Administrative Law and Curial Deference

by

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Abstract
This thesis examines three interrelated issues. The first concerns a question about the status of administrative law, namely whether administrative officials have authority to determine what the law requires under a democratic constitution. Historically, this question has not been adequately addressed in public law scholarship because neither Diceyan constitutional theory nor common law doctrine has been traditionally receptive to administrative law. In this thesis, I argue that there are good reasons for people to respect the legal authority of administrative officials and their decisions. Those reasons are rooted in respect for the democratic process by which administrative officials are empowered, and respect for the various forms of expertise that administrative officials possess.

The second issue concerns the doctrinal aspect of administrative law. If there are good reasons for believing that administrative officials have legitimate legal authority, then those same reasons suggest that judges should respect administrative legal decisions. In order to better understand how the relevant reasons for respecting administrative decisions alter the practice of judicial review, I compare and contrast the traditional doctrine of jurisdictional review with the doctrine of curial deference. This comparison
shows that the doctrine of curial deference provides a superior account of the legitimate legal authority of administrative officials, and that this account makes a practical difference for the practice of judicial review.

The third issue concerns whether the doctrine of curial deference can be reconciled with the rule of law. Assuming that there are good reasons for respecting administrative decisions, how can judges both respect an administrative decision while ensuring that it is consistent with the rule of law? I argue that judges can both respect administrative decisions and maintain the rule of law by requiring administrative officials to justify their decisions adequately in light of public reasons which are both patent and latent in existing legal materials.
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I. A Question about Administrative Law

One of the most puzzling questions in public law concerns the status of administrative law: do administrative officials have any authority under the constitution to decide what the law requires? Surprisingly, common law jurists have rarely phrased the issue in these terms. Instead, they have preoccupied themselves with the different question about administrative “jurisdiction”: when should a superior court impugn the legality of an administrative decision? Much ink has been spilt over various, conflicting formulations of jurisdictional review, but to little avail.

Nevertheless, the question about administrative law is of central importance to public law theory. Public law scholars agree that the administrative branch of government is one of the most pervasive sources of law in modern societies, but only modest attempts have been made to explain how administrative institutions fit within our existing constitutional framework and how other legal institutions should respond to their decisions. In recent years, for example, the question about administrative law appears only as a sidebar to persistent debates regarding the constitutional legitimacy of judicial review. By this I mean that public law scholarship is generally preoccupied with identifying the peripheral legal limits or parameters of administrative jurisdiction, which are determined exclusively by the legislature or courts, rather than illuminating the substantive values that make administrative law worthy of respect under a democratic constitution. This preoccupation generates a hollow or “black box” conception of administrative law,

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because it portrays administrative authority as a type of discretionary power that emerges only when the law runs out.5

What I am suggesting is that the question about administrative law should be approached from a different perspective, one which aims to provide a normative account of administrative institutions from the ground up, rather than merely attempting to identify the point at which judicial review is triggered. This perspective suggests that instead of relying upon the problematic concept of jurisdiction, we should ask more directly whether administrative decision-makers possess legitimate legal authority, what the normative basis of that authority is, and how it ought to be incorporated into a constitutional order unified by the rule of law.

The contrast between the black box and substantive perspectives regarding administrative law underscores a particular doctrinal schism within the common law world. The schism divides adherents of the traditional doctrine of jurisdictional review in the United Kingdom and most Commonwealth countries from proponents of the doctrine of curial deference in Canada and the United States. Much of my thesis is devoted to elaborating this schism, but the basic features of the opposing camps can be gleaned from two landmark cases.

A. The Doctrine of Jurisdictional Review

Anisminic Ltd. was a British corporation which owned a manganese mine located in the Sinai Peninsula. Prior to the Suez-Sinai war, Anisminic estimated the value of its mine to be £4.5 million, but Israeli forces damaged approximately £500,000 worth of property during the war and the Egyptian government expropriated all the remaining assets when the Israeli army withdrew. Anisminic subsequently mounted a public campaign to dissuade former clients from buying manganese from the Egyptian economic authority which was operating the mine. In order to placate Anisminic, the Egyptian government

agreed to purchase all of Anisminic’s remaining assets for £500,000. However, the agreement stipulated that the settlement would not prejudice Anisminic’s ability to seek compensation from any other government.

Almost two years later, the United Arab Republic paid £27.5 million to Britain as compensation for property damage incurred by British citizens during the war. This money was to be distributed by an administrative tribunal, the Foreign Compensation Commission, pursuant to the provisions of the *Foreign Compensation Act, 1950* and the regulations promulgated under that statute.6 Among other things, the *Act* declared that any “determination by the commission of any application made to them...shall not be called into question in any court of law.”7 Anisminic applied for compensation, but after a four day hearing the Commission rejected the bulk of their claim on the basis that Anisminic had failed to prove that the Egyptian economic authority was not its “successor in title” within the meaning of the regulations.8 Anisminic then challenged the Commission’s decision by seeking judicial review.

The House of Lords held that the Commission had exceeded its jurisdiction by misconstruing the meaning of the “successor in title” provision.9 However, the majority opinions in *Anisminic* incorporate two very different conceptions of administrative jurisdiction. Lord Reid’s opinion makes this plain when he draws a distinction between what he calls jurisdiction in its “narrow and original” sense and jurisdiction in its “wider” sense. The narrow sense refers simply to whether the legislature has in fact empowered an administrative decision-maker to “enter on the inquiry in question.”10 In this sense, the Commission was authorized to decide whether Anisminic was entitled to compensation, because it had been expressly empowered by an Act of Parliament to decide that question. If further support for this conclusion was needed, it could be drawn from the

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8 *The Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962*, S.I. 1962/2187, s. 4(1).
fact that Parliament had included a privative clause in the statute, which stated that the Commission’s decisions could not be challenged through judicial review.

However, Lord Reid went on to argue that the Commission’s authority was constrained by additional legal considerations, which he associated with a conception of jurisdiction in the “wider” sense:\textsuperscript{11}

…there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. … If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.

Thus, even though he thought the Commission had been empowered by Parliament in the narrow sense to adjudicate Anisminic’s claim, Lord Reid held that it had exceeded its jurisdiction in the wider sense because its decision deviated from what he considered to be the “true construction” of the regulations. The interesting point is that, although Lord Reid recognized that there were two different conceptions of jurisdiction at play, he assumed that both were derived from legislative intent. Accordingly, Lord Reid and the other judges who sided with the majority claimed that they were not challenging Parliament’s intent by intervening in spite of the privative clause.\textsuperscript{12}

Lord Reid’s discussion in \textit{Anisminic} highlights three chronic problems with the doctrine of jurisdictional review. The first concerns a point I made earlier: that administrative legal authority is perceived only in terms of its formal parameters. Lord Reid’s opinion focuses exclusively upon the limits of the Commission’s jurisdiction, which he assumes

\textsuperscript{11} \textit{Ibid.} A similar argument is advanced by Lord Pearce at 195.

\textsuperscript{12} See \textit{e.g.} \textit{ibid.} at 208 \textit{per} Lord Wilberforce: “The courts, when they decide that a “decision” is a “nullity”, are not disregarding the preclusive clause. For, just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so, as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed…. In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive.”
are established by either Parliament or the judiciary. As a result, Lord Reid’s approach adopts an impoverished conception of administrative jurisdiction that does not adequately explain why citizens and other legal institutions ought to respect administrative decisions.

The second problem is that, because Lord Reid employs two different conceptions of jurisdiction, the doctrine of jurisdictional review seems to be incoherent. This incoherence is rooted in the fact that jurisdictional review incorporates two conflicting conceptions of law. Lord Reid’s “narrow” conception identifies the parameters of administrative jurisdiction by reference only to the positive law established by Parliament, whereas his “wider” conception asserts additional parameters established through judicial interpretation of what the law (understood more broadly than mere legislative commands) requires of administrative decision-makers. So in addition to being hollow, the doctrine of jurisdictional review in Anisminic is incoherent because it is built upon two conflicting views about the legal parameters of administrative action. This confusion is particularly acute when judges attempt to grapple with the interpretive problem posed by privative clauses. If judges disagree with an administrative decision, they can circumvent the privative clause by assuming that Parliament intended for courts to enforce unwritten limits associated with the “wider” sense of jurisdiction on administrative officials; conversely, judges can justify judicial inaction by adopting the “narrow” sense of administrative jurisdiction and interpreting the delegating statute and privative clause in a more literal fashion.

The third problem with jurisdictional review concerns the important issue of constitutional legitimacy. If the doctrine of jurisdictional review were only hollow and incoherent, it might be possible to defend it as some sort of pragmatic compromise which enables judges to achieve equitable or just outcomes. But that type of argument is generally regarded as a poor one. Almost no one makes this argument because it undermines the constitutional legitimacy of judicial review. Generally speaking, people expect that judges will enforce the law when conducting judicial review instead of manipulating legal concepts to secure outcomes the judges perceive to be just, especially when those perceptions conflict with existing decisions made by officials who have been
appointed through the democratic process. This belief is shared by judges who (like Lord Reid) attempt to justify their decisions by relying upon existing law, as opposed to making bold claims that prioritize judicial assessments regarding the justice of a particular administrative decision.

If we accept the intuition that administrative institutions have legitimate legal authority and that judges should not interfere with an administrative decision merely because they disagree with the outcome on its merits, then we have good reasons for seeking an alternative theory to guide the practice of judicial review. More specifically, we have a reason to consider whether the doctrine of curial deference, which prevails in Canadian and American public law, generates a more persuasive account of administrative authority and is more defensible as a matter of constitutional legitimacy.

B. The Doctrine of Curial Deference

In 1977, the Canadian Union of Public Employees [C.U.P.E.] declared a lawful strike against the New Brunswick Liquor Corporation. During the strike, the Corporation began using management personnel to operate its stores. This tactic upset the union, and its members began picketing various stores owned by the Corporation throughout the province. The union also complained to the New Brunswick Labour Relations Board, alleging that the Corporation had violated s. 102(3)(a) of the Public Service Labour Relations Act, which declared that “the employer shall not replace the striking employees or fill their position with any other employee”. The Board agreed with this interpretation of the statute, and ordered the Liquor Corporation to stop using managers as replacement employees. The Corporation challenged the Board’s decision by applying for judicial review, even though s. 101 of the Act stated that “every order, award, direction, decision, declaration, or ruling of the Board…is final and shall not be questioned or reviewed in any court.”

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14 Ibid. at s. 101(1).
The Canadian Supreme Court upheld the Board’s decision, but in doing so Dickson J. did not resort to the doctrine of jurisdictional review set out in *Anisminic*. Rather, he began by observing that the meaning of s. 102(3)(a) was ambiguous. Although interpretation of the provision was a question of law, he declined to characterize it as a “jurisdictional” issue saying that “courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.” Since the subject matter of the dispute fell within the broad mandate of the Board and the legislature had indicated a preference that the Courts not interfere with the Board’s decisions, Dickson J. held that it was inappropriate for the Court to approach the issue as if it was the primary decision-maker.

Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board’s decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to an administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers—broadly than those typically vested in a labour board—to supervise and administer the novel system of collective bargaining created by the Public Service Labour Relations Act. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. Nowhere is the application of those skills more evident than in the supervision of a lawful strike by public service employees under the Act.

Accordingly, Dickson J. held that “[t]he interpretation of s. 102(3) would seem to lie logically at the heart of the specialized jurisdiction confided to the Board.” Therefore, the Court could not intervene merely because it disagreed with the Board’s interpretation of the statute. Instead, Dickson J. argued that judicial intervention was appropriate only where the Board’s decision was “so patently unreasonable that its construction cannot be

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16 Ibid. at 233.
17 Ibid. at 235-236.
18 Ibid. at 236.
rationally supported by the relevant legislation and demands intervention by the court upon review”. After considering the Board’s reasons for its decision, Dickson J. held that its interpretation of the provision was not patently unreasonable and therefore declined to intervene.

The main distinction between the doctrine of curial deference outlined in *C.U.P.E.* and the doctrine of jurisdictional error is the manner in which administrative authority is perceived. Instead of defining administrative authority solely by reference to limits attributed to legislative intent or determined by courts through judicial interpretation, Dickson J.’s judgment emphasizes the substantive legitimacy of the Board’s mandate. Among other things, he highlights the Board’s democratic pedigree and the fact that the provincial legislature had granted the Board the authority to interpret the law regarding a controversial regulatory issue. In addition, he points out how the Board was particularly well-suited to decide the issue in light of its experience or “[c]onsiderable sensitivity and unique expertise”. Thus, Dickson J.’s judgment provides a more elaborate, substantive account of the reasons which legitimate administrative authority than Lord Reid’s judgment in *Anisminic.*

Furthermore, because Dickson J. does not fragment the concept of administrative authority into “narrow” and “broad” senses, his decision seems to be more coherent. Despite this initial impression, subsequent developments in the Supreme Court’s jurisprudence have been anything but straightforward. Much of this confusion stems from the fact that the Supreme Court has never made a decisive break from the language of jurisdictional review. But even if the doctrine of curial deference were not corrupted in

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this way, its complexity would still raise serious questions about its integrity. Thus, one prominent academic observed in 1996 that “CUPE has run into the sand, and a reformulation is needed urgently”, a plea later echoed by at least one Supreme Court justice. If, as I argued earlier, the appearance of doctrinal incoherence raises serious questions about the constitutional legitimacy of judicial review, a more rigorous analysis of the normative underpinnings of curial deference is a worthwhile task to undertake.

C. The Argument in Brief

In this thesis, I will compare and contrast how the doctrines of jurisdictional review and curial deference address the question about administrative law. In chapter two, I will investigate why traditional public law theory fails to directly consider the question about administrative law. Although most constitutional models reserve pride of place for the legislature and courts, they usually fail to make adequate provision for the role of administrative institutions within modern democratic constitutional arrangements. I will argue that this blind spot has been inherited from A. V. Dicey’s theory of the English constitution. Dicey famously argued that there was no such thing as administrative law under the English constitution, and claimed that this conclusion followed logically from the constitutional principles of Parliamentary sovereignty and the rule of law. However, this claim was unfounded as a matter of fact, is contestable as a matter of political morality, and is essentially incoherent in its inspiration. As a matter of historical fact, England possessed an established system of administrative law long before and well after Dicey published his influential treatise on constitutional law, so it is incorrect for us to accept the empirical validity of his claim. I will argue that instead of treating Dicey’s claim as an a priori truth about the English constitution, it is better understood as a controversial ideological argument which is hostile to the emergence of the modern administrative state. By contesting this ideological premise, we can begin to develop a more forthright theory about the legitimacy of administrative authority. Finally, I will

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23 Toronto (City) v. Canadian Union of Public Employees, Local 79, [2003] 3 S.C.R. 77 at 113-148 per LeBel J.
argue that when its rhetorical veneer is stripped away, Diceyan constitutional theory is essentially incoherent and dialectical because it involves an attempt to marry both Austinian positivist and Blackstonian common law conceptions of law within the same constitutional theory.

In chapter three, I will proceed to construct an abstract, but provisional, conception of legitimate administrative authority. The outline of this conception will emerge from a critique of Joseph Raz’s service conception of authority. I will argue that while Raz’s theory does not account for certain necessary features of administrative authority in a liberal democracy, it nevertheless identifies two crucial issues that must be addressed in order to understand the legitimate authority of administrative institutions. I will then compare my provisional, abstract conception with a range of different public law theories that have emerged over the past century. I will argue that even though common law jurists have developed greater awareness of administrative institutions over the course of the twentieth century, this awareness has not enabled them to escape their Diceyan heritage. Thus, instead of addressing the question about administrative law directly, lawyers continue to rely upon inadequate theories about jurisdictional review. The end result is that these conflicting modes of public law scholarship perpetuate the instability of Diceyan constitutional theory and ultimately fail to address its blind spot concerning the substantive legitimacy of administrative authority.

In chapter four, I will examine a series of landmark cases concerning attempts by English courts to apply the doctrine of jurisdictional review and, more recently, proportionality review. I will argue that the reasoning in these cases is both formal and incoherent. The formalism in these cases is rooted in the assumption that the scope of judicial review is determined by analytical categories and distinctions informed by the Diceyan dialectic rather than an assessment of relevant principles of political morality. The reasoning is also incoherent because while English judges apply a seemingly unified doctrine of judicial review, the practice of judicial review varies dramatically across a range of cases. One class of cases holds that administrative officials are entitled to wield an unrestrained form of political discretion that can be shielded from judicial review by legislative fiat;
the other class of cases holds that judges always retain the ability to quash administrative decisions which do not comply with their own standard of correct legal judgment. In light of the deficiencies of jurisdictional and proportionality review, I argue that it is worth exploring whether the doctrine of curial deference provides a better analytical framework for understanding administrative law.

In chapter five, I will examine how the Canadian Supreme Court gradually developed the doctrine of deference as an alternative to the doctrine of jurisdictional review. Although the doctrine of jurisdictional review formed the bedrock of Canadian administrative law until 1979, the Canadian Supreme Court has since developed what it now calls a “standard of review analysis” for assessing the normative basis for administrative authority across a range of regulatory domains. I will argue that this approach provides a superior method for understanding the various reasons that signal the legitimacy of administrative institutions. Furthermore, I will show how the court’s assessment of these reasons shapes its understanding of reasonableness review.

Finally, in chapter six I will attempt to provide a theory about curial deference through a synthesis of the comparative case law, public law theory, and legal theory examined throughout the thesis. I will argue that once the normative basis of legitimate administrative authority is identified, we can begin to address the problems posed by administrative law and constitutional theory with a clearer sense of purpose. More specifically, I will argue that a deeper understanding of deference will enable lawyers to identify with greater certainty those types of reasons that are relevant to judicial review of administrative action and assist judges to articulate an approach to judicial review which is more defensible in light of democratic constitutional values.

Before proceeding with my argument in praise of curial deference, however, I should issue one important caveat. Despite my argument that the doctrine of curial deference provides a more lucid and coherent account of legitimate administrative authority, it nevertheless remains incapable of dispelling the perennial sense of controversy that judicial review of administrative action attracts. Because the reasons that motivate
arguments about legitimate administrative authority are complex and evaluative, disagreements are bound to erupt over whether a particular administrative decision ought or ought not to be overturned by a judge conducting judicial review. However, it would be a mistake to deduce from this that the doctrine of curial deference is incoherent or fundamentally confused like the doctrine of jurisdictional review. Rather, the prevalence of disagreements about the appropriate degree of deference owed to any particular administrative decision is a function of the controversy that inheres in the complex evaluation of the various reasons that explain and justify a particular administrative decision. So even though the doctrine of deference may not guarantee a greater sense of certainty or determinacy than the doctrine of jurisdictional review, it enables those interested in administrative law to cultivate a better understanding of what is at stake in these disputes as a matter of principle, and enable us to resolve them more reasonably. This, then, is the principal advantage of the doctrine of deference: even if it does not determine the resolution to a dispute, it enables lawyers, judges and citizens to better understand their disagreement and to provide better justifications regarding just outcomes.
II. Rethinking the Diceyan Dialectic

In order to better understand why the issue of administrative authority has been neglected in the common law tradition, it is worth revisiting Albert Venn Dicey’s theory of the English constitution. Dicey claimed that administrative law, which he regularly associated with French *droit administratif*, was utterly foreign to the English legal system. He deduced this from two principles he took to be the foundation of the constitution: parliamentary sovereignty and the rule of law. According to Dicey, these two principles occupied the entire constitutional field, and ensured the primary constitutional status of Parliament and the judiciary. But the consequence of this assumption was that there was no distinct form of legal authority left to be exercised by administrative institutions.¹ The persistence of Dicey’s views in public law doctrine and theory thus explains, to a large extent, why the concept of administrative authority remains underdeveloped in most common law legal systems.

There are two very different ways to understand Dicey’s theory. The first assumes that the principles of parliamentary sovereignty and the rule of law are *a priori* constitutional axioms locked in a zero sum contest for supremacy within the constitutional order. This “binary” understanding of constitutional authority pits Parliament’s monopoly on making law through the democratic process against the judiciary’s monopoly on interpreting the law through the common law method.² By definition, the Diceyan constitution can only perceive administrative authority as either an unrestrained exercise of political discretion akin to a delegated legislative power³ or it achieves legal status by virtue of its

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¹ I do not mean to suggest that statutes and common law values are irrelevant for the purposes of understanding administrative authority, but only that the idea of administrative authority is based upon a more complex interpretive assessment of relevant legal materials. The important point is that this assessment ultimately recognizes the legal legitimacy of an administrative decision, one that merits the respect of other institutions according to principles concerning the apportionment of legal authority under the constitution.


³ See *e.g.* the manner in which the Donoughmore Committee describes the essence of an administrative decision. “In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion.” United Kingdom, *Committee on Ministers’ Powers*
substantive congruence with judicial standards of correct procedure or judgment.\footnote{See \textit{e.g.} Coke J.’s sweeping dictum in \textit{James Bagg’s Case} (1615), 11 Co. Rep. 93a at 98a; 77 E.R. 1271 at 1277-1278, where he held “that to this Court of King’s Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be reformed or punished by due course of law.”} Moreover, the Diceyan constitution appears to pivot on an insoluble dialectic between parliamentary sovereignty and the rule of law, because it incorporates two conflicting conceptions of law. Dicey’s principle of parliamentary sovereignty is motivated by a form of legal positivism, which resembles John Austin’s command theory of law;\footnote{\textit{John Austin, The Province of Jurisprudence Determined} (London: Weidenfeld & Nicolson, 1954).} and his conception of the rule of law is motivated by a form of natural law, which relies upon William Blackstone’s reverence for the common law. While this conflict explains much of the confusion associated with the doctrine of jurisdictional error, for now I just want to identify the Diceyan dialectic simply as a matter of constitutional theory.

There is, however, a second and more elaborate explanation of Dicey’s theory that recognizes it as an illustration of a central problem in political liberalism. I argue that Dicey’s theory helps us to understand the tension between the liberal commitments to democratic government (on the one hand) and to substantive limitations on the extent to which government may interfere with personal liberty (on the other).\footnote{David Dyzenhaus, “Dicey’s Shadow” (1993) 43 U.T.L.J. 127; David Dyzenhaus, “Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?” in Christopher Forsyth, ed., \textit{Judicial Review and the Constitution}, (Oxford: Hart Publishing, 2000) at 141 [“Form and Substance”].} This approach tracks the same tension in Dicey’s theory between parliamentary sovereignty and the rule of law but, unlike the Diceyan dialectic, it does not exclude the idea of administrative authority by stipulation. Rather, it understands the tension as an outcrop of the same friction that Isaiah Berlin identified between “positive” and “negative” liberty almost fifty years ago.\footnote{Isaiah Berlin, “Two Concepts of Liberty” in Isaiah Berlin, \textit{Four Essays on Liberty} (Oxford: Oxford University Press, 1969) 118 [“Two Concepts”].} To borrow Berlin’s terminology, Dicey was wedded to the notion of “negative” liberty, and this is revealed by the substantive limits he incorporated into his

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version of the English constitution. He thought these limits would promote maximum protection for individual liberty and (by extension) a limited role for government.\(^8\) Conversely, Dicey was disturbed by constitutional reforms that extended the franchise because they culminated in new, redistributive government policies. These policies were legitimized by the notion of “positive” liberty, the idea that all citizens should be free to exercise self-government and (by extension) participate in the democratic process in order to decide how to govern their political community. Dicey was reluctant to recognize the legality of the welfare state, and this is reflected in the fact that his constitutional theory does not contemplate any role for administrative legal authority.

This chapter examines both accounts of Dicey’s constitutional theory. I will argue that the first account is both reductive and unhelpful, because it alienates Dicey’s constitutional principles from the reality of legal practice and obscures their political foundation. The result is that lawyers who invoke this account are unable to explain administrative authority as a valuable characteristic of modern government or to explain how judges can respect the autonomy of administrative judgment while at the same time rendering it consistent with legal values associated with the rule of law. These opportunities emerge only when one adopts the second, more substantive, account of Dicey’s constitutional theory, which enables us to engage with its political and institutional principles more directly. I will argue that, by doing so, we can begin to address the question of administrative authority more intelligently.

