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Wednesday, October 11, 2023

Judicial Deference to Administrative Interpretation of Statues: A Broad Comparative View

Guest Blogger

For the Balkinization Symposium on The Chevron Doctrine through the Lens of Comparative Law

Vincent Martenet

Diversity in Context

Questions relating to the relationship between administrative bodies and courts in statutory interpretation cases arise in several democratic countries, regardless of their legal traditions. They invite us to reflect from a comparative perspective, without ignoring the constitutional, legal, and judicial context prevailing in each country, and being fully aware that generalizations regarding judicial deference should be, if not completely avoided, at least very carefully crafted. A nuanced approach is actually inevitable.

Judicial deference to administrative interpretation of statutes may arise where three main preconditions are met. First, the statute in question provides a margin of interpretation with respect to the specific issue raised. In other words, it allows at least two admissible or defensible interpretations in light of the applicable methods and canons of construction used by courts and, as the case may be, administrative bodies. The choice by the legislature of ambiguous, vague, or broad legal terms may, for instance, occur because the legislature recognizes the superior expertise of the executive or because ambiguous statutory language resulted from the political negotiations prior to the passage of the statute. Second, the court's deference must fit within international, constitutional, as well as statutory or other constraints and, third, the court's deference must somehow be willed or accepted by the legislature. In other words, the latter has control over this issue, as it can open or close the door to judicial deference to administrative statutory interpretation. Its intent or assent is, however, often at best implicit, which means that courts have to determine whether and, if so, to what extent they should or can defer to administrative bodies.

Standard features of modern democracies have a contested relationship to judicial deference. In some countries, administrative legitimacy and the principle of separation of powers, as well as the optimal allocation of limited resources are cited to justify judicial deference to administrative interpretation of statutes. Humility, honesty, and transparency from the courts, themselves, may also explain some forms of judicial deference. In contrast, elsewhere, the separation of powers, the concept of checks and balances, the rule of law, the notion of *État de droit*, the constitutional role of the judiciary, as well as procedural safeguards support the case *against* judicial deference to administrative statutory interpretation. Agency independence, when it exists, and the risk of wrong incentives, as well as other considerations, may also support the case for or against judicial deference.

Comparative studies in this area suggest that the supreme courts of Canada and the United States have gone quite far in terms of judicial deference to administrative interpretation of statutes. A presumption of deference somehow exists in Canada, even though its scope is significantly reduced, and the case law is not always straightforward. In the United States, the *Chevron* doctrine, even with its subsequent limitations, is rather far reaching. However, the procedural requirement of the U.S. Administrative Procedure Act for rulemaking, arguably, impose recognized limits on executive branch discretion. From a principled perspective, at least, no other country seems to have ventured so far down the deference path on questions of legal interpretation. Strong legal and contextual reasons may explain and justify some landmark cases in both countries. Nevertheless, does a presumption of deference adequately reflect the role of the courts in an *État de droit* when it applies to questions of law? Do U.S. or Canadian courts infer too much, institutionally speaking, from the ambiguity of statutes? In short, should a more nuanced approach be preferred? Secondly, procedural safeguards are deemed, in several countries, to require full judicial review of the interpretation of the law and its application to the facts. In other countries, they do not exclude judicial deference to administrative interpretation of statutes. Do the doctrines developed in Canada and the United States give sufficient weight to fundamental procedural safeguards? This question is delicate and cannot probably be answered *in abstracto*. Arguably, it should instead be examined on a case-by-case basis or, at least, on a procedure-by-procedure basis.

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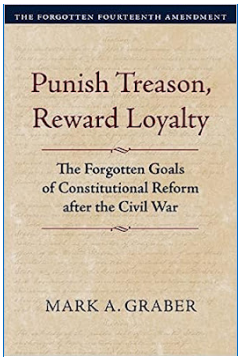

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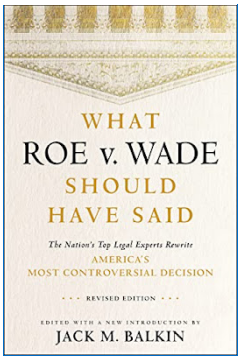

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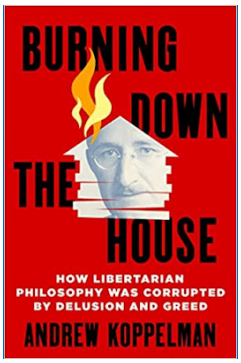

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Expertise

All things considered, an important, and perhaps the most convincing, justification for judicial deference to administrative interpretation of statutes lies in the asymmetry of non-legal expertise. In certain countries at least, such a deference may be regarded as a pragmatic and realistic way of allocating limited resources and of dealing with the asymmetry of non-legal expertise among administrative bodies and courts, provided that it is framed by several conditions. When these conditions are met, the separation of powers principle is not endangered, and judicial deference in statutory interpretation cases may be described as oil in the complex machinery of checks and balances. In any event, the legislature retains the final say, at least *ex post* and *pro futuro*.

As statutes rarely deal with the issue of judicial deference to their interpretation, courts themselves must determine whether such deference is permitted or forbidden, generally or in certain cases only. The constitutional, legal, and judicial context prevailing in each country is of great significance in this regard. It may nevertheless provide courts with little, if any, guidance on the specific issue of deference to administrative statutory interpretation and leave them helpless. In this respect, courts may eventually consider adopting a nuanced approach and applying all or part of the following test: When (i) in light of the applicable methods and canons of construction, a statute allows a margin of interpretation, (ii) the administrative interpretation of the statute remains within this margin, and (iii) the applicable international, constitutional, statutory, or other constraints permit or, at least, do not exclude judicial deference either generally or in the case at hand, then courts may or, depending on the country, must defer to the administrative interpretation of the statute, especially when or, depending on the country, provided that (iv) this interpretation requires non-legal—scientific, technical, or policy—expertise, (v) the administrative body enjoys an asymmetry of such expertise as compared to courts, and (vi) the legislature was or should have been aware of both this necessity and this asymmetry. Depending on how condition (iii) is interpreted in a given country, courts could disregard condition (vi). The level of courts' expertise in the relevant subject matter should in principle be determined after taking account of the measures available to judges, including the appointment of experts.

