

October 1997

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### Recommended Citation

Yvette M. Barksdale, *New Wine Bottles: Rethinking Political and Judicial Controls on Administration*, 72 Chi.-Kent L. Rev. 1337 (1997).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol72/iss4/12>

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## NEW WINE BOTTLES: RETHINKING POLITICAL AND JUDICIAL CONTROLS ON ADMINISTRATION

YVETTE M. BARKSDALE\*

I found this task of commenting on the works in this symposium engaging. The perspectives provided here are a fascinating snapshot of administrative law scholarship today and its groping steps toward a newer understanding of the perennial problem of the place of administrative agencies in government. What struck me most about this scholarship was its patent dissatisfaction with contemporary models of administration, and in particular with the fallout from the left-right battles of the Reagan and Bush and early Clinton years over the administrative state. The scholarship in this symposium edges warily away from these battles of the 1980s and early 1990s towards new conceptualizations of administration which favor legislative or administrative controls on administration over normative executive, judicial, or public participatory ones.

The work here ranges from historical work which reassesses post-New Deal administrative law theory,<sup>1</sup> to jurisprudential work which reconceptualizes the relationship between administrative agencies and politics,<sup>2</sup> to structural work which reconceptualizes the politics of administrative agency decisionmaking.<sup>3</sup> Even the classic doctrinal scholarship also fills new wine bottles by looking to legislative or administrative models in its conception of judicial review.<sup>4</sup>

The historical pieces focus on the legal community's understanding of the peculiar nature of administrative law decisionmaking: the neither fish nor fowl blend of law, policy, and politics. Two of the

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1. See Thomas W. Merrill, *Capture Theory and the Courts*, 72 CHI.-KENT L. REV. 1039 (1997); Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159 (1997); Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119 (1997).

2. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997); Edward L. Rubin, *Discretion and its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997).

3. See Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).

4. See Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187 (1997); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

three historical commentators, Thomas Merrill and Daniel Rodriguez, discuss the rise and fall of the courts' enchantment with judicial review as a method of control of administration. Merrill ascribes the twentieth century history of judicial review of administrative decisionmaking to a judicial move away from (1) an early post-New Deal conception of administration as "public interested," rational, and pure, to (2) a 1960s Great Society hands-on conception of administration as corrupt, captured, and inefficient, to (3) a recent hands-more-or-less-off cynical conception of administration as merely another cog in the systemically pathological rent-seeking wheel of political democracy.<sup>5</sup>

Daniel Rodriguez follows by highlighting the work of Louis Jaffe as a principal example of the "move" from the "hands-off" judicial review of the early post-New Deal era to the more intensive judicial review of the Great Society era of the 1960s and 1970s.<sup>6</sup> Rodriguez argues that underlying the enhanced judicial intervention in the administrative state was a Jaffe-esque conception of administrative law as closer to normative political science.<sup>7</sup> Under this view, judicial review was appropriate not merely because it was commanded by statute, but rather because it was normatively desirable for administration.<sup>8</sup> This instrumentalist view of administrative law, Rodriguez argues, was also a core undergird of the now dominant model of administrative law scholarship: a quest to shape administrative law in a way which improves administration.<sup>9</sup>

The third historical commentator, Nicholas Zeppos, discusses the role of the elite practicing bar in shaping the post-New Deal administrative state.<sup>10</sup> In discussing the elite bar's early opposition to and later embrace of an enhanced administrative state, Zeppos focuses on the tension between normative and legal conceptions of administration. Zeppos challenges a model that blames the bar's early opposition to the Administrative Procedure Act on fear of loss of professional status and prestige from the administrative states' reduced emphasis on court-centered common law reasoning. This model, argues Zeppos, ignores many factors, including the symbiosis between the elite bar and corporate clients who were threatened by the anti-capitalist, regulatory potential of the administrative state.<sup>11</sup>

5. Merrill, *supra* note 1.

6. Rodriguez, *supra* note 1.

7. *Id.* at 1184-1185.

8. *See id.* at 1173-76 nn.105-11.

9. *Id.* at 1174.

10. Zeppos, *supra* note 1.

11. *Id.* at 1133-37.