Part A below offers a brief sketch of the Diceyan dialectic that highlights the essential features of his constitutional model and exposes its inadequate portrayal of legal practice. Part B develops the more elaborate account of Dicey’s theory in order to demonstrate that these weaknesses can be ascribed to Dicey’s political ideology. I argue that, in order to grapple with the Diceyan dialectic, one must recognize that the nature of this political debate does not raise any \textit{a priori} objections to the concept of legitimate administrative authority. Rethinking the Diceyan dialectic in this way is important because it allows us

\(^8\) Friedrich Hayek held similar views about the rule of law. However, he constructed his conception as an explicit political theory rather than wrapping it in the mantle of “legal science”, as Dicey did. See F.A. Hayek, \textit{The Road to Serfdom}, (London: Routledge, 1944).
to engage in the fruitful enterprise of revealing a principled basis for the complex systems of administrative regulation that exist in every democratic society. By engaging with the issue in this fashion, we can better justify arguments for respecting administrative judgment or, alternatively, arguments in favour of judicial review.

A. The Diceyan Dialectic

Before Dicey, very few lawyers recognized constitutional law as a domain distinct from the more general principles of the common law. One of Dicey’s declared aims in writing the *Introduction to the Study of the Law of the Constitution* was to carve out a coherent system of constitutional law so that it might become the object of sustained legal scholarship. To put it simply, Dicey wanted to identify the “rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state” so that they could be examined and expounded through legal analysis.

When Dicey was appointed Vinerian Professor at Oxford, English universities were advocating an undergraduate course to prepare students for the legal profession. At the time, English law appeared to be a chaotic mass of precedent. Earlier attempts to lend the law a sense of structure like Coke’s *Institutes* or Blackstone’s *Commentaries* could not dispel the confusion inherent in the common law. Instead, legal practice was organized around the different forms of action, but when this framework (which had significant deficiencies of its own) was abolished in 1875 the need to bring some sense of order to the common law was acute. This period marked the revival of “legal science” in both England and America, as law professors on both sides of the Atlantic began to portray law as a subject that could only be rationalized if it were taught alongside the natural sciences in universities.

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9 A.V. Dicey, *Introduction to the Study of the Constitution*, 10th ed. (London: Macmillan & Co, 1959) c. 1 [*Introduction*]. Dicey’s famous treatise was first published in 1885, and last edition Dicey edited personally was the seventh in 1908. However, the text itself remained unaltered in subsequent editions, save for an extended introduction by E.C.S. Wade. I will refer to the tenth edition throughout.


12 David Sugarman, “The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science” (1983) 46 M.L.R. 102 at 107 [“Legal Boundaries”]. The idea of legal science stretches back at least to Roman Law,
Throughout his career, Dicey employed the language of legal science to advocate a curriculum devoted to the principled study of law. In his view, the current system of pupils reading law in chambers was inadequate because it was fragmentary and unsystematic: pupils only learned random, particular points of law without developing an appreciation for the grand legal principles that unified the topics of tort, contract, and the common law as a whole. This myopia was also symptomatic of many textbook writers, who tended to portray a legal subject in terms of formal rules and exceptions rather than a coherent body of principle. Dicey argued that professors dedicated to the notion of legal science could provide an antidote to this problem by analysing and defining basic legal concepts, organizing these concepts according to the rules of logic, and using the method of legal science to identify an agenda for legal reform. In Dicey’s words:

> It is for professors to set forth the law as a coherent whole—to analyse and define legal conceptions—to reduce the mass of legal rules to an orderly series of principles, and to aid, stimulate and guide the reform or renovation of legal literature.

This latter task was particularly important because by reforming the available legal literature, law professors could improve both the form and the substance of the common law.


14 Ibid. at 18. See also “The Study of Jurisprudence” supra note 13.

15 Ibid. at 23-24:”The rules of law which are supposed to be so inflexible are, for the most part, in fact enactments of judicial legislation, and nothing is more remarkable or more intelligible than the ease with which judicial legislation is swayed by the pressure of authoritative opinion. Busy magistrates, dealing with cases as they occur, take their principles from text-writers. Particular authors have notoriously, even in recent times, modeled, one might almost say brought into existence, whole departments of law”.
These considerations provide the backdrop for Dicey’s constitutional theory, in which he expressly sought to enhance the prestige of constitutional law by extricating it from other domains of inquiry. Like Blackstone, Dicey believed in the wisdom and dignity of the common law as a cultural artefact that revealed the character of English nation. The difference, according to Dicey, was that his conception of constitutional law was realistic, contemporary, and detached from moral or political argument, whereas Blackstone’s *Commentaries* tended to mythologize the common law. Thus, Dicey professed to be neither a critic, nor an apologist, nor a eulogist, but simply an “expounder” of the constitution whose task was “to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection.”

Although he recognized the contributions of lawyers, historians and political theorists who had addressed the topic before him, Dicey argued that previous attempts to identify the law of the constitution had failed to capture its distinct legal nature. Lawyers (especially Blackstone) were prone to “unreal language” that obscured the real meaning of the constitution; historians had cured this defect by paying attention to hard facts, but their “antiquarianism” or excessive reverence for historical curiosities made their treatises unsuitable for contemporary legal analysis; and while political theorists examined issues of significant parliamentary importance, those issues were matters of conventional

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20 Ibid. at 32.

21 Ibid. at 11:“We have all learnt from Blackstone, and writers of the same class, to make such constant use of expressions which we know not to be strictly true to fact, that we cannot say for certain what is the exact relation between the facts of constitutional government and the more or less artificial phraseology under which they are concealed”.

22 Ibid. at 14:“Let use eagerly learn all that is known, and still more eagerly all that is not known about the Witenagemöt. But let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law of England was yesterday, still less what is was centuries ago, or what it ought to be to-morrow, but to know and be able to state what are the principles of law which actually and at the present day exist in England”.
or political morality, not law.\textsuperscript{23} “Law”, insofar as Dicey defined it, merely meant “any rule which will be enforced by the courts”,\textsuperscript{24} whether it was written (in the case of statutes) or unwritten (in the case of common law principles).\textsuperscript{25} So Dicey purportedly trained his sights on accepted sources of law—statutes, the common law, solemn agreements (i.e. the Bill of Rights), treaties and quasi-treaties—in order to unearth the true nature of the English constitution.\textsuperscript{26} The two central principles or “legal facts”\textsuperscript{27} that emerged from Dicey’s exegesis were parliamentary sovereignty and the rule of law.

The principle of parliamentary sovereignty means that Parliament has “the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”\textsuperscript{28} In other words, Parliament has a monopoly on making law under the constitution, and no other institution (i.e. the executive, the judiciary, the electorate, or either House acting alone) can limit this privilege through \textit{de jure} means. The only \textit{de facto} limitations on Parliament’s law-making function are a function of political or popular morality, which constitutes both “external” and “internal” constraints. Political morality is an external constraint on Parliament’s law-making function, because statutes that are radically at odds with popular opinion are likely to undermine parliamentary authority by inciting civil disobedience; and it is an internal constraint, because members of Parliament are a product of, and therefore highly responsive to, popular opinion.\textsuperscript{29} Because the members

\textsuperscript{23} \textit{Ibid.} at 20-21: “The truth is that Bagehot and Professor Hearn deal and mean to deal mainly with political understandings or conventions and not with rules of law…. These inquiries are, many of them, great and weighty; but they are not inquiries that will ever be debated in the law courts”.

\textsuperscript{24} \textit{Ibid.} at 40.

\textsuperscript{25} \textit{Ibid.} at 27-28.

\textsuperscript{26} \textit{Ibid.} at 6 n 1. The terms “solemn agreements” and “quasi-treaties” are Dicey’s. Although Dicey did discuss various constitutional conventions in his treatise, it was clear that he did not consider them to be “law” by virtue of the fact that they were enforced by popular sentiment rather than the courts. See W. Ivor Jennings, “In Praise of Dicey” (1935) 13 Public Administration 123 at 130.

\textsuperscript{27} Dicey’s characterization of legal principles as matters of “fact” is symptomatic of the legal science movement. See \textit{e.g.} Dicey, \textit{Introduction, supra} note 9 at 11, 68.

\textsuperscript{28} Dicey, \textit{Introduction, supra} note 9 at 40.

\textsuperscript{29} \textit{Ibid.} at 76-85.
of Parliament are themselves steeped in the popular sentiment of the times, they are likely to enact laws that were more or less sympathetic with popular opinion.

By contrast, the rule of law deals not with statutory law promulgated by Parliament, but with the common law enforced by “ordinary” courts. On Dicey’s account, the rule of law has three interrelated aspects. First, it establishes “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government.”

Second, it establishes equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the ‘rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

Finally, Dicey emphasized that the rule of law is entrenched at common law as part of the constitution, rather than a legislative code. In this sense, the law of the constitution is not the source of individual rights, but the consequence of the myriad judicial decisions that define those rights. This was an important point for Dicey, because he thought this feature of the rule of law confers a special advantage: if individual rights are deduced from codified principles, they could be suspended as easily as they had been enacted, but if liberty were diffused through the customary law of the land, it could only be suspended or amended through wholesale revolution.

Dicey’s conception of the rule of law is significant because, by definition, it excludes the possibility that administrative institutions might wield legal authority under the law of the constitution. The most fundamental problem, according to Dicey, is that droit administratif threatens the idea of formal equality so dear to the rule of law: it judges transactions between citizens and the state according to “principles essentially different from those rules of private law which govern the rights of private persons towards their

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30 Ibid. at 202-203.
31 Ibid.
32 Ibid. at 201.
33 Ibid. c. 12.
neighbours.”34 This danger was logically entailed by the doctrine of the separation of powers prevailing in France that prevented “the government, the legislature, and the courts from encroaching on one another’s province.”35 Dicey distinguished the French conception of the separation of powers from the idea of judicial independence underlying the English constitution. In France, the separation of powers established reciprocal principles, namely that ordinary judges ought to be independent and irremovable and that the government and its officials “ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary courts.”36 This latter addendum, which contains the germ of administrative legal authority, is anathema to Dicey’s conception of the rule of law, because it exposes citizens to what he regarded as (by definition) arbitrary or discretionary executive action and immunizes public officials from liability in tort.37 Unless government officials remain subject to the “fixed” certainty of private law administered by the ordinary courts, formal equality and the rule of law would be undermined.

Ironically, even at the time Dicey published his first edition, his analysis was prone to the same defects he attributed to the previous generations of lawyers, historians and political theorists who took an interest in the English constitution. Despite all his rhetoric of legal science, Dicey did not discover his principles through rigorous induction, but rather “found what he hoped or expected to find.”38 Dicey merely adopted the concept of sovereignty he inherited from Hobbes via Blackstone and John Austin’s positivist theory

34 Ibid. at 388.
35 Ibid. at 337.
36 Ibid. at 338.
37 Dicey frequently refers to what he assumes are allied notions of “discretion”, “arbitrariness”, “executive prerogative” and “despotism” to characterize the concept of droit administratif. See e.g. ibid. at 335-350, where Dicey examines the historical lineage of droit administratif. Dicey thought droit administratif was bound to be uncertain and arbitrary in its application because it remained under the control of the executive branch of government, which was motivated by the preferences or opinion of politicians rather than the wisdom of independent judges.
of law.\textsuperscript{39} The idea of an uncommanded commander was the orthodox political doctrine of the period, and Dicey rather took it for granted as a pillar of his constitutional theory.\textsuperscript{40} And although his conception of the rule of law was innovative by comparison, Dicey did not draw its specific content from established case law. It is more accurate to say that its meaning, like that of the principle of parliamentary sovereignty, was stipulated by the author.

The catalogue of errors attributed to Dicey is well documented, so there is no need to delve into great detail here.\textsuperscript{41} Nevertheless, I want to briefly examine three particular defects, because they illustrate the dissonance between Dicey’s theory and common legal practice when the first edition of \textit{The Law of the Constitution} rolled off the presses. These defects belie the scientific or factual basis Dicey claimed for the twin pillars of his constitutional theory and provide sufficient justification for revising it in light of the reality of administrative authority in modern democratic states.\textsuperscript{42}

First, Dicey did not seem to appreciate the extent to which the English legal system already utilised administrative institutions—boards, commissions, inspectorates, ministries, etc.—to deliver public goods and services.\textsuperscript{43} Although the elaborate system of

\begin{footnotesize}
\begin{enumerate}
\item A.W.B. Simpson, “The Common Law and Legal Theory” in A.W.B. Simpson, ed., \textit{Oxford Essays in Jurisprudence} (Oxford: Clarendon Press, 2\textsuperscript{nd} series, 1973) 77 at 96:”Dicey announced that it was the law that Parliament was omnicompetent, explained what this meant, and never devoted so much as a line to fulfilling the promise he made to demonstrate that this was so. The oracle spoke, and came to be accepted”.
\item As Ivor Jennings puts it, “the criticism of Dicey is not that his politics were wrong, but that his constitution did not exist. It is not that the Rule of Law is undesirable, but that it was not correct analysis of the British Constitution of 1885 and has become even more incorrect since.” W. Ivor Jennings, Book Review of \textit{Introduction to the Study of the Law of the Constitution} by A.V. Dicey (1940) 3 M.L.R. 321 at 322.
\item H.W. Arthurs, “\textit{Without the Law}”: Administrative Justice and Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985) at cc. 4-6 [\textit{Without the Law}]; Parris, \textit{Constitutional Bureaucracy}, supra note 41; W. Ivor Jennings, \textit{The Law and the Constitution}, 5\textsuperscript{th} ed. (London: University
the courts of local and special jurisdiction was becoming obsolete by the mid-nineteenth century, their decline coincided with the emergence of new administrative institutions that formed the basis of the modern administrative state. Beginning with the introduction of the factory and mines inspectorates in 1833, the central government began administering national policies through delegated administrative authority. While this practice evolved over the next forty years, one can say with confidence that the blueprint for the modern system of administration had been laid out well before 1870, the year Dicey identified with the emergence of unorthodox “collectivist” legislation. So although Dicey was keenly aware of the battle between the Crown and Parliament over conciliar courts like the Star Chamber in the seventeenth century, he was either ignorant or unduly dismissive of the emanations of executive authority in the nineteenth century.

Second, even if we assume that Dicey recognized the extent of administrative law in 1885, his theory seriously distorts the manner in which it was supervised through judicial review. The most glaring omission in this regard is his failure to recognize the concept of administrative “jurisdiction”, which was the central hypothesis for all methods of judicial supervision of public power, and the importance of the prerogative writs, which provided a remedy distinct from private law claims for damages against public officials who had...
exceeded their authority.\textsuperscript{47} Already by the sixteenth century, litigants began seeking redress by claiming prerogative relief, because common law actions against public officials were impractical and ineffective modes of redress.\textsuperscript{48} Assuming that the aggrieved citizen had the means to pursue such an action, lawsuits targeted only low ranking public officials, who usually were not capable of satisfying a judgment even if the action was successful. The unhappy result was that private law remedies were doubly flawed: they did not adequately vindicate a citizen’s grievance \textit{and} they imposed an inordinate burden on persons who, although not responsible for issuing warrants, were liable to be prosecuted if they refused to execute them.\textsuperscript{49} Neither citizens nor the commonwealth benefited from this state of affairs. This framed a dilemma for common law courts: whether to grant relief to the citizen or some form of public interest immunity to the official. The result was relentless confusion.\textsuperscript{50} Gradually the courts began restricting recovery to situations where the defendant had acted “without jurisdiction”, a term that implies \textit{(contra Dicey)} that public officials are to some extent exempt from ordinary private law;\textsuperscript{51} the Privy Council began imprisoning plaintiffs until they abandoned their cause of action;\textsuperscript{52} and punitive costs were imposed on unsuccessful plaintiffs for wrongful vexation.\textsuperscript{53} All these reactions were motivated by the desire to curb the use of tort as the means for prosecuting grievances against public officials.

\textsuperscript{47} Jennings, "In Praise of Dicey" \textit{supra} note 26 at 236-238.
\textsuperscript{48} Henderson, \textit{Foundations, supra} note 44 c. 1.
\textsuperscript{49} \textit{Ibid.} at 13-18.
\textsuperscript{51} \textit{Case of the Marshalsea} (1598), 5 Co. Rep. 99b; Rubinstein, \textit{Jurisdiction and Illegality, supra} note 50 at 56-61. This explains why, from its very inception, the concept of administrative jurisdiction developed an affinity for what Murray Hunt calls the “spatial metaphor”. Jurisdiction served to delimit the boundaries of liability. If a public official acted “within” his jurisdiction, he was exempt; if he acted “without” jurisdiction, he was liable. See Murray Hunt, “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in Nicholas Bamforth & Peter Leyland, eds., \textit{Public Law in a Multi-Layered Constitution} (Oxford: Hart Publishing, 2003) 337.
\textsuperscript{52} For example, when William Headley sued the Sewer Commissioners for false imprisonment, the Privy Council imprisoned him until he relinquished his action, \textit{Headley v. Sir Anthony Mildmay}, (1617) 1 Rolle 395, 81 E.R. 560. See \textit{Acts of the Privy Council}, 1616-17, 240; Henderson, \textit{Foundations, supra} note 44 at 25-35.
\textsuperscript{53} Henderson, \textit{ibid.} 17.
Thus, steady recourse to the prerogative writs began in the early seventeenth century as an alternate means for checking public power.\textsuperscript{54} This point, insofar as it relates to Dicey’s constitutional theory, is important. It demonstrates, contrary to Dicey’s claims about the rule of law, that the common law had developed a means for supervising administrative authority that recognized the special status of public officials within the legal system. The development of prerogative relief enabled common law courts to supervise the exercise of public power while still recognizing the special status of public officials who held public, not private, duties and obligations. In short, the prominence of prerogative relief in English public law supports the claim Dicey was so keen to falsify, namely, “that the relation of individuals to the State is governed by principles essentially different from those rules of private law which govern the rights of private persons towards their neighbours.”\textsuperscript{55}

Dicey’s omission of the role of the prerogative writs in securing liberty in England is all the more striking since they were widely celebrated as prizes secured by judicial champions of the common law like Sir Edward Coke and Sir John Holt. Moreover, the relationship between \textit{habeas corpus}, which was one of Dicey’s favourite constitutional devices,\textsuperscript{56} and the other prerogative writs is unmistakable: it secured freedom without resorting to an action in damages.\textsuperscript{57} The modern development of the different prerogative writs occurred more or less in tandem during the seventeenth century precisely because common law actions in damages were hobbled by inherent defects.\textsuperscript{58} By the middle of the eighteenth century, Lord Mansfield recognized the close affinity between the “prerogative writs”;\textsuperscript{59} a classification echoed by Blackstone.\textsuperscript{60} So by the time Dicey wrote

\textsuperscript{54} Ibid. at cc. 2-5; Rubinstein, \textit{Jurisdiction and Illegality}, supra note 50 c. 4. See e.g. \textit{James Bagg’s Case}, supra note 4; \textit{Commins v. Massam} (1643), March N.C. 196, 82 E.R. 473; \textit{Groenvelt v. Burwell} (1700), 1 Ld. Raym. 454, 91 E.R. 1202 [\textit{Groenvelt}].

\textsuperscript{55} Dicey, \textit{Introduction}, supra note 9 at 388.

\textsuperscript{56} Ibid. at c. 6. The fact that a scholar of Dicey’s repute only recognized \textit{habeas corpus} suggests that his disregard of the other prerogative writs was somewhat disingenuous.


\textsuperscript{58} Henderson, \textit{Foundations}, supra note 44 at 94-95.

\textsuperscript{59} \textit{R. v. Cowle} (1759), 2 Burr. 834, 97 E.R. 587.
his first edition, prerogative relief had been well established and was rapidly becoming the preferred avenue for reviewing administrative decisions, so much so that even by the end of the seventeenth century, Parliament began enacting privative clauses in order to limit or exclude it altogether.

Privative clauses pose a final problem for Dicey’s theory, because they seem to pit parliamentary sovereignty directly against the rule of law. These provisions purport to limit or exclude judicial review in order to immunize administrative action from judicial oversight. Although Dicey ignored or (at the very least) largely discounted the prevalence of administrative institutions and did not address the widespread legislative practice of resorting to privative clauses, he did acknowledge the apprehension that his constitutional principles might conflict, at least in theory. This potential conflict frames the Diceyan dialectic between the principles of parliamentary sovereignty and the rule of law.

Dicey thought the apprehension of a constitutional dialectic was “delusive”, because the principles of parliamentary sovereignty and the rule of law were in fact mutually supportive. On closer inspection, however, it seems that Dicey’s resolution is more problematic than he lets on. Dicey claims that the rule of law supports parliamentary sovereignty by insisting on a narrow judicial construction of parliamentary will. He argues that since the resolutions of either House have no independent juridical significance, a bi-cameral legislature must express its will through determinate, identifiable legislative acts that are always subject to judicial interpretation. In this situation, judges can only give effect to the precise wording of each statute. According to

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61 Henderson, Foundations, supra note 44 at cc. 4-5. De Smith, “Prerogative Writs”, supra note 57 at 48 observes that after Holt’s sweeping reformulation of certiorari in Groenvelt, supra note 54 that “the King’s Bench became inundated with motions for certiorari to quash rates and orders made by Justices and other bodies exercising administrative functions under semi-judicial forms. It became what Gneist has called an Oberverwaltungsgericht, a supreme court of administration, supervising much of the business of local government by keeping subordinate bodies within their legal limitations by writs of certiorari and prohibition, and ordering them to perform their duties by writs of mandamus.”
62 Rubinstein, Jurisdiction and Illegality, supra note 50 at 71-73. See e.g. An act to prevent and suppress seditious conventicles, 22 Car. II, c. 1, s. 6: “…no other court whatsoever shall intermeddle with any cause or causes of appeal upon this act, but they shall be finally determined in the quarter-sessions only.”
63 Dicey, Introduction, supra note 9 c. 13.
Dicey, this interpretive approach greatly contributes “to the authority of the judges and to the fixity of the law”, because parliamentary initiatives regarding issues historically governed by the common law would be strictly construed. Therefore, the timeless rationale of the common law, and its constitutive values, would largely remain undisturbed by parliamentary incursions.

Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments. In England judicial notions have modified the action and influenced the ideas of the executive government. By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.

The upshot is that Dicey purchased his resolution by prioritizing the judicial role in interpreting legislative will. And the mode of interpretation Dicey had in mind was anchored by common law values that were, by their very nature, conservative and opposed to the exercise of executive discretion, which he thought was bound to be determined by arbitrary political opinion. Thus, Dicey argued that the configuration of the English constitution precluded the emergence of administrative law, because it was sceptical of any form of administrative judgment.

Unfortunately, Dicey’s theory cannot address the problem posed by privative clauses, because these instruments bring the contest between parliamentary sovereignty and the rule of law into stark relief. When Parliament issues a clear directive that it wants judges to abstain from reviewing certain administrative decisions, Dicey’s resolution is unhelpful because judges have to choose which constitutional principle will prevail. This explains why the doctrine of jurisdictional error, which enables judges to grapple with the problem posed by privative clauses, is so volatile and erratic. Judges have historically

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64 Ibid. at 408.
65 Ibid. at 413-414.
adopted very different notions of jurisdictional error in order to justify very different postures towards privative clauses, ranging from total abstention from judicial review to determining correct answers for administrative institutions to implement. In the former case, administrative action is treated as an extra-legal exercise of political power because it is wholly beyond the reach of judicial review; in the latter case, the court ignores Parliament’s will and administrative action is brought to heel in accordance with judicially determined outcomes. So Dicey’s resolution is both illusory and irrelevant, at least insofar as privative clauses are concerned.

This point cannot be marginalized as an extraordinary phenomenon that Dicey could have otherwise accommodated within his theory. On the contrary, it shows that Dicey’s theory cannot provide an adequate rationale of administrative authority at all, even in situations where Parliament does not resort to a privative clause, because there is simply no room for administrative judgment in his binary constitution. In situations where Parliament delegates a decision-making power to an administrative institution, Dicey envisages only two options where it exercises “judicial or quasi-judicial powers”.\(^{67}\) First, the decision-maker must “conform precisely to the language of any statute by which the power is given” or else “the courts of justice may treat its action as a nullity”.\(^{68}\) Second, it must comport with “the spirit of judicial fairness and equity” which English courts ultimately enforce through judicial review. In either case, an administrative institution would not possess any measure of legal authority under the constitution, because its decisions would be determined by another branch of government.\(^{69}\)

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\(^{67}\) It is revealing that Dicey could only envisage a species of delegated power that was “judicial” or “quasi-judicial” rather than “administrative” in nature. A.V. Dicey, “The Development of Administrative Law in England” (1915) 31 L.Q.R. 148.

\(^{68}\) Ibid. at 151.

