Subject: Email review questions - Statutory Interpretation
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Thanks for all of your great emailed questions! As promised, I've compiled below all of the queries that I've received since the practice exam. You can also find them (along with answers) on the class website as well.

I'll be in my office briefly tomorrow afternoon if you have any last-minute questions or concerns. Otherwise, good luck, and see everyone on Friday morning.

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1. *True or False: State courts can adopt their own rules of statutory construction that differ from federal rules, and some state courts – notably New York and California – use generally purpose-based approaches rather than literal textualist approaches. Found this online and am unclear. I know different states using different tools so I figured it was true*.

   It's true. Only caveat is that state legislatures also may face separation of powers challenges if they incur too deeply into judicial branch powers under their own state constitutions.

2. *Are we allowed to bring our textbooks with us to the exam by any chance? Or is it only our outlines?*

   You can bring your textbooks as well as your self-generated outlines. I only disallow commercial or third-party materials that might unfairly advantage students who can afford or collect them.

3. *If Congress has expressly delegated authority to the Agency to decide a specific issue (I know this is rare), my notes say the Court would then apply a "Hard Look Review" on something. Is the Court applying this on the Agency interpretation or on the procedure or is it all wrapped in one? If the interpretation, that seems strange because Chevron would give the Agency more deference than they're getting when Congress expressly delegated them the power to decide the issue. If its just the procedural aspects addressed in the 1st paragraph, that seems strange because then its almost an automatic check as long as the Agency meets the initial procedural review.*

The Chevron case that talks about applying Arb & Cap review to the Agency when Congress expressly delegated just says: "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute..." I guess I am asking is this just the same arbitrary and capricious review we've seen in Nova Scotia, State Farm, Overton or is this something different? If its the same as the Nova Scotia, State Farm, Overton, Mass EPA then is the Court automatically giving the Agency a check as long as they meet the requirements articulated in those cases? If the Court will apply arbitrary and capricious if expressly delegated, haven't they already done so to even get to Mead?

First, you're right - express Congressional delegations of statutory interpretive questions to agencies are exceedingly unusual. But you're also correct that in this type of rare "you decide it, not me" scenario, Congress' express delegation to the agency means that the agency's ultimate decision is, at heart, just an agency action like any other. As a result, *Chevron* found this type of agency interpretation would receive the typical arbitrary-and-capricious review given to any agency action. By contrast, Congressional silence or ambiguity provides an implied delegation of authority to the agency to interpret that statutory term. Under *Chevron,* this Step Two analysis only requires that the court determine whether the agency reached a "reasonable" conclusion. The court may not agree that the agency reached the best conclusion, or the correct conclusion – but only that the agency selected an interpretation that fell within a zone of reasonable interpretations that the statute could support. This obscure and tightly constrained use of arbitrary-and-capricious review in *Chevron* for express delegations, however, does mirror the standard used for general agency actions under APA 706.

4. *The book seems to indicate the court is more reluctant to apply Chevron deference when the agency is speaking to a state law. But I have a note in class from you that says there's no federalism carve out in Chevron. I just wanted to clarify what that standard is?*

   The book (at page 892) talks about federal court deference to agency interpretations on the preemption of state law or other federalism values, and notes that the U.S. Supreme Court in *Wyeth v. Levine* refused to give *Chevron* deference to the FDA's legal conclusion that its labeling regulations preempted state tort laws. While commentators (and, frankly, me) might disagree with the book on this issue, for purposes of the final exam you should go with the book. Therefore, please assume that *Chevron* deference may not extend to agency interpretations that address state law preemption or federalism values.

5. *Should we just ignore* Business Roundtable*? Or do we use it as a hyped up version of* State Farm*? Or do we use it as a counter-argument to* State Farm*?*

   Of course, you should never ignore a case that we've read! In general, *Business Roundtable* focuses specifically on the degree of judicial review applied to agency estimates of costs and benefits of regulations. While still good law, this case demonstrates a questionably aggressive judicial review in a corporate/securities law context.

6. *Do we need to know the specific section and subsection numbers of the APA? For example, would it be sufficient to say* "Per the APA, decisions committed to agency discretion are unreviewable." *Or would we need to say* "Per APA § 701(a)(2), decisions committed to agency discretion are unreviewable."

   In general, you don't need to track down subsections for your statutory citations, but it helps to

point to any particular provisions that are especially salient. For example, "APA 706 sets out the arbitrary and capricious standard of judicial review for agency actions" would be just fine. Saying "706(2)(A)" might give a small additional bump in the points you get for your answer, but don't sacrifice valuable time to track it down if you have more important parts of your answer to complete.

7. *Do we use the tools of statutory interpretation to apply the* Mead *test? Or would congressional delegation of the power be clear from the facts/presumed? I am confused generally about the application of this test.*

   In general, you can use the same statutory interpretive tools to answer *Mead's* central question – did Congress intend to empower the agency to issue binding interpretations of statutes, and did the agency actually utilize those powers? But generally this question offers a relatively straightforward answer if Congress gave the agency notice-and-comment rulemaking powers which the agency actually used.

8. *Quick question—for rule of lenity, I see there's a lot of different ways the Justices apply them: as a tiebreaker introduced at the end, a presumption (thumb on the scale) introduced in the beginning, etc. Is it safe to say using any of these methods is a good way to introduce this substantive canon (or others, for that matter)? I'm kind of confused on when to introduce substantive canons in my analysis.*

   In general, the rule of lenity applies at the end of the interpretive process – if you cannot clarify truly ambiguous language with other textual and substantive canons, you apply the rule of lenity to select the interpretation that favors the criminal defendant. Most other substantive canons also require some base level of ambiguity before you can invoke them (e.g., the constitutional avoidance canon), but not all. For example, the federalism clear statement principle doesn't mandate ambiguous language. Under *Gregory v. Ashcroft,* the Court would likely construe a federal statute not to intrude into core state sovereign functions unless Congress clearly stated that intent – even if the statute's language was otherwise unambiguous.

9. *Was it the Senate where a bill doesn't have to be related in subject matter to the expertise Committee?*

   The House uses a referral process that usually sends a bill to a primary committee that handles the bulk of the review, even if the bill also receives multiple referrals to other committees. The House leadership will usually refer the bill to the standing committee with jurisdiction over the subject matter of the bill, but that broad parameter still leaves a lot of discretion to the Speaker because a sizable bill can typically fall under multiple committee's jurisdictions (e.g., Judiciary, Intelligence, etc.).

   By contrast, the Senate simply refers the bill to the committee via Parliamentarian's office. But the Majority and Minority Leaders can simply short-circuit the process and move the bill directly to the Senate floor; there's no Senate rule that mandates referral to committee, although that's by far the typical process.