Part 2.

Studia Iuridica Lublinensia vol. XXVII, 1, 2018
DOI: 10.17951/sil.2018.27.1.69

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Precedent and United States Administrative Law[1]

Precedens i amerykańskie prawo administracyjne

SUMMARY

In the *common law* order, precedent is not only a matter of applying law but also of making law. The crucial function of *stare decisis* is to relieve the appearance of judicial arbitrariness. Precedent also applies in the domain of administrative law in the context of judicial control of administrative policy making. Federal courts treat administrative agencies as having precedent-setting powers comparable to their own, under what is referred to as the *Chevron* doctrine. This doctrine determines the scope of judicial control of the decisional process performed by an administrative agency, particularly when the court is called upon to enforce a limitation to the administrative discretion delegated by the agency's governing statute.

Keywords: precedent; *stare decisis*; division of powers; American administrative law

INTRODUCTION

The doctrine of precedent serves an important role in common-law systems. By "common law systems", I mean judicial systems in which judges are not restricted to "finding" and "applying" law that is made by those who perform a legislative role. Judges in common-law systems also "make" law. The central private law doctrines of contract and tort in anglophone jurisdictions were evolved – made and remade – over centuries in common law style. So, too, were many of the central now codified doctrines in criminal law.

[1] I thank Brian Bix, Jeremy Farris, Tim Lytton, and Eric Segall for helpful comments, and Leszek Leszczyński for inviting me to make this contribution.

PRECEDENT AND SEPARATED POWERS

Judicial lawmaking is problematic in any political system that emphasizes the separation of governmental powers. If the legislative power is constitutionally vested in a legislative branch, then judicial lawmaking must illegitimately encroach upon territory properly belonging to the legislature. But, in a constitutional system that puts certain subjects beyond the reach of ordinary legislation, it falls to the courts to adjudicate the constitutionality of legislation. The Supreme Court of the United States, in the celebrated case of *Marbury v. Madison*, declared itself to be the ultimate arbiter of the legality of congressional legislation.

This seems an inevitable result, where the written constitution is clear and Congress (the federal legislature) has clearly acted contrary to an express constitutional provision. No other result is consistent with the rule of law, for Congress would be free to ignore the Constitution unless it had to answer to the courts, whose job is "emphatically to say what the law is", as Justice Marshall put it. By "say" he meant "discern", not "dictate", for the notion that the courts have no proper power to make law is deeply rooted in the American psyche.

The popular supposition in the United States, then, is that courts do not – because they ought not – make law. But, of course, they have to make law. It is inevitable that they do because the Constitution and statutory law often speak in abstract and general terms, or do not speak at all as to issues that arise with respect to them. Put in Aquinean terms, almost every judicial declaration of the meaning of such terms is a *determinatio* that might, without self-contradiction, have been otherwise. How is this not lawmaking?

The English judges in the common-law tradition had already developed a doctrine that served to mitigate the appearance of arbitrariness of judicial law-making. This is the doctrine of precedent, or *stare decisis*, "let the prior decision stand". Courts took their prior decisions as binding upon them. Lawyers developed the practice of finding and citing prior cases to persuade judges that a decision (favorable to their client) was determined. Yet the fetters of precedent are, necessarily, loose. The language of a prior decision can be parsed into holding and dictum. The holding is the *ratio decidendi* of the prior case – the reasons the court gave for deciding as it did. *Obiter dictum* is language the prior court used that was not necessary to the decision. Only the holding binds later courts, under the doctrine of precedent. This is a departure from how courts read statutes: if possible, every word of a statute is to be given significance.