\(^{69}\) Although Dicey recognized that, by 1915, Parliament was clearly delegating some kind of authority to administrative institutions, he never recanted his view that the English constitution could not accommodate the notion of administrative law, because “the fact that the ordinary law courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true droit administratif.” Ibid. See also Cosgrove, Rule of Law, supra note 11 at 98-102.
B. Rethinking the Diceyan Dialectic

If Dicey’s theory is demonstrably flawed on empirical grounds, is there an alternative way to explain his conception of the English constitution? The answer to that question, I argue, is best tackled by looking through the lens that Dicey claimed to eschew, namely that of political theory. While Dicey’s theory was clearly at odds with legal practice, it was a seamless extension of the political principles which he espoused. Put bluntly, “Dicey saw the constitution of 1885 through Whig spectacles. His [constitutional] principles were Whig principles.”

But in order to gain a better view of the political terrain on which Dicey’s theory is pitched, I will briefly review Isaiah Berlin’s famous essay regarding a central tension in liberal political theory between “positive” and “negative” conceptions of liberty. This framework contributes to two important tasks in the more general project of rethinking the Diceyan dialectic. First, it shows that Dicey’s terms of reference are political in nature, as opposed to scientific or immutable constitutional axioms. This is not to say that the principles of parliamentary sovereignty and the rule of law are unimportant or fanciful legal fictions. On the contrary, they have been so persistent in constitutional theory because they tap into widely held convictions regarding the legitimacy of democratic government through law. Rather, I want to show that the particular political content that Dicey imported into his constitutional framework, especially his revulsion for administrative law, is contestable. This interpretive task prefaces the second, constructive endeavour to advance an alternative constitutional theory that is more defensible in light of liberal and democratic values. While I will not address this second task here, it is important to acknowledge that the two projects are interrelated to some extent, and that any attempt to move beyond the Diceyan dialectic should still respect the important political values that underpin it.


1. Berlin’s Dilemma

In his essay “Two Concepts of Liberty”, Berlin examines two recurrent, often conflicting, conceptions of liberty that frequently emerge in debates concerning the question of obedience and coercion in political philosophy. The first, “negative” conception of liberty concerns “the area within which a man can act unobstructed by others.” This conception of liberty is thus generally opposed to social constraints on the grounds that they are likely to suffocate individual originality, energy, the pursuit of truth, social progress, and so forth. But Berlin also recognizes that negative liberty is not a supreme ideal, and is often strained by the political controversies it provokes. At the very least, negative liberty cannot be unlimited, because that would entail a Hobbesian state of nature which would preclude the emergence of civil society. Naturally, proponents of negative liberty prefer only those constraints that provide minimal conditions for social interaction, such as the enforcement of criminal law—any further trade-offs between negative liberty and other political ideals (such as equality, justice, happiness, or security) are bound to be controversial. These controversies are liable to be compounded by the fact that certain social policies, such as ameliorating poverty, might be both justified and criticized on the grounds of negative liberty (i.e., whether poverty should be regarded as attributable to human agency and socio-economic arrangements that are morally or politically significant).

Berlin does not take sides in any of these particular debates in the essay, in part because he takes a relatively uncritical stance on negative liberty compared to its counterpart. His only comment is that these sorts of issues are likely to remain a matter of “infinite debate.” But he makes one further point that is worth noticing: that negative liberty is not logically related to any particular form of government, including democracy. In his

72 Ibid. at 122.


75 Ibid. at 122-123. However, in his later writings Berlin does suggest that, to the extent that negative liberty is harnessed in service of laissez-faire economic arguments, such arguments pervert the value of liberty. See Isaiah Berlin, “My Intellectual Path” New York Review of Books (14 May 1998) 53 at 58; reprinted in Isaiah Berlin, The First and the Last (London: Granta, 1999) at 61.

76 Ibid. at 126.
words, “[j]ust as a democracy may, in fact, deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom.”

Thus, negative liberty is threatened by any form of government, including a democratic one.

The second, “positive”, conception of liberty concerns the freedom of self-direction: to participate in the act of self-governance by conceiving goals and realizing them of one’s own accord. Berlin is noticeably more critical of this idea because he thinks it leads one down a slippery slope towards authoritarian or totalitarian governance, the principal targets of his cold war essay. This supposed tendency stems from the way in which the individual personality is frequently bifurcated in political thought, namely by distinguishing between the “authentic” or “rational” self associated with conceiving long term goals and purposes, and the “empirical” or “spontaneous” self governed by irrational impulses and desires. Historically speaking, this distinction has been routinely exploited by despots and tyrants who justify their oppression by claiming to possess a better understanding of their subjects’ “authentic” personalities. In other words, despotism was justified on the basis that citizens cannot be trusted to govern in their true interests, because they are blinded by their “empirical” or irrational personalities. Thus, the idea of positive liberty could be perverted by despotic governments, even benign ones.

This explains why Berlin is also suspicious of popular governments premised on the ideal of positive liberty. Although positive liberty demands that an individual be recognized as an agent of free will, Berlin is wary of this idea in its “socialised” form of collective self-

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77 Ibid. at 129-131.
78 Ibid. at 131: “I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not”.
79 Ibid. at 132.
80 Ibid. at 145-154.
Of course, humans are social creatures and it is only logical that they should engage in common enterprises, the most obvious being common government. If citizens could govern themselves by affording equal participation in popular government, it might seem that such an arrangement is justified by positive liberty. But Berlin, in keeping with his pluralist convictions, was reluctant to subscribe to this view, because he apprehended that popular government might regress into monism—the same tendency that characterized tyrants and despots who believed they had exclusive insight into how to construct social harmony. Just as positive liberty might be perverted to justify tyranny of the few, it might be perverted to justify tyranny of the majority. 

While this concern might explain why Berlin is reluctant to wholeheartedly endorse democratic government, it does not rebut the strong moral relationship between the “positive” conception of liberty and claims regarding the legitimacy of democratic government. Rather, Berlin’s reticence highlights a central dilemma for democratic theory: how to reconcile the tension between the “positive” value of liberty associated with democratic government and the “negative” value of liberty associated with legal limits on the coercive power of the state. This dilemma is particularly challenging because, as Berlin’s essay shows, the tension is rooted in different conceptions of liberty, which virtually all participants in modern legal and political debates will invoke (either directly or implicitly) in order to justify arguments about enforcing democratic

81 Ibid. at 154-162. Berlin recoils from calling this an extension of positive liberty, saying that it bears an equally close relationship to the distinct ideals of equality and fraternity. Nevertheless, he also refuses to dismiss the case for social recognition from positive liberty as confusion, because the two ideas are still intimately connected.

82 Ibid. at 162-166.

83 David Dyzenhaus makes a similar claim when he argues that “even radical democratic proceduralism seems to presuppose some protected liberal substance so that all involved in the great debates of political theory are part of one big, though sometimes rancorous family. The various positions in that debate no longer seem greatly at odds with each other. Rather, they look like points along a continuum marked by the extent of protected liberal substance. The less the extent of protected substance, the more faith is put in the outcomes of procedures, and vice versa.” See Dyzenhaus, “Form and Substance”, supra note 6 at 144. See also David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., The Province of Administrative Law (Oxford: Hart Publishing, 1997) 279 at 280.
outcomes, inviolable legal rights or some sophisticated synthesis of the two.\textsuperscript{84} Moreover, this type of moral tension is ripe for what Ronald Dworkin calls “theoretical disagreements” in public law, because it is implicated in many contemporary debates about the proper role of judicial review within a democratic constitution.\textsuperscript{85}

But despite his suspicions about democratic government, Berlin offers some tentative ideas on how to negotiate the dilemma. The key to avoiding the excesses of popular sovereignty, in Berlin’s view, is to remain vigilant against “the accumulation of power itself….since liberty [is] endangered by the mere existence of absolute authority as such.”\textsuperscript{86} At the very least, this requires the establishment of certain minimum, inviolable frontiers of negative liberty to restrain the exercise of sovereignty. Once again, Berlin declines to give specific content to these limits, other than to say that they preserve “an essential part of what we mean by being a normal human being.” But later in the same section, Berlin suggests that these frontiers are related to something like the rule of law, since they include rules prohibiting conviction without trial or punishment under a retroactive law.\textsuperscript{87}

This strategy of fragmenting state power and establishing inviolable rules to protect negative liberty is broadly consistent with two legal concepts that are strongly implicated in Dicey’s constitutional theory: the separation of powers and the rule of law. But, as Berlin’s essay suggests, these issues are frequently contested by virtue of their political nature. Therefore, we must unpack Dicey’s views on these matters in order to ascertain whether they can be reconciled with our current understanding of modern democratic government and the role that administrative decision-makers actually play within that framework.

\textsuperscript{84} In this regard, Ronald Dworkin’s recent attempts to chart the complex metaphysics of political value are intriguing. See e.g. Ronald Dworkin, “Hart’s Postscript and the Character of Political Philosophy” (2004) 24 O.J.L.S. 1; Ronald Dworkin, Justice in Robes, (Belknap Press: Cambridge, 2006) c. 4.


\textsuperscript{86} Berlin, “Two Concepts of Liberty”, supra note 7 at 163.

\textsuperscript{87} \textit{Ibid.} at 166.
2. Dicey’s Dilemma

It is not hard to see the relationship between Dicey’s constitutional principles and Berlin’s analytical framework. At a very general level, Dicey’s idea of the rule of law was meant to provide something of a bulwark against parliamentary government. Nevertheless, it is important to follow through with the analysis, because only by revealing the full content of Dicey’s formulation will we be able to engage in a forthright discussion about the character of the Diceyan dialectic. As Berlin aptly noted, “to understand such movements or conflicts is, above all, to understand the ideas or attitudes to life involved in them, which alone make such movements part of human history, and not mere natural events.” This advice is equally germane when probing the “scientific” basis Dicey claimed for his constitutional theory and its place in public law more generally.

At the beginning of the nineteenth century, English politics were marked by at least three indelible influences. The first concerned the ongoing transition from monarchical to parliamentary government. While this process was set in motion by the Civil War and formalized by the Bill of Rights in 1689 and the Act of Settlement in 1701, it was not until the early nineteenth century that Parliament secured its independence from the Crown’s influence. The transition to parliamentary government, however, did not entail full democratic reform. That process would take another century, culminating in 1928 when women were granted an equal vote in parliamentary elections.

The second influence concerned the profound impact of the industrial revolution, which began in the latter half of the eighteenth century. The enormous technological and economic progress associated with the industrial revolution spilled over into the political arena. This age of national prosperity lent considerable force to laissez-faire capitalism, but it also invigorated political movements amongst the landed gentry, the newly propertied and the working classes. Unsurprisingly, the rapid technological advances

88 Ibid. at 121.
sparked by the industrial revolution also caused a significant social and political upheaval throughout England.

Finally, popular optimism and economic prosperity in Britain gave an imperialist edge to political scholarship during the nineteenth century. The rhetoric of Blackstone and Burke regarding the felicitous nature of English law, as compared with its continental counterparts, was a recurrent device in both legal and political discourse. As Ivor Jennings noted, “British economic supremacy in the nineteenth century was not likely to extinguish the notion that Englishmen had an inherent capacity for government which other nations did not possess.”

Dicey, like many other intellectuals of his period, took an avid interest in the politics of the nineteenth century and his scholarship reflects a curious amalgam of these influences. Among other things, he was a staunch individualist; a proponent of laissez-faire economic policy; a great admirer of Jeremy Bentham and the utilitarian reform movement (although he was less enthusiastic about democratic constitutional reform); and, like Blackstone, he was prone to eulogize the distinct Englishness latent in the common law and traditional legal institutions. But at times, these sentiments led Dicey to make some rather peculiar claims, among them that “Benthamism was…little else than the logical and systematic development of those individual rights, and especially of that individual freedom which has always been dear to the common law of England.” Of course, this is absurd. Bentham made a career of lampooning the common law and its chief expositor, Blackstone. He regarded the common law as nothing more than an irrational or “fictional” impediment to utilitarian reform and sought to relieve his readers from the delusion (induced by Blackstone) that the common law was, in fact, law at all.

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Moreover, Dicey’s suggestion of a common law ground for individual rights does not square easily with Bentham’s contempt for the notion of natural rights.\textsuperscript{94}

In order to understand why Dicey forced this marriage between Bentham and the common law, we have to gain a better understanding of his political predilections. Dicey’s political theory hinged on individualism, an ideology he ascribed to Bentham.\textsuperscript{95} Dicey revered Bentham’s utilitarian principle—that legislation should promote the greatest happiness of the greatest number—and held that it was contingent upon the idea that the individual was the best judge of his own happiness. But, unlike Bentham, Dicey was sceptical of the legislature’s role in promoting utility. Given the diversity and complexity of individual desires, Dicey thought that the legislature could not orchestrate individual happiness; it could only aspire to establish the conditions under which citizens might prosper.\textsuperscript{96} Thus, Dicey claimed that “though laissez-faire is not an essential part of utilitarianism it was practically the most vital part of Bentham’s legislative doctrine.”\textsuperscript{97}

In reality, it seems that the utilitarians were themselves more divided on this issue. Even John Stuart Mill, the great author of the liberal manifesto \textit{On Liberty}, significantly qualified his views over his lifetime.\textsuperscript{98} But Dicey remained throughout an undaunted supporter of laissez-faire.\textsuperscript{99} While he advocated legal reforms which repealed unnecessary laws, he was deeply sceptical about proactive legislative measures. In his


\textsuperscript{95} Dicey, \textit{Law & Public Opinion}, supra note 46, Lecture VI. See also A.V. Dicey, “Modern English Law” (1876) 23 Nation 273; A.V. Dicey, “Bentham” (1878) 27 Nation 352.

\textsuperscript{96} \textit{Ibid.} at 137.

\textsuperscript{97} \textit{Ibid.} at 147.


\textsuperscript{99} In fact, at various points in \textit{Law & Public Opinion}, Dicey takes Mill to task for corrupting the utilitarian creed by importing notions of egalitarianism. See \textit{e.g.} Dicey, \textit{Law & Public Opinion}, supra note 46 at xxviii (fn 2).
mind, individualism was the only political creed worthy of being called “legal science”, because its principles established logical and systematic parameters for both parliamentary and judicial legislation. This enthusiasm is underlined by the fact that Dicey extolled Bentham by comparing him to the great mechanical inventors of the industrial revolution, such as James Watt and Richard Arkwright, suggesting that legislation constructed along individualist lines was characteristic of an advanced, prosperous and technological civilisation.

Dicey’s dilemma concerned the social implications of his brand of individualism. On the one hand, he could understand how institutions like trade unions and democratic government could be reconciled with individualism; he was also wary, however, that such developments might undermine his preference for laissez-faire. At the micro level of social interaction, individualism entailed the expansion of freedom of contract, but Dicey was troubled by the problem posed by trade combines (a conglomeration of individual contracts) for laissez-faire economic policy. He thought this “speculative paradox” revealed an important gap in Benthamite philosophy: “the tendency of all individualists to neglect the social aspect of human nature.” In retrospect, this observation applies equally to Dicey’s constitutional theory, because he could not rationalize a valuable proactive role for democratic government.

This same dilemma played out at the macro level of social interaction. While Dicey could see how individualism might aid movements for democratic reform, he recognized that a democratic government could not guarantee individualist legislation since its actions would be dictated by public opinion, not legal science. Public opinion was the antithesis of Dicey’s scientific legislative rationale, because it consists of the volatile “speculative views” held by the electorate instead of an enlightened theory of

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100 Ibid. at 135-136, Lecture IV.
101 Ibid. at 130. See also Dicey, “Bentham”, supra note 95.
102 Ibid. at 155. See also A.V. Dicey, “The Legal Limits of Liberty” (1868) 3 Fortnightly Review (N.S.) 1.
103 Ibid. at 158.
104 Ibid. at 158-168. Like Berlin, Dicey recognized that individualism did not logically entail democratic government (or vice versa), but that there was still a strong kinship between these political values.
It has no intrinsic preference for individualism, logicality or coherence because at bottom it is driven by the accumulation of irrational self-interest and prejudice, manipulated by party factions and cobbled together through *ad hoc* political compromises to result in legislation. It was all too predictable that the chickens hatched through democratic reform would come home to roost in a manner worrisome to the Victorian compromise, whereby an elite governing class passed *laissez-faire* legislation through Parliament. No sooner had the Radicals begun repealing old law and introducing constitutional reforms did the opponents of *laissez-faire* begin mobilising political support for new government programs premised on the conflicting ideal of “collectivism” that state intervention should enhance common welfare. The interesting point here is that although the collectivist rationale conflicted with *laissez-faire*, it remained strictly compatible with the utilitarian principle Bentham preached.

But compatibility with utilitarianism did not redeem collectivist initiatives in Dicey’s estimation. Throughout his *Lectures on Law and Public Opinion*, he makes a series of thinly veiled attacks on various collectivist legislative policies. For instance, in Lecture VIII he derides publicly funded education (for compelling disinterested individuals to bear the expense); workmen’s compensation schemes (for eroding freedom of contract, personal responsibility and forcing employers to pay for insurance); welfare reform and old age pensions (for comforting undeserving individuals).

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<td>105</td>
<td><em>Ibid.</em> at 3. It is no accident that Dicey begins his discussion on public opinion by reciting Hume’s paradox and refers to public opinion as various forms of vulgar irrationality (<em>i.e.</em>, the manifestation of feelings, beliefs, sentiments, inclinations and speculations), in contrast to the rational logic of individualism.</td>
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<td>108</td>
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disenfranchisement of persons in receipt of social assistance\textsuperscript{112} in addition to lamenting the advent of labour standards legislation and progressive taxation.\textsuperscript{113}

Against this background, it is easy to see where Dicey’s political theory fits in terms of Berlin’s typology. If Berlin was a tad sympathetic towards negative liberty, Dicey was a true believer. Whereas Berlin thought \textit{laissez-faire} was a perversion of negative liberty and was prepared to allow room for other values (like equality or justice), Dicey’s vision was decidedly monochromatic: negative liberty was the ultimate value and its epitome was \textit{laissez-faire} economic policy. If a legislative proposal could not be justified on the grounds that it enhanced the scope of individual freedom, it was automatically suspect. This largely explains Dicey’s antipathy for redistributive social programs. And like Berlin, Dicey perceived that democratic government does not guarantee negative liberty, because it is ultimately contingent upon the ebb and flow of public opinion. Since public opinion was characterized by irrationality and prone to manipulation by party factions, parliamentary government posed a constant threat to Dicey’s preferred ideological equilibrium.

Both Berlin and Dicey opted for similar escapes from their respective dilemmas, namely to establish guaranteed frontiers of negative liberty as a bulwark against the exercise of popular sovereignty. For a short period (at least in retrospect), it seemed to Dicey that an enlightened Parliament inspired by the doctrine of individualism was capable of maintaining such limits, but as the electorate became increasingly heterogeneous these limits became confused by ideological conflict. So Dicey resorted to other devices to constrain legislative adventures.

One device was the referendum or “nation’s veto”, whereby all amendments to any important piece of legislation, including (but not necessarily limited to) constitutional

\textsuperscript{112} \textit{Ibid.} at xxxiv, li.
\textsuperscript{113} \textit{Ibid.} at li-lii.
reform, were contingent upon popular approval. Toward the end of the nineteenth century, when democratic constitutional reform was becoming politically entrenched, Dicey began advocating the referendum as a means of limiting the extent to which Parliament could exercise unrestrained legislative power. Sir Henry Maine, speaking of the Swiss experience, declared that the referendum “can only be considered thoroughly successful by those who wish that there should be as little legislation as possible” because most citizens, when confronted with an actual legislative proposal, were apt to find some reason for preferring the status quo. Dicey conceded this observation, but dismissed its critical aspect by saying “no one has a right to complain of an effective bridle that it is not a spur.” At other times, he cast the referendum in a more positive light by comparing it to the role of a jury. This comparison is loaded, because Dicey idealized the jury system as the means by which individual liberty could be vindicated by fellow citizens who were apt to deflect the coercive power of the state. The same reasoning applied to the referendum: if you were going to have a democratic government, warts and all, it was best to fashion a democratic constraint to prevent political parties from imposing rash legislative policies on society in general. Thus, the referendum was consistent with Dicey’s political beliefs, not because he was a proponent of popular

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114 See A.V. Dicey, “The Referendum” (1894) 23 National Rev. 65; A.V. Dicey, “The Referendum and its Critics” (1910) 212 Quarterly Rev. 538; A.V. Dicey, “The United States and the Swiss Confederation” (1885) 41 Nation 297. Hugh Tulloch points out that, in addition to the question of home rule for Ireland, Dicey wanted to subject the Old Age Pensions Act of 1908 and female suffrage to the test of a referendum in the hopes that both initiatives would be thwarted by conservative public opinion. See Tulloch, “Irish Question”, supra note 91 at 155.


117 Ibid. at 548.

118 A.V. Dicey, “Judicial Policy” (1874) 29 Macmillan’s 473 at 481: “When an unreformed Parliament failed to represent large masses of the people, the jury-box became a representative institution, and popular sentiment expressed itself through the voice of the jury, when it could find no utterance within the walls of the House of Commons”.

119 Dicey, “Referendum and Its Critics”, supra note 114 at 543. The main problem with democratic government, according to Dicey, was the advent of party factions that tended to give modern legislation an extremist bent: “The point in debate is whether the English democracy now established in power requires to be spurred on towards rapid legislation by the factitious and by no means disinterested agitation that forms the life of the party system, or rather needs some strong check on the tendency to yield at once to the prevalent idea, sentiment, or passion of the moment.” See also Dicey, “The Referendum”, supra note 114; Cosgrove, Rule of Law, supra note 11 at 108-109.
sovereignty (as I have already noted, Dicey was at best ambivalent about public opinion), but because it fostered a minimalist role for the legislative branch.\textsuperscript{120}

The second, more subtle, strategy was to reserve a prominent role for the judiciary in the constitution in the hopes that it would limit parliamentary incursions along lines mandated by legal science. Dicey regarded the judiciary as “the best and soundest of English institutions”\textsuperscript{121} and the common law or “judicial legislation” as the most important aspect of the English legal system.\textsuperscript{122} It accounted for nearly all law governing interpersonal relationships (\textit{i.e.}, contract and tort); some of the better examples of parliamentary legislation, like the Sale of Goods Act, were in reality a codification of common law rules; and even those statutes that were not premised on the common law were subjected to judicial interpretation, which endowed them with “nearly all their real significance”.\textsuperscript{123} It is difficult to overstate Dicey’s admiration for the Bench. In his mind, public reverence for judicial character guaranteed compliance with its decisions,\textsuperscript{124} in contrast with public contempt for parliamentary legislation.\textsuperscript{125}

Dicey attributed this institutional superiority to the character of the English courts. Although judicial temperament was (to a limited extent) influenced by public opinion, Dicey thought judges constituted an independent social caste with its own distinct motives. Members of the judiciary were an elite group of legally trained professionals who were well remunerated and shared the sentiments of the higher social classes.\textsuperscript{126} Judicial independence ensured that English courts remained insulated from political manoeuvring, and the traditions of common law practice favoured the rigorous

\textsuperscript{120} See Tulloch, “Irish Question”, \textit{supra} note 114; Mads Qvortrup, “A.V. Dicey: The Referendum as the People’s Veto” (1999) 20 History of Political Thought 531. For a contrary argument that Dicey was in fact “an ardent supporter of popular sovereignty”, see Rivka Weill, “Dicey was not Diceyan” (2003) 62 Camb. L.J. 474.

\textsuperscript{121} Dicey, “Judicial Policy”, \textit{supra} note 118 at 473.

\textsuperscript{122} Dicey, \textit{Law & Public Opinion}, \textit{supra} note 46 at 361.

\textsuperscript{123} \textit{Ibid.} at 362.

\textsuperscript{124} Dicey, “Judicial Policy”, \textit{supra} note 118 at 474.

\textsuperscript{125} A.V. Dicey, “The Prevalence of Lawlessness in England” (1883) 37 Nation 95.

\textsuperscript{126} Dicey, “Judicial Policy”, \textit{supra} note 118 at 478.
application of legal science to discrete cases, especially in the face of popular opposition. By contrast, members of Parliament were likely to adopt more sweeping, haphazard remedies in order to ingratiate themselves to a fickle electorate. Thus, the nature of the judicial role was, insofar as possible, to mould legislation in accordance with the tenets of legal science and had the extra advantage of restricting the use of state coercion to enforcing discrete judicial decisions.

C. The Question of Administrative Authority

Having said all this, what are we to make of Dicey’s constitutional theory and its aversion to administrative authority? From a distance, Dicey’s theory seems utterly confused and unstable. On the one hand, it is anchored by Austinian legal positivism and the idea of legislative sovereignty; on the other hand, it prescribes an anti-positivist judicial role that ultimately determines the content of legislation by common law standards, usually with the aim of stifling popular legislative projects. In practice, the principles of parliamentary sovereignty and the rule of law are seen to be locked in a contest for supremacy within the constitution, and this contest effectively excludes any constructive legal role for administrative institutions.

