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Florida East Coast Railway and the Structure of Administrative Law

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FLORIDA EAST COAST RAILWAY AND THE STRUCTURE OF ADMINISTRATIVE LAW

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INTRODUCTION

A typical Administrative Law course presents the Supreme Court's decision in *United States v. Florida East Coast Railway Co.*[1] as establishing the rule that statutory text quite close to the magic words, "on the record after opportunity for an agency hearing,"[2] is needed to trigger the Administrative Procedure Act's (APA) formal hearing requirements for a rulemaking.[3] *Florida East Coast Railway* is a prime example of an underrated case because, even though the case is well known,[4] its renown is

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1. 410 U.S. 224 (1973).
2. 5 U.S.C. § 553(c) (2000).
3. *Fla. E. Coast Ry.*, 410 U.S. at 238.
4. *See, e.g.*, John M. Rogers, Michael P. Healy & Ronald J. Krotoszynski, Jr., Administrative Law 226 (2003) (including *Florida East Coast Railway* as a lead case on the

a consequence only of its black letter rule about rulemaking procedures. Many scholars and practitioners do not appreciate the case for illuminating three important and fundamental principles of administrative law: the distinction between rulemaking and adjudication, the significance of the organic statute and the APA in determining the content of administrative law, and the interrelationship of the three branches of government in defining administrative law. In this last respect, Justice Rehnquist's opinion for the Court is a striking example of the significance and vagaries of statutory interpretation.

I. THE FACTUAL BACKGROUND OF THE DECISION

William Rehnquist often relied on historical context to determine the content of legal requirements.[5] Although his narrative in *Florida East Coast Railway* appears to place the action of the agency into a historical context for understanding the legal issue, that history does not inform the decision in a way that it might have.[6] The story is one in which Congress amended the Interstate Commerce Act in 1966 to delegate to the Interstate Commerce Commission (ICC) the authority to remedy a national shortage of railroad freight cars.[7] Specifically, Congress amended § 1(14)(a) to "enlarge[] the Commission's authority to prescribe per diem charges for the use by one railroad of freight cars owned by another."[8] The ICC waited a year before taking action to exercise the new power delegated by Congress, and in December of 1967, the ICC required railroads to report to the ICC about the demand for and the supply of freight cars over a period of about one year beginning in January 1968.[9] The railroads raised concerns about this study and the ICC staff held an informal meeting with representatives of twenty railroads.[10] This meeting "adjourned on a note that undoubtedly left the impression that hearings would be held at some future date."[11]

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subject of the trigger for formal rulemaking).

5. *See, e.g.*, Air Courier Conference of Am. v. Am. Postal Workers Union, 498 U.S. 517, 519-20, 530-31 (1990) (presenting the history of the Private Express Statutes to demonstrate that Congress did not intend for the monopoly of the United States Postal Service to protect the employment of Postal Service employees); Leo Sheep Co. v. United States, 440 U.S. 668, 669-82 (1979) (presenting the history of land grants to the Union Pacific Railroad, pursuant to the Union Pacific Act of 1862, to demonstrate that Congress did not intend to reserve an implied easement for public access).

6. The story may have supported a conclusion that a congressional committee tried to impose its view of the rulemaking procedures required by statute on the agency over which the subcommittee was exercising oversight. *See infra* Part IV.A.

7. *Fla. E. Coast Ry.*, 410 U.S. at 230.

8. *See id.* (citing Interstate Commerce Act, Pub. L. No. 89-430, 80 Stat. 168 (1966)).

9. *Id.* at 231.

10. *Id.* at 231-32.

11. *Id.* at 232.