In reality, he argues, this shift to administrative normative instrumentalism actually benefitted the bar, perhaps leading in part to the bar's later embrace of administration, in that it enlarged the lawyer's role from mere craftsman to regulatory architect.<sup>12</sup>

These historical pieces all catalog a perennial skepticism about the desirability of the post-New Deal experiment in administrative government. From Zeppos's description of a bar challenging the new administrative state, to Merrill and Rodriguez' description of the 1960s and 1970s courts' infatuation with management science, to Merrill's description of a 1990s Court cynical retreat to empty positivist formalism, these works reveal a legal community stubbornly uneasy with the power of bureaucracy. Merrill argues that contemporary judges have abandoned the effort to resolve the unease, believing that the government is so corrupt that modeling bureaucratic power no longer matters, and that in any event, politics, however corrupt, is for politicians, not courts.<sup>13</sup>

The remaining non-historical pieces, however, suggest that scholars at least, are still optimistic, still searching for a better, if not yet perfect, paradigm to properly constitute administration and administrative law. The four remaining articles in this symposium range from those who favor increased legislative controls on agencies<sup>14</sup> to those who favor loosening external controls to more fully empower agencies as a freer standing part of government.<sup>15</sup> None here write in favor of increased executive or judicial controls.

In favor of tightening legislative controls is Edward Rubin's fascinating piece, *Discretion and its Discontent*,<sup>16</sup> which challenges a fundamental pillar of administrative law theory, the concept of administrative discretion. That is the idea that agencies have decision-making authority within statutory gaps left by legislation. Rubin argues that this concept is a fiction, a myth.<sup>17</sup> He contends that administrative agencies do not exercise discretion, at least in the sense that connotes "will," that is the ability to make independent decisions between equally permissible alternatives.<sup>18</sup> Instead, he argues, the role of a bureaucracy properly understood is to implement the will of

12. *Id.* at 1151-56.

13. Merrill, *supra* note 1, at 1044. One law professor has casually described caring about structural constitutional issues as akin to "shuffling the deck chairs on the Titanic."

14. See Rubin, *supra* note 2; Levin, *supra* note 4.

15. See Strauss, *supra* note 3; Farina *supra* note 2; Krent *supra* note 4.

16. Rubin, *supra* note 2.

17. *Id.* at 1299.

18. *Id.* at 1317-18.

others, namely the legislature which gives them administrative authority.<sup>19</sup> Sometimes that administrative authority is to apply dispositive standards (referenced as weak discretion).<sup>20</sup> Sometimes that administrative authority is to make policy (referenced as strong discretion).<sup>21</sup> However, Rubin argues, neither the standard application authority nor the policymaking authority is administrative "discretion." Rather such authority is merely a charge to the administrative agency to carry out legislative objectives,<sup>22</sup> that is to discern and effectively implement the will of the legislature. Under this view of agency responsibility the agency has no right of independent judgment except about how best to implement that will. The "law" of the statute becomes directions to an agent. Judicial review becomes a procedural check to evaluate whether agencies are implementing this legislative will. Thus, under this view, the "empty" formalism and textualism which Merrill's piece describes as a feature of recent judicial review decisions, such as *Chevron*,<sup>23</sup> can be recharacterized as a court's careful policing of the instructions given by the legislature to administrative agencies. Once this policing is finished and statutory commands are enforced, the court's job is complete. All else is the authority (but not the discretion) of the administrator.

The article that comes closest to retaining the model of a judge-centered approach to administrative control of agency decisionmaking is Ronald Levin's *The Anatomy of Chevron: Step Two Reconsidered*.<sup>24</sup> Levin argues for recognition of "step two" *Chevron* "reasonable statutory interpretation" analysis as equivalent to Administrative Procedure Act arbitrariness review.<sup>25</sup> On the surface, this article seemingly advocates increased judicial control of administrative agency statutory interpretation. After all, as Levin notes, arguably once the court has concluded that an agency's interpretation is not clearly inconsistent with the governing statute, what more should there be to review?<sup>26</sup> Thus, hard look review under step two would simply reassert judicial

19. *Id.*

20. *Id.* at 1301.

21. *See id.* at Part I.B.

22. Rubin, *supra* note 2, *passim*. Rubin suggests that there might be other permissible sources for the administrative objectives beyond the legislature, such as perhaps executive or social norms. However, under his model, these would have to be subordinate to those of the legislative, because the agency's job is to carry out the statutory choice. In any event, he argues, these objectives are not the choice of the administrators, but are socialized institutional norms.

23. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

24. Levin, *supra* note 4.

25. *Id.* at Part III.C.

26. *Id.* at 1260-61.

dominance over issues the *Chevron* Court shipped to the agency and its supervising political process.

Levin, however, disclaims any normative preference for increased judicial review of agency statutory interpretation.<sup>27</sup> Rather, he asserts as an objective merely to accurately describe and to clarify lower courts' interpretation of step two, so as to provoke further discussion of the soundness of the approach. Yet, Levin's formulation of step two as arbitrariness review would seem to require agencies to tie expressly their statutory interpretation to some value within the governing statute, even in situations where the legislature simply did not consider the precise issue of construction at hand. That is, applying a reasoned decisionmaking requirement for agency statutory interpretation would at a minimum appear to require the agency to support its interpretation by reasoning from some value in the governing statute.

Thus, similar to Rubin's article, Levin's article describes the court's role, even under "*Chevron* arbitrariness review," as merely policing statutory prescriptions, rather than exercising any independent control over agency statutory interpretation.<sup>28</sup>

The remaining articles argue for reducing, at least somewhat, executive and judicial controls on administrative agency decision-making. Peter Strauss' *Presidential Rulemaking*,<sup>29</sup> and Cynthia Farina's, *The Consent of the Governed: Against Simple Rules for a Complex World*<sup>30</sup> both argue against strong unification of the executive and administration. Harold Krent in *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*,<sup>31</sup> argues for the abandonment of judicial review of an agency's compliance with its internal rules and policies, at least concerning otherwise nonreviewable agency action.

Peter Strauss, who has previously argued for stronger executive control of administrative decisionmaking,<sup>32</sup> and Cynthia Farina, who previously argued for enhanced judicial review of administrative decisionmaking,<sup>33</sup> both argue here for less executive control of administration. Peter Strauss argues against a model of executive branch

27. *Id.* at 1255.

28. *But see id.* at 1290-94 (arguing that in rare circumstances courts should be able to reverse administrative agency interpretations under a hard-look analysis as "farfetched" applications of the statute).

29. Strauss, *supra* note 3.

30. Farina, *supra* note 2.

31. Krent, *supra*, note 4.

32. *See, e.g.*, Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

33. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

decisionmaking in which the President takes all responsibility for administrative agency action.<sup>34</sup> As an example, Strauss cites the recent FDA tobacco initiative, in which President Clinton announced "his tobacco rules."<sup>35</sup> In particular, Strauss argues, this "credit-taking" by the President blurs the distinction between administration and pure "politics."<sup>36</sup> Strauss argues that administrative agency relationships to statutory authority, to Congress as an institution, and to norms of regularity and rationality obviate a model of the President as the ultimate decisionmaker.<sup>37</sup> Administrative decisionmaking is not simply Presidential policymaking and, he argues, to suggest otherwise is to gloss over the very institutional strengths that support the delegation of authority to agencies.<sup>38</sup>

In *The Consent of the Governed: Against Simple Rules for a Complex World*, Cynthia Farina argues for a reconception of the basis for political control of administrative decisionmaking away from a simple model of democratic accountability and representation to a more complex model of interlocking institutions; all with related but diverse claims of connectivity with "we the people."<sup>39</sup> In particular, she argues that no one institution, such as the Presidency, (or implicitly the Congress, as well), can claim to be the more authentic representative of "we the people" either conceptually, or historically.<sup>40</sup> This is because "we the people" are too diverse a group, and democratic "representation" or "accountability" too complicated a concept for any one branch of government, whether executive or legislative, to claim a superior pedigree as the people's voice in government. Instead, she argues, the original constitutional design contemplated a complex web of interrelationships between the branches of government and "the people."<sup>41</sup> When this original conception is translated to today's modern bureaucratic government, Farina argues, what results is a governmental structure of shared representative responsibility by the branches of government and the agency itself.<sup>42</sup>

Harold Krent in *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*,<sup>43</sup> wishes to restrict judicial review of ad-

34. Strauss, *supra* note 3, at 4.

35. *Id.* *supra* note 3, at 965-966.

36. *Id.* at Part I.

37. *Id.* at 984-86.

38. *See id.*

39. Farina, *supra* note 2.

40. *Id.* at Part I.

41. *Id.* at Part II.

42. *Id.* at Part III.