127 Ibid. See also A.V. Dicey, “Sir George Bramwell and the English Bench” (1881) 33 Nation 468.

128 Dicey, Law & Public Opinion, supra note 46 at 370 n 1: “Parliament in most instances pays little regard to any general principle whatever, but attempts to meet in the easiest and most off-hand manner some particular grievance or want. Parliament is guided not by considerations of logic but by the pressure which powerful bodies can bring to bear on its action. Ordinary parliamentary legislation then can at best be called only tentative. Even ordinary judicial legislation is logical, the best judicial legislation is scientific”.

129 In this regard, Dicey’s theory bears strong resemblances to John Austin’s concept of authority and utilitarian epistemology. Austin argued that because the masses were incapable of assessing the utility of alternative courses of conduct for themselves, they should defer to the judgment of an elite class of “inquirers” who were capable of applying the utilitarian science to human affairs. This argument explains, to some extent, Austin’s apology for the common law, which deviates from Bentham’s views on utilitarianism. See Austin, The Province of Jurisprudence Determined, supra note 5 Lecture III; John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, 5th ed. by Robert Campbell (London: John Murray, 1885) vol. I, Lecture III; R.B. Friedman, “An Introduction to Mill’s Theory of Authority” in J.B. Schneewind, ed., Mill: A Collection of Critical Essays (London: Macmillan, 1968) 379.

130 This confusion may be symptomatic of a deeper problem in traditions of political thought. For instance, while Thomas Hobbes’ political philosophy reserves pride of place for a sovereign legislator and positive law, it also preserves an important role for the judiciary and natural law reasoning. See e.g. David Dyzenhaus, “Hobbes and the Legitimacy of Law” (2001) 20 Law & Phil. 461. Likewise, while John Austin’s command theory of law revolves around an uncommanded commander, it also preserves a significant role for judicial elites for fear that the legislative branch may fall under the control of the masses. See supra n 129.
But we might better understand it as an attempt, albeit controversial and confused, to come to grips with the central tension between “negative” and “positive” liberty in democratic society. From this point of view, it was designed to set what Dicey thought were the legitimate limits of state authority. The gloss of legal science lent it the necessary leverage to “define as precisely as possible the boundaries which delineated permissible self-regarding behaviour (“rights”) from activities which interfered with the “self-regarding” activities of others.”\footnote{Sugarman, “Legal Boundaries”, supra note 12 at 108.} This strategy has important institutional implications, since legal science was reserved for judges, lawyers and law professors who would remain faithful to laissez-faire ideals. Parliamentary legislation was tolerated only to the letter, with the remainder accruing to the judiciary. By elimination, there was no room for administrative authority, because there was no scenario in which judges should defer to administrative interpretations of law.

The fact that Dicey’s political ideology caused him to preclude administrative authority in this way should be cause for concern amongst constitutional theorists because it skews our understanding of how to resolve questions of legal authority as between different legal institutions or officials. These questions have traditionally been addressed through debates regarding a “separation” or “division” of legal powers, but by equating the idea of a separation of powers with the doctrine of judicial independence Dicey seriously underestimated the complex relationship between legal institutions. The result is that, although Dicey’s theory does attempt to grapple with questions of how to resolve disagreements between Parliament and the courts, his resolution is problematic because it appears to give judges a broad licence to emaciate legitimate legislative projects. It is just as problematic from the perspective of administrative law that Dicey’s theory does not afford any degree of legal authority for administrative institutions, since they play such an important role in deciding how best to interpret and pursue legislative objectives on a daily basis.

However, even today there is a persistent tendency to alienate Dicey’s constitutional theory from its controversial political foundations. Perhaps the most telling evidence of
this is the tendency amongst both public lawyers and historians to venerate Dicey’s abstract description of the constitution in *An Introduction to the Study of the Constitution*, while ignoring the practical normative foundation Dicey laid for it in his other writings. For instance, in their landmark textbook on administrative law, Sir William Wade and Christopher Forsyth preface their discussion of Dicey’s constitutional theory by observing that “most students of public law feel no need to explore the theory which forms its background; or, if they do, they find little illumination.”132 This posture is both ambiguous and problematic. If Wade and Forsyth mean to promote the constitutional principles of parliamentary sovereignty and the rule of law as Dicey conceived them, then they are assuming a constitutional theory that cannot easily be reconciled with the complex institutional practices that typify most democratic constitutional arrangements. If, however, they are promoting different conceptions of these constitutional principles (conceptions that can be reconciled with the modern administrative state) then the content of those principles should be articulated. However, by simply perpetuating the Diceyan dialectic and marginalizing the important questions of political principle that it raises, Wade and Forsyth risk obscuring important questions regarding administrative authority. This approach might explain the seemingly intractable nature of current debates within administrative law that remain trapped by the Diceyan dialectic.133

One way of grappling with the dialectic is to acknowledge that descriptions of orthodox constitutional theory rooted in the Diceyan tradition contain an important blind spot regarding the question of administrative authority. Instead of treating administrative institutions as alien or hostile per se, public lawyers should look for additional resources to explain why administrative judgments are important and valuable from a legal perspective. In doing so, they would be exploring an avenue of inquiry which Dicey recognized (but did not pursue) in his later years when he softened his criticism regarding droit administratif. Although Dicey never altered his essential ideas about the rule of law and the English constitution, his perception of droit administratif changed dramatically


between the first and the seventh edition of his treatise. These revisions, which were prompted by Dicey’s engagement with French public lawyers, reveal “a distinct change of tone, and indeed a very handsome acknowledgment of the way in which droit administratif had become a stable body of law administered by tribunals which were now almost completely judicialized.”

Hence, in describing the character of droit administratif in 1908, Dicey rendered a more optimistic assessment of droit administratif:

To any person versed in the judicial history of England, it would therefore appear to be possible, or even probable, that droit administratif may ultimately, under the guidance of lawyers, become, through a course of evolution, as completely a branch of the law of France (even if we use the word “law” in its very strictest sense) as Equity has for more than two centuries become an acknowledged branch of the law of England.

Nevertheless, Dicey ruled out the possibility of a similar development in England because he thought that the logic of droit administratif, which judges the relationship between citizen and state essentially different from the rule of private law, was simply incompatible with the traditions of the English constitution.

I want to revive this line of inquiry in subsequent chapters by examining the doctrine of curial deference towards administrative decisions. That doctrine requires judges to engage in a more forthright contextual analysis in order to understand the various reasons (both within the statute and at common law) for deferring to administrative decisions, and to ensure that administrative decisions are in fact generally faithful to those values.

This analysis provides a better foundation for understanding administrative authority and a principled way to revise our understanding of traditional constitutional theory in light of the modern administrative state. Nevertheless, it is also important to recognize that the doctrine of deference has problems of its own that require attention. Although it has greatly benefited from the piecemeal method of the common law, it needs to be further

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134 Lawson, “Dicey Revisited”, supra note 39 at 111. See also, Dicey, Introduction, supra note 9 c. 12; A.V. Dicey, “Droit Administratif in Modern French Law” (1901) 17 L.Q.R. 302. I am grateful to David Dyzenhaus for drawing this point to my attention.

135 Dicey, Introduction, supra note 9 at 382-383.

136 Ibid. at 389-391.

137 See e.g. Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982.

refined as a matter of principle. This more theoretical endeavour, which will be undertaken in the last chapter, reveals the normative basis of the interrelationship between courts and administrative institutions within complex constitutional arrangements. In other words, it reveals a possibility that Dicey rejected too hastily: the possibility of developing a constitutional theory that is capable of explaining and justifying how administrative decision-makers contribute to the modern democratic ideal of good governance.
III. Administrative Authority and Public Law Theory

Despite its controversial political foundations and overt contempt for administrative authority, A.V. Dicey’s constitutional theory continues to exert a powerful influence over attempts to theorize about administrative law. Over the last century, it seems that most debates regarding administrative law are typically characterized by reiterations of the dialectic between Parliamentary sovereignty and the rule of law with little regard for the question of administrative legal authority.\(^1\) This is surprising considering the degree to which modern government relies upon administrative institutions to preserve national security, manage the economy, plan urban development, regulate the environment, etc. While the development of the modern administrative state has inspired innovations in related fields of inquiry, for the most part public lawyers have maintained their serene confidence in the theory inherited from Dicey. The most telling testament to this is the fact that both friends and foes of administrative authority have been unable to articulate a constitutional theory to rival Dicey’s paradigm.\(^2\)

Although the persistence of Dicey’s theory is problematic in many respects, it also has merits that should be recognized. One reason why Dicey’s theory remains so attractive is that it successfully conveys the idea that government is constituted by law, in the sense that it derives its authority from law as opposed to simply exerting its will over habitually obedient subjects. Although Dicey did appeal to the idea of Austinian sovereignty, he embedded it within an overarching theory of constitutional law. For instance, Dicey maintained that legislative authority was constituted by the relationship between democratic and traditional institutions, an arrangement he liked to call “democracy tempered by snobbishness”.\(^3\) Accordingly, the Queen, Lords and Commons could only

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produce legislation when they cooperated to issue statutes which were normally public, general, stable, and prospective in character.\(^4\) In addition, Dicey held that disputes regarding government action and interpretation of Parliamentary legislation were to be adjudicated by an independent judiciary. Taken together, these ideas express powerful and enduring sentiments regarding the manner in which government is constituted or authorized by law, employs it to achieve political ends, and subjects itself to the law through judicial review.

Despite the array of interesting disputes in twentieth century jurisprudence, this idea of government being constituted by law attracts a broad, albeit abstract, consensus amongst legal theorists. Hans Kelsen invokes it when he posits a legal system consisting of a chain of legal validity which culminates in the *grundnorm* that authorizes the constitution and all legal officials who draw authority from it;\(^5\) Herbert Hart uses it to debunk John Austin’s command theory of law and to establish a rule of recognition in its place by which legal officials identify valid legal norms;\(^6\) Lon Fuller appeals to it when he argues that the “inner morality” of law or “legality” shapes the law and constrains government action;\(^7\) and it is implicit in Ronald Dworkin’s theory of legal interpretation in which true legal propositions are determined by the best justification of a community’s political and constitutional practices.\(^8\) Furthermore, both positivists and anti-positivists alike seem to agree that independent judicial review plays an essential role in ensuring that the

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\(^4\) While Dicey did recognize the formal validity of retrospective Acts of Indemnity, he regarded this as an exceptional use of legislative power. See A.V. Dicey, *Introduction to the Study of the Constitution*, 10th ed. (London: Macmillan & Co, 1959) at 412-413 [Introduction]. Furthermore, by requiring Acts of Indemnity to be validated through the regular Parliamentary law-making process, the government still remained subject to law despite the fact that the statute compromised the aspect of prospectivity.


government is ruled by the law and remains subject to it.9 So, at least in this respect, Dicey’s constitutional theory was prescient: it proposed a theory of government according to the rule of law and identified a fundamental problem entailed by such a theory, namely the problem of ensuring government according to law through judicial review.

Nevertheless, this insight is often confounded by the Diceyan dialectic. As I argued in the previous chapter, the confusion associated with the dialectic stems from the way in which Dicey married Austinian positivism (which attributed supreme legislative authority to an uncommanded commander) with Blackstonian reverence for the common law method (which gives judges a monopoly on legal interpretation according to common law values). This confusion is most acute in hard cases in administrative law, where judges and lawyers tend to gravitate to one of the poles in Dicey’s constitutional theory. On the one hand, it is frequently tempting for judges to lose their grip on the idea that government is constituted or authorized by law and to substitute, in its place, the idea that government action is validated merely in a formal sense by positive legislation. This move has significant implications for judicial review, because instead of ensuring that the government is acting according to substantive rule of law values, judges who gravitate towards this view truncate their role to ensure merely that administrative action is validated by duly enacted statutes. As David Dyzenhaus puts it, the “rule of law” (which implies substantive normative constraints on how government interprets and applies the law) morphs into “rule by law”, where the only constraint is that government must act through the form of law to achieve its desired purpose.10

In the previous chapter, I argued that Dicey did not ultimately succumb to this temptation. This is confirmed by the prominent role he reserved for the judiciary and the

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9 Joseph Raz, “The Rule of Law and its Virtue” in Raz, The Authority of Law, supra note 5 at 210. For disagreement regarding whether the rule of law implies a degree of moral legitimacy, see Fuller, The Morality of Law, supra note 7.

common law within the constitution. 11 But I also demonstrated how his conservative political ideology caused him to promote a controversial conception of the rule of law, which was loaded against the idea of administrative authority per se. This prompted him to encourage a robust form of judicial review that he thought would stifle popular democratic legislative policies. Moreover, it caused him to mistakenly assume that the idea of administrative legal authority was simply untenable as a matter of constitutional law. In this chapter, I will demonstrate how, contrary to Dicey’s assumption, administrative legal institutions have become entrenched in constitutional practice. Furthermore, I will examine how public law theorists have responded to the development of the administrative state by adjusting their views regarding the rule of law. The purpose of this examination is to inquire whether either of the two dominant strains in modern public law scholarship, neo-Diceyanism and Functionalism, are capable of reconciling administrative authority with the rule of law.

But before exploring questions regarding the different movements within public law theory, I want to develop a better appreciation for the concept of administrative legal authority in the abstract. Since Dicey had neither truck nor trade with any idea of administrative legal authority, there has been no need to clarify the concept up to this point. If, however, we reject Dicey’s view on this issue, we will require at least a provisional understanding of it in order to proceed with our analysis of public law theory. In the next section I will sketch the outline of my abstract, provisional account of legitimate administrative authority. By doing so, I aim to develop a conception that combines criteria for legitimate possession of administrative authority with a requirement that an administrative institution demonstrate that legitimacy in more discrete applications of its authority. In other words, my account of legitimate administrative authority has two interrelated components. The first is concerned with identifying and explaining the various institutional reasons for deferring to administrative authority; the second is concerned with ensuring that more discrete exercises of administrative authority are justifiable in light of those underlying values.

11 Dicey, Introduction, supra note 4 at 188 and 413-414.
It is important to identify this conception of administrative authority so that we can distinguish it from the more traditional concept of administrative jurisdiction. The concept of administrative jurisdiction is problematic for two reasons. First, it assumes that all “jurisdictional” questions are questions of law that judges are entitled to determine exclusively according to their own standards of correct legal judgment. Thus, jurisdictional issues do not involve the idea of administrative authority at all, since they are determined by judges, not administrative decision-makers. Second, the concept of administrative jurisdiction is problematic because it suggests that beyond these jurisdictional parameters, administrative decision-makers are free to determine outcomes in a manner unconstrained by law. In other words, to the extent that the idea of administrative jurisdiction does involve a notion of administrative authority, that conception of discretionary authority is vulnerable to the charge of arbitrariness because it essentially involves the exercise of raw political power which occurs beyond the reach of the rule of law. Thus, according to the idea of administrative jurisdiction, once the criteria for jurisdiction or possession of authority have been satisfied, the administrative institution or becomes a law unto itself.

My provisional conception of legitimate administrative authority aims to avoid the shortcomings associated with the concept of administrative jurisdiction. It avoids the charge of judicial supremacy by firmly grounding itself in the idea that administrative decision-makers do, in fact, possess legitimate legal authority over questions of law so that their decisions deserve the respect of other legal officials and institutions. At the same time, however, the idea of legitimate administrative authority does not involve the unrestrained exercise of political discretion because it combines the criteria for legitimate possession of authority with the requirement that legitimacy be demonstrated in more particular instances where administrative authority is exercised.

A. The Concept of Administrative Authority

The best way of acquiring an understanding of administrative authority is to think through an example. Recall that in Anisminic v. Foreign Compensation Commission the Foreign Compensation Commission was empowered by statute to determine whether and
to what extent an applicant was entitled to receive compensation from the government.\textsuperscript{12} While an executive order did identify a set of relevant considerations for the Commission, it did not determine in advance whether any particular applicant would be legally entitled to receive compensation. That question was left to the Commission to decide by interpreting the executive order and applying it to the particular cases that came before it. Furthermore, the statute provided that any “determination by the commission of any application made to them...shall not be called into question in any court of law.”\textsuperscript{13} Under these circumstances, it would appear that (1) the Foreign Compensation Commission has been empowered by the legislature to decide according to its own interpretation of the relevant legal materials whether and to what extent an applicant is entitled to compensation and (2) that other legal institutions (especially courts exercising judicial review) ought not assume that they are entitled to substitute their own assessment of that question once it has been decided by the Commission. I want to suggest that this common intuition encapsulates the basic idea of administrative authority: that the Commission is empowered to declare what the law requires by exercising its own judgment regarding a particular legal issue and that that judgment should be respected by other legal institutions (i.e. courts), which are also responsible for making legal decisions under the constitution.

As it stands, this idea requires further elaboration. First, the idea obviously entails some notion of legal normativity or the ability to generate legal rights and obligations. In this regard, the idea suggests that the Commission has a legal right to decide the question before it, which also implies a duty or responsibility for others to respect its decisions. This means that when we recognize that an administrative institution has legal authority, we are really mounting an argument that one ought to respect the decisions issued by that institution. The fact that an administrative institution has rendered a decision on an issue that has been delegated to it by the legislature generally means that people have reasons not to simply reweigh the issue for themselves. There are many ways to describe this normative attitude, which is closely associated with the idea of a political duty. We might

\textsuperscript{12} \textit{Anisminic Ltd. v. Foreign Compensation Commission}, [1969] 2 A.C. 147 (H.L.) [\textit{Anisminic}].

\textsuperscript{13} \textit{The Foreign Compensation Act} (U.K.), 1950, s. 4(4).
variously refer to someone as obeying, complying, deferring, responding, respecting, surrendering or submitting to an authority’s decision in a way that they otherwise would not had the authority not issued a decision on the matter. While I think there are important differences between these various terms, it is not necessary to choose between them at this point. Suffice it to say that the assertion of administrative authority provides people with reasons that at least render a de novo reassessment and substitution of one’s own opinion for the administrative decision inappropriate.

Second, in order for the idea of administrative authority to be legitimate or rationally justifiable, it cannot be simply assumed or asserted. One should not simply assume that just because an administrative institution claims authority that it is entitled to it. A claim of authority, in other words, should provide people both with authoritative guidance and a lucid basis for assessing the legitimacy of ostensible authoritative directives.14 This second feature thus involves some reciprocity between those in authority and those who recognize a duty to respect or comply with an authority’s decisions. In the more specific case of administrative authority, it also involves a central tension, namely that the reasons which explain the legitimacy of an administrative authority serve the dual purpose of explaining why its decisions ought to be respected, and establishing a standard by which the legitimacy of those decisions might be judged by others.15 This feature is further complicated by the fact that the relevant reasons may vary according to the particular legal context that constitutes and justifies a particular administrative institution.

There are a variety of general ways to justify legal authority in general. For instance, one might argue that it is ultimately justified by the opportunity it provides to develop and

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15 David Dyzenhaus refers to this aspect of administrative authority as a “paradox of rationality”, because in recognizing the rationality of deferring to administrative authority, one implicitly begins to measure that practice against the standards of rationality. See Dyzenhaus, The Constitution of Law, supra note 10 at 126-129. The dual role of such reasons sheds light upon Dixon J’s judgment in R. v. Hickman, ex parte Fox and Clinton, (1945) 70 CLR 598 at 615 (H.C.A.), in which he declared that a court ought not invalidate an administrative decision “provided always that [the decision] is a bona fide attempt to exercise the power, that it relates to the subject-matter of the legislation, and that it is reasonably capable of reference to the power given to the body.”
sustain valuable public goods that serve the interests of the political community;\textsuperscript{16} or one might argue that it is justified whenever it possesses some form of superior practical expertise or is able to secure social coordination through authoritative guidance;\textsuperscript{17} or it may be legitimized by the moral integrity of the constitutional structure or legal practices that establish it in the first place.\textsuperscript{18} The point is that in attempting to understand legal authority (and, I would suggest, administrative authority more particularly), one must at the same time attempt to explain what makes having it worthwhile for its adherents.

As a result, one will inevitably be drawn into both descriptive and normative inquiries that involve identifying and evaluating the relevant explanations, values, reasons and justifications for establishing and deferring to administrative authority.\textsuperscript{19} One common justification for having administrative authority is that many administrative decision-makers possess special expertise on a particular subject. Alternatively, one might argue that administrative decision-makers are able to administer a particular social program more efficiently than the legislature or the courts. Separate and apart from considerations of expertise or efficiency, one might argue that the mere fact that legal authority has been delegated to an administrative institution through a fair democratic process justifies its legal authority. These are only a few examples. Given the wide array of administrative decision-makers, such an analysis will raise a number of different considerations that will vary according to the regulatory context. But it is important to recognize that all of these considerations are by their nature limited in scope. In order for an authority to be

\textsuperscript{16} John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980) c. IX.

\textsuperscript{17} Joseph Raz, “Introduction” in Joseph Raz, ed., Authority (Oxford: Blackwell, 1990) at 9-10.: “Knowing the limits of my knowledge and understanding, and being aware of the danger that my judgment will be affected by bias, and my performance by the weakness of my resolve, I am aware of the possibility that another person, or organization might be better able to judge when there are strong or sufficient reasons for social coordination in which I should participate. This may be the case if the person or organization is less likely to be biased than I am and if they have greater expertise than I have on the goods and social needs for which coordination may be required, and the ways of achieving them. In such a case I should adopt a rule to follow the instructions of such a person or body, to regard them as authorities, within certain specified bounds.”

\textsuperscript{18} Dworkin, Law’s Empire, supra note 8 c. 6.

\textsuperscript{19} In practice, it is unlikely that the descriptive and normative elements of authority can be completely disentangled when assessing claims to legitimacy. See Steven Lukes, “Perspectives on Authority” in J. Roland Pennock & John W. Chapman, eds., Authority Revisited: NOMOS XXIX (New York: New York University Press, 1987) 59.
legitimate, it must still incorporate some constraints which respect the autonomy and dignity of those subject to it.\textsuperscript{20}

Third, the types of reasons which justify administrative authority are operative \textit{as between legal officials and institutions} in addition to soliciting the respect of persons who are subject to administrative decisions.\textsuperscript{21} It is this inter-institutional aspect of administrative authority that is the most important when attempting to explain and justify the practice of judicial review of administrative action. This aspect of administrative authority is a bit tricky, because it is not wholly independent of the normative relationship between citizens and administrative institutions. As Jeremy Waldron points out,\textsuperscript{22}

\begin{quote}
It is usually not possible to understand the relation between one official or institution and another without understanding the relation between officials in general and those over whom officialdom ultimately rules (ordinary citizens). The relations come in one package.
\end{quote}

This means that if there are reasons for a citizen to regard an administrative decision as authoritative, those reasons are also relevant to how judges perceive their role in reviewing administrative decisions.

Returning to our example, I want to suggest that the Commission’s decision regarding the issue of compensation provides both citizens and courts with reasons to adjust their reasoning in light of that decision. Of course, there may be many different, conflicting opinions on how the Commission ought to decide any given case that comes before it: one of the main reasons Parliament established the Commission in the first place is to settle such disputes. But if citizens and courts behaved as though they were entitled to

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\textsuperscript{20} For instance, Joseph Raz argues that a theory of legitimate practical authority must incorporate some principled limits on the scope of that authority. For Raz, such limits include (1) the proposition that one cannot possess authority to do what one cannot do efficiently and (2) that one cannot possess legitimate authority on “those matters regarding which it is more important to act independently than to succeed in doing the best.” See Raz, \textit{Authority}, supra note 17 at 12-13. By contrast, Ronald Dworkin argues that the requirements of equality, justice and integrity establish interpretive moral parameters for political authority and obligation. See Dworkin, \textit{Law’s Empire}, supra note 8 c. 6.
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\textsuperscript{22} \textit{Ibid.}
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modify Commission decisions whenever they disagreed with them, they would not be respecting the legitimacy of the institutional arrangement established by the legislature. Waldron describes this as a situation which requires respect for institutional settlements.\(^{23}\)

If there is an essential core to the idea of respect in the context of institutional settlement – the concept of respect, perhaps, as opposed to particular conceptions of respect – it is this. First, one must acknowledge that what is at stake here is a question of common concern; second, one must recognize the presence of established arrangements for producing answers to such questions; third, one must ascertain whether such arrangements have actually produced a decision that answers the question; and fourth, if they have, one must play one’s part in the social processes that are necessary to sustain and implement such decision as a settlement.

