The Secret History of the Administrative State

*By Thomas W. Merrill**

For the last couple years, I have been digging into some history that sheds new light on the creation of the American administrative state. The research grew out of work on the Supreme Court's *Chevron* doctrine, which requires courts to defer to reasonable agency interpretations of statutes.[1] In two recent decisions, *Christensen* and *Mead*,[2] the Court cut back on *Chevron*, saying that it applies only to agency interpretations that have the "force of law." In order for agency interpretations have the force of law, the Court explained, Congress must delegate authority to the agency to act with the force of law.

The next logical question would seem to be: How do we know when Congress has delegated power to an agency to act with the force of law? The Court has not provided an answer to this question, at least not a very clear one. And in the context of rulemaking, which is responsible for most of today's important agency interpretations, we run almost immediately into a problem: statutes almost never say in so many words whether the agency has power to make rules with the force of law, or legislative rules. Instead, they typically say that the agency has authority to make "rules and regulations" necessary to carry out or implement the statute – without specifying whether those rules can be legislative rules, or are limited to interpretative and procedural rules. So starting a couple years ago, I set out, together with a co-author, Kathryn Watts, who was then a third year student at Northwestern, to try to discover what Congress understood when it created these ubiquitous rulemaking grants that are ambiguous on their face as to whether they authorize legislative rulemaking.

The results are set forth in a 120 page article in a recent issue of the Harvard Law Review.[3] What follows is a very brief recap of the principal findings of that paper, some musing about the broader implications of those findings in terms of the history of the administrative state, and some tentative thoughts about where we should go from here.

First, what we found. Throughout the twentieth century, Congress has delegated rulemaking power to agencies in ambiguous language. We found only one statute still on the books that explicitly says an agency is authorized to make rules with "the force and effect of law."[4] But it turns out that from about World War I up though at least the end of the New Deal, Congress followed a drafting convention for signaling whether any particular rulemaking grant was intended to confer power to make rules with the force of law. That convention was simple and easy to apply in most cases: If Congress coupled the rulemaking grant with another statutory provision imposing some sanction on persons who violate the agency's rules – meaning criminal penalities, civil fines, loss of benefits, or other legal consequences – then the grant was understood to confer legislative rulemaking power. But if Congress just enacted a naked rulemaking grant, without any provision for sanctions for rule violators, then the grant was understood to confer only interpretative and procedural rulemaking powers. Under this convention, a number of important agencies, including the Securities Exchange Commission, the Social Security Administration, and the Federal Communications Commission (at least as to broadcasting) had been given general rulemaking grants that conferred legislative rulemaking power. But other important agencies, including the Federal Trade Commission, the National Labor Relations Board, the Food and Drug Administration, and the Treasury Department (as to the Internal Revenue Code) had general rulemaking grants that did *not* confer legislative rulemaking power.

When I learned about this convention, I was quite surprised. Although I have taught administrative law for a number of years, I had never heard of it before. When Kathryn and I went back and looked at all the Supreme Court decisions that involved rulemaking grants in the last century, it quickly became clear why. The drafting convention employed by Congress to signal whether legislative rulemaking power was being given to an agency is never mentioned in any of these decisions. The Supreme Court has long recognized the distinction between legislative rules and interpretative rules. And it has long recognized that agencies can make legislative rules only if authorized to do so by Congress. But never in its glorious history did the Court articulate any understanding about how one determines when Congress has conferred the required power on an agency. The issue just slid by in silence.

The final chapter of the story has to do with what happened in the 1960s and 1970s. This was the era when many commentators and judges suddenly discovered the virtues of rulemaking. Rules were thought to be more fair than adjudication because they announced legal duties in advance. Rules were also regarded as a more powerful weapon, permitting agencies to protect workers, consumers, and the environment more effectively than could be done through case-by-case adjudication. It was in this context that prominent court of appeals judges took advantage of the facial ambiguity of rulemaking grants to transfer enhanced rulemaking authority to agencies. In *National Petroleum Refiners v. FTC*,[5] decided in 1973, Judge J. Skelly Wright held for the DC Circuit that the ambiguous rulemaking grant in the Federal Trade Commission Act of 1914 authorized legislative rules, even though this was inconsistent with 60 years of understanding to the contrary. This was followed by decisions of the Second Circuit in 1975 and 1981,[6] the most prominent of which was authored by Judge Henry Friendly, holding that the general rulemaking grant in the Federal Food Drug and Cosmetic Act of 1938 authorized legislative rulemaking – this determination being inconsistent with only about 40 years of unbroken understanding to the contrary.

