its conclusion and whether its decision shows a rational connection with the administrative record underlying the agency action. The *Chevron* “bubble step” asks instead whether the agency’s specific answer on the substantive issue that Congress explicitly delegated to them is arbitrary and capricious.

By the way, the “bubble step” label is strictly a creature of our class discussion – to my knowledge, no other court, professor or practitioner has ever used the term. Please don’t include it in your future briefs and memoranda (unless you’re ready to explain what it means)!

9. From more of a structural point of view - when would be the best place within an assessment of judicial review of agency action to discuss State Farm as the framework for standard of review? I was thinking it would make sense to address before getting into Mead, but Ben seemed to think it worked better at the end of the Mead/Chevron/Skidmore analysis. I would imagine both would work. However, for organizational purposes, wouldn’t it be better to lay out the State Farm framework right after assessing which type of agency action we are dealing with?

Your instincts are sound. You can approach the problem either way, but I tend to start with a review of *State Farm* sufficiency (which applies to all administrative actions) and then turn to *Mead-Chevron-Skidmore* for the narrower statutory interpretation issue.
10. My question is about when a court is examining a professed non-legislative and non-binding interpretive rule or policy statement and is trying to determine whether that interpretive rule or policy statement should have gone through the notice-and-comment procedures of the APA.

The APA exempts interpretive rules and policy statements from notice-and-comment procedures, but:

(1) Do we apply the factors listed in "American Mining?" "Without the rule there would be no legal basis for enforcement; was the rule published in the Code of Federal Regulations; has the agency explicitly invoked its general legislative authority; does the rule effectively amend a prior legislative rule"

(2) If we do apply "American Mining," is this review under arbitrary and capricious or under the "without observance of procedure required by law" listed under the arbitrary and capricious standard in the APA?

(3) In the context of interpretive rules and policy statements, is it then fair to say that "Arbitrary and Capricious" has two prongs: (1) was the process of the rule's promulgation sufficient, and (2) was the agency's rationale for the interpretive rule or policy statement sufficient?

A very good, and specific, question! In short, you need to apply the American Mining test (although I shortened it in class to whether the guidance or memoranda created a legally binding consequence or obligation for an affected party that effectively makes it a rule). And if the agency has effectively promulgated a rule by cloaking it as a guidance without notice and comment, that action is presumptively arbitrary and capricious as well as ultra vires – no need for further analysis or review.

11. Fair warning, this is a long question, and I may be reading into this way too deep and gone down rabbit hole.

The book mentions that an otherwise interpretive "rule is legislative if it has 'legal effect.'" Then it goes on to list factors that define "legal effect" (Note—this was a DC Circuit Court decision).

When conducting a Mead analysis, we say there is a presumption of delegation when Congress gives the agency the power to make rules "carrying the force of law." We also say that (one of the ways) Congress gives the agency the power to make rules carrying the force of law is through "some other procedure indicating comparable congressional intent."

Therefore, let's say Congress has declined to grant legislative authority to an agency, but the agency, nonetheless, deploys an interpretive rule. Now let's say that the interpretive rule becomes a legislative rule because it has "legal effect."
Under Mead, could an argument be made the the above set-up falls under "some other procedure indicating comparable congressional intent?" Or, would this be a situation where no congressional delegation can be found, and, thus, we move on to Skidmore?

As Alice said, curiouser and curiouser (hey, you mentioned chasing down rabbit holes…)

A fascinating question, but the end analysis is fairly simple. If Congress expressly denied power to the agency to issue a legislative rule, an attempt to issue an interpretive rule that ultimately has the same effect would exceed the agency’s mandate. Simply put, it’s ultra vires, and a court would likely strike it down.

You reach the same result through a second path as well: if an agency promulgates an interpretive rule that has the same effect as a legislative rule, it effectively has promulgated a “stealth rule” without going through proper notice and comment rulemaking procedures. This logic follows the same test that we discussed for agency attempts to smuggle rule-like standards via informal memoranda and guidance.

12. To apply the MEAD-CHEVRON-SKIDMORE framework, does it make a difference if the statute that authorized the agency to issue the rule required formal or informal rule making?