The ICC duly collected information from the railroads and presented that information to the Senate Committee on Commerce Subcommittee on Surface Transportation in May of 1969.[12] The Supreme Court quoted two district court summaries of the Subcommittee's response to the agency's appearance, one stating that "[c]omments were general that the Commission was conducting too many hearings and taking too little action. Senators pressed for more action and less talk . . . ."[13] The other, written by Judge Friendly, stated that "Senators voiced displeasure at the Commission's long delay at taking action under the 1966 amendment, engaged in some merriment over what was regarded as an unintelligible discussion of methodology . . . and expressed doubt about the need for a hearing."[14] In both summaries, the district court opinions stated that the ICC told Congress that it believed the agency lacked the power to regulate without a hearing.[15] The ICC indicated to the railroads that it would hold a hearing after it collected the factual information.[16]

Justice Rehnquist reported that, following this hearing, the ICC was "apparently imbued with a new sense of mission."[17] In December 1969, the ICC issued a report and proposed regulation requiring railroads to pay "'incentive' per diem charges" for the use of the box cars of another railroad.[18] The rates were incentive rates because their values were greater than the amount needed to ensure a fair return to encourage prompt return of the boxcars.[19] The ICC also invited written responses to the report and proposed regulations and informed interested parties requesting an oral hearing that they needed to explain the need for a hearing.[20]

Four months later, in April 1970, the ICC modified several of the conclusions included in the December 1969 report and denied the requests for a hearing that several railroads submitted.[21] The ICC's final order became effective on June 1, 1970.[22]

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12. *Id.* at 232.
13. *Id.*
14. *Id.* at 232-33 (citation omitted).
15. *Id.*
16. *See id.* at 232.
17. *Id.* at 233.
18. *Id.*
19. *See id.*
20. *See id.* at 233-34.
21. *See id.* at 234.
22. *See* Long Island R.R. Co. v. United States, 318 F. Supp. 490, 491 n.1 (E.D.N.Y. 1970).

II. THE DISTINCTION BETWEEN RULEMAKING AND ADJUDICATION

In *Florida East Coast Railway*, the Court considered the type of hearing required before the ICC could impose incentive per diem rates.[23] An important lesson of the case is that the nature of the hearing compelled by the Constitution or by statute will depend on the nature of the agency action: "The term 'hearing' in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts."[24]

The classic early pair of due process cases, *Londoner v. Denver*[25] and *Bi-Metallic Investment Co. v. State Board of Equalization,* shaped the *Florida East Coast Railway* Court's view of the varied hearing requirement.[26] That pair of cases establishes a core administrative law principle: Constitutional due process does not require an individualized hearing when the government engages in across-the-board, generalized determinations.[27] Procedures that are helpful and required for resolving individualized, adjudicative matters are not necessary when the issue being resolved by the agency is a legislative sort involving broad policy determinations.

The Court's distinction in *Londoner* and *Bi-Metallic* also framed the understanding of the hearing mandated by statute. The Court concluded that the required procedures did not include an oral hearing because the agency was not making individualized determinations.[28] On this basis, the Court distinguished the more onerous procedures that it required for the adjudicative action that the ICC successfully challenged in *ICC v. Louisville & Nashville Railroad Co.*[29] In setting the incentive per diem

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23. *See Fla. E. Coast Ry.*, 410 U.S. at 226-28.

24. *Id.* at 239 (footnote omitted). Although the procedural requirements for hearings vary depending on the type of administrative action the agency has taken, the Court suggested that the notice requirements are the same. *See id.* at 243-44 (concluding that notice in *Florida East Coast Railway* was adequate and distinguishing *Morgan v. United States*, 304 U.S. 1 (1938), on that basis, rather than holding that less precise notice is required in a case of prospective rulemaking).

25. 210 U.S. 373 (1908).

26. 239 U.S. 441 (1915).

27. *See id.* at 445-46; *Londoner*, 210 U.S. at 378.

28. *See Bi-Metallic*, 239 U.S. at 445; *Londoner*, 210 U.S. at 378.