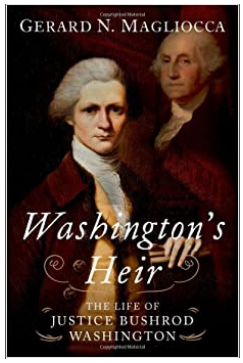
Rulemaking vs. Adjudication

Various features in administrative law systems may significantly affect debates about deference. The difference between review in specialized administrative courts or tribunals versus general jurisdiction courts may influence approaches to deference. The possibilities for a court to appoint experts may play a role in this respect. Furthermore, the processes by which statutes are drafted and the way—precise or vague, for instance—in which they are written, may affect the salience of the issue. The breadth of delegation to agencies or other administrative bodies of powers to adjudicate disputes in specific areas with the force of law may considerably vary from one country to another. Finally, the nature of the executive action under review could also play a role. Deference may especially be justified above all for policies formulated in a rulemaking process, but less so for case-by-case adjudications without issuing general rules.

This last distinction is usually not made in European countries where deference exists. Three comments come to mind at this point. First, rulemaking—and not just some interpretive authority—is delegated when an administrative agency issues rules (see, for instance, Articles 55(3), 56(3) & 57(3) CISA in Switzerland). The reviewing courts then perform a narrower task, notably to check whether the rules do not violate the statute at stake. They are in principle bound by these rules, at least in the context of European continental law. Or course, some rules are just interpretations of the relevant statute, but many others are policy decisions. To an important extent, the debate takes place at another level and in different terms. Second, notice-and-comments procedures in the rulemaking context may provide agencies with additional expertise coming, so to speak, from the outside, as emphasized by K. Hickman & A. Nielson on page 966 of their article. Inside expertise should however not be disregarded, and this expertise can be used in adjudications. Third, rulemaking through notice-and-comments procedure may open the door to lobbying and the risk of agency capture. This may justify closer scrutiny by judges. In the final analysis, the strict limitation of judicial deference to rulemaking may prove overly schematic.

Illustrations

The term "dangerous substances" used in a statute needs to be interpreted. This task very likely requires having deep theoretical and empirical knowledge of chemistry, biology, and other scientific fields, as well as of the various factual situations in which the application of the provision in question can be considered. The distinction between law and fact definitely comprises a grey zone, not least because some issues raise mixed questions of law and fact. Indeed, the prohibition on "dangerous substances" raises countless factual issues, but the relevant administrative body must determine criteria to evaluate a substance's danger and set limits beyond which a prohibition is justified. In other words, it must not only determine whether some substances are dangerous, but also—at



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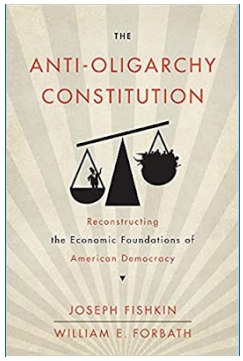

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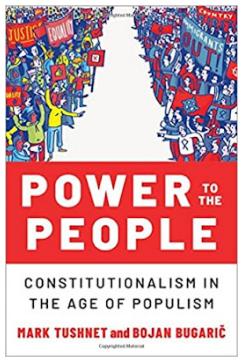

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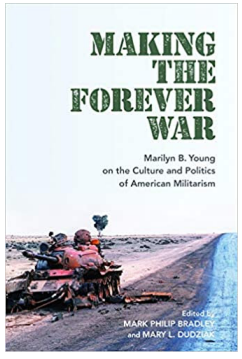

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least to a certain extent—define what "dangerous" means. By doing so, it interprets or constructs the relevant statute. Inside or outside non-legal expertise seems relevant in that case, irrespective whether adjudication or rulemaking is at stake.

The asymmetry of non-legal expertise between administrative bodies and courts must be relevant to the disputed interpretation of the statute, especially when a prediction, an appraisal, or an assessment must be made. For instance, the word "carcinogenic" may allow a margin of interpretation (when and at what level can a substance or a product be qualified as such?) and its interpretation through rulemaking or adjudication may require non-legal expertise as well as the making of predictions. By contrast, a broad and open-ended word used in a statute such as "reasonable" or "appropriate" can, but should not necessarily be considered as ambiguous or unclear. In the context of the statute in its entirety and on the basis of the applicable methods and canons of construction, the distinction between reasonable and unreasonable may indeed be clear or require no particular non-legal expertise.

This kind of illustrations could also help guide the reflection on judicial deference to administrative interpretation of statutes. Some micro-comparison on a specific issue would indeed be extremely interesting and very illuminating. At the end of the day, it is possible that courts which have developed a doctrine on deference defer less than they are supposed to, according to their own doctrine, and that courts which have explicitly rejected any idea of deference with regard to the interpretation of the law actually defer consciously or unconsciously. One of the great merits of a doctrine, such as the ones existing in Canada, Germany, and the United States, is to raise an issue and to open or frame a debate in a transparent and even democratic way, as the legislature can always reclaim the field. In short, transparency may open appropriate—and possibly fruitful—inter-branch dialogue.

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