Interesting question. For Mead purposes, probably not – the sole question is whether Congress allocated power to the agency to issue a binding opinion through its grant of rulemaking authority. Whether the agency exercised that authority through informal or formal rulemaking probably makes little comparative difference.

This isn’t a bright line conclusion, though. If an agency interprets a statute through a formal rulemaking proceeding, but that rulemaking (1) applied only to the parties before the agency, (2) was subject to de novo review by a higher court or deliberative body, or (3) reflected little or no agency deliberation due to a sparse record and flimsy opinion, then a court might find that the agency had failed to conduct a formal rulemaking that would support its statutory power to issue a binding interpretation. Mead requires both the bestowal of power to the agency and its proper exercise.

13. In Muscarello, it is mentioned that the Rule of Lenity "only applies when courts have no guidance regarding Congress's intent."

Note five of Ashcroft mentions that the Presumption Against Preemption (Clear Statement Rule) can be applied in two ways: (1) as a clear statement rule, or (2) as a basic presumption.

When applied as a basic presumption, the note mentions that ambiguity, similar to that of the Rule of Lenity, becomes the trigger.
Thus, my question is, what is the trigger when Presumption Against Preemption is used as clear statement rule? Is it simply based on the facts of the particular case and those facts raising a federalism issue?

Good question. If the presumption against preemption is applied as a clear statement rule, then you don’t need ambiguity in the statutory language to invoke the presumption. Congress’ failure to state explicitly and clearly that it intended to preempt the state law is enough to conclude that it did not want to preempt, even if Congress’ language might otherwise be construed to avoid preemption. You gotta say it for it to preempt, in other words.


Question: During class you mentioned that Locke v. US is the clearest example of soft textualism. I was wondering why is Locke an example of soft textualism? I thought Locke held that the meaning was clear and only looked at the text. Is it soft textualism because New Textualism requires looking at plain meaning and looking at other statutes (Scalia in Casey and Scalia’s dissent in Chisom)?

Another clarification-- there is plain meaning rule where soft textualism falls in, and then there is-- Scalia's legacy--New Textualism?

You’ve raised a good point – Locke is a strongly textualist decision in its rationale. But note that Justice Marshall also refers to legislative history by noting that it doesn’t offer any suggestion why Congress chose Dec. 30 over Dec. 31. I referred to Locke as a soft textualist decision because (1) it is essentially textualist in its rationale, (2) it nonetheless relies on legislative history to corroborate its textualist interpretation, and (3) it predates the rise of stricter textualism in subsequent decisions in the late 1980s and early 1990s.

In general, the hallmark division between new textualism and soft textualism is their use of legislative history – soft textualists are willing to look to legislative history to confirm or support their interpretations, while new textualists view any recourse to legislative history as highly dubious.

The plain meaning rule underlies all of these interpretative approaches – you’ll find it in textualism of all stripes, purposivism, originalism, etc.

And last, don’t worry overmuch how the decisions and canons fit within each of the schools of interpretation. Courts usually don’t distinguish among these philosophies when they interpret a statute, and the doctrines have no binding legal effect. They’re meant solely to help you navigate the different opinions.

15. In Skidmore, before the courts get to the analysis, they say "there is no Statutory provision that indicates what kind of deference the court should pay to the agency's conclusions".
Does the Mead-Chevron-Skidmore framework take a backseat if the statute itself indicates what kind of deference the court should pay to the agency action?

Yes, express statutory language that dictates the level of deference will usually control. That’s why the currently introduced bills (including the REINS Act) to abolish *Chevron* would genuinely affect the federal courts’ review of agency statutory interpretations.

16. The way the court in Mass v. EPA summarizes *Heckler v. Chaney* seems to significantly narrow the scope of Chaney’s holding (we held that agency’s refusal to initiate enforcement proceedings is not ordinarily subject to judicial review).

I was just curious if statements like this one had any effect on stare decisis for applying *Chaney* (I.e. If the court is actually couching the holding in this way to try to narrow it ... or is this just dicta because the issue is not actually before them?)

I’ve always viewed these types of narrowing statements as dicta because the court hasn’t expressly ruled on the scope of its prior decision, but it’s fair game to point to a series of rulings that subsequently have the practical effect of limiting the decision.