



Common good constitutionalism and the Administrative State. A comparative perspective

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Ibero-American Center for the Study of Public
Law and Technology

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Summary



Common Good



Constitutionalism



ADRIAN VERMEULE

- The modern Administrative State and Law: a comparative perspective.
- The Chevron doctrine and the margin of deference: A Violation or a Consequence of the Separation of Power?
- The major questions doctrine and the *positive bunding*.
- The Administrative State: A problem of Constitutional Interpretation.
- The end of the Administrative State in the U.S.? A proposal based on the common good.

The modern Administrative State: a comparative perspective.

- The Administrative State: Within the Government, a particular organization oversees the administrative action.
- The modern Administrative State: During the XX century, the welfare transformation of the Government expanded the administrative action.
- The Ibero-American Law studies the modern Administrative State through the theory of the Welfare State (Estado Social).
- The Welfare State must fulfill the requirements of the rule of law.

THE MAX PLANCK HANDBOOKS IN
EUROPEAN PUBLIC LAW

VOLUME I
THE
ADMINISTRATIVE
STATE

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OXFORD

The Chevron doctrine and the margin of deference: Ibero-American Law.

➤ **Luis Arroyo Jiménez:** A core problem of Public Law is the scope of the judicial review over the administrative action.

➤ **Eduardo García de Enterría:** The relevance of the general principles and the arbitrariness prohibition.

➤ **Allan Brewer-Carías:** Administrative discretion is necessary for the modern state.

➤ The Ibero-American Law recognized the margin of deference as a core principle based on the balance towards good administration.

ESTUDIOS SOBRE LA BUENA ADMINISTRACIÓN EN IBEROAMÉRICA

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The Chevron doctrine and the margin of deference: the U.S. Law

- The early roots of the Administrative Law. *Crowell v. Benson*, 285 U.S. 22 (1932).
- The end of the non-delegation doctrine? *NLRB vs. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
- The *Administrative Procedure Act* and the balanced vision towards the modern Administrative State. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).
- A common-sense solution: the permissible, rational, or reasonable interpretations of ambiguous statutes should be accepted by courts. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).



THE *CHEVRON* DOCTRINE

ITS RISE *and*

FALL, *and the*

FUTURE *of the*

ADMINISTRATIVE STATE

THOMAS W. MERRILL

The major question doctrine and the positive bunding

➤ *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U. S. ____ (2021). Congress prevails, and statutes must be clear.

➤ *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 595 U. S. ____ (2022). Administrative agencies are creatures of the statute.

➤ *West Virginia v. Environmental Protection Agency*, 2022. In major questions of Law, the statute cannot use broad or ambiguous terms.

Reading the Constitution

Why I Chose
Pragmatism,
not Textualism

Stephen Breyer

Former Associate Justice, U.S. Supreme Court

The major question doctrine and the positive bunding

➤ *Biden v. Nebraska*, (2023). Experience shows that major questions cases “have arisen from all corners of the administrative state,” and administrative action resulting in the conferral of benefits is no exception to that rule.

➤ The end of the Chevron doctrine? *Relentless, Inc. v. Department of Commerce*, N°22-1219, (OT 2023) and *Loper Bright Enterprises v. Raimondo*, No. 22-451 (OT 2023).

➤ The agencies as creatures of the Law: A *positive bunding* for the 21st Century?

➤ Oren Tamir: “Our Parochial Administrative Law”.

Is
Administrative
Law
Unlawful?

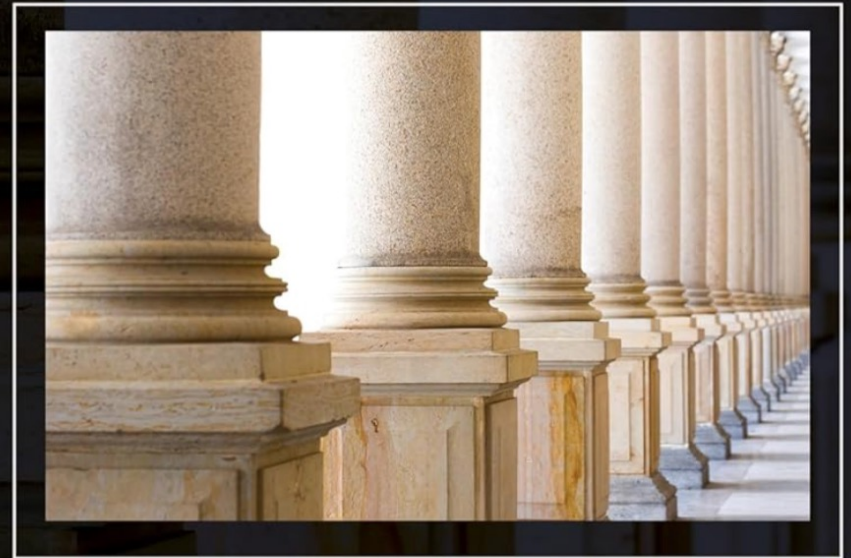


Philip Hamburger

The Administrative State: A problem of Constitutional Interpretation.