The Wright and Friendly opinions inaugurated the

modern understanding – which is nearly always assumed rather than articulated explicitly – that all rulemaking grants authorize legislative rules, unless Congress has explicitly limited the agency to interpretative or procedural rulemaking. For example, the NRLB is universally assumed to have legislative rulemaking authority (although it almost never uses it), even though this is contrary to the intent of Congress as indicated by the New Deal-era drafting convention. And agencies like the Department of Housing and Urban Development and the Environmental Protection Agency are often assumed to have authority to issue legislative rules under general rulemaking grants that doubtfully confer such authority.

Let me shift gears at this point and offer some reflections on the implications of these findings in terms of the growth of the administrative state. Broadly speaking, one can say that the modern administrative state rests on three critical constitutional propositions – three legs of the stool if you will. Each of these understandings provides a necessary prop supporting modern regulatory enterprises of vast power such as the Environmental Protection Agency, the Food and Drug Administration, or the Securities and Exchange Commission.

The first leg, which is quite familiar, is the understanding that the enumerated powers of Congress are sufficiently broad to permit the federal government to regulate virtually any aspect of social and economic activity. The main vehicle here of course has been the Commerce Clause, which has been interpreted to permit the regulation of any activity of a commercial nature having a substantial affect on interstate commerce. One can quarrel with this conclusion, and the Supreme Court has begun in recent years to do some trimming and rationalizing around the edges. But at the very least no one can maintain that there is anything secret about this understanding. Congress itself has at times wrestled publicly with the question of how to construe its enumerated powers; academics and other commentators have written extensively on the subject; and, perhaps most prominently, the Supreme Court has rendered dozens of decisions on the subject.

The second leg is the understanding that Congress can delegate authority to administrative agencies to make discretionary policy choices with relatively little guidance from Congress. This is the famous and again highly familiar nondelegation doctrine issue. Article I section one of the Constitution says "All legislative Powers herein granted shall be vested in a Congress of the United States." It has been argued that this means that only Congress can make significant discretionary policy choices, and that these choices cannot be turned over to an agency to make. The Court, however, has almost never enforced this understanding, and has repeatedly held that, as long as Congress has laid down an "intelligible principle" to guide the agency, Congress can delegate significant discretionary powers.[7] Again, whatever one thinks about the correctness of this position, at least the issue has been repeatedly and publicly debated – in Congress, in the halls of the academy, and before the Supreme Court.

The third leg is the understanding that Congress can delegate authority to administrative agencies to make rules with the force of law. The language of the first section of Article I would also seem to be relevant here. If it is plausible that this language means that Congress cannot transfer power to make discretionary choices to agencies, then it is equally or more plausible that it means Congress cannot transfer authority to agencies to make mini-statutes. This is where the historical research described above becomes relevant. Notice that this third leg supporting the modern administrative state, in contrast to the first two, can hardly be said to be one that has received a thorough and vigorous public debate in any forum.

Let's start with Congress. In the nineteenth century, Congress occasionally enacted statutes stating explicitly that certain agencies were being given authority to make rules "with the force and effect of law."[8] But starting around World War I, this practice largely stopped, and was replaced by the convention I have described, in which Congress signaled that it was giving legislative rulemaking authority by enacting an ambiguous rulemaking grant and then also enacting some type of sanction for those who violate rules. Why did Congress prefer the oblique and indirect convention to simply stating upfront that it was delegating power to make rules with the force of law? We cannot know for sure. But one plausible explanation is that it was controversial to delegate authority to agencies to enact what amount to statutes, given the language of Article I suggesting Congress was supposed to do this itself. In order to mute the controversy, Congress adopted a signaling mechanism that obscured the issue, and rendered it more likely that the transfer of lawmaking authority would pass unnoticed by opponents of the legislation.

What about academics? Here the performance can only be described as dismal in the extreme. I have no doubt that influential administrative law scholars who came out of the New Deal and taught administrative law in the post-World War II era were aware of potential constitutional objections to delegating power to agencies to make legislative rules. But, to a man (they were all men), they omitted any discussion of the issue in their writings and teaching materials. For example, Walter Gellhorn was the research director of the Attorney General's Committee on Administrative Procedure that undertook a massive study of administrative law in the late 1930s. The materials produced by the committee contain several references to the drafting convention used by Congress to signal the delegation of legislative rulemaking authority. But when Gellhorn wrote a monograph on administrative law in the early 1940s, and later authored the most widely-used casebook on the subject in the 1950s, the issue was ignored. Similarly, Kenneth Culp Davis, another New Deal veteran, was probably the leading expert on rulemaking coming out of the New Deal. He also became, in the 1960s, the leading academic proponent of expanded use of rulemaking by agencies. Yet throughout his voluminous writings, there is no allusion to the constitutional question about whether Congress can delegate the power to make legislative

rules, nor is there even any discussion about how one might tell whether Congress has or has not delegated such power. Why did the academics bury the issue? Again I can only speculate, but it is plausible that being ardent New Dealers and supporters of the administrative state, they recognized that the question was awkward and potentially destabilizing to the enterprise they identified with, and so they decided it was best not to stir up trouble.