Now as Waldron makes clear, the idea of “playing one’s part” in implementing the relevant decision is not an all-or-nothing question. Respect in this context does not necessarily mean that courts must accept every Commission decision no matter what. There may be instances where the Commission’s decision is so perverse that a citizen or court may be justified in withdrawing their support for the decision, either because the decision is no longer rationally justifiable on its own terms as a plausible expression of legitimate administrative authority or in terms of other constitutional principles which courts are duty bound to uphold. Nevertheless, even in these situations one would not say that there were no reasons for institutional or official deference, but rather that those reasons were somehow negated by the administrator’s more particular decision on the question or outweighed by other important considerations which triggered another institutional response.

This is an admittedly provisional account of the idea I want to pursue in the next few chapters. I will later try to flesh out different ways in which this idea has been expressed in common law doctrines regarding judicial review of administrative action. But since we are still dealing with the idea in the abstract, it might be helpful to further elucidate it by comparing it with the most prevalent account of authority in legal philosophy, namely Joseph Raz’s service conception of authority.\(^{24}\)

\(^{23}\) Ibid. at 56.

For Raz, one of law’s essential features is that it claims to possess legitimate authority, and his service conception of authority seeks to explain the conditions under which an authority is legitimate. Legal authority requires some sort of justification because, at first glance, it might otherwise appear that a duty to obey law is an unwarranted abdication of personal autonomy or “one’s right and duty to be responsible for one’s action and to conduct oneself in the best light of reason.”

The general response that Raz provides is that law’s authority is justified to the extent that it enhances one’s practical reasonableness. In other words, deference to law is not an unwarranted surrender of autonomy if, generally speaking, such deference improves our ability to make good practical decisions for ourselves. Raz’s general explanation consists of three central theses: the normal justification thesis, the dependence thesis, and the preemption thesis. Each of these theses explains, respectively, (1) the conditions which legitimate or justify authority in general, as well as legal authority in particular, (2) what general considerations should guide legal authorities in light of its normal justification, and (3) how expressions of legal authority impact one’s practical reasoning.

Raz begins with the basic intuition that deference to an authority is neither irrational nor unjustifiable when compliance with authoritative directives is likely to enhance our ability to make good practical decisions for ourselves. For example, a patient is justified in deferring to the therapeutic judgment of her doctor, because the patient is more likely to conform to reasons which will enhance her physical well-being by deferring to the doctor’s expertise instead of deciding the question for herself. This intuition, most commonly associated with theoretical authority, leads Raz to endorse what he calls the normal justification thesis, which claims that

> the normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.

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26 Raz, “Authority and Justification”, *supra* note 24 at 18-19 [emphasis original].
Although Raz acknowledges that this is not the exclusive way to justify or legitimate all types of authority, he does argue that it is “the normal and primary one” for practical authorities and, by extension, legal ones.\(^\text{27}\) So while he does recognize the possibility of other “secondary” justifications for deference (i.e. as a means of expressing one’s membership within a political community), he argues that such considerations are not sufficient to render an authority legitimate independent of the normal justification thesis.\(^\text{28}\) Secondary justifications can only serve “to lower the burden of proof” required to establish the normal justification thesis, but “cannot by themselves establish the legitimacy of an authority.”\(^\text{29}\) Thus, in circumstances where an institution claiming authority does not satisfy the minimum conditions set by the normal justification thesis, no amount of respect or self-identification with the community would justify one’s attitude of deference towards that particular institution.

The normal justification thesis implies the dependence thesis, which claims that\(^\text{30}\)

> [a]ll authoritative directives should be based, in the main, on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”

Returning to the doctor/patient scenario, this means that, ideally speaking, the doctor ought to base her therapeutic judgment primarily (although not exclusively) upon reasons which are relevant to the patient’s physical condition and well-being rather than basing her diagnosis upon extraneous considerations. If this were not the case, it is unlikely that the patient would construe her doctor’s advice as authoritative in the long run. This does not mean, however, that an authoritative directive is binding only if it correctly reflects all of the independently relevant reasons that apply to its subjects in particular cases. If that were the case, Raz argues that authorities would make no practical difference in our deliberations, because they would merely direct us to do what we ought to be doing in any event. But he argues that a doctor’s mistaken medical advice will still be binding, so

\(^{27}\) Ibid. at 19.


\(^{29}\) Raz, “Authority and Justification”, *supra* note 24 at 19.

\(^{30}\) Ibid. at 14.
long as it satisfies the more abstract conditions of the normal justification thesis. For Raz, this shows that an authority can make a practical difference, because it has the ability to bind its subjects even in situations where its directives do not correctly assess the merits of a particular case. Taken together, the normal justification thesis and the dependence thesis comprise what Raz calls the service conception of authority, which asserts that the primary function of legitimate authority is to serve the governed by helping them to act on the reasons which apply to them.

Finally, in order to explain the dynamics of authoritative guidance, Raz argues that directives issued by legitimate authorities provide a special type of reason which subjects take as a reason not to undertake their own practical assessment of the relevant reasons for action. This is the preemption thesis: 31

*[31]* The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.

Returning to our example, Raz would argue that when a patient follows a doctor’s advice, they do not merely assign weight to the advice in order to compare it with other reasons that are apparent to them. Rather, they take the fact that the doctor prescribes treatment x as a reason to undergo the treatment without undertaking their own assessment of the issue. If they did, they would risk forgoing the opportunity to be guided by medical expertise by entertaining their less educated guesses about the matter. Thus, the doctor’s advice has the ability to provide the patient with a reason for not acting on otherwise relevant practical considerations, and that reason allows the patient to reap the full benefits of submitting to medical expertise insofar as her physical well-being is concerned. 32

The preemption thesis is meant to reveal the special normativity of authoritative directives. As already mentioned, they are *exclusionary* in the sense that those subject to the authority take the directive as a reason for excluding or pre-empting actions based

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upon their own assessment of a subset of otherwise eligible reasons for action. Authoritative directives are not just another reason to be weighed against others, rather they are “meant to be based on the other reasons, to sum them up and to reflect their outcome.” In doing so, the directive replaces some set of otherwise relevant reasons for action. Furthermore, the distinct reasons provided by the directive are content-independent, in the sense that they are facts that exert normative influence in virtue of some feature besides their substantive content. This is demonstrated by the fact that the doctor’s advice still has exclusionary force, even when her advice is mistaken or incorrectly reflects the balance of reasons on the actual merits. So long as the authority generally satisfies the normal justification thesis, those subject to it are justified in deferring to its directives. In Raz’s words, “an authority is legitimate only if there are sufficient reasons to accept it, that is, sufficient reasons to follow its directives regardless of the balance of reasons on the merits of such action.”

How does Raz’s picture of authority and deference compare with the provisional idea of administrative authority I sketched out earlier in this section? More specifically, how does it relate to the explanatory, normative, justificatory and institutional features of my provisional account?

First, it seems that while my ideas about legitimate administrative authority might accommodate something like the normal justification thesis as an eligible reason for deferring to administrative decisions, it is by no means the only or perhaps even the primary justificatory reason for doing so. Separate and apart from such considerations,

33 See Joseph Raz, Practical Reason and Norms (Princeton, 1990) c. 1. Within Raz’s account of practical reasoning, exclusionary reasons are second-order reasons, which function differently than more ordinary first-order reasons. Whereas conflicts between first-order reasons are resolved by their relative weight, conflicts between exclusionary second-order reasons and first-order reasons are subject to a general principle of practical reasoning that determines that the exclusionary reasons prevail. However, this general principle is subject to two exceptions: an exclusionary reason may not prevail where (1) it is subject to a “nullifying condition” or (2) incorporates certain scope affecting considerations which limit the types of first-order reasons it excludes.

34 Raz, “Authority and Justification”, supra note 24 at 9.

35 Raz, The Morality of Freedom, supra note 24 at 35.

36 Raz, “Authority and Justification”, supra note 24 at 8.
the idea of administrative authority necessarily involves consideration of *how that authority has been established*. For instance, the fact that an economist possesses expertise relating to identifying to ideal conditions of competition in the widget making industry is obviously not a sufficient condition to establish her as an administrative authority in that field. It is only when the legislature delegates that authority to her that her claim to administrative authority becomes plausible. Of course, this does not mean that the economist’s expertise is no longer relevant to the character of her authority: the legislature probably based its decision to invest her with authority on her expertise and capacity for efficiency in regulating the widget making industry. My only point is that, as it stands, the normal justification thesis overlooks an important element in understanding how administrative authority is constituted and its relation to the grounds for respecting its legal status.

This criticism is inspired by a broader democratic objection to the Razian conception of authority. The objection claims that in democratic legal systems, there are reasons for recognizing the authority of legal officials and institutions that are different from considering whether the legal authority is generally capable of enhancing our substantive reasonableness in the way Raz suggests. According to the objection, we need fair democratic process precisely because of the pervasiveness of reasonable disagreement between people on questions of common concern, and those disagreements extend to debates about who or what should be recognized as a legal authority on those questions. The democratic argument suggests that we have reason to comply with laws established through fair legislative processes that convey equal respect for those subject to law. While one might believe the democratic process will generate better substantive decisions, there are clearly further non-instrumental reasons for recognizing the legitimacy of democratic laws. For instance, one might argue that legal legitimacy in a democracy is motivated by the idea that citizens should not be merely subject to legal requirements, but ought to play a meaningful and equal part in creating them as well.

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This relationship fosters a distinct normative attitude amongst citizens and legal officials in democratic legal systems. As Waldron puts it:\textsuperscript{38}

> When something is enacted as law or as a source of law, I believe it makes on us a demand not to immediately disparage it, or think of ways of nullifying it or getting around it, or mobilizing the immune system of the corpus juris so as to resist its incorporation. This must be stated carefully, for systems like ours also make available generous structures like appeal, constitutional amendment, legislative reversal, judicial review, periodic elections, and so on; so, in a sense, no one is ever required to accept a legal or political defeat as final or irreversible. However, the demand that interests me operates in the logical space between defying or ignoring a statute or other legal decision and working responsibly for its repeal or reversal. It is a demand for a certain sort of recognition and, as I said, respect—that this, for the time being, is what the community has come up with and that it should not be ignored or disparaged simply because some of us propose, when we can, to repeal it.

Thus, we can imagine situations where we would believe a despotic decision to be an illegitimate expression of authority, even when it is likely to enhance our practical reasonableness. Conversely, we can imagine situations where we would consider ourselves justified in deferring to democratic laws and institutional arrangements, even when we think those arrangements are sub-optimal or concern issues we think we might do better reasoning for ourselves.\textsuperscript{39} This same intuition explains why broadening the reach of the normal justification thesis (i.e. by recognizing the capacity of authority to solve complex social coordination problems) is not an adequate response to the democratic objection,\textsuperscript{40} for even if a despot is capable of resolving coordination problems one might question its legitimacy on non-instrumental democratic grounds.\textsuperscript{41}

Now, to be fair, Raz readily admits that the normal justification thesis is not the only way to justify authority, but only the primary way. He leaves open a category of “secondary” justifications which might contribute to the idea of legitimate authority, by lowering the evidentiary burden required to establish the normal justification thesis. But, at least in the case of administrative authority, it seems that the “normal” or “primary” justification is

\begin{itemize}
\item \textsuperscript{38} Waldron, \textit{Law and Disagreement}, supra note 28 at 100.
\item \textsuperscript{39} Christiano, “The Authority of Democracy”, \textit{supra} note 37 at 277-280; Hershovitz, “Legitimacy, Democracy, and Razian Authority”, \textit{supra} note 37 at 216-217.
\item \textsuperscript{40} Raz, “Authority and Justification”, \textit{supra} note 24 at 16-18.
\item \textsuperscript{41} Waldron, \textit{Law and Disagreement}, supra note 28 c. 5. Recently, Andrei Marmor has argued that the legitimacy of practical authority “rests on a combination of the soundness of its decision and the fairness of the process which has led to it”, but assumes that considerations of fairness remain secondary or auxiliary to the normal justification thesis as a ground of legitimacy. Andrei Marmor, “Authority, Equality and Democracy” (2005) 18 Ratio Juris 315 [emphasis original].
\end{itemize}
rooted in the recognition that the legislature has the legitimate authority to establish not only new regulatory regimes, but also new legal institutions to interpret framework legislation and administer it. If the administrative institution possesses expertise that may serve as an additional ground for its legitimacy, but its authority is by no means strictly contingent upon that consideration. This is an important point, because it means that the primary justification for administrative authority is not the “prudential” reasons which suggest that deference is justified only insofar as the administrator is more competent or expert on some question than common law courts (although they frequently are, as a matter of fact), but rather the “constitutional” reasons having to do with the legitimate apportionment of legal authority in a democratic legal system. This means that the question of institutional legitimacy cannot be adequately answered simply by identifying which of the institutions is de facto superior by virtue of its expertise, but which is ex officio superior by virtue of the constitutional principles that legitimate the relevant institution.

This aspect of the provisional account is especially important in the context of administrative law, because it suggests that courts are not justified in interfering with an administrative decision merely because they disagree with it on substantive grounds or think they are better able to assess the relevant reasons which apply in any given case. This is just another way of expressing the controversial claim that, as between courts and administrative institutions, the former are generally more capable of satisfying something like the normal justification thesis. This has been a recurrent problem in public law, and explains why legislatures began resorting to devices like privative clauses in the first

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44 Waldron, “Authority for Officials”, supra note 21 at 67.
place. Among other things, privative clauses were meant as a riposte to those who, like Dicey, believed that judicial review should serve as a means of preserving the individualism inherent in the common law against the onslaught of progressive social welfare legislation. Another, more thoughtful way, of dealing with this type of reactionary judicial subterfuge is to incorporate some basic appreciation of the democratic justification for administrative institutions within the common law doctrines relating to judicial review.

The second contrast between my provisional account of administrative authority and the Razian account concerns the normative dynamics of administrative authority. According to Raz’s preemption thesis, legitimate authorities are able to mediate between their subjects and the reasons that apply to them by giving them exclusionary and content-independent reasons for complying with authoritative directives. Nevertheless, Raz makes it clear that no authority is capable of providing its subjects with an absolute reason for compliance, and whether it constitutes a conclusive reason for doing so depends on the circumstance. In order to determine the extent to which an authoritative directive has content-independent exclusionary force, one needs to attend to the considerations underlying the normal justification thesis. However, Raz does acknowledge additional limitations that disqualify the exclusionary normativity of authoritative directives.

Even where an authoritative decision is meant to settle finally what is to be done, it may be open to challenge on certain grounds, for example, if an emergency occurs, or if the directive violates fundamental human rights, or if the authority acted arbitrarily. The nonexcluded reasons and the

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45 Amnon Rubinstein, *Jurisdiction and Illegality* (Oxford: Clarendon Press, 1965) at 70-74; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (P.C.) at 159-161. Originally, a public official could only be held liable in tort for acting without jurisdiction, but certiorari lay for any patent defect in an administrative decision. As recourse to certiorari expanded, and courts began receiving affidavit evidence, judges began developing a robust form of judicial review that often resulted in them retrying the issue on the evidence. In order to curb this practice, Parliament resorted to privative clauses. However, the courts could still circumvent such clauses by characterizing the issue as “jurisdictional” in nature. It was only when Parliament stipulated a common form for administrative decisions, which did not include a statement of the evidence or the reasons for the decision, that courts retreated from the field. And even then, the retreat was motivated by practical, not principled, considerations.


47 Raz, “Authority and Justification”, *supra* note 24 at 14.
grounds of challenging an authority’s directives vary from case to case. They determine the conditions of legitimacy of the authority and the limits of its rightful power.

This concession raises important questions for Raz’s theory of authority. How does one go about identifying whether a decision made by an ostensible authority is open to challenge, and on what grounds? How does one determine whether the decision is merely “mistaken”, which according to Raz is still binding, as opposed to being arbitrary and therefore illegitimate? And how can we reconcile this type of analysis with the preemptive and content-independent features of authoritative directives?

All of these are very interesting questions, to which Raz does not directly respond. One answer might be that the distinction between a mistaken (but authoritative) directive and an arbitrary (and therefore illegitimate) one is largely determined ex ante, through an application of the normal justification thesis. But even if we are solely concerned with determining whether the normal justification thesis holds in the long run, it seems that one must retain at least some sense of how the authoritative directives compare against the balance of reasons that apply to one’s case. How is this compatible with the preemption thesis? Returning to the doctor/patient scenario, Raz seems to be arguing that the parameters of the doctor’s authority are largely determined prior to her rendering any medical advice. The doctor’s advice is meant to replace the patient’s less educated medical diagnosis. The apparent difficulty is that the doctor’s advice seems to exclude the patient from comparing the advice against her own private assessment of her medical condition even if the advice were to strike her as being mistaken. So how does the patient decide whether the medical advice is arbitrary, and therefore illegitimate? If we take the normal justification thesis seriously, it seems that any ex post assessment rendered by the patient would immediately be suspect, because it would entail her relying

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49 See Hurd, “Challenging Authority”, supra note 25 at 1629-1641. This criticism is equally applicable to the ideas of jurisdictional limits, scope affecting considerations and unstated exceptions that Raz incorporates in order to explain controversies that might otherwise cast doubt upon his general account of authoritative guidance.

50 Raz, “Authority and Justification”, supra note 24 at 15. See also Bogg, “In Defence of Correlativity”, supra note 48.
on the type of reasons (i.e. her imperfect grasp of medical health knowledge) it is meant to exclude. This appears to be what Raz means when he argues that “[t]hose subject to the authority are not allowed to second guess the wisdom or advisability of the authority’s directives.”\textsuperscript{51} However, at other times Raz seems to reject this austere version of the normal justification thesis. For instance, he emphasizes that “there is no reason for anyone to restrain their thoughts or their reflections on the reasons which apply to the case, nor are they necessarily debarred from criticizing [an authority] for having ignored certain reasons or for having been mistaken about their significance.”\textsuperscript{52} So the question remains: which errors will brand an ostensibly authoritative directive (i.e. one that emanates from an institution which satisfies the normal justification \textit{ex ante}) as illegitimate, thus robbing it of its ability to exert exclusionary normative force?

Raz’s answer to this question is further muddied by his reliance upon the concept of “arbitrariness”. This concept is problematic because it is a loaded term that is capable of embracing a variety of defects that are not merely limited to ensuring that the directive emanates from an authoritative source, one that satisfies the normal justification thesis. Normally the charge of arbitrariness is leveled when the directive is issued by an authoritative source, but is tainted by some procedural or substantive defect. So it is sensible for someone to both recognize an institution as generally authoritative \textit{and} object that its directive is arbitrary in a particular case. For instance, when someone argues that a particular administrative decision is arbitrary, it might variously mean that it offends an express provision of the framework legislation, is substantively irrational in light of its broader purpose, or was produced through procedural unfairness to an interested party.\textsuperscript{53} If this is the case, it seems that in order to adequately evaluate the degree to which concerns about human rights or arbitrariness should constrain or shape how administrative authority is exercised, one must relate those considerations to the reasons that justify instituting that authority in the first place. If these sorts of debates and assessments are relevant to determining the scope of legitimate authority, then it seems

\textsuperscript{51} Raz, “The Problem of Authority”, \textit{supra} note 24 at 1018.

\textsuperscript{52} Raz, “Authority and Justification”, \textit{supra} note 24 at 10.

\textsuperscript{53} See \textit{e.g.} \textit{Council of Civil Service Unions v. Minister for the Civil Service}, [1985] A.C. 374 (H.L.).
both unhelpful and misleading to describe the normativity of authoritative decisions as having content-independent exclusionary force.

Raz does anticipate an objection of this kind, which argues against the preemption thesis on the grounds that these types of limits require those subject to authority consider the merits of the directive, before ultimately submitting to its authority.\textsuperscript{54} The objection asserts that in order to determine the limits of authority, one must consider the directive in light of some of the reasons it was meant to replace. Raz argues that this objection does not threaten the preemption thesis, because it confuses a “great” mistake (one that is egregious in light of the institution’s principled justification and the relevant dependent reasons that apply to the case) with a “clear” mistake (one which is identifiable without rehearsing the relevant reasons and jeopardizing the preemption thesis). Such clear mistakes, which Raz equates with “jurisdictional” errors, will undermine the exclusionary force of an authoritative directive, and do not require one to rehearse an assessment of the reasons the directive is meant to exclude.\textsuperscript{55} Thus, according to Raz, all other obscure or non-jurisdictional errors will continue to exert exclusionary force, and relieve those subject to the directive from reassessing it in light of the excluded reasons post facto. But this move is unconvincing, because the idea of reviewable or jurisdictional error (at least insofar as that idea is deployed in ordinary legal practice) is usually associated with a “great” error rather than a “clear” one. When citizens, lawyers and judges argue about whether a directive is compromised by a jurisdictional error, they usually characterize as egregious official act, one that is not supported by the principles that justify the institution as a whole. And it is by no means certain that such an error will be a “clear” one, since errors like adjudicative bias are not usually readily or easily apparent: the

\textsuperscript{54} Raz, “Authority and Justification”, supra note 24 at 25-26. Raz draws an analogy with mathematics to explain the nature of a “clear” mistake: “Consider a long addition of, say, some thirty numbers. One can make a very small yet clear mistake as when the sum is an integer whereas one and only one of the added numbers is a fraction. One the other hand, the sum may be off by several thousands without the mistake being detectable except by laboriously going over the addition step by step…. Establishing that something is clearly wrong does not require going through the underlying reasoning. It is not the case that the legitimate power of authorities is generally limited by the condition that it is defeated by significant mistakes which are not clear.”

\textsuperscript{55} Ibid. at 26.
question regarding whether an error is jurisdictional or justifies judicial intervention is one of the most controversial issues in administrative law.\textsuperscript{56}

In short, I think that Raz’s response to the basic question underestimates the depth and complexity of the types of limits that are associated with legitimate administrative authority. Even if we leave complex questions posed by bills of human rights to one side, it seems that the general ideas of arbitrariness and jurisdictional review are much richer than his response suggests. Of course, it does include the types of clear mistakes that Raz envisions, but (at least in the context of administrative law) the idea of arbitrariness includes much more. This deficiency comes into better focus when we compare Raz’s narrow definition of jurisdictional error in his account of legitimate authority with his more expansive treatment of the rule of law, a concept that is traditionally thought to serve as a bulwark against the arbitrary use of political power.\textsuperscript{57}

Although the question of normativity remains central to Raz’s conception of the rule of law, he does not explicitly anchor it to the idea exclusionary or preemptive normativity that features so prominently in his account of authority. Instead, he teases out the normative implications of the rule of law from its basic premise that “the law must be capable of guiding the behaviour of its subjects.”\textsuperscript{58} From this premise, he deduces a series of propositions that he associates with the general concept of the rule of law, among them that laws should be clear, prospective, stable and publicly accessible. More specifically, he asserts that ephemeral laws (i.e. issued by administrative legal authorities) should be declared “only within a framework set by general laws which are more durable and which impose limits on the unpredictability introduced by the particular orders”; that they

\textsuperscript{56} See Smith v. East Elloe Rural District Council, [1956] A.C. 736 at 751 (H.L.), Viscount Simonds: “no one can suppose that an order bears upon its face the evidence of bad faith.”


\textsuperscript{58} Raz, “The Rule of Law and its Virtue”, supra note 9 at 214.
should be discharged in accordance with the principles of natural justice; and subjected to review by an independent judiciary.\footnote{Ibid. at 216-217.} Although Raz declines to invest the rule of law with inherent moral virtue, he does acknowledge that adherence to the rule of law averts many of the problems associated with arbitrary power. In this sense, he asserts\footnote{Ibid. at 219.} the exercise of power is arbitrary only if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them. The nature of the purposes alluded to varies with the nature of the power.