The holding, as *ratio decidendi*, is anchored in the facts of the decision. Subsequent cases will necessarily present numerically distinct facts, and it will be a question whether the holding of the cited precedents governs this new and distinctive pattern of facts. The American Legal Realists made much of the indeterminacy of holding and dictum. In their view, the doctrine of precedent was

merely a fig leaf to disguise the fact that every case is a "case of first impression", in which judges make law to justify an outcome, and "retroactively" apply the law to parties to the dispute. Judicial law-making is not saved from arbitrariness by the doctrine of precedent, in the Realists view, it is saved (if at all) by correctly reaching the best, all things considered result in the case. What makes that best result the best might include respect for settled expectations, but those expectations do not control.

PRECEDENT AND ADMINISTRATIVE LAW

Now I will make some remarks on how the doctrine of precedent has shaped the administrative law of the United States. By "administrative law" I mean that body of law that governs the federal agencies and, in particular, the law of judicial review of agency actions. Congress, in its exercise of the legislative power, typically directs some agency of the federal government to regulate some activity. The federal agencies are creatures of Congress. Congress designs them, empowers them, funds them, and in various ways supervises them. Congress may do this only by legislation, a cumbersome process. It falls mainly to the judicial branch to assure the legality of agency action.

In judicial review of agency action, the doctrine of precedent has two roles. In one role, the Court must decide what weight to give to its own prior decisions with respect to particular agencies, which operate under a charter enacted by Congress. Once the Court has declared that a certain statutory passage has a certain specific meaning, it is very rare for the Court to later change its mind about what Congress meant. Of course, what Congress intended is the ultimate touchstone, and it is possible that a prior decision by the Court might have misread a statute. But normally the Court will stick by its prior (mis)interpretation until Congress overrules it, that is, corrects it by new legislation, passed in identical form by both Houses, and signed by the President (or passed by supermajorities in both Houses to override the President's veto). The Court presumes that Congress is aware of any potential misreading and, by not legislating a correction, has expressed an acquiescence in the Court's interpretation.

The other role of precedent in judicial review of agency action is defined in what is known as the *Chevron* doctrine. If Congress's intention in a statute can be fairly discerned as speaking directly to the precise issue in dispute, then that intention must control. But if the language of the statute does not disclose a precise intention, then the Court will examine the agency's interpretation, and defer to it if it is reasonable. Normally, questions of statutory interpretation come to the Court because a private party disputes an agency interpretation of its governing statute. Therefore, the agency will already have made a decision as to the statute's

meaning, or made a determination – or "filled a gap" – within a presumed range of possibilities created by the statute. The *Chevron* doctrine, in effect, treats the agency's decision as if it were a prior interpretation by the Court itself. It is controlling unless there are strong reasons to overrule it. And, as in the case of the Court's own prior interpretations of statutory language, congressional acquiescence is counted in favor of letting the prior decision stand.

It seems unnecessary for the Court to treat an agency as though it were a prior court. If the agency makes law, then it is natural to regard the lawmaker's advice as to the meaning of that law as definitive – unless exceptional circumstances exist. This is, in fact, the Court's present posture regarding agency interpretations of their own regulations. This is known as the *Auer* or *Seminole Rock* doctrine. But a line of Supreme Court decisions affirms a "nondelegation" doctrine: Congress cannot delegate lawmaking power to the agencies. The constitution forbids it. Of course, agencies can be endowed with decisionmaking authority, where Congress by statute has articulated an "intelligible principle" to guide the agency in exercising that authority. Only once in the nation's history has the Court been unable to find such a principle, and the Court has long and repeatedly upheld delegations in such sweeping terms as "in the public interest, convenience, or necessity", or "unfair methods of competition". Agencies regulate but they do not make law, on this understanding.

But if an agency regulation is not received by a court as a law made by an exercise of the legislative power, how is it to be received? Under the *Chevron* doctrine, agency regulations, insofar as they represent interpretations of the statute under which the agency operates, is treated with much the same kind of deference as the Court treats its own prior decisions interpreting statutory language: to be followed, unless plainly mistaken or (perhaps) outmoded.

