Judging the Government: Evidence from the Supreme Court of Canada

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Abstract

Administrative law involves judges in a struggle between the rule of law and the need for pragmatic, effective policy decisions. Part of the difficulty lies in finding ways to take the politics out of judicial review of administrative decisions of government. How can you limit the ability or willingness of judges to decide often complex, high stakes policy questions on the basis of their own policy preferences? The answer may lie in part in the tests developed to sort between those questions on which the courts should defer to the administrative decision-maker and those for which the judge herself should provide the answer. As with most areas of empirical research into judicial decision-making, much of the empirical work on administrative law has been undertaken on US courts. However, different countries have arrived at distinctive ways for resolving this issue. Moreover, countries appear to have difficulty finding stable solutions to this problem, with courts altering tests as difficulties with each new answer appear. In this project we seek to further understanding of this struggle by examining the evolution of the solutions adopted in Canada. We use a database we have developed of all Supreme Court of Canada cases since 1953 to study how the Supreme Court has reacted over time to this challenge. Canada has in the past used a highly contextual test for determining when to defer to administrative decision-makers, though more recently has moved towards a more categorical approach that was argued to be less discretionary (and therefore harder for judges to use ideologically). We examine whether the changes in these tests on when to defer seem to alter how the Supreme Court decides cases.