Deference Asymmetries: Distortions in the Evolution of Law

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This Article examines how distortions in the evolution of law may result from the systematic application of different standards of review to an agency’s legal interpretations of a statute. The analysis proffered in this Article differs from other models of agency and court interaction is several aspects. Most saliently, it examines how the application of different deference regimes to agency statutory interpretations may cause the substantive standards of law to drift in a direction favored (or least favored) by the constituency the agency regulates over time even if there is no strategic behavior on part of the agency. After setting forth the theoretical basis of the model, the Article utilizes the Patent & Trademark Office (PTO) as its primary exemplar to more fully explore the ramifications of the model for the development of substantive patent law. More specifically it argues that deference will more often be due to PTO interpretations that uphold patent validity than to those that deny patentability, resulting in an expansionary pressure on substantive patent law. This Article concludes by exploring policy proposals to eliminate or minimize deference asymmetries.

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