This understanding helps to illuminate a corollary of the *Chevron* doctrine, which was derived in a case styled *National Cable v. Brand X Cable*. A prior Supreme Court decision had upheld an agency's interpretation of a certain statutory term. In the presented case, the agency had acted in a way that represented a different interpretation of the same statutory language. In doing so, the agency seemed to be overruling the Court's prior decision. This is troublesome since the agency seems to arrogate to itself the power to overrule the Court itself! But, not to worry, the Court explained. The prior decision of the Court had failed to declare that the agency's prior reading was the proper reading, as opposed to a permissible reading. Where Congress has, in effect, delegated to an agency the power to determine the meaning of vague or ambiguous terms, it has also implicitly delegated the power to reinterpret those terms. So long as the reinterpretation is reasonable, it is to be treated as the new precedent – even if it is not any better a reading. When a common-law court overrules one its precedents, the overruling is the new precedent. In much the same way, an agency's reinterpretation (or, better, redetermination)

of a statutory term is the new reading, to be deferred to by later courts (though not, curiously, by later agencies: the analogy is not perfect).

Chevron has troubled many as being an abdication of the judicial duty, "to say what the law is". But if the law *is* that Congress intends agency interpretations to govern, so long as they are not directly contrary to the statute and are otherwise reasonable, then that *is* the law. The late Justice Scalia (who joined the Court after *Chevron* had been decided) justified *Chevron* as the Court's imputing to Congress a blanket intention: "Construe any irresolvable statutory unclarity as a delegation of interpretive authority to the agency". Not as a delegation of *legislative* authority, of course, and the unclarity must be housed within some "intelligible principle". It amounts to a self-imposed resolution by the Court to treat the agency as though it were a common-law court, capable of setting and resetting precedents.

The U.S. Constitution is understood to give Congress the power to create courts and to define their jurisdiction, and even to staff them with judges who do not enjoy lifetime tenure and irreducible salaries – these are called "Article I courts" in contrast to the "Article III courts" that comprise the federal judicial branch, properly speaking. Article I courts are subordinate to Article III courts on all matters of law except, it seems, those defined by *Chevron*. As to those, Article III courts are effectively to defer to decisions of Article I courts as if they were precedent set by an earlier Article III court.

Justice Scalia was a great champion of the *Chevron* doctrine throughout his career on the Court. He wrote bitterly against decisions that took away the "blanket presumption of Congressional intent" understanding of *Chevron*, in favor of a case-by-case inquiry whether Congress intended to let agencies set precedents. The case-by-case approach, and what he derided as "th'ol' 'totality of the circumstances' test", derogate from the principle of legality. "The rule of law is a law of rules", as he ringingly expressed it. But, in reply, one might point out that the doctrine of precedent has always been a doctrine of *presumptive* rules.

Justice Gorsuch, Justice Scalia's successor on the Supreme Court, is an avowed skeptic of *Chevron*. In his view, *Chevron* seems impossible to reconcile with the nondelegation doctrine. If there is enough tension to warrant a break with the Court's precedents, it could begin with the Court's conceding that administrative agencies are better seen as little legislatures than little common-law courts.

STRESZCZENIE

Precedens w porządku *common law* jest nie tylko elementem stosowania, ale też środkiem tworzenia prawa, niezależnie od trudności, jakie w tym kontekście płyną z zasady podziału władz. Decydujące znaczenie dla przyjęcia tej tezy ma ograniczenie arbitralności sędziowskiej, wynikające z formuły *stare decisis*, wpływającej na konkretny proces decyzyjny. Dotyczy to także stosowania prawa administracyjnego w kontekście sądowej kontroli działań administracji. W jej ramach sądy

posługują się precedensami w sposób, który jest określony jako doktryna *Chevron*, określająca zakres sądowej kontroli procesu wykładni dokonanej przez organ administracyjny, zwłaszcza w sytuacji konieczności limitowania swobody administracyjnej wykreowanej przez ustawę.

Słowa kluczowe: precedens; *stare decisis*; podział władz; amerykańskie prawo administracyjne