43. Krent, *supra* note 4.

ministrative agency failure to follow its own rules or policies, at least where the reviewed agency decision would otherwise be nonreviewable. Krent argues that such judicial enforcement of internal agency policy regarding otherwise nonreviewable decisions discourages agencies from formulating internal policy.<sup>44</sup> Krent further argues that such judicial enforcement freezes old agency policy by permitting malcontents to challenge the new policy as inconsistent with the old one.<sup>45</sup> Further, Krent argues, such judicial review of agency compliance with internal policy creates the risk that courts will misinterpret the agency's policy.<sup>46</sup> Krent would substitute an "adequate consideration" standard with which courts would question whether agency departures from prior policy were sufficiently deliberated.<sup>47</sup> Krent limits his thesis to a critique of judicial review of otherwise nonreviewable agency decisions, but at least the latter two arguments for abandoning judicial review would seem to justify similarly eliminating all judicial enforcement of internal agency policy.

There is much of abiding interest in all of the articles in this symposium, from those that favor increased legislative controls, to those that favor increased agency autonomy. The articles by Rubin and Levin seek to tether agencies more closely to legislation by limiting agencies' freedom to pursue extra-legislative objectives. For example, Rubin would restrict the agency's judgment to determining how best to implement legislative goals. Similarly, Levin's description of *Chevron* step-two analysis would prohibit agencies from statutory interpretations which frustrate or are inconsistent with statutory goals, even if the interpretation otherwise comports with the statute.

This seeming preference for legislative controls has much attraction in neatly reconciling administrative government with representative democracy. Of all government institutions, the legislative process has the clearest structural claim to represent "the people" however, qua Farina, messy, diverse, and heterogenous a community that is.

This legislative solution, however, becomes more problematic when one moves from the abstractions of theory to look more closely at administrative tasks. Certainly, where the statute specifically com-

44. *Id.* at Part II.A.

45. *Id.* at Part II.B.

46. *Id.* at Part II.C.

47. *Id.* at Part III.E.



mands, the agency, like any other part of government, is, assuming its constitutionality, bound by it.<sup>48</sup>

Similarly, even where there is not a specific statutory command, if there is at least a clear, unitary statutory objective or value, the agency's task can also be characterized as merely deciding how to best advance this objective. Many cases which Levin's article describes as using *Chevron* step-two analysis to overturn agency statutory interpretation involve such statutes. In these cases, the court reversed agency interpretations which ignored or undermined the one solitary statutory purpose.

However, where the statute seeks to accommodate conflicting goals and values without a single unifying purpose or value, the task of holding the agency accountable to the statute is problematic.

The statute in *Chevron* clearly demonstrates this problem. The Clean Air Act Amendments at issue there did not resolve, apparently purposefully, whether the pollution source to which the statutory requirements applied was the more environmentally protective "single" source or the more economically protective "bubble" plant-wide "source."<sup>49</sup> The statute did not even clarify whether environmental or economic values were generally preeminent in implementing the Amendments.<sup>50</sup> Accordingly, unlike in Levin's examples where the Court could overturn an otherwise permissible statutory construction as inconsistent with legislative objectives, the *Chevron* statute contained no clear goals by which to evaluate the legitimacy of the agency's choice. Neither the most environmentally protective standard, nor the most economically protective standard could actually be said to be excluded by the statute, because the agency's job was to accommodate both. Thus, at this point, the agency's task is not to implement the legislative will, but to select it.

Of course, even where the statute contains multiple and conflicting values, the statute can eliminate policies that advance neither value. The agency though still has a choice between policies that at least advance one of the legislative objectives. Of course, hypothetically, the statute might conceivably mandate an agency policy that best advances both policies. Thus, if one churns enough numbers (assuming one's data is correct, and one's predictions sound), one might

48. Although arguably the agency should have some interpretive room even here, where the specific statutory command complicates the administrator's overall statutory responsibility.

49. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 859-866 (1984).

50. See *id.*

be lucky enough to discover a policy which maximizes both values. In this idyllic scenario, the initial difficult value choice left unresolved by the statute turns out to be a false one. There is at least one "right answer." One clean air standard, for example, results in greater environmental protection and greater wealth than any alternative standard.<sup>51</sup> In this world, the statute arguably requires the agency to make this "best" choice.

