Balkinization

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an unanticipated
consequence of
Jack M. Balkin

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Friday, September 29, 2023

Judicial deference to administrative action: the Brazilian experience

Guest Blogger

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

Carlos Ari Sundfeld & Yasser Gabriel

Deference is not a widespread expression in Brazilian administrative law. But the argument that the Judiciary must observe many limits when acting as controller of public administrations is, in fact, very old in Brazil. It is closely related to the country's single jurisdiction system — a choice made in 1891, under the influence of North American law, and still in force today. Thus, Brazilian public law rejected the French system of Administrative Justice that separates administrative law from general law. Brazil´s legal tradition assumes that *judging* is independent of *making and executing public policies*, meaning that judges are not allowed to step into the role of public administrators.

The argument that public administrators have discretionary powers in several cases, including in technical matters and regarding aspects of convenience and opportunity, still prevails today in the legal literature. As a result, it is understood that judicial control of administrative acts must focus only on the requirements established by law as bound and invariable to its production (such as the form of the act, the administrative process for its publication and the administrative authority legitimated to decide). These ideas are summarized in the widely accepted notion, commonplace in Brazil, that *the Judiciary is responsible for assessing the legality of administrative acts, not their merit*.
It is true that, from the 1940s onwards, little by little, and inspired by French jurisprudence, judicial control of discretionary acts was also accepted, but as an exception, in situations of flagrant incompatibility with public purposes. And, in more recent decades, the idea of controlling the act's reasonableness and proportionality have been used for the same purpose and in exceptional situations.
But, as a rule, administrative acts are always presumed valid on account of the independence of the Powers. This, in theory, imposes a heavy burden of demonstration on the judge who intends to find misuse of power, lack of reasonableness, or disproportionality in an administrative act.

Therefore, although the term *deference* is not commonly used, its fundamental premise — respect, by the Judiciary, for administrative action, when in compliance with legislation — resonates strongly in the theoretical bases of our administrative law.

It is true, however, that, following the re-democratization of Brazil and the publication of the 1988 Constitution, there has been increased litigation in matters linked to the exercise of administrative functions. At the same time, judges have shown a greater willingness to make interventions, without the same concern for respecting the independence of public administrations and without the same acceptance of ideas in legal literature about the limits of judicial intervention.

Still, this trend does not seem to be so ample, focusing mainly on situations involving the expansion of social protections or benefits. The explanation for this has to do with the very particular characteristics of the 1988 Brazilian Constitution: on the one hand, it includes many open-ended norms dealing with the protection of individual rights, inclusion, and correction of social inequalities; and, on the other, the broad opening, by the Constitution, of judicial means for making such norms effective.

Due to these characteristics, when considering the recognition or imposition of public obligations in the face of constitutionally based social rights, the Judiciary has tended to be less deferential to administrative action than is other areas of public law. These are decisions that, for example, have forced public administrations to provide medical treatments not covered by the public health system or to grant social security benefits not expressly provided for by law.

An article published in 2021 indicates that, between 2010 and 2018, the federal administration spent R$ 8.5 billion (approximately US$ 1.7 billion) purchasing medications under court order, the equivalent of around 10% of the pharmaceutical assistance budget in the period. Most of these sums were allocated to the purchase of a limited number of high-cost medicines not provided by the public health system.

Regarding social security benefits, research published in 2020 presents impressive

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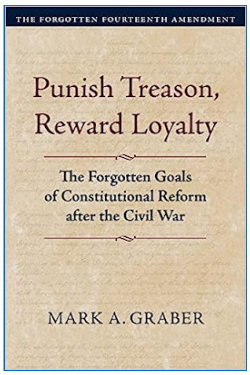

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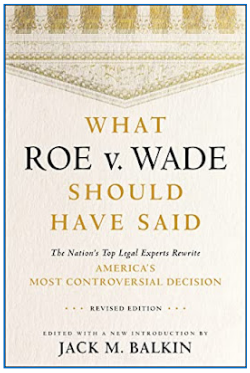

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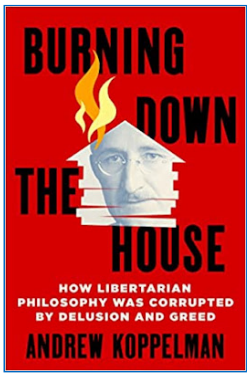

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data: at least 11% of benefits granted by the National Social Security Institute (INSS) result from court orders. There are many questions regarding the granting of sickness benefits, a topic that involves both discussions about the validity and scope of medical examinations carried out by the INSS, as well as a divergence between the public administration and the Judiciary over the legal concept of "invalidity" and what it includes.

The characteristics that the Brazilian legal system has assumed in the last 35 years, therefore, have come to partially compromise the discourse of judicial respect for an administrative act's merit — for the discretion, including technical, of public administrators. This is a direct result of the constitutionalization, through open norms, of a series of social rights, such as rights to health, education and a balanced environment, without, however, further specifications regarding the content and extent of these rights. Normative incompleteness or uncertainty, combined with the strengthening of the Judiciary as guardian of constitutionality, has led to judicial control that is not very deferential to the administration in matters of social rights.