Furthermore, he claims that the rule of law not only shapes the form and content of the law, but also affects “the manner of government beyond what is or can usefully be prescribed by law.”\footnote{Ibid. at 215. Elsewhere, Raz suggests that the rule of law in Britain directs public officials “to apply statutory and common law faithfully, openly, and in a principled way.” See Joseph Raz, “The Politics of the Rule of Law”, supra note 57 at 374.}

Now, it is possible that Raz is talking about two entirely different senses of arbitrariness here: one rather narrow sense associated with the service conception of authority that determines clear analytical limits on the authority while maintaining the plausibility of the preemption thesis, and another more complex notion that should be tackled by the rule of law. That distinction seems strange, because Raz both argues that the idea of legitimate authority is essential to the very concept of law and that the rule of law is one of the central attributes of any legal system. Instead, I think we should prefer Raz’s second formulation, because it better captures the type of assessment that judges undertake when they review administrative decisions in order to ferret out arbitrary behaviour. Such an assessment is not merely limited to flagging “clear” errors, but includes (among other things) an attempt to ensure that administrative authorities are faithful to their legislative mandates, abide by fair procedures and respect fundamental human rights. If these types of assessments are to be principled, judges must assess particular administrative decisions in light of a deeper understanding of the purposes which the administrative institution is meant to serve. In short, they must consider a broad range of considerations that would otherwise be excluded by the preemption thesis.
Finally, even if we assume that there is some way to reconcile the preemption thesis with implicit limits of arbitrariness and jurisdictional review, we would still have to confront complex political questions regarding relative institutional legitimacy because the scope of exclusionary reasons differs between courts and those subject to authoritative legal directives within the Razian account. This is because Raz asserts that courts are not bound in an exclusionary sense because they have the power to change the laws that apply to litigants who appear before them. In such situations, Raz claims that whether a court changes the law (either by distinguishing or overruling an existing legal directive) is an open question of political morality, which judges can evaluate for themselves without hindrance from the preemption thesis. This is the situation that arises in judicial review, since the reviewing court has the power to overrule a directive issued by an administrative institution. In this situation, Raz concedes that the court “may still have conclusive reason not to change [the directive]: It may be better than the alternatives, or changing the law may cause more upset and harm than the improvement in it will warrant. But such reasons for not changing the law are not pre-emptive.” Thus, the question of whether a court should affirm or modify an administrative directive is a question of political morality that Raz simply does not address.

If this is the case, there is a need to explore the doctrine of curial deference, which provides a principled framework to explain the reasons why a court is or is not justified in deferring to an administrative decision. The type of assessment I have in mind has a structure that tracks the distinction that John Rawls draws between justifying a social institution or practice and justifying a particular action falling under that practice. In the context of administrative law, this distinction implies two levels of justificatory reasoning. The first concerns a general assessment of existing institutional arrangements and seeks to identify the grounds upon which those arrangements are justifiable.

62 Raz, Authority of Law, supra note 5 at cc. 6 and 10; Joseph Raz, “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment” (1998) 4 Legal Theory 1 at 16-20. I am indebted to Dimitrios Kyritsis for this point.

63 Ibid.

64 Ibid.

Obviously, the answer to this question will vary according to the specific institution or practice, but the general institutional justifications for administrative authority that I have been pursuing up to this point (democratic legitimacy, expertise and efficiency) will likely be involved in some capacity. The second level concerns an assessment of the more particular decisions or actions taken by an administrative institution and asks whether and to what extent those decisions and actions are reasonably justifiable in light of its institutional justification. This means that, although the levels of justification are distinct, they are intertwined. One cannot determine whether a particular institutional act is justified without having some understanding of what makes that institution justifiable in the first place; by the same token, however, the institutional justification will also constrain the types of justificatory rationales that are eligible in particular cases. For instance, those types of rationales for interfering with a decision that are motivated by a hostile attitude toward the legislative scheme settled upon by the legislature would be generally ineligible. By contrast, an objection that the administrative decision-maker has rendered a decision that perverts the legislative scheme which underwrites its role will be considerably more persuasive. These are only two extreme examples. But they show that if we pursue this type of analysis, we will have strayed a long way from saying that administrative decisions are exclusionary and content-independent in their normative effect.

To sum up: the provisional account of administrative authority differs in at least two important respects from Raz’s more abstract account of practical authority. First, the provisional account recognizes that the justification of administrative authority is primarily anchored by reasons associated with the manner in which it is established. This means that, although the authority of administrative institutions may frequently involve questions of expertise and efficiency, there are often more important constitutional reasons for deferring to administrative decisions which are rooted in democratic principle. Second, the type of normative influence generated by administrative decisions

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66 Ibid. at 27: “Only by reference to the practice can one say what one is doing. To explain or to defend one’s own action, as a particular action, one fits it into the practice which defines it.” [emphasis original]

67 Ibid. at 17.
is much more complex and nuanced than the Razian account allows. This complex normative attitude is better captured by theorists like Waldron (in the case of democratic legislation) and Dyzenhaus (in the case of administrative law), who prefer to explain legal normativity as a matter of “respect” rather than “submission” to relevant legal decisions.\(^6\) It also explains why Dyzenhaus characterizes judicial review of administrative action as a “paradox”, because it requires judges to simultaneously recognize the ability of administrative institutions to render rationally justifiable legal decisions while asserting a limited supervisory role in scrutinizing those decisions according to legitimate standards of legal rationality.\(^7\) While these observations seem daunting at first, they can be readily accounted for by the complex justificatory structure of administrative authority.

Now it might seem that an abstract discussion regarding administrative authority is far removed from everyday questions regarding common law doctrine. Although there is some truth in this criticism, it is important to bear these theoretical considerations in mind because they provide us with new insights into perennial problems in administrative law. The main problem concerns the judicial penchant for reviewing administrative decisions according to a standard of correctness, whereby judges assert that they are entitled to interfere with administrative decisions whenever they depart from judicial standards of correct legal judgment. This attitude towards administrative authority is problematic, because it does not respect the legitimate role played by administrative institutions in democratic legal systems. The traditional response to this criticism is that judges only apply the correctness standard to a relatively small set of questions deemed to be jurisdictional in nature, beyond which an administrator is entitled to decide the merits of the question through an exercise of political discretion. However this response is equally problematic for at least two reasons. First, it fails to provide any principled distinction between jurisdictional and non-jurisdictional questions. In fact, there is reason to doubt whether there is any meaningful way of drawing this distinction as it is currently


formulated in doctrines of administrative law. Second, even if we assume that the distinction is tenable, it is problematic insofar as it equates administrative authority with administrative discretion. In doing so, theories that rely upon the idea of administrative discretion tend to counsel submission to administrative directives rather than the more complex attitude of respectful deference.

B. Administrative Authority and Public Law Theory

For the remainder of this chapter, I will examine how public law theory has grappled with the question of administrative authority throughout the twentieth century. The turn of the century was marked by Dicey’s dubious claim that there was no room for administrative law within the English constitution. That claim was rooted in his individualist ideology, but it was couched in apolitical or “scientific” rhetoric about the nature of the constitution. Unfortunately, this type of discourse assumes a distinction between law and political morality that often prevents lawyers from developing a more elaborate, principled account of institutional relationships under the constitution. Thus, public law disagreements regarding the proper scope of judicial review tend to be distorted as debates regarding axiomatic legal “facts” that are supposedly capable of resolving the disagreement in one way or another. However, these types of debates are unhelpful because they lack the necessary resources to explain and justify constitutional arrangements that are more complex than the static Victorian model imagined by Dicey.

In what follows, I discuss how this type of discourse has confounded both critics and advocates of administrative authority. The most prominent critics of administrative authority during this period, Lord Hewart and Sir William Wade, share an outspoken allegiance to Diceyan constitutional theory and deep-seated mistrust of administrative decision-making, which they perceive to be an inherent threat to the rule of law. However, despite their similarities, there are some important strategic differences between their approaches. Like Dicey, Hewart opposes administrative authority per se because he assumes that it is fundamentally incompatible with the nature of the English

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constitution. But since administrative institutions have become fixtures of modern public law, Hewart’s objection is no longer credible on empirical grounds. This explains why neo-Diceyan scholars, like Wade, resort to a slightly different strategy: instead of excluding administrative authority per se they attempt to condition it via a robust conception of the rule of law enforced by common law courts. According to this view, courts are allowed to intervene whenever an administrative decision conflicts with judicial interpretations of the law. Thus, the neo-Diceyan model provides judges with a broad license to review administrative decisions in a manner which threatens to collapse into full appellate review of the merits; and since judicial review usually concerns issues which the legislature reserves for administrative assessment, this broad license undermines its constitutional legitimacy.

The last section of this chapter is devoted to examining how different advocates of administrative authority react against the neo-Diceyan model. More specifically, I will examine the work of D.M. Gordon and a heterogeneous group of scholars generally referred to as “functionalists”. Both Gordon and functionalist scholars are keen to point out the arbitrary and illegitimate manner in which judges have historically exercised their power of judicial review. In this regard, they both employ a tactic (more commonly associated with American legal realism) of satirizing the indeterminacy and inconsistency of common law doctrines like the doctrine of jurisdictional review, which concern the scope of judicial review. But while Gordon’s critique is motivated by the desire to reconstruct the formal logic of the rule of law and the separation of powers, the functionalist critique is motivated by more explicit political considerations—it asserts that ad hoc judicial review is both anti-democratic and inefficient because it frustrates progressive policies that are better implemented by administrative institutions. Despite this important difference, both Gordon and the functionalists prescribe a similar solution to the problem of arbitrary judicial review, namely an invigorated notion of administrative discretion that is either immune or largely exempt from judicial review.

By contrasting these different movements within public law scholarship, I aim to identify the legacy of the Diceyan dialectic: two starkly contrasting conceptions of administrative
authority. The first conception asserts that the legitimacy of administrative decisions is contingent upon judicial agreement with the substantive content of those decisions. According to this account, administrative authority is either ephemeral or irrelevant because judges should never defer to administrative decisions about what the law requires. The second conception of administrative authority asserts that administrative decisions involve the exercise of political discretion that is not amenable to judicial review. Hence, judges should defer routinely to administrative decisions without subjecting the substance of those decisions to independent scrutiny.

1. Neo-Diceyanism and Judicial Review

In order to identify the torchbearers of Dicey’s constitutional theory, it is not sufficient to merely identify lawyers and theorists who adopt the tenets of Parliamentary sovereignty and the rule of law. If this were the case, nearly all English public lawyers would qualify, because nearly all of them (even those that are critical of Dicey’s theory) operate within that constitutional framework. What distinguishes neo-Diceyanism from other forms of public law theory is its enduring suspicion of all forms of administrative action. Although this suspicion is often rooted in a particular brand of liberalism, this approach to public law usually does not wear its political commitments on its sleeve. Instead, it expresses itself through arguments claiming either that administrative authority is unconstitutional per se or that the constitution requires it to be conditioned by a robust form of judicial review. These tendencies are exemplified by the work of two prominent public lawyers of the twentieth century: Lord Hewart and Sir William Wade.

a) Administrative Law as the New Despotism

Lord Hewart, who had a prominent career as both a politician and a judge, was a staunch critic of what he considered to be administrative “lawlessness” in the early part of the

71 For instance, Carol Harlow & Richard Rawlings characterize neo-Diceyanism as a “red light” constitutional theory, which asserts “that the primary function of administrative law should be to control any excess state power and subject it to legal, and more especially judicial control.” Carol Harlow and Richard Rawlings, Law and Administration, 2nd ed. (London: Butterworths, 1997) at 37.

72 In the previous chapter, I argued that Dicey’s political ideology was inclined toward what Isaiah Berlin calls the “negative” conception of liberty, and was thus generally opposed to popular redistributive policies. Martin Loughlin draws a similar conclusion when he refers to this school of thought as “conservative normativism”. See Martin Loughlin, Public Law and Political Theory (Oxford: Clarendon Press, 1992).
twentieth century. In 1929, while he was the Chief Justice of England and Wales, he wrote *The New Despotism*, a book which Felix Frankfurter characterized as giving “fresh life to the moribund unrealities of Dicey by garnishing them with alarm.” Hewart represents the first, and perhaps the last, English jurist who attempted to preserve Dicey’s constitutional theory in its original pristine form. He argued that administrative law was simply incompatible with the English constitution because it involved, by its very nature, the arbitrary exercise of political power. However unlike Dicey, Hewart was aware of the extent to which public officials were actually exercising power delegated by Parliament. This knowledge was acquired during his tenure as Attorney-General, when he was responsible for advising the government on how to delegate authority to administrative officials.

But in his role as Chief Justice, Hewart was disturbed by this practice, because he perceived it to be both illegitimate and deceitful. It was illegitimate because it undermined both Parliamentary sovereignty and the rule of law; it was deceitful because it was accomplished in the backrooms of cabinet instead of being debated in public.

Writers on the Constitution have for a long time taught that its two leading features are the Sovereignty of Parliament and the Rule of Law. To tamper with either of them, it might be thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employ the one to defeat the other, and to establish a despotism on the ruins of both!... The old despotism [of the Stuarts], which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme.

The predominance of party politics meant that the executive, which controlled a majority of parliamentary representatives, could push legislation through Parliament that delegated

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74 Felix Frankfurter, “Foreward” (1938) 47 Yale L.J. 515 at 517.


76 After Hewart published *The New Despotism* his critics “pointed out with some acerbity that the type of Bill to which Hewart took exception, giving blank-cheque powers to the executive, could be illustrated by Bills which Hewart had backed personally as Attorney-General.” Robert Jackson, *The Chief: The Biography of Gordon Hewart Lord Chief Justice of England 1922-40* (London: George G. Harrap & Co. Ltd., 1959) at 214 [*The Chief*].

77 Hewart, *supra* note 73 at 17.
unfettered discretion back to itself. Thus, Parliament was no longer sovereign: it was subordinated to the party which controlled a majority of representatives within the House of Commons. This strategy was all the more alarming when legislation included privative clauses, which precluded the courts from scrutinizing administrative decisions.\(^7\) This was the means by which the executive could pervert the principle of Parliamentary sovereignty and simultaneously hamstring the rule of law.

This state of affairs constitutes what Hewart dubs “administrative lawlessness”, in which public officials wield coercive authority in the absence of legal constraints. In this situation, administrative decisions are made by anonymous officials who are not responsible to Parliament or bound by the normal rules of evidence and procedure that apply to common law decision-making (i.e. discovery, cross-examination, a public hearing and a duty to give reasons).\(^7\) According to Hewart, this is not “law” at all—it is unsystematic, arbitrary and wholly subject to the political discretion of executive officials.\(^8\) To emphasize this point, he contrasts the dire situation in England with the droit administratif of France.\(^9\)

The essential idea which underlies and gives meaning to “droit administratif” is not that State officials, in their official dealings with private citizens, are above the law, or are a law unto themselves. It is rather that the position and liabilities of State officials, and the rights and liabilities of private individuals in their dealings with officials as such, form a separate and distinct chapter of law, which depends upon principles different, indeed, from the principles of the ordinary law, but nevertheless legal principles.

Interestingly enough, Hewart did not think that the droit administratif in France was prone to the same abuse as the administrative lawlessness which prevailed in England. Droit administratif was “administered by real tribunals” that applied “definite rules and principles to the decision of disputes”, followed regular procedures and gave reasons for

\(^{7}\) Ibid. at c. 5.
\(^{8}\) Ibid. at c. 4.
\(^{9}\) Ibid. at 46.
\(^{10}\) Ibid. at 40.
their decisions.\textsuperscript{82} This was both systematic and logical, because it was based on a defensible conception of the separation of powers.\textsuperscript{83}

If one starts with the assumption that the Government, and every one of its servants, enjoys a special class of rights and privileges as against private individuals, and that the nature and extent of those rights and privileges are to be determined upon principles which differ from the principles of ordinary law, it follows naturally enough that suitable steps should be taken in order to prevent either the Government or the ordinary Courts from trespassing upon the other’s territory. It is in that sense that the expression “separation of powers” is used in countries where “droit administratif” is familiar.

Hewart, like Dicey, does not consider whether common law doctrine similarly recognizes the special legal status of administrative officials. Rather, he stipulates that the English constitution is inimical to any analogue of droit administratif, because in England the separation of powers “refers, and can refer only, to the principle that the Judges are independent of the Executive.”\textsuperscript{84}

Hewart’s polemic, and the reaction it caused, is a mixed bag of initial alarm tempered by some sober second thoughts regarding the role of administrative institutions under the constitution. Hewart uncritically assumed the validity of Diceyan constitutional theory and thought that it precluded any meaningful role for administrative decision-makers. The fact that the welfare state was not honouring Dicey’s theory in practice was the catalyst that prompted Hewart’s call to arms, and it immediately prompted a response from Whitehall. After The New Despotism was published, the Donoughmore Committee was established to investigate Parliamentary use of delegated power “and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law.”\textsuperscript{85} However, the Committee modified its view of Diceyan constitutional theory by adopting an account of the separation of powers that assumed a legal role for legislative, judicial and executive powers. While it acknowledged various general concerns regarding the delegation of

\textsuperscript{82} Ibid. at 45.

\textsuperscript{83} Ibid.

\textsuperscript{84} Ibid. at 41.

power to administrative institutions, the Committee declared that there were “definite advantages” to it and that, in any event, the development of delegated authority was “inevitable” in light of the expanding role of modern government. Accordingly, the Committee declared that there was “nothing to justify any lowering of the country’s high opinion of its Civil Service…or any ground for a belief that our constitutional machinery is developing in directions which are fundamentally wrong”.

But perhaps the most telling reaction came ten years later from Lord Hewart himself. It seems he came to regret writing *The New Despotism* altogether, because he believed that the welfare state could be realized without utilizing the form of delegated authority that he had railed against. At that point, in the 1930s, it was no longer tenable to propound Dicey’s extravagant claim that administrative law was incompatible with the English constitution, because it played such a prominent role in enabling the government to implement popular public policies.

*b) Administrative Law and the Textbook Tradition*

Hewart was the last of the die-hard Diceyans, who opposed administrative authority *per se*. After Hewart’s private capitulation, English public lawyers no longer advanced the view that administrative authority was inherently unconstitutional. Instead, they assuaged the lingering sense of impropriety by reformulating their conception of the rule of law to ensure that all administrative action was exercised in a legal and regular manner. So although this type of scholarship did not maintain Dicey’s frontal assault on administrative authority, it still functioned within a Diceyan constitutional framework characterized by an uneasy tension between Parliamentary sovereignty and the rule of law.

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86 *Ibid.* at 4-11; 51-54.
88 Jackson, *The Chief*, supra note 76 at 216.
The most influential neo-Diceyan of the 20th century was Sir William Wade. Whereas Lord Hewart’s polemic revolved around the scourge of “administrative lawlessness”, Wade was a tireless advocate of what he called “administrative justice”. But this was not a quality that administrative agencies could cultivate on their own: administrative justice was achieved by subjecting administrative action to ordinary law enforced by the ordinary courts through judicial review. In essence, both Dicey and Wade assert the same constitutional theory; the only significant difference is that, unlike Dicey, Wade does not assert that administrative law is fundamentally incompatible with in the English constitution.

For Wade, the English constitution is primarily anchored by Parliamentary sovereignty. This means that all Acts of Parliament must be authorized by the joint motion of the Crown, Lords and House of Commons; that no Act of Parliament may bind its successors; and that no Act of Parliament may be invalidated by superior courts. This is essentially the same idea Dicey espoused, and Wade seeks to vindicate it in his landmark article on the legal sovereignty of Parliament. Accordingly, Wade claims that “there is one, and only one, limit to Parliament’s legal power: it cannot detract from its own sovereignty.” But at the same time, Wade asserts that Parliamentary sovereignty is

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93 Wade often juxtaposes administrative “power” with the “law” administered by common law courts. See e.g. H.W.R. Wade Administrative Law, supra note 92 at 6: “…the rule of law requires that the government should be subject to the law rather than the law subject to the government. This broad ideal is to be seen especially in administrative law, where the main question is how executive power can be controlled by law and also, so to speak, colonized by legal principles of fair and proper procedure.” See also ibid. at c. III; Wade & Forsyth, Administrative Law, 9th ed., supra note 92 at 6 and 32-35.


95 Ibid. at 174.
ultimately contingent upon judicial opinion. In a classic turn of phrase, Wade describes Parliamentary sovereignty as a unique common law rule entrusted to the courts.  

...[I]f no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule [of Parliamentary sovereignty] is above and beyond the reach of statute, as Salmond so well explains, because it is itself the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism. The rule of judicial obedience is in one sense a rule of common law, but in another sense—which applies to no other rule of common law—it is the ultimate political fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation.

What Salmond calls “the ultimate legal principle” is therefore a rule which is unique in being unchangeable by Parliament—it is changed by revolution, not legislation; it lies in the keeping of the courts, and no Act of Parliament can take it away from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact.

In later years, Wade likened his account of Parliamentary sovereignty to H.L.A. Hart’s theory of legal positivism, arguing that Parliamentary sovereignty is fixed by the “rule of recognition” underlying the English constitution. According to Hart’s theory, the content of the rule of recognition is ultimately determined by the convergent behaviour of legal officials (i.e. judges) charged with the task of identifying valid legal propositions. Likewise for Wade, legal validity under the English constitution is ultimately determined by the courts. Thus, when the House of Lords held that Parliament was bound by the European Communities Act 1972 in Factortame, Wade described the decision as a judicial revolution; and when he advocated a Bill of Rights in his Hamlyn lectures, he argued that the most effective means of implementing it would be to amend the judicial oath of office, since Parliament was legally incapable of entrenching amendments to the constitution.

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96 Ibid. at 187 and 189.
99 Wade, Constitutional Fundamentals, supra note 97 at 47: “If [the judges] solemnly undertake to recognise a new grundnorm and to refuse validity to Acts of Parliament which conflict with a Bill of Rights or other entrenched clauses, that is the best possible assurance that the entrenchment will work. Always in the end we come back to the ultimate legal reality: an Act of Parliament is valid only if the judges say it is, and only they can say what the rules for its validity are.”
For Wade, the judicial role is also pivotal in administrative law. Here again, Wade begins by installing the premise of Parliamentary sovereignty, but asserts that the meaning of parliamentary legislation is actually contingent upon judicial interpretation. So even though Wade claims that judicial review is justified by the *ultra vires* doctrine (whereby judges enforce only those statutory limits intended by Parliament), he argues that the content of all legislation depends on how judges interpret it. Judges can intervene in any case by characterizing an issue as “jurisdictional” (and hence reviewable) through the device of implied Parliamentary intent; and by the same token they can refuse to intervene in any case, whenever they deem the issue to be “non-jurisdictional” or within the “merits” of administrative discretion.

This instability is symptomatic of the Diceyan dialectic, where judges vacillate between Dicey’s principles of Parliamentary sovereignty and the rule of law when conducting judicial review. Although Wade attempts to straddle both poles of the dialectic, his theory is clearly inclined towards the rule of law. This much can be gathered from a synopsis of his chapter regarding “Judicial Control of Administrative Powers”, which begins with a classic rendition of the *ultra vires* doctrine: that judicial review merely vindicates Parliamentary sovereignty by enforcing Parliamentary intent. What follows, however, is a list of scenarios where courts can intervene even when there is no explicit statutory ground for review; and a subsequent chapter is devoted entirely to the principles of

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100 Ibid. at 82: “All law students are taught that Parliamentary sovereignty is absolute. But it is the judges who have the last word. If they interpret an Act to mean the opposite of what it says, it is their view which represents the law.” See also Wade & Forsyth, *Administrative Law*, 9th ed., supra note 70 at 30 and 37-40.


102 Wade & Forsyth, *Administrative Law*, 9th ed., supra note 70 at 37: “The technique by which the courts have extended the judicial control of powers is that of stretching the doctrine of ultra vires. As already observed, they can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament, as they do when they hold that the exercise of a statutory power to revoke a licence is void unless done in accordance with the principles of natural justice. For this purpose they have only one weapon, the doctrine of ultra vires. This is because they have no constitutional right to interfere with action which is within the powers granted (intra vires): if it is within jurisdiction, and therefore authorized by Parliament, the court has no right to treat it as unlawful.” Since almost any jurisdictional question can be recast as non-jurisdictional, and vice versa, the supposed distinction between the courts’ appellate and review functions is similarly jeopardized.

natural justice, which Wade defines as “fundamental rules which are so necessary to the proper exercise of power that they are projected from the judicial to the administrative sphere.”

In other words, the extent of judicial review is not determined by historical facts about Parliamentary intent, but rather by the “true” construction that judges attribute to a statute. So in a peculiar way, Wade asserts both that the doctrine of Parliamentary sovereignty is the central constitutional principle in administrative law and that it is really just an artifice judges employ to assert control over administrative decisions.

Of course, it might seem that this constitutional model is strained in situations where Parliament explicitly attempts to exclude judicial review by enacting a privative clause. But Wade is undaunted: the courts are perfectly justified in ignoring such clauses in order to preserve the rule of law.

For three centuries...the courts have been refusing to enforce statutes which attempt to give public authorities uncontrollable power. If a ministry or tribunal can be made a law unto itself, it is a potential dictator; and for this there can be no place in a constitution founded by the rule of law. It is curious that Parliament shows no consciousness of this principle. But the judges, acutely conscious of it, have succeeded in preventing Parliament from violating constitutional fundamentals. In effect they have established a kind of entrenched provision which the legislature, whatever it says, is compelled to respect. The essence of this provision is that no executive body should be allowed to be the final judge of the extent of its own powers. But while entrenching this principle for sound reasons, the judges have naturally disclaimed any intention of rebelling against the legislature. They have prudently concealed the constitutional aspect in a haze of technicality about jurisdiction and nullity.