29. 227 U.S. 88 (1913). The *Florida East Coast Railway* Court described *Louisville & Nashville Railroad* as follows:

> [*Louisville & Nashville Railroad*] involved what the Court there described as a "quasi-judicial" proceeding of a quite different nature from the one we review here. The provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, and of the Hepburn Act, 34 Stat. 584, in effect at the time that case was decided, left to the railroad carriers the "primary right to make rates," 227 U.S., at 92, but granted to the Commission the authority to set them aside, if after hearing, they were shown to be unreasonable. The proceeding before the Commission in that case had been instituted by the New Orleans Board of Trade complaint that certain class and

rates, however, the Court found that the ICC was acting in a quasi-legislative manner by promulgating prospective requirements with a broad categorical impact.[30] The ICC's decision to reject the railroads' claims that alternate rates should apply to them because of their particular characteristics reinforced the categorical nature of the agency determination.[31]

The dissent agreed with the majority's analytic approach to determining the procedural requirements for a hearing. The dissent distinguished the Court's then recent decision in *United States v. Allegheny-Ludlum Steel Corp.*[32] by arguing that the Court had accepted minimal procedures there because the rulemaking being reviewed:

> [Was] wholly legislative. We held that § 1(14)(a) of the Interstate Commerce Act, requiring by its terms a "hearing," "does not require that such rules 'be made on the record'" within the meaning of § 553(c). We recognized, however, that the precise words "on the record" are not talismanic, but that the crucial question is whether the proceedings under review are "an exercise of legislative rulemaking" or "adjudicatory hearings." The "hearing" requirement of § 1(14)(a) cannot be given a fixed and immutable meaning to be applied in each and every case without regard to the nature of the proceedings.[33]

The dissenters claimed that the ICC's regulatory action in *Florida East Coast Railway* was more particularized in its financial impact and should have triggered procedures that would ensure appropriate administrative consideration of those individualized impacts.[34]

> commodity rates charged by the Louisville & Nashville Railroad from New Orleans to other points were unfair, unreasonable, and discriminatory. 227 U.S. at 90. The type of proceeding there, in which the Commission adjudicated a complaint by a shipper that specified rates set by a carrier were unreasonable, was sufficiently different from the nationwide incentive payments ordered to be made by all railroads in this proceeding so as to make the *Louisville & Nashville* opinion inapplicable in the case presently before us.

United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 244 (1973).

30. *See Fla. E. Coast Ry.*, 410 U.S. at 246 ("The factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.").

31. *See id.*

32. 406 U.S. 742 (1972).

33. *Fla. E. Coast Ry.*, 410 U.S. at 251 (Douglas, J., dissenting) (citations omitted).

34. *See id.* at 256, where Justice Douglas stated that:

> Section 1(14)(a) of the Interstate Commerce Act bestows upon the Commission broad discretionary power to determine incentive rates. These rates may have devastating effects on a particular line. According to the brief of one of the appellees, the amount of incentive compensation paid by debtor lines amounts to millions of dollars each six-month period. Nevertheless, the courts must defer to the Commission as long as its findings are supported by substantial evidence and it has not abused its discretion. "All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity." *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 304.

Florida East Coast Railway confirms the basic principle that agencies make two different types of decisions and that the proper procedures for agency decisionmaking depend on the category of the decision being made. That distinction between adjudication and rulemaking is so well established that it defines the context for evaluating the adequacy of a hearing and the nature of the hearing that Congress mandated. Categorizing the decision may, however, be controversial and may reflect an underlying view of the value of additional procedural requirements.

III. THE SIGNIFICANCE OF THE ORGANIC STATUTE AND THE APA IN DETERMINING THE CONTENT OF ADMINISTRATIVE LAW

Florida East Coast Railway also nicely illustrates how the content of administrative law is determined by the applicable organic act, in addition to the default requirements of the APA. Although this principle is straightforward, it may carry great legal significance. The Court had to consider this characteristic of administrative law, after it had decided that the Interstate Commerce Act did not trigger the formal hearing requirements of the APA.[35] The Court stated that:

> even though the Commission was not required to comply with §§ 556 and 557 of that Act, it was required to accord the "hearing" specified in § 1(14)(a) of the Interstate Commerce Act. Though the District Court did not pass on this contention, it is so closely related to the claim based on the APA that we proceed to decide it now.[36]

The Court concluded that the organic act did not impose any hearing requirements in addition to those required by § 553 of the APA.[37] Accordingly, the Court held that the procedures followed by the ICC in the rulemaking conflicted with neither the APA nor the organic act.[38] In other cases, of course, the organic act may establish procedural requirements that supplement the requirements of the APA.[39]

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35. *See Fla. E. Coast Ry.*, 410 U.S. at 238.
36. *Id.*
37. The Court's interpretation is discussed later in this article. *See infra* Part IV.B.
38. A third source of additional procedural requirements—the agency's own procedural regulations—apparently did not require the ICC to accord additional hearing rights to the railroads.
39. *See, e.g.*, 15 U.S.C. § 2603(b)(5) (2000) (requiring for rulemaking an opportunity for "oral presentation of data, views, or arguments" in addition to the Administrative Procedure Act's (APA) requirements); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876-77 (1st Cir. 1978) (holding, in an adjudicatory proceeding, that the Clean Water Act requirement of "public hearing" compelled an oral hearing, even though the APA requirements for a formal adjudication did not mandate an oral hearing); Bennett v. Spear, 520 U.S. 154, 163 (1997) (relying on the organic act to supplement the standing granted under the APA).

IV. THE INTERRELATIONSHIP OF THE THREE BRANCHES OF GOVERNMENT IN DEFINING ADMINISTRATIVE LAW

The final principle of administrative law presented in *Florida East Coast Railway* is the significance of the interrelationship of the three branches of government in defining the law. *Florida East Coast Railway* allows this principle to be considered from two perspectives: the ability of Congress to effect law independent of the enactment of legislation and the authority of the judiciary to say what the law is. These perspectives will be discussed in turn.

A. Ongoing, Non-Statutory Congressional Power Over Agencies

The controversy in *Florida East Coast Railway* required the resolution of the question of what procedures applied to the ICC's promulgation of regulations establishing incentive per diem rates. The ICC believed that those procedural requirements included an oral hearing before the agency at which railroads could present evidence about the need for and impact of incentive per diem rates. This was the ICC's position at congressional hearings reviewing the status of the per diem rates and the agency's actions to define them.[40]

The Senate subcommittee reviewing the ICC's handling of the issue let the agency know that it was quite unhappy about the slow pace of agency action to resolve a problem that Congress had delegated to the agency for a regulatory fix.[41] The ICC's view was that it could promulgate a regulation only after it held additional oral hearings.[42]

As part of the 1966 statutory delegation of rulemaking authority, Congress had neither amended the long-standing requirement of the Interstate Commerce Act that agency action be taken only "after hearing" nor included any deadline for action or any trigger mechanism if the agency failed to act by a particular date.[43] Instead, a single subcommittee changed the agency's position about the need for a hearing by deriding the slow pace of agency action at the congressional hearing.

Although this subcommittee action is far different than the legislative veto that the Supreme Court famously found unconstitutional in *INS v. Chadha*,[44] the effect appears to be a dubious attempt by a subgroup of the legislature to determine the procedural requirements for the ICC hearing

40. *See supra* Part I.
41. *See supra* notes 11-12 and accompanying text.
42. *See supra* notes 13-14 and accompanying text.
43. For examples of such statutory requirements, see 42 U.S.C. § 6924 (2000), in which Congress barred land disposal of hazardous waste unless the agency defined treatment standards for those wastes by a date defined in the statute.
44. 462 U.S. 919, 959 (1983).

after the enactment of the statute requiring a hearing. A court may properly criticize such non-statutory lawmaking by Congress,[45] but the *Florida East Coast Railway* Court seemed wholly unmoved except for giving rise to a humorous rhetorical turn.[46]

In sum, the congressional subcommittee's efforts to change the ICC's view of the law were lawful because the Court is the final arbiter both of any limits on congressional control over agency lawmaking and of the interpretation of statutes, the issue to which we now turn.