This complexity of the Brazilian legal system has increased the gap between the reality of the courts and the theoretical discourse traditionally used to draw limits to judicial control over public administrations. The Judiciary has shown itself comfortable carrying out this type of intervention, which generates consequences such as different treatment for similar cases (people who can access the Judiciary tend to be in a more advantageous position compared to those who cannot — and the court decisions benefit the individual claimant but do not always require an overall change in policy); delays in the implementation of public policies (due to court decisions that require reformulations of the original plans of public administrations) and increase or reconfiguration of public spending (due to the creation of new obligations).

However, it is important to note that the trend towards greater judicial interventionism does not appear to be general. In situations involving the imposition of conditions or restrictions on individual actions by public administrations — regarding environmental or sanitary concerns, for example — the predominant stance of the Judiciary is still one of (de facto) *deference* to administrative decisions.

The phenomenon has attracted a lot of attention from academia. In the last two decades, there has been much research dedicated to understanding judicial intervention in public management. Also, academic exchange programs of students on postgraduate courses studying important topics for administrative law from the perspective of comparative law have become common. North American institutions tend to be a recurring destination for these students. In these programs, connections between the *Chevron* doctrine and Brazilian law have emerged, reinforcing traditional notions regarding the limits of judicial control.

Relevant works by Brazilian former students who attended institutions such as Yale and Harvard explored the *Chevron* case and highlighted lessons that could be used in the Brazilian experience — such as the work of Eduardo Jordão. The term *deference* even started to be used with some familiarity in the Brazilian debate. As a result, in recent years, the *Chevron* doctrine has become well known to Brazilian administrative law and has already had some repercussions in decisions of the Supreme Court, precisely in cases outside the realm of public assistance of a social nature.

In 2018, in a case involving a restriction on the sale of cigarettes with additives imposed by a regulatory agency based on an interpretation of a federal law, the Supreme Court, although in a divided vote, ended up maintaining the administrative regulation questioned. In the debates, there was express reference to the *Chevron* doctrine. Some justices defended the idea that, if there is ambiguity in the law in relation to a certain topic, the Court should decide whether, by accommodating opposing interests, the solution adopted by the agency was based on a reasonable interpretation of the law and compatible with the Federal Constitution.

In the following year, 2019, the Supreme Court again resorted to *Chevron*, this time in a case that concerned an act carried out by the administrative authority responsible for competitiveness protection, which was maintained by the Judiciary. Not only did the Court use the assumptions of deference outlined in the *Chevron* doctrine, but it stated that, compared to the Judiciary, the public administration had greater capacity to evaluate factual and economic elements relevant to the regulation in question.

At the current moment, in Brazil, the feeling is that, after having partially exceeded its old limits, the model of judicial control of public administration is seeking a new point of balance. The general assumption of the idea of judicial *deference* towards administrations do not exactly appear to be in crisis. What did experience a crisis was the traditional passivity in face of social inequalities. The question is whether judges would be able to prompt the state to correct inequalities such as these or, considering all cases, perhaps they mostly end up increasing confusion or benefiting the wrong people. So far, the answer is unclear.

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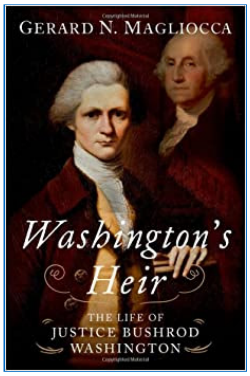

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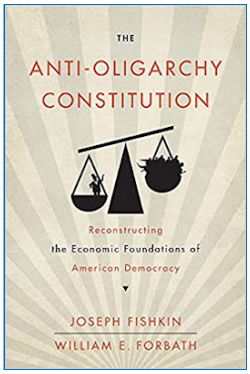

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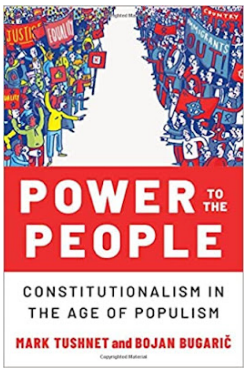

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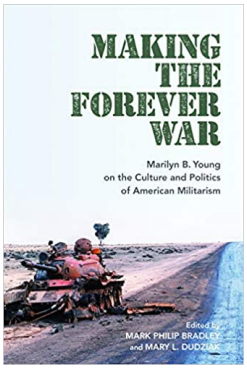

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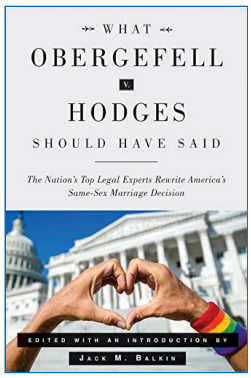

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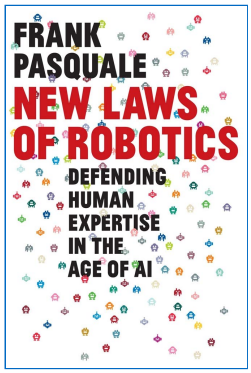

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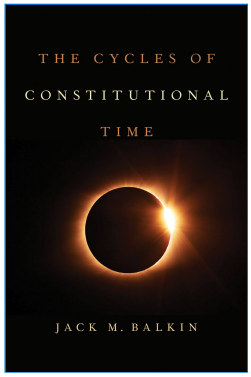

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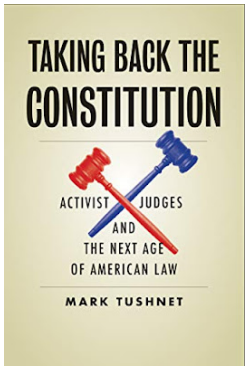

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