The inviolable “constitutional fundamentals” Wade has in mind include things like the rule of law, judicial independence, and judicial review. Later, in the same article, he protests that privative clauses “are repugnant to a coherent legal system” and that it is the special preserve of the courts to maintain such coherence “by looking at what the intention of Parliament ought to be rather than what it is.”

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104 Ibid. at 127.

105 Wade frequently refers to the “true” construction of a statute, which results from judicial interpretation, in contradistinction with the ostensible or “plain-meaning” of statutory text. See e.g. ibid. at 57 and Wade & Forsyth, Administrative Law 9th ed., supra note 70 at 33-42.

106 For a similar observation, see D.J. Galligan, “Judicial Review and the Textbook Writers” (1982) 2 O.J.L.S. 257 at 263-267 [“Judicial Review”].


One major difficulty with this argument is that judicial application of jurisdictional review throughout the 20th century has been demonstrably incoherent. This has led many leading scholars to doubt whether there is any credible distinction to be made between jurisdictional and non-jurisdictional error.\textsuperscript{110} Although Wade recognizes the erratic parameters of judicial review, his confidence in it never wavers.\textsuperscript{111}

If the high quality of the case-law is sometimes marred by erratic application, that is perhaps the price to be paid for the confusion of public and private law in one wide jurisdiction, where particular public-law principles do not stand out as clearly as they should from the general mêlée. If some of the remedies have the defects of their antiquity, that again is part of the price. The English courts of law are held in great respect by the public, and the satisfaction of being able to challenge the legality of the government’s acts in the ordinary courts by ordinary procedure is a real one, not to be decried. That the courts can still play their historic role of protector is something of more than sentimental importance. This is a major matter on which Dicey was right.

It seems, then, that the “coherence” Wade had in mind is more formal than substantive: as long as the judiciary remains at the apex of the constitution, it preserves a sense of institutional coherence whereby courts always have the last word on what the law requires, even though their more particular interpretations of the law appear to be more erratic in the long run.\textsuperscript{112}

With some minor adaptations, this is essentially the same model of judicial review advanced throughout the orthodox textbook tradition in English administrative law.\textsuperscript{113}


\textsuperscript{112} A similar theme emerges in Wade & Forsyth, Administrative Law, 9th ed., supra note 70 at c. 8 where the authors observe euphemistically at 279-280 that “[t]he overall picture is of an expanding system struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them.”

\textsuperscript{113} For an insightful analysis of the orthodox English textbook tradition and, more specifically, a comparison of Wade and de Smith’s scholarship, see Galligan, “Judicial Review”, supra note 106. Although I recognize that there are differences in the manner of exposition between different camps within the orthodox tradition, these differences pale in comparison to their essential similarities. I explore both the
For instance, Stanley de Smith also recognized the pivotal constitutional role played by judges. But he was initially more forthright in acknowledging how the practice of jurisdictional review tended to vary across different policy domains.\(^{114}\) Thus, although he subscribed to the orthodox view of the English constitution, he recognized that “the concept of [administrative] jurisdiction for the purposes of judicial review has been one of public policy rather than one of logic”, and that it fell to judges to determine the right balance between Parliamentary sovereignty and the rule of law in each particular statutory context.\(^{115}\) The current editors of de Smith’s text have since retreated from this pragmatic approach back to what they call a “principled” approach to judicial review, but the institutional role played by the judiciary remains essentially the same.\(^{116}\) Despite this, the editors assert that “reference back to these principles [of Parliamentary sovereignty and the rule of law] will allow the issues to be resolved in a more coherent manner than can be achieved through a purely functional or pragmatic approach that leads to confusion and a ‘wilderness of single instances.’”\(^{117}\) In making this move, they have merely traded de Smith’s frankness for Wade’s thin idea of formal or institutional coherence, since the essential constitutional structure (and the judicial role within it) remains unaltered. Of course, the downside to this is that the description obscures the instability associated with jurisdictional review.

In short, there is nothing about Wade’s notion of institutional coherence that prevents judges from assuming an enlarged institutional role or exercising judicial review in an erratic, arbitrary or ad hoc fashion. This much is apparent in a curious debate within the orthodox tradition.\(^{118}\) The debate pits the proponents of the ultra vires doctrine, who argue (from Parliamentary sovereignty) that the legitimacy of judicial review is grounded

\(^{114}\) This wrinkle in de Smith’s otherwise orthodox version of judicial review might be explained by his association with other functionalists at the London School of Economics.

\(^{115}\) S.A. de Smith, Judicial Review of Administrative Action (London: Stevens & Sons Ltd., 1959) at 68.


\(^{117}\) Ibid. at 250.

\(^{118}\) See generally, Forsyth, ed., Judicial Review and the Constitution, supra note 1.
only by express or implied Parliamentary intent, against those who argue (from the rule of law) that the legitimacy of judicial review is grounded independently by the common law. Insofar as this debate concerns the institutional relationship between Parliament and the courts, it is unproductive because both camps ultimately adopt Dicey’s resolution in favour of judicial review and the rule of law. Although ultra vires proponents claim that judicial review merely enforces Parliamentary intent, they still concede that the most important developments in administrative law, like doctrines relating to procedural fairness or substantive reasonableness, derive not from facts about Parliamentary intent but from the implied intent that judges ascribe to Parliament. And even when judges choose to ignore even explicit directions from Parliament, as in the case of privative clauses, they persist in arguing that it can somehow be rationalized as a vindication of true Parliamentary intent, which judges determine through their interpretive license. So while it is true that judges frequently justify their decisions in terms of Parliamentary intent, it is doubtful whether this is necessarily the case. Rather, it seems that the only difference between the two camps is that common law adherents do not feel the need to conceal the reality of judicial review behind the fiction of parliamentary intent.

There is, however, an important reason why Wade, and others like him, might insist upon justifying judicial review through Parliamentary sovereignty—namely, that the reality of

119 Although current proponents of the ultra vires doctrine have rejected the proposition that there is a “direct” link between Parliamentary intent and judicial review, they continue to assert a “modified” ultra vires doctrine that asserts an “indirect” connection via the device of implied Parliamentary intent. For the purposes of this section, I will refer to the ultra vires theory in its modified form. See e.g. Christopher Forsyth, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” (1996) 55 Camb. L.J. 122; Mark Elliott, “The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law” (1999) 58 Camb. L.J. 129; Mark Elliott, The Constitutional Foundations of Judicial Review (Oxford: Hart Publishing, 2001) at 162.


124 Barber, “The Academic Mythologians”, supra note 121 at 379.
judicial review raises an important legitimacy problem. If judges really do have the final say, their actions might be construed as constitutionally illegitimate. However, since Wade’s analysis eschews direct questions about political legitimacy, he cannot tackle this issue directly. His only recourse is to make a half-hearted gesture toward Parliamentary sovereignty. Thus, Wade applauds the way in which judges have “prudently concealed the constitutional aspect [of judicial review] in a haze of technicality about jurisdiction and nullity” because it creates the illusion that the courts are merely enforcing legislative intent. However, if courts were ever to dispense with this pretense, it would expose a serious legitimacy deficit. Accordingly, when Lord Denning declared that judicial review lay for all errors of law in *Pearlman v. Keepers and Governors of Harrow School*, Wade’s main concern had nothing to do with the substantive result: he was rather preoccupied with the bold manner in which Denning had discarded the pretense of jurisdictional review. Without the doctrine of jurisdictional review, he argued, judicial review would be “exposed” as a means of thwarting legislative policy.

2. Some Realism about Administrative Discretion

While neo-Diceyanism remains the orthodox account of English public law, it has attracted attention from scholars who are more critical of judicial review. These scholars point out how judges abuse the conceptual distinctions like the distinction between jurisdictional and non-jurisdictional errors of law in order to extend the reach of judicial review. These critiques are designed to show that, instead of merely applying legal concepts, judges actually exploit the law in order to interfere with administrative decisions without having to offer an explicit justification for their actions.

129 Wade, “Anisminic ad Infinitum”, *supra* note 111.
This critical approach resonates with the American legal realist movement that gained prominence during the early twentieth century. Like Dicey, the legal realists employed the rhetorical device of legal “science”, which asserts that legal analysis should emulate the natural sciences in order to gain meaningful knowledge about the nature of law. But whereas Dicey purported to discern and define a coherent framework of autonomous legal principles, the realists criticized conceptual analysis because it neither explained nor justified the inconsistent rulings rendered by common law courts. When other scholars inspired by realism subjected the ultra vires doctrine to critical scrutiny, they concluded that judges were abusing the concept of administrative jurisdiction in order to arrogate power under the constitution. Thus, they concluded that judges were overreaching their constitutional role in a manner that threatened progressive legislative initiatives. In order to counteract these tendencies, critical scholars often propose an invigorated form of administrative discretion as an antidote for the indeterminacy and arbitrariness of judicial review. The general thrust of the critical argument is that, at the very least, administrative discretion is no more arbitrary than the judicial discretion involved in legal interpretation. More importantly, it asserts that administrative discretion has redeeming qualities. For instance, administrative officials seem to enjoy a greater degree of democratic legitimacy than judges. Moreover, many administrative decision-makers possess some form of expertise or specialized knowledge that judges do not ordinarily possess. These, and other similar considerations, lead like-minded scholars to argue that judges should generally defer to administrative decisions without scrutinizing their substantive content.

132 Ibid. at 51.
134 Ibid. at 405. Robert Gordon observes that, in the American context, legal realists were generally “concerned to expand the authority of administrative agencies to govern new areas of economic life; to promote their virtues as policy makers and adjudicators over those of their chief rivals, the courts; to defend them against charges of arbitrariness and absolutism; and to limit the scope of judicial review of their decisions.” I will argue that D.M. Gordon’s scholarship reflects many of these same themes.
The difficulty, however, with this approach is that in its haste to debunk notions like the rule of law, it implies that law is essentially an instrument of *realpolitik*.\(^{135}\) As a result, it prescribes an emaciated form of judicial review, which assumes that judges should defer to administrative decisions so long as there is some warrant for administrative discretion within the relevant statute. This emphasis tends to confuse the rule of law (which includes substantive constraints on the manner in which government acts) with rule by law, whereby the only constraint imposed on government is that it must act through the form of law to achieve its desired purpose.\(^{136}\) The confusion is exacerbated by the fact that, despite their outspoken skepticism of legal principles, proponents of administrative discretion still retain an ambiguous role for judges within their constitutional framework. This ambivalent stance provides a profitable line of inquiry that many public law scholars ignore: the potential for a conception of administrative authority that can be reconciled to the rule of law without collapsing into the type of correctness review associated with neo-Diceyanism.

\[\text{a) The “Pure” Theory of Administrative Jurisdiction}\]

D.M. Gordon was a Canadian lawyer who wrote a series of law review articles regarding the law of judicial review. Gordon’s scholarship provides an important case study in administrative law theory, because it reveals a tension between Gordon’s faith in the scientific or apolitical method of legal analysis and his disillusionment at how judges applied abstract legal concepts through judicial review in order to interfere with administrative decisions. Gordon’s idealized version of legal science established the standard against which he judged (and found wanting) the manner in which judges were conducting judicial review, but this never caused him to doubt the efficacy of conceptual analysis.\(^{137}\) Instead, he proposed a “pure” theory of administrative jurisdiction in order to reorient judicial review around a better conception of administrative jurisdiction. This conception claimed that as long as an administrative decision-maker was formally

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empowered to decide a particular legal issue, her decision should be treated as conclusive regardless of whether the decision was reached through fair process or was substantively reasonable.

According to Gordon, the erratic nature of judicial review is directly linked to the fact that its central concepts have not been scientifically defined.\(^\text{138}\)

There is no English text-book on jurisdiction. That want must have a bearing, either as cause or effect, on the fact that in no branch of English law is there more confusion and conflict.

This welter of inconsistency and contradiction must repel any text-writer who would follow traditional methods, avoiding speculation and expounding what the law is rather than what it ought to be. For the approved methods of text-writing cannot be followed in a treatise on jurisdiction, if the writer is to do more than record ‘a wilderness of single incidents’ and is to bring to light some coherent principles by which to test the soundness of a given ruling.

What follows is a detailed, almost tedious demonstration of how judges have abused the doctrine of jurisdictional review over the last two hundred years. Throughout the article, and indeed his whole career, Gordon was relentless in his pursuit of so-called logical fallacies, anomalies, and superstitions embedded in common law doctrine. Nevertheless, he optimistically asserts that he can identify a “sane, coherent, and self-consistent theory of jurisdiction” by sifting through the jumbled mass of common law material while remaining faithful to an apolitical method of legal analysis.\(^\text{139}\) In order to construct this theory, Gordon exhorts judges to subject the relationship between administrative jurisdiction and legality to close scrutiny.\(^\text{140}\)

Generally speaking, the doctrine of jurisdictional review posits a distinction between “jurisdictional” issues, which an administrative decision-maker must decide correctly, and “non-jurisdictional” issues, which are determined through the exercise of


\(^{139}\) Ibid. at 460. Gordon built his theory upon a series of cases from the early nineteenth century that conceived administrative jurisdiction entailed determinate boundaries for judicial review and was skeptical of any attempt to review the process or substance of administrative decisions. See e.g. Brittain v. Kinnaird (1819), 1 B. & B. 432; Cave v. Mountain (1840), 1 Mon. & G. 257; R. v. Bolton (1841), 1 Q.B. 66; R. v. Rotherham (Inhabitants) (1842), 3 Q.B. 776; R. v. Buckinghamshire JJ. (1843), 3 Q.B. 800.

\(^{140}\) D.M. Gordon, “The Observance of Law as a Condition of Jurisdiction” (1931) 47 L.Q.R. 386, 557 at 387.
administrative discretion.¹⁴¹ The distinction supposes that when Parliament delegates authority to an administrative decision-maker, it makes that authority contingent upon the actual existence of certain legislative or jurisdictional facts. Although a decision-maker may provisionally determine jurisdictional issues, it cannot arrogate legal authority by rendering an erroneous decision on such matters. Thus, a superior court is entitled to review administrative findings on jurisdictional issues in order to ensure that the decision-maker does not exceed its authority. Any residual, non-jurisdictional issues are deemed to fall within the merits of administrative discretion, which are deemed to be beyond the scope of judicial review.

According to Gordon, the distinction posed by the doctrine of jurisdictional review is untenable: there is no meaningful way of distinguishing between jurisdictional and non-jurisdictional issues in practice. The unreality of this distinction is revealed by various conflicting judicial decisions regarding jurisdictional review.¹⁴² The better view, according Gordon, is to realize that the doctrine is really just a rhetorical device that enables courts to interfere with administrative decisions whenever they disagree with a particular outcome.¹⁴³ Thus, judges use the doctrine in order to enlarge their constitutional role: although they understand that they cannot justifiably assert a general appellate jurisdiction over inferior tribunals, they employ the doctrine of jurisdictional review as a subterfuge to achieve the same result.¹⁴⁴ Hence, Gordon argues that “if the result of a disagreement on any question between the High Court and an inferior tribunal is that the latter’s findings are nugatory, the actual situation is that the High Court has the jurisdiction to try the question, and the inferior tribunal has none”.¹⁴⁵

¹⁴¹ D.M. Gordon, “Conditional or Contingent Jurisdiction of Tribunals” (1960) 1 U.B.C. L. Rev. 185 at 186. Jurisdictional issues are variously referred to as jurisdictional, collateral or preliminary facts in the cases and legal literature. As Gordon correctly points out, although the idea takes on many guises in common law discourse the essential idea of “conditional” jurisdiction is the same.


¹⁴³ To appreciate how Gordon perceived the development of the doctrine, see D.M. Gordon, “Conditional or Contingent Jurisdiction of Tribunals”, supra note 141 at 186-199.

¹⁴⁴ Ibid. at 217-221; Gordon, “The Relation of Facts to Jurisdiction”, supra note 138 at 466-468.

¹⁴⁵ Ibid. at 467. This retort was equally applicable to situations where the Court intervened to correct a procedural error committed by the decision-make. Ibid. at 483.
Instead, Gordon proposed a theory based upon the logic of delegated legislative authority. The argument assumes that, by virtue of its sovereign legal status, Parliament can create all manner of legal rights and obligations and, furthermore, may delegate fragments of its legislative authority to administrative officials. In doing so, Parliament delegates complete authority to the administrative agency over the general subject-matter by empowering it to make all the necessary findings of fact and to grant any ancillary remedies. The only relevant question, then, is to determine which institution Parliament intends to govern with respect to a particular issue. Once an administrative decision-maker’s jurisdiction or “capacity to take cognizance” of an issue has been established, she cannot lose jurisdiction by merely committing an error in judgment. Since all decision-makers (including superior courts) are fallible, Gordon claims that it is futile to speak of standards of correct legal judgment because “there is no means of dealing with facts in the absolute, and the legislature knows this.” Hence, the best the common law can achieve is the value of finality whereby “[a]n untrue finding must be just as conclusive as a true one” in order to maintain a coherent system of resolving legal disputes.

In effect, Gordon’s theory treats administrative institutions as Austinian mini-sovereigns that project their unconstrained legislative will within their particular regulatory bailiwicks. The nature of this legislative power is illuminated by the contrast he draws with judicial discretion:

Judicial tribunals must treat legal rights and liabilities as pre-existing, because such tribunals declare themselves bound by a fixed objective standard; they profess not to confer rights or impose liabilities themselves, but only to do what is dictated by law. But ‘administrative’

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146 Although Gordon acknowledges the possibility that Parliament might divide authority amongst different tribunals, he argues that this result should be avoided wherever possible because it results in inconvenience and inefficiency. See Gordon, “The Relation of Facts to Jurisdiction”, supra note 138 at 463-466.

147 Gordon, “Conditional or Contingent Jurisdiction of Tribunals”, supra note 141 at 200. It is difficult to overestimate Gordon’s enthusiasm for finality. Elsewhere he remarks that “every tribunal with power to investigate an alleged offence is quite within its jurisdiction in finding the accused guilty, however complete his innocence.” See Gordon, “The Relation of Facts to Jurisdiction”, supra note 138 at 462.

148 D.M. Gordon, “ ‘Administrative’ Tribunals and the Courts” (1933) 49 L.Q.R. 94, 419 at 107-108. For a similar use of this distinction, see United Kingdom, Committee on Ministers’ Powers Report, supra note 85 at 73-81.
tribunals, which act upon policy and expediency, themselves dictate what is politic and expedient; they are not concerned with pre-existing rights and liabilities, but themselves create the rights and liabilities that they enforce. A judicial tribunal looks for some law to guide it; an ‘administrative’ tribunal, within its province, is a law unto itself. The same idea is often expressed in this way, that the discretion of an ‘administrative’ tribunal, as opposed to a judicial discretion, is a ‘pure,’ ‘absolute,’ ‘complete,’ or ‘unfettered’ discretion.

Since there are no pre-existing rights and liabilities which confine the exercise of administrative discretion, an interested party is not entitled to any particular outcome—they can only be disappointed, but not injured, by any administrative decision.149 Gordon’s theory thus leaves very little scope for judicial review, because no other institution is entitled to scrutinize or evaluate the exercise of administrative jurisdiction.150

Despite the logical credentials of his theory, Gordon stood alone against a tide of judicial and academic opinion that favoured the neo-Diceyan approach to judicial review. The timing of Gordon’s argument coincides with that point in the twentieth century when judges were enlarging the scope of judicial review.151 And although Gordon’s theory touched the “logical conscience” of legal academics, they were noticeably reluctant to adopt a theory that would practically extinguish judicial review of administrative action.152 Hence, de Smith worries that Gordon’s theory would reduce judicial review “almost to the vanishing point”,153 Wade and Christopher Forsyth similarly criticize Gordon’s theory because it fails to recognize the important judicial role in maintaining “constitutional fundamentals”;154 and although Louis Jaffe conceded that the judicial application of jurisdictional review was not strictly logical, he chastised Gordon’s theory

149 Ibid. at 426-427. See also D.M. Gordon, “Case Comment” (1933) 11 Can. Bar Rev. 510.

150 Gordon, “The Observance of Law as a Condition of Jurisdiction”, supra note 140.


152 See Roach, supra note 137.

153 S.A. de Smith, Judicial Review of Administrative Action, 3rd ed. (London: Stevens & Sons Ltd., 1973) at 98. See also Geoffrey Sawer, “Error of Law on the Face of an Administrative Record” (1954) 3 U.W. Aust. L. Rev. 24 at 34. Paul Craig also seems to take the position that Gordon’s theory is objectionable on public policy grounds. See Paul Craig, Administrative Law, supra note 110 at 480.

for adopting a "barrenly semantic" approach to characterizing administrative functions.\textsuperscript{155} For his part, Gordon was dumbfounded—he simply could not fathom how he could win the battle of scientific legal analysis but lose the war to reform the doctrine of jurisdictional review.\textsuperscript{156}

\textit{b) Functionalism and Administrative Law}

It is only when the apolitical mode of legal analysis begins to break down that one can gain some sense of how debates about the legitimacy of administrative decisions might proceed. In this regard, functionalist critiques of judicial review provide a more elaborate perspective of administrative law. The functionalist approach is driven by a political philosophy that is very different from the one Dicey espoused. Whereas Dicey’s theory was premised on the value of individualism and sought a limited role for government, the functionalist approach is defined by its belief that individual well-being is best secured through social interaction and the democratic process. Put differently, the disagreement between functionalists and neo-Diceyans involves a deeper disagreement about fundamental political values like liberty and equality.\textsuperscript{157}

However, neither neo-Diceyans nor functionalists are apt to describe their disagreement in such explicit terms. In fact, they often appear to be talking at cross purposes about the nature of law. Whereas neo-Diceyans believe that law’s central function is to prevent the government from unduly encroaching upon individual rights, functionalists believe that law is an instrument by which government discharges its duty to secure individual well-being and promote social solidarity. Instead of isolating and defining abstract legal concepts as an autonomous discipline, functionalist scholars attempt to reestablish some important connections between law and other social sciences like history, sociology, psychology, economics, etc. Nevertheless, the functionalist approach still claims to be

\textsuperscript{155} Louis Jaffe, “Judicial Review: Constitutional and Jurisdictional Fact” (1957) 70 Harv. L. Rev. 953 at 961-963.


occupying an empirical high ground by dispassionately observing what law “is” or rather “does” within a collectivist social ontology.

This brief comparison displays both the negative and positive elements within the functionalist style of public law. The negative element, which tends to be the primary focus of most functionalist critiques, consists of exposing and eradicating “the classical theological jurisprudence of concepts”. As we saw in the previous section, the doctrine of jurisdictional review is a prime candidate for such criticism, and has been variously derided as a “weasel word” or “comforting conceptualism” by functionalist scholars. Generally speaking, functionalists are occupied with demonstrating that these legal concepts are in fact meaningless, in the sense that they are motivated by speculative (and usually conservative or reactionary) political ideologies. Likewise, the negative element is skeptical of the rule of law, because it justifies judicial intervention by suggesting there is some set of objective legal principles that judges are entitled to enforce through judicial review.

The positive element, which features less prominently in functionalist scholarship, shifts legal analysis away from the logic of first principles towards a pragmatic assessment of outcomes that are likely to enhance social welfare. Thus, the functionalist conception

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159 Loughlin, Public Law and Political Theory, supra note 72 at 105.


165 Cohen, “Transcendental Nonsense and the Functional Approach”, supra note 158 at 828: “The ghost-world of supernatural legal entities to whom courts delegate the moral responsibility of deciding cases
of law is instrumental or functional, in the sense that it is valuable only insofar as it provides a means to achieve socially desirable goals that are determined through the democratic process. In this respect, the functionalist agenda is driven by Benthamite democratic positivism, wherein law, politics and the democratic process are instruments in the utilitarian project of promoting general welfare. So instead of imagining how law might control administration, functionalism brackets out common law values by asking how law can best facilitate outcomes consistent with policies identified through the democratic process.

Moreover, since administrative institutions are best equipped to undertake purposive and expert technical assessments within their particular regulatory domains, it is only natural that they should be allowed to wield their discretion in a manner unencumbered by judicial review. In other words, they should be allowed to function much like Gordon’s mini-sovereigns, who exert their legislative will within the parameters of their formal legislative mandate. The main question is to determine which institutional arrangement would serve as the best or most efficient means of achieving the social purposes or goals identified by the legislative process.

The problem put is, how shall the powers of government be divided up? The problem is neither one of law nor of formal logic, but of expediency. The functional approach examines, first, the existing functions of existing governmental bodies in order to discover what kind of work each has in the past done best, and assigns the new work to the body which experience has shown best fitted to perform work of that type. If there is no such body, a new one is created ad hoc.

vanishes; in its place we see legal concepts as patterns of judicial behavior, behavior which affects human lives for better or worse and is therefore subject to moral criticism.”