B. The Power of the Judiciary: The Significance and Vagaries of Statutory Interpretation

Florida East Coast Railway stands as just one of numerous cases that illustrate the power wielded by courts in determining the content of American public law through the impact of statutory interpretation. The extent of that power is limited, in theory. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[47] may be the most famous administrative law case of the last quarter-century because it defines in clear terms the requirement that courts defer to reasonable agency interpretations of ambiguous statutes.[48] Moreover, *Chevron* establishes the principle that only congressional action that clearly defines the content of the law binds an agency's authority to determine the content of the law.[49] Under this principle, a court itself does not have a lawmaking role—at least when the agency has intended to make law in accordance with procedures for making law defined by Congress.[50]

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45. *See* Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 365, 371 (D.C. Cir. 1989) (remanding to the Environmental Protection Agency (EPA), which had modified the proposed regulation based on comments disagreeing with the proposed regulation submitted by members of Congress without any independent determination by the agency).

46. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 233 (1973) (following the congressional hearing, the ICC was "apparently imbued with a new sense of mission").

47. 467 U.S. 837 (1984). In *Chevron*, the Court established the following two-step analysis of the legality of an agency's legal interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

48. *See id.* at 866.

49. *See id.* at 842-43.

50. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

The more than twenty years that have passed since *Chevron* was decided show, however, that courts retain significant lawmaking power even under a doctrine of deference to agencies. Perhaps most importantly, a court has the power to decide when Congress has spoken clearly in a statute.[51] In such a case, Congress's clear statutory direction, as found by a court, determines the content of the law.[52]

To be sure, the Court decided *Florida East Coast Railway* one decade before *Chevron*. *Florida East Coast Railway* nevertheless presents, in a different context, the issue of the extent of a court's authority to determine the content of law. The Court's decision in *Florida East Coast Railway* nicely illustrates the extent of judicial power because, when one contrasts Justice Rehnquist's opinion for the Court with the dissenting opinion of Justice Douglas and the opinion of Judge Friendly in *Long Island Railroad*, one can gauge the vagaries of statutory interpretation and the extent of lawmaking discretion that a court may exercise in the guise of interpretation.

I will focus on two aspects of the varied interpretative approaches to the legal issue: the question of the statute that the Court is interpreting, and the question of the relevant enacting Congress.

1. Which Statute?

Even before the Supreme Court decision in *Chevron*, courts accorded varying degrees of deference to agency interpretations of law.[53] In his dissent in *Florida East Coast Railway*, Justice Douglas predictably urged deference to the ICC's view (up until the time of the Senate subcommittee hearing) that the Interstate Commerce Act required an oral hearing.[54] Justice Rehnquist could not ignore the long tradition of deference to agencies, but fashioned an interpretive approach that allowed him to avoid the need to defer to the ICC's view that the statute required an oral hearing. Justice Rehnquist concluded that courts did not owe the ICC deference

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51. *See* Michael P. Healy, *Textualism's Limits on the Administrative State: Of Isolated Waters, Barking Dogs, and* Chevron, 31 ENVTL. L. REP. 10,928, 10,937-41 (2001).

52. *See Chevron*, 467 U.S. at 842-43.

53. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944).

54. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 254-55 (1973) (Douglas, J., dissenting) ("The Commission's order initiating the rulemaking proceeding notified the parties that it was acting 'under authority of Part I of the Interstate Commerce Act (49 U.S.C. § 1, et seq.); more particularly, section 1(14)(a) and the [APA] (5 U.S.C. §§ 553, 556, and 557).' Clearly, the Commission believed that it was required to hold a hearing on the record. This interpretation, not of the [APA], but of § 1(14)(a) of the Commission's own Act, is 'entitled to great weight.'") (footnote and citations omitted). Judge Friendly did not formally defer to the ICC's view that a formal hearing was necessary, although he did refer to the agency's position in concluding that the formal rulemaking procedures were triggered by § 1(14)(a). *See* Long Island R.R. Co. v. United States, 318 F. Supp. 490, 497-98 (E.D.N.Y. 1970).