We come then to the courts. The Supreme Court wins no prizes for its performance in this area. The cases in which the Court has episodically puzzled over the meaning of rulemaking grants reflect no comprehension of the delegation issue or how it might be resolved. But I do not really blame the Court for this. The cases arose at very irregular intervals, and an examination of the briefs reveals that none of the parties ever alerted the Court to the larger constitutional question or to the convention Congress had used for signaling the delegation of legislative powers.

The decisions of the lower courts, especially the Wright and Friendly decisions conferring general legislative rulemaking authority on the FTC and the FDA, are another matter. These are shameful – the worst kind of activist decision in which the court knows there is a right answer to the legal question before it, but ignores it in favor of another answer that it thinks is preferable. What is more, by inaugurating the understanding that any ambiguous rulemaking grant confers power on the agency to make rules with the force of law, the Wright and Friendly decisions may have achieved the largest one-time transfer of power from one branch of government to another in the history of our Republic. And they did so without any acknowledgement that this was happening.

So where do we go from here? Kathryn and I discuss a number of possibilities at the end of the article, including using the original drafting convention of the New Deal era as a canon of interpretation in construing ambiguous rulemaking grants. Yet I think the history and its implications for the growth of the administrative state raises a broader issue.

The Supreme Court has long maintained that the Vesting Clause of Article I means that Congress and Congress only has the power to legislate. The legislative power may not be delegated. The Court has recognized that this reading is in tension with statutes that give agencies broad discretion to make policy, and it has sought to reconcile this tension with the "intelligible principle" doctrine. In the meantime, however, Congress has repeatedly delegated power to agencies to make legislative rules. But the Court has not even commented on how this can be reconciled with the understanding that only Congress has the power to legislate, and the administrative law fraternity has brushed the issue under the rug. It seems to me that no reconciliation is possible. If Article I, section one means that only Congress can legislate, then it is unconstitutional to delegate power to agencies to make legislative rules.

But perhaps the Court has been wrong all along in its assumption that the Vesting Clause of Article I prohibits delegation of legislative power. Consider the language again: "All legislative Powers *herein granted* shall be vested in a Congress of the United States." This simply says that the only legislative powers granted by *the Constitution itself* go to Congress. In other words, neither the Executive Branch nor the Judicial Branch have any inherent power to make law; there is no executive or judicial prerogative. So read, the Vesting Clause does not say anything one way or the other about whether Congress can delegate its legislative powers to some other entity. As Eric Posner and Adrian Vermeule have recently written, all complex organizations delegate, and there is no good reason to think that the Framers of the Constitution intended to deny this necessary power to the federal government. [9]

So read, the Vesting Clause would not incorporate a nondelegation doctrine, but rather a delegation doctrine. It would say, not that the power to legislate may never be delegated to an agency, but rather that an agency can exercise the power to legislate only if it has been delegated authority to do so by Congress. The best way to implement this understanding would be through an express statement rule, requiring that Congress state explicitly when it is delegating the power to make rules with the force of law to an agency. But I am afraid it would be too disruptive to adopt such an understanding at this late date. At the very least, however, courts should require evidence of a clear congressional intent to delegate power to act with the force of law. Mere ambiguity – the usual "rules and regulations" formulation – should not be enough.

I do not propose this reading out of hostility to the administrative state. The administrative state can be a force for good, as long as it is properly directed and checked and balanced. I am motivated rather by a desire for coherence and candor. If we are to reconcile the administrative state with our Constitution's structure, we need an open public discussion about how agencies can engage in legislative rulemaking. For the last 100 years we have debated other propositions that must be established to have a federal administrative state. But this issue has been suppressed. Let the discussion begin.

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Footnotes

[1] *Chevron U.S.A. Inc. v. Natural Resources Def. Council,* Inc., 467 U.S. 837 (1984).

[2] *Christensen v. Harris County,* 529 U.S. 576 (2000); United States v. Mead Corp., 533 U.S. 218 (2001).

[3] Thomas W. Merrill and Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467 (2002).

[4] Agricultural Adjustment Act of 1933, 7 U.S.C. § 610(c) (2000).

[5] 482 F.2d 672 (D.C. Cir. 1973).

[6] *National Nutritional Foods Ass'n v. Weinberger,* 512 F.2d 688 (2d Cir. 1975); *National Ass'n of Pharmaceutical Manufacturers v. FDA,* 637 F.2d 877 (2d Cir. 1981) (Friendly, J.).

[7] See, most recently, *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457 (2001).

[8] Merrill and Watts, supra note 3 at 497.

[9] See Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U.Chi. L. Rev. 1721 (2002).