This mythical situation, however, in which the agency is limited to choosing the "right" or "best" answer, even though the statute has conflicting values, assumes that government can find this answer, and thus properly be held accountable to it. One can legitimately ask, assuming such a "best" answer exists, would any part of government recognize it if they stumbled over it in broad daylight?<sup>52</sup> And if government cannot find it, how can they be required to select it?

For example, one can ask, will anyone (in or outside of the government) have both the resources and the incentive to discover this correct answer? And, even if information is available that purports to reveal this right answer, must the government decisionmakers agree that it is the only "right" one? Obviously, supporters of whatever position is undermined by this conclusion of "rightness" are going to challenge it in any forum with decisionmaking power. And once they do, the decision calculus resolves to: some data supports this "right answer," some data goes against the "right answer." Once that occurs there is no longer one known "right" or "best" way to implement the legislative will. Neither decision is inconsistent with the statute; neither decision is arbitrary and capricious. And, since there are no preeminent statutory values or goals to guide the decision, the choice of action seems to be purely the agency's. And, a resort to extra-legislative factors or politics seems to be the only way for the agency to make the choice.

If administrative agencies do have some extra-legislative power to act in the gaps left by law, perhaps this is not necessarily a bad thing. Perhaps it would be preferable if statutes clearly resolved at

51. Of course this conclusion assumes that there are only two statutorily relevant values, environmental protection and wealth, and that no other values count, such as distributive fairness, etc. However many values there are though, hypothetically there may be one "best" answer that maximally advances them all.

52. Although I am not an economist, it does not seem clear that market solutions would be any better, unless this "right answer" happened to coincide with the self interest of the strongest fish in the pond. As an example, reference the tobacco issue, where for decades it was not possible in or outside of government to establish as conclusively true the link between tobacco and health problems because of the smokescreen (could not resist) put out by the tobacco industry.

least first order value questions. But, gridlock, among other things, may prevent it. And, it is not at all clear that an invigorated non-delegation doctrine is the answer, either. If for whatever reason, a value decision cannot be made politically, is it necessarily better to have an "any choice will do" decision forced by constitutional doctrine, rather than real consensus? In this gray bog, perhaps the agency is the best forum for the resolution of these value problems, at least on the limited case by case basis (whether regarding individual rules or individual adjudications) within which agencies normally act.

The Strauss and Farina articles also suggest that administrative policymaking power is not necessarily a bad thing. Strauss' argument against an excess of executive supervision of administrative agency policymaking is based on the potential loss of benefits from shifting delegated policy decisions from agencies' with their unique blend of law, politics, and expertise to the pure politics gestalt of the Presidency. These policy decisions should not be made purely politically, argues Strauss, because the legislature, if nothing else, assigned them to institutions, i.e., agencies, which operate within a larger legal and institutional framework. Accordingly, the "politics" of the Presidency, he asserts, is not an adequate substitute for the more variegated administrative agency decisionmaking process.<sup>53</sup>

Even under this view, however, a strong argument can be made for a strongly political role, on the theory that the absence of law suits the decision for democratic politics. However, there also a unilateral, rather than inclusive Presidential role undermines participatory, deliberative, and other procedural policymaking values which the richness of the administrative process better reflects.

Additionally, Farina argues, the President is not necessarily more "representative" and "accountable" to "we the people" than the full administrative process, which includes interlocking institutions each with its own particular relationship to the people. This interlocking structure is particularly important, Farina argues, when the "we the people" to which government must democratically relate, is not a monolithic mass, but rather our broadly heterogenous and diverse population. Here, no one institution can properly lay claim to being the people's "representative," and the administrative process, with all of its sloppiness, is at least one in which each institution, and the pub-

53. I am partial to this view because I argued in the past for a strong administrative role where the agency makes decisions within the value "gaps" left open by legislators. See Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273 (1993).

lic directly, has a claim to power.<sup>54</sup> This administrative forum is particularly important for groups who lack sufficient votes or dollars to be adequately heard amid the hubbub of Washington politics, but who can nevertheless find a participatory pipeline to the administration.

And so, in the end, perhaps the message of this symposium is that to a large extent we are stuck with administrative government, first, as Edward Rubin states, because our political process has decided to make it that way, but also because administrators may be a necessary release valve for the craziness that is our constitutional, political government.

54. *But see* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. (forthcoming 1997) (arguing that the costs of mass public participation may perversely make agency governance less democratic by undermining deliberative values).