because the ICC position that an oral hearing was needed was based on the agency's understanding of the requirements of the APA, rather than the Interstate Commerce Act. The majority did not defer to the ICC interpretation of the APA because the ICC had neither expertise nor delegated lawmaking authority for the interpretation of the APA's requirements.[55]

Florida East Coast Railway provides a sense of the vagaries of statutory interpretation by showing that a court retains the ability, even in a legal regime that mandates judicial deference, to define the limits on deference.[56] That ability is plainly most important when a court has a different view of the law than the agency.

2. Which Congress?

In addition to this disagreement about which statute the ICC had interpreted, Justice Rehnquist disagreed with the dissent and Judge Friendly regarding the appropriate legislative intent used to determine the procedural requirements for agency rulemaking. Although the *Florida East Coast Railway* majority was able to resolve the APA formal hearing trigger issue without deference to the ICC, the majority still had to decide the nature of the hearing required by § 1(14)(a) of the Interstate Commerce Act.[57]

Both Justice Douglas and Judge Friendly looked to the intent of the 1917 Congress, which initially had enacted § 1(14)(a) and the "after hearing" requirement. Justice Douglas, agreeing with Judge Friendly, concluded that Congress was requiring a traditional hearing of the sort described in *Louisville & Nashville Railroad Co.*[58]

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55. Justice Rehnquist argued that:

> The dissenting opinion . . . relies in part on indications by the Commission that it proposed to apply the more stringent standards of §§ 556 and 557 of the [APA] to these proceedings. This Act is not legislation that the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering. An agency interpretation involving, at least in part, the provisions of that Act does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency "charged with the responsibility" of administering a particular statute does.

Fla. E. Coast Ry., 410 U.S. at 236 n.6 (citations omitted).

56. The *Florida East Coast Railway* Court interestingly ignores the question of deference when it resolves the legal issue of whether the Interstate Commerce Act itself required an oral hearing, see *supra* Part III, an issue as to which deference to the ICC would have been proper.

57. *See supra* Part III.

58. *See Fla. E. Coast Ry.*, 410 U.S. at 254 (Douglas, J., dissenting) ("I would agree with the District Court in *Long Island R. Co.*, that Congress was fully cognizant of our decision in *Louisville & Nashville R. Co.* when it first adopted the hearing requirement of § 1(14)(a) in 1917.") (internal citation omitted).

Justice Rehnquist, however, believed that the Congress whose intent mattered was the 1966 Congress, which had amended § 1(14)(a) of the Interstate Commerce Act to authorize the imposition of incentive rates, although it had not amended the "after hearing" language in the first part of § 1(14)(a).[59] This interpretive strategy allowed Justice Rehnquist to claim that Congress, legislating in 1966, intended the required "hearing" to be one that was suitable for the promulgation of a legislative rulemaking with prospective effect, that is, the rulemaking procedures defined by the APA.[60]

Justice Rehnquist's interpretation of the law was bolstered in two important respects. First, because the intent of the 1917 Congress was insignificant, the majority could ignore how people would have understood the statutory term "hearing" at that time. Second, the Court saw the 1966 Congress as having known that the statutory term "hearing" had a specific legal meaning in the context of a prospective rulemaking. In the Court's view, Congress would have intended the term "hearing" to reflect the procedural requirements for rulemaking in the APA.[61] Relying on the intent of the 1966 Congress permitted Justice Rehnquist to avoid the charge that his interpretation of the 1917 provision was anachronistic.

