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WHAT IS "THE RULE OF LAW" IN ADMINISTRATIVE LAW?

Adam J. White*

If administrative law's key case is *Chevron*, then administrative law's key lines are in a footnote. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent,"[1] the Court noted amid its defense of deference. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[2]

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* Co-Executive Director, C. Boyden Gray Center for the Study of the Administrative State, Antonin Scalia Law School; Senior Fellow, American Enterprise Institute. The Gray Center is grateful to the Journal's editors for helping to develop this symposium and for co-hosting a February 2023 conference featuring several of the symposium's authors.

[1] Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[2] *Id.*

Questions abound! How do we draw lines between Congress's "clear" intent and its unclear intent?[3] What are the "traditional tools" of statutory construction, and what are the non-traditional ones?[4] And above all, why should all of Congress's mere "intentions" be treated as "law"?[5]

Administrative law has been, in no small part, the exploration of these questions. Scholars disagree profoundly about these questions, and about the administrative state writ large,[6] yet all would claim to vindicate "the rule of law."[7] Professor Thomas Merrill recently put it

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[3] *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) ("But judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way.").

[4] *See, e.g.*, John F. Manning, Chevron *and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1518 (2014) ("Behind it, however, lie innumerable questions of application—including the question of what methods should count as 'traditional tools of statutory construction' for purposes of sorting clear from indeterminate statutes. No consensus exists about the proper mode of statutory construction." [footnote omitted]).

[5] *See, e.g.*, Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION 132 (Amy Gutmann ed., 1997) ("The criterion of 'legislative intent,' by contrast, positively invites the judge to impose his will; by setting him off in search of what does not exist (there is almost never any genuine legislative intent on the narrow point at issue), it reduces him to guessing that the legislature intended what was most reasonable, which ordinarily coincides with what the judge himself thinks best."); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194 (2017) ("The disagreement is not about statutory meaning versus congressional intent, as it was in the old days, but about which set of linguistic conventions determine what the words mean.").

[6] *See, e.g.*, CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

[7] *See, e.g.*, SUNSTEIN & VERMEULE, *supra* note 6, at 15 ("These chapters emphasize specific principles associated with the rule of law. In the extreme, a legal system that lacks such principles is unjust to such a degree that it amounts to no real legal system at all.). *But see* Hamburger, *supra* note 6, at 7 ("It is commonplace to talk rather loosely about the rule *of* law. This formulation, however, is so vague as to be a distraction from the rule problems with administrative law . . . What is more concretely at stake here is rule *through* and *under* law (or put another way, rule *by* and *under* law.) [emphasis in original]).

best: "We have heard much in recent times about the rule of law. Everyone seems to be in favor of it. Everyone seems to think that those with whom they strongly disagree are violating it."[8]

Judges, too. In the modern administrative state's earliest days, Justices Felix Frankfurter and Robert Jackson warned that allowing agencies to make policy through adjudication threatened "the rule of law in its application to the administrative process and the function of this Court in reviewing administrative action."[9] (Justice Jackson went so far as to decry the Court's opinion as endorsing "administrative authoritarianism," a "power to decide without law."[10]) Yet each of them was famously favorable toward other aspects of administrative law,[11] each reflecting, either implicitly or explicitly, their own particular sense of "the rule of law." Meanwhile, the early administrative state's most prominent critics famously saw the entire endeavor as a threat to the rule of law.[12]

Such disagreements over "the rule of law" continue today, sometimes obviously and sometimes subtly. Even Justices Antonin Scalia

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[8] Thomas W. Merrill, *The Essential Meaning of the Rule of Law*, 17 J.L. ECON. & POL'Y 672, 672 (2022).

[9] SEC v. Chenery Corp., 332 U.S. 194, 209 (1947) (Frankfurter & Jackson, JJ., dissenting).

[10] *Id.* at 216 (Jackson, J., dissenting).

[11] *See, e.g.*, Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 619 (1926-27) ("But we must be on our guard against an undue quest for certainty, born of an eager desire to curb the dangers of discretionary power."); Robert H. Jackson, *The Administrative Process*, 5 J. SOC. PHIL. 143, 149 (1940) ("The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts. That hope is still dominant, but its possession bears no threat to our ideal of the 'supremacy of law.' Instead, it lifts it to new heights[.]") (quoting James M. Landis, THE ADMINISTRATIVE PROCESS 155 (1938)).

[12] *See, e.g.*, *Report of the Special Committee on Administrative Law*, 64 ANN. REP. A.B.A. 575, 585 (1939) (decrying proposed limitations on judicial review as "alien to our traditions of government and free institutions," coming "to us through certain continental countries now under the rule of dictators . . . who either personally or through their controlled subordinates exercise legislative, executive, and judicial power practically in their entirety," and which could produce "administrative absolutism" at home).

and Clarence Thomas, who agreed deeply on so much, could still disagree profoundly over how to square *Chevron* deference with *stare decisis*,[13] a disagreement that implicitly highlighted the subtleties of each justice's sense of what "the rule of law" entails.

That is how most debates about "the rule of law" in the administrative state play out—less explicitly than implicitly, with each judge or scholar's general sense of it implicitly undergirding an edifice of their specific, explicit arguments.

So we decided to pose the question explicitly: *What does "the rule of law" mean in the modern administrative state?* No symposium essay can be the final word on the subject, but we hope that these essays are the first words in a broader conversation.

Many thanks to Ron Cass, who helped to formulate this symposium in the first place.[14] And many thanks, too, to all the authors who contributed to it: Professors Hamburger, Heinzerling, McConnell, and Rosenblum.

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[13] *Compare* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur"), *with id.* at 1014–1020 (Scalia, J., dissenting) ("This is not only bizarre. It is probably unconstitutional.").

[14] *See* RONALD A. CASS, THE RULE OF LAW IN AMERICA (2001); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147 (2017).