- Administrative Law is the implemented Constitutional Law (a German legacy) in the Ibero-American Law.
- The Constitutional foundations of Administrative Law, the human rights centrality, and the common good (Cassagne, Coviello, Delpiazzi, Durán).
- There is no system of Administrative law in the U.S., which raises doubts about its legitimacy (Epstein).
- The constitutional interpretation of the Administrative Law: between the living constitutionalism and the (neo) originalism.

THE DUBIOUS MORALITY OF
MODERN
ADMINISTRATIVE
LAW



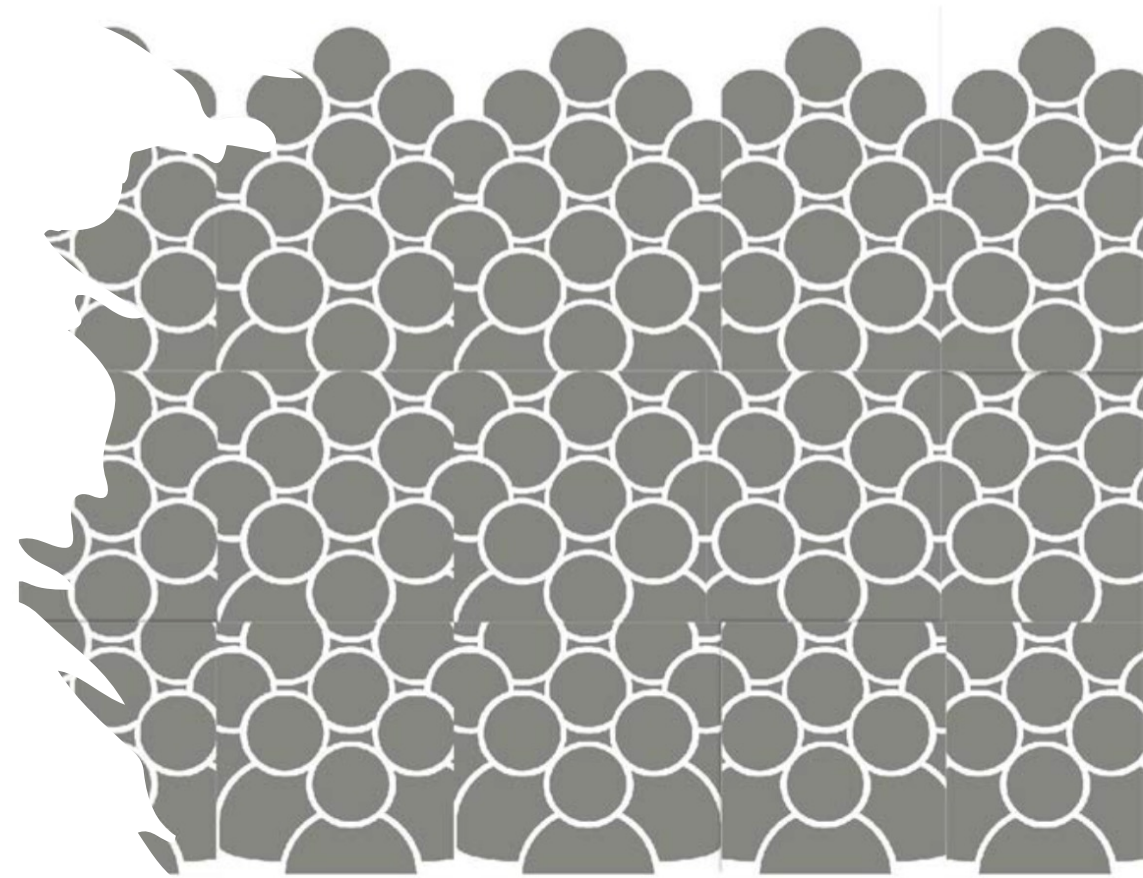
RICHARD A. EPSTEIN

The end of the Administrative State in the U.S.?

- A third way: The morality principles of Administrative Law (Sunstein and Vermeule).
- The Ibero-American perspective: general principles and constitutional values.
- The common good constitutionalism: The constitutional interpretation must rely on fundamental values rooted in the *ius commune*.
- The common good is a cornerstone of the Inter-American Administrative Law.
- The real challenge in the U.S. is moving from the *lex* to the *ius*.

LAW & EVIATHAN

MOVING THE ADMINISTRATIVE STATE



CASS R. SUNSTEIN

ADRIAN VERMEULE



The end of the Administrative State in the U.S.?

- Overruling Chevron will create new problems: Congress cannot command agencies.
- The Public Administration is not at the Congress's service but at the persons' service (Art. 103.1, Spanish Constitution; Art. 138, Dominican Republic Constitution).
- The margin of deference is not an exception but a consequence of the separation of powers.
- The common good clause is part of the U.S. Constitutional History: Art. VII. of the 1780 Massachusetts Constitution: Government is instituted for the common good (and its legacy in the Spanish-American Constitutional Law).