The interpretive disagreement reflected by these two different approaches to the question of legislative intent in *Florida East Coast Railway* is important for two reasons. First, the difference goes a long way toward determining the interpretive result: It is likely that the 1917 and 1966 Congresses would have had different views of the hearing that the ICC needed to provide before establishing per diem rates for cars.[62] If legislative intent is seen as determining the content of the law,[63] there may

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59. *See id.* at 239-40 (discussing the intent of Congress when it promulgated the 1966 amendments of the Interstate Commerce Act).

60. *See id.* at 240-41.

61. *See id.* at 240 ("Under these circumstances, confronted with a grant of substantive authority made after the [APA] was enacted, we think that reference to that Act, in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term 'hearing' used in another statute. Turning to that Act, we are convinced that the term 'hearing' as used therein does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker.") (footnote omitted); *see also id.* at 241 ("We think this treatment of the term 'hearing' in the [APA] affords a sufficient basis for concluding that the requirement of a 'hearing' contained in § 1(14)(a), in a situation where the Commission was acting under the 1966 statutory rulemaking authority that Congress had conferred upon it, did not by its own force require the Commission either to hear oral testimony, to permit cross-examination of Commission witnesses, or to hear oral argument.").

62. Both of these Congresses likely would have intents that differ as well from the view of the required rulemaking procedures held by the Senate Subcommittee in 1969 following a lengthy period of agency inaction. *See supra* Part IV.A.

63. Justice Rehnquist was an intentionalist. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 228-29 (1979) (Rehnquist, J., dissenting); RONALD DWORKIN, A MATTER OF PRINCIPLE 319-26 (1985) (critiquing Justice Rehnquist's intentionalist approach to statutory interpretation).

be great importance to deciding which congressional intent should be evaluated. Second, neither side makes a clear case that it has identified correctly the proper Congress for finding intent. The fact that neither side fully engages the position of the other on this question is implicit in the fact that each side makes claims that the intent of the "other" Congress is either uncertain[64] or consistent with the intent of the Congress that is the focus of the particular approach.[65] For a legal issue that may determine the interpretive result and thus the content of public law, there does not appear to be any straight-forward interpretive rule. The result is that a court has considerable discretion in finding and applying the interpretive rules of its choice.

CONCLUSION

Given the concerns of this Article, it is not necessary to decide who is right or wrong in interpreting the statute. The decision's importance as a teaching tool is that it illustrates that courts are the final arbiters of the content of administrative law. Moreover, when defining law, courts have an extensive array of devices for concluding that the law means one thing or another.

Although students and practitioners of administrative law know the *Florida East Coast Railway* case, they typically know only its rule regarding the triggering of the APA's formal rulemaking procedures. Because the rule of the case is so easily stated and because that rule has significantly limited the application of formal rulemaking procedures, students and practitioners have been less attentive to the other important

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64. Justice Rehnquist argued that the intent of the 1917 Congress was unclear:

> It is by no means apparent what the drafters of the Esch Car Service Act of 1917, 40 Stat. 101, which became the first part of § 1(14)(a) of the Interstate Commerce Act, meant by the term. Such an intent would surely be an ephemeral one if, indeed, Congress in 1917 had in mind anything more specific than the language it actually used, for none of the parties refer to any legislative history that would shed light on the intended meaning of the words "after hearing." What is apparent, though, is that the term was used in granting authority to the Commission to make rules and regulations of a prospective nature.

Fla. E. Coast Ry., 410 U.S. at 239.

65. *See id.* at 254-55, where Justice Douglas argued in dissent that:

> [W]hen Congress debated the 1966 amendment that empowered the Commission to adopt incentive per diem rates, it had not lost sight of the importance of hearings. Questioned about the effect that incentive compensation might have on terminating lines, Mr. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce and floor manager of the bill, responded: "I might say to the gentleman that this will not be put into practice until there have been *full hearings* before the Commission and all sides have had an opportunity to argue and present their facts on the question." 112 Cong. Rec. 10443 (emphasis added).

insights into administrative law that the case offers. *Florida East Coast Railway* is one of administrative law's most underrated cases, because of the lessons about the fundamental structure of administrative law that the case teaches.