Loughlin, “Pathways of Public Law Scholarship”, supra note 130 at 172.


See e.g. Ivor Jennings, “Courts and Administrative Law – The Experience of English Housing Legislation” (1936) 49 Harvard L. Rev. 429 at 430: “The task of the lawyer as such is not to declare that modern interventionism is pernicious, but, seeing that all modern States have adopted the policy, to advise as to the technical devices which are necessary to make the policy efficient and to provide justice for individuals.” See also, Harlow & Rawlings, Law and Administration, supra note 71 at c. 3; Loughlin, “Pathways of Public Law Scholarship”, supra note 130 at 170-174.

See e.g. John Willis, “Three Approaches to Administrative Law”, supra note 158, which refers to administrative institutions as “governments” or “legislatures in miniature”.

Willis, “Three Approaches to Administrative Law”, supra note 158 at 75.
However, given the chequered history of judicial review, functionalists assume that the courts are simply incapable of undertaking such a practical assessment. The confused doctrines of statutory interpretation—which allow judges to either adopt a textual or purposive reading of the statute qualified by any number of other common law presumptions—enable judges to pervert regulatory regimes while purporting to uphold the rule of law.\(^{171}\) For some functionalists, this simply demonstrates an irremediable fact about all forms of legal interpretation;\(^{172}\) for others, it reveals how judges in particular flout popular legislative policies through legal interpretation.\(^{173}\)

There is, however, an important tension revealed by this summary account of the functionalist style. While the negative element is motivated by an empirical critique of legal reasoning, the positive element is motivated by an argument rooted in two related moral philosophies: new liberalism and pragmatism.\(^{174}\) This means that, although functionalists heap scorn upon the idea that courts have a legitimate role in vindicating individual rights through judicial review, their preference for legislative and administrative action ultimately derives its normative force from an argument about equal concern and respect for individuals. This tension is revealed by the fact that, despite their desire to restrict judicial review as much as possible, functionalists still retain an ambiguous role for it within their constitutional theory.

\(^{171}\) Willis, “Statute Interpretation in a Nutshell”, supra note 158. With respect to the issue of statutory interpretation, functionalists assert a strong preference for a purposive interpretation, however they are skeptical whether the judiciary possesses either the practical resources or the inclination to undertake a genuinely purposeful approach.

\(^{172}\) Jennings, supra note 168 at 434-435: “There is certainly no evidence in England of a deliberate misuse by the courts of their control powers…. What does appear is that the common law itself is biased against administrative law, and that on occasions judges have, without in any way offending against the law, used that bias in such a way as to impede the administrative machine.”

\(^{173}\) Willis, “Statute Interpretation in a Nutshell”, supra note 158 at 17: “Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are a means of controlling that intent.” See also John Willis, “Administrative Law and the British North America Act” (1939) 53 Harv. L. Rev. 251; John Willis, “Three Approaches to Administrative Law”, supra note 158.

An example of this tension can be seen in the scholarship of J.A.G. Griffith. The negative or empirical element of the functionalist style is front and center in his famous study, *The Politics of the Judiciary*.\(^{175}\) By exposing the inconsistent manner in which judges invoke their powers of judicial review, he debunks the myth that judges are merely applying legal concepts or enforcing Parliamentary intent. Furthermore, he argues that by observing this “creative function” one can unmask the politics of the judiciary, especially where it is used to arbitrate disputes between political interest groups.\(^{176}\) For instance, Griffith demonstrates how in the early twentieth century, courts frequently overturned expropriations through compulsory purchase,\(^{177}\) but were reluctant to intervene in cases where local authorities refused public housing to the homeless.\(^{178}\) Similarly, he shows how courts regularly support executive decisions concerning national security, but are clearly more interventionist when it comes to trade union activity.\(^{179}\) Nevertheless, the courts continue to assert that they are merely applying the doctrine of jurisdictional review in judicial review proceedings. Griffith’s point is not that judges, as a group, act according to their own private agenda, but rather that they act according to their own peculiar (and controversial) conception of the public interest, which often fails to protect individual interests or recognize the legitimacy of progressive legislative policies.\(^{180}\)

This critique explains why Griffith and so many other functionalists are generally critical of judicial review in contrast with their faith in the political process. In this respect, Griffith argues that the rule of law or value of legality should be demystified and discredited as politics by another name.\(^{181}\)

The fundamental political objection is this: that law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth. For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written


\(^{176}\) *Ibid.* at 6-7. Griffith defines political disputes as “those cases which arise out of controversial legislation or controversial action initiated by public authorities, or which touch important moral or social issues.”

\(^{177}\) *Ibid.* at 103-104.

\(^{178}\) *Ibid.* at 137-145.

\(^{179}\) *Ibid.* at c. 9.

\(^{180}\) *Ibid.* at 297.

constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons.

Thus, Griffith is skeptical of constitutional reform through the entrenchment of a Bill of Rights for Britain\(^{182}\) or a grand theory of judicial review.\(^{183}\) Instead, he urges a more forthright political resolution to political disputes. In his words, “the best we can do is to enlarge the areas for argument and discussion”\(^{184}\) and “to create situations in which groups of individuals may make their political claims and seek to persuade governments to accept them.”\(^{185}\) Among other things, this means that disputes should be resolved by politicians who are accountable to the electorate, that access to information should be enlarged to “force government out of secrecy and into the open” and that greater efforts be made to ensure freedom of the press.\(^{186}\) In the context of administrative law, this means that courts should retreat from judicial review and allow democracy and public opinion to run its course.

But despite his trenchant criticism of judicial review, Griffith and many other functionalists still preserve a foothold for independent review in order to guard individuals against abuse of administrative discretion or arbitrariness. For example after rehearsing his deconstruction of English case law in his Pritt Lecture, Griffith cautions that “if, in light of all these decisions, we direct our efforts simply to diminishing the power of the courts, we shall find ourselves in no better case. Seeking to resist judicial authoritarianism, we shall find that we have merely increased executive authoritarianism.”\(^{187}\) Similarly, although John Willis, the leading Canadian functionalist, was clearly skeptical of legal values and modes of reasoning,\(^{188}\) he still recognized the

\(^{182}\) Ibid.


\(^{185}\) Ibid. at 18.

\(^{186}\) Ibid. at 16.


need to have some form of independent review in order to protect individuals affected by administrative agencies.\textsuperscript{189}

If we accept at the outset, as we must, the notion that the right of appeal from the decision of a judge on a point, say, of the law of contract, is granted not in aid of the uniformity of law, but of the interests of the individual litigant, then there is no reason to distinguish in administrative law between questions of policy and questions of law. An administrator is no less liable to err in applying standards of policy than a judge is to err in applying standards of law, and he should be equally liable to correction.

At the time, Willis and his fellow functionalists were lobbying for a system of independent administrative courts to fulfill this role.\textsuperscript{190} But when this system failed to materialize, they developed what can only be called a grudging acceptance of judicial review, provided that it was exercised with restraint.\textsuperscript{191}

This ambivalence towards judicial review shows that, despite the pretense of restricting itself to an empirical or instrumental understanding of law, functionalism retains an interest in the legitimacy associated with the rule of law.\textsuperscript{192} Although the functionalist project asserts an empirical foundation for their negative element (i.e. skepticism of common law values and concepts) it limits their ability to make sense of their positive element (i.e. a legal reform program with an emphasis on a popular democratic process). An elaboration of the constructive project would require them to elaborate their views on democratic values that include, among other things, a genuine concern for individuals who are affected by administrative decisions. This prospect poses a dilemma for functionalist scholars, because if one elaborates how democratic values figure in legal arguments regarding administrative decisions, it also invites judges to vindicate them through the practice of judicial review that they were so keen to criticize in the first place. Hence the cagey attitude of functionalists towards judicial review.\textsuperscript{193} Nevertheless, this

\textsuperscript{189} John Willis, “Three Approaches to Administrative Law”, supra note 158 at 80.

\textsuperscript{190} Ibid. See also Willis, The Parliamentary Powers of English Government Departments, supra note 89.

\textsuperscript{191} Willis, “Canadian Administrative Law in Retrospect”, supra note 162 at 244-245. See also Michael Taggart, “Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law” (2005) 43 Osgoode Hall L.J. 223 at 248-250 (“Prolegomenon”).


\textsuperscript{193} For other examples of functionalist ambivalence toward judicial review, see Harry Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) Osgoode Hall L.J. 1; Harlow & Rawlings, Law
ambivalence holds out some hope that functionalism might yet be capable of being reconciled to the rule of law. As David Dyzenhaus observes, one must possess at least “a thin conception of legality” so long as one retains even a limited form of independent review as a matter of constitutional law.\textsuperscript{194}

If this is true, it casts new light upon the intellectual development of Bora Laskin, who was one of the more interesting figures in the functionalist movement. Laskin was a successful academic at Osgoode Hall and the University of Toronto, and considered himself to be “an unabashed admirer” of his functionalist colleague, John Willis.\textsuperscript{195} During this period, he wrote a number of review articles and case commentaries which roundly criticized judicial review and the way it employed “comforting conceptualisms” in order to meddle with administrative decisions;\textsuperscript{196} and in his later years as a judge on the Ontario Court of Appeal and the Supreme Court of Canada, he continued to preach what he called a “pragmatic and functional” approach to judicial review in both his judicial\textsuperscript{197} and extra-judicial remarks.\textsuperscript{198} Yet in \textit{Crevier v. Attorney General of Québec}, he held in a majority opinion that a privative clause was invalid on constitutional grounds because the provincial legislature could not foreclose judicial review without infringing the constitutional right to judicial review. And although he relied upon s. 96 of the Canadian Constitution, which on its face merely grants the federal government the power to appoint superior court judges, he reasoned that “it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power”.\textsuperscript{199} While one might

\textsuperscript{194} Dyzenhaus, “The Logic of the Rule of Law”, \textit{supra} note 192 at 707.

\textsuperscript{195} Taggart, “Prolegomenon”, \textit{supra} note 191 at 237.


\textsuperscript{197} \textit{Tomko, supra} note 62 at 120; \textit{R. v. Ontario Labour Relations Board, ex parte Metropolitan Life}, [1969] 1 O.R. 412 (Ont. C.A.).


\textsuperscript{199} \textit{Crevier v. Québec (Attorney General), [1981] 2 S.C.R. 220.}
understandably quibble with the details of his reasoning, it is clear from his judgment that Laskin considered the constitutional argument to be a more forthright and “functional” method of explaining why a general privative clause should not be interpreted literally, and why at least some minimum degree of judicial review was required by the constitution.

In light of functionalist ambivalence towards rule of law logic, there are two possible explanations for Laskin’s apparent change of heart. The first casts Laskin as a sort of Benedict Arnold, who reneged on his functionalist credentials once he had defected to his judicial post. But this explanation would also have to cast Laskin’s consistent appreciation for functionalism as the cynical recitation of a faithless creed. The alternative (and more persuasive) explanation is that Laskin did not have a change of heart at all. He simply found himself in a position where he thought he had to confront the logic of the rule of law in dealing with a broadly worded privative clause. According to this view, Laskin retained his functionalist beliefs as a judge, but thought these beliefs had to be reconciled somehow with concern for individuals who were subject to administrative decisions. If this latter explanation holds, it opens up the possibility for a theory of administrative authority that can be reconciled with the rule of law, while still avoiding the legitimacy problem associated with the neo-Diceyan brand of judicial review.

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200 See e.g. David Mullan, “The Uncertain Constitutional Position of Canada’s Administrative Appeal Tribunals” (1982) Ottawa L. Rev. 239.

201 Crevier, supra note 199 at 234, 236.
IV. The Legacy of the Diceyan Dialectic

So far I have been examining the question of administrative law at a theoretical level in order to demonstrate that it has been addressed inadequately by public law scholarship steeped in the Diceyan constitutional tradition. In the next two chapters, I will examine at a doctrinal level two different common law responses to the reality of the administrative state—the complex array of administrative institutions empowered through legislation to decide how best to implement regulatory regimes. The first response is the doctrine of jurisdictional review, which has deep roots in the common law and continues to exert considerable influence on the practice of judicial review throughout the Commonwealth. The second response is the doctrine of curial deference, which is a relatively recent development in American and Canadian administrative law. This chapter examines how the deep tension associated with the Diceyan dialectic—the normative tension between the constitutional principles of parliamentary sovereignty and the rule of law—is reflected by the doctrine of jurisdictional review and its successor, proportionality review under the Human Rights Act 1998 [HRA].

The doctrine of jurisdictional review hinges on a formal distinction between jurisdictional issues and the merits of an administrative decision. This distinction is formal because it assumes that the scope of judicial review is determined by sources of law which identify a particular issue to be jurisdictional or non-jurisdictional, thereby obviating the need for judges to weigh relevant reasons (be they moral, political, economic, etc.) that might otherwise justify judicial review. Put differently, jurisdictional review is formal because it requires judges to use analytical categories and distinctions in order to determine the

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1 The doctrine of jurisdictional review is also frequently referred to as the “ultra vires doctrine” or the “doctrine of jurisdictional error”. I will refer to it as the doctrine of jurisdictional review throughout.


scope of judicial review instead of engaging in a more direct assessment of the principles of political morality that concern the legitimacy of judicial review.⁴

According to the doctrine of jurisdictional review, jurisdictional issues are questions of law and, since legal interpretation is the exclusive province of the judiciary, should be determined by judges according to their own standards of correct judgment. Therefore, when reviewing an administrative decision regarding a jurisdictional issue a judge is entitled to reassess an administrative decision on that issue, and if the administrative decision deviates from the judge’s opinion the judge is entitled to impose his or her own view on the matter. As Farwell L.J. puts it in *R. v. Shoreditch Assessment Committee*, “[n]o tribunal of inferior jurisdiction can by its decision finally decide on the question of the existence or extent of such jurisdiction; such question is always subject to review by the High Court”.⁵ By contrast non-jurisdictional issues or the merits of an administrative decision are, by their nature, political; and since political matters are the exclusive province of the legislature, the legislature is entitled to delegate responsibility for assessing the merits of any given issue to administrative officials through legislation. Therefore, administrative officials are entitled to decide the outcome through the exercise of political discretion, and judges cannot intervene merely because they disagree with an administrative decision on its merits. As Lord Denman puts it in *R. v. Bolton*, “[e]ven if [a] decision should on the merits be unwise or unjust, on these grounds we cannot reverse it.”⁶

Of course, the problem with jurisdictional review is that the formal distinction between jurisdictional issues and the merits has proven historically to be incoherent.⁷ When

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introducing the topic of jurisdictional review in 1929 D.M. Gordon observed “that in no branch of English law is there more confusion and conflict”, an assessment that has been echoed by virtually every major administrative law treatise in the United Kingdom ever since. When addressing jurisdictional review, William Wade and Christopher Forsyth observe candidly that judges “can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament”. Similarly, Lord Woolf and Jeffrey Jowell observe that jurisdictional review “calls for analytical distinctions which have, as judicial review has developed, become difficult if not impossible to sustain.” And Paul Craig points out that the case law reveals a variety of conflicting methods for jurisdictional review ranging from the “collateral fact” approach, to “limited review”, to “extensive review” of questions of law. The chequered history of jurisdictional review in the United Kingdom has prompted at least one prominent legal theorist, T.R.S. Allan, to argue that “in so far as theories of jurisdiction and nullity draw chiefly on conceptual analysis for their contribution to doctrinal clarification, their practical value and philosophical status are alike open to question.”

This chapter examines how the doctrine of jurisdictional review and, more recently, the doctrine of proportionality review reflect the tension associated with the Diceyan dialectic identified in chapter 2. I will argue that the history of jurisdictional review shows how judges have deployed two very different conceptions of law when attempting to identify jurisdictional parameters especially, but not exclusively, in cases where the relevant legislation includes a privative clause. The first conception, which is anchored by the constitutional principle of Parliamentary sovereignty, asserts that judges are

9 Wade & Forsyth, Administrative Law, supra note 2 at 37.
10 De Smith, Woolf & Jowell, Judicial Review of Administrative Action, supra note 2 at 223.
12 Allan, “Doctrine and Theory in Administrative Law”, supra note 7 at 435 [emphasis original].
13 A privative clause is a statutory provision that purports to exclude or otherwise limit judicial review. While privative clauses may take on a variety of different forms (e.g. finality clauses, time limitation clauses, no certiorari clauses, subjective opinion clauses, etc.) they all share the same general purpose: to consolidate the power of executive officials by forestalling the prospect of judicial interference with administrative decisions. See Craig, Administrative Law, supra note 2, c. 27.
entitled to enforce jurisdictional parameters which are established by positive facts about legislative intent. This conception focuses on the plain meaning of the words contained in legislation in order to ascertain whether and to what extent Parliament in fact intended for judges to enforce statutory limits on administrative action. Beyond these positive jurisdictional parameters, administrative officials are entitled to exercise a non-justiciable form of political discretion free from judicial second guessing on the merits. Because this conception of jurisdictional review assumes that all legal limits on administrative action are determined by the legislature, I will call it the “legislative” conception of jurisdictional review.14

The second, “judicial” conception of jurisdictional review is underpinned by a Diceyan conception of the rule of law and asserts that judges are entitled to enforce jurisdictional parameters that are established by both positive legislation as well as common law principles. While the judicial conception continues to pay lip service to the principle of Parliamentary sovereignty, it asserts that Parliament relies upon judges to determine the content of the law through the common law method of interpretation and adjudication. Thus, judges are entitled to interpret legislative intent more broadly by looking to the purpose of legislation in a given social context or supplementing it with common law values like the principles of procedural fairness and substantive reasonableness. This interpretation of the law is then attributed to Parliament through the device of implied Parliamentary intent. Like the legislative conception, the judicial conception of jurisdictional review purports to identify whether Parliament intended a given issue to be considered “jurisdictional”, and any administrative judgment regarding such issues are to be determined by judges according to a correctness standard of review. But because the judicial conception enables judges to draw upon an array of common law resources when interpreting legislation, it broadens the scope for judicial review significantly and reduces the latitude for administrative determination of the merits. As the House of Lords

14 Lord Reid famously referred to this conception in Anisminic as jurisdiction in the “narrow and original sense” of the word. See Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147 at 171 (H.L.) [Anisminic]. However, Lord Reid’s spatial metaphor is inapt because it fails to convey important assumptions about the role of particular legal institutions that this conception of jurisdictional review projects.
decision in *Anisminic* shows, when the judicial conception of jurisdictional review is taken to its logical conclusion it collapses the distinction between jurisdictional issues and the merits so that the legality of administrative decisions is ultimately determined according to judicial standards of correct judgment.

Because the doctrine of jurisdictional review incorporates both the legislative and the judicial conceptions of jurisdictional review, it is fundamentally incoherent or unstable. Murray Hunt makes a similar observation, albeit in the context of proportionality review under the *HRA*, when he says that

> [t]his is the contemporary manifestation of our Diceyan inheritance: a constitutional discourse which selectively invokes democratic positivism and liberal constitutionalism in order to justify or explain a particular decision, but which lacks an overarching coherent vision of democratic constitutionalism in which the apparent contradiction of these foundational commitments is explicitly confronted and an attempt made to reconcile them without resort to the language of sovereignty.

In this chapter, I will argue that Hunt’s assessment provides an accurate portrayal of the Janus-faced nature of judicial review in the United Kingdom. One face—which is typified by cases like *Liversidge v. Anderson*, *Associated Provincial Picture Houses v. Wednesbury Corporation*, *R. v. Home Secretary, ex parte Hosenball*, and *Secretary of State for the Home Department v. Rehman*—asserts that administrative law is essentially the exercise of political discretion on the merits that can be immunized from independent judicial scrutiny by legislative fiat. The other face—which is typified by cases like *Roberts v. Hopwood*, *Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw*, *Anisminic Ltd. v. Foreign Compensation Commission*,

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19 *Secretary of State for the Home Department v. Rehman*, [2003] 1 A.C. 153 (H.L.) [*Rehman*].


21 *Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw*, [1951] 1 K.B. 711 [*Shaw*].

22 *Anisminic*, supra note 14.
Pearlman v. Keepers and Governors of Harrow School,\textsuperscript{23} and Huang v. Secretary of State for the Home Department\textsuperscript{24}—asserts that judges always retain the ability (even in the face of an express privative clause) to quash administrative decisions which do not comport with their own standard of correct judgment on the merits. And since both approaches to judicial review remain viable at common law, judges continue to deploy these conflicting senses of legality when attempting to justify judicial review of administrative action.

A. Pre-Anisminic Jurisdictional Review

From the beginning of the modern administrative state right up to the current day, judges in the United Kingdom have consistently relied upon the rhetoric of Parliamentary sovereignty when attempting to justify judicial review.\textsuperscript{25} This preoccupation with Parliamentary sovereignty as an organizing principle explains why virtually all cases regarding judicial review from the United Kingdom bear at least some superficial marks of the legislative conception jurisdictional review.\textsuperscript{26} However, this rhetorical argument was more pervasive during the late nineteenth and early twentieth century, when judges regularly asserted that the scope of judicial review was determined uncontroversially by facts about legislative intent. Judges during this period tended to focus upon a semantic analysis of discrete words within the text of the enabling legislation in order to justify their decisions.\textsuperscript{27} The argument was that legislative facts, also commonly referred to as

\textsuperscript{23} Pearlman v. Keepers and Governors of Harrow School, [1979] Q.B. 56 (C.A.) [Pearlman].

\textsuperscript{24} Huang v. Secretary of State for the Home Department, [2007] 2 A.C. 167 (H.L.) [Huang].

\textsuperscript{25} For my purposes, I will assume that the modern administrative state in the United Kingdom began to emerge with the establishment of the Factory and Mines Inspectorate in 1833. See e.g. Harry Arthurs, \textit{Without the Law”}: Administrative Justice and Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985) at cc. 4-6; Henry Parris, \textit{Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century} (London: George Allen & Unwin Ltd., 1969); W. Ivor Jennings, \textit{The Law and the Constitution}, 5th ed. (London: University of London Press, 1959) at 308-311.

\textsuperscript{26} See e.g. Christopher Forsyth, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” 55 Camb. L.J. 122.

\textsuperscript{27} A semantic approach to statutory interpretation focuses on the meaning of discrete words within the legislation in order to divine legislative intent. This approach may be contrasted with a purposive approach, which attempts to determine the meaning of statutory language by examining the broader purposes of a given legislative scheme. Stanley de Smith observes that, during the first half of the twentieth century, courts preferred semantic or “formal linguistic” analysis when determining the parameters of administrative authority. Stanley de Smith, \textit{Judicial Review of Administrative Action} (London: Stevens & Sons Ltd., 1959) at 59 [Judicial Review]. The clearest example of this mode of thought is Lord Radcliffe’s invocation of Bacon’s admonition, “Non est interpretatio, sed divinatio, quae recedit litera” [Do not interpret, but in order
“collateral” or “jurisdictional” facts, determined the parameters of administrative jurisdiction and were distinguishable from the merits of an administrative decision. The famous dicta from *R. v. Bolton* which asserts that the parameters of administrative jurisdiction are “determinable at the commencement not at the conclusion of the inquiry” illustrates this aspect—the implication being that the scope of judicial review was determined *ab initio* by the legislature, and that beyond these jurisdictional parameters was the realm of administrative discretion which was not subject to legal restraints. In *Bunbury v. Fuller*, Coleridge J. attempted to clarify the analytical distinction between jurisdictional issues and the merits in the following terms:

Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court. Then to take the simplest case—suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen’s Bench will issue its mandamus or prohibition to correct his mistake.

Thus, if an administrative decision deviates from a judicial assessment regarding a jurisdictional issue, the judge is entitled to intervene; whereas if an administrative decision merely deviates from a judicial assessment of the merits, the matter is deemed to be beyond the proper scope of judicial review.

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28 The most common issues which were deemed jurisdictional in this sense concerned the constitution of an administrative tribunal, the scope of the subject matter over which an administrative tribunal had been given responsibility, and the geographic jurisdiction of an administrative tribunal. See de Smith, *Judicial Review*, supra note 27 at 227-228.

29 *Bolton*, supra note 6 at 73.

30 *Bunbury v. Fuller* (1853), 9 Ex. 111 at 140; 156 E.R. 47 at 60.

One problem for judges who adopted this line of reasoning was to explain why judges were entitled to overturn administrative decisions protected by privative clauses. By the end of the seventeenth century, common law courts were already familiar with the interpretive problem posed by privative clauses. These legislative provisions were initially treated with suspicion, and the common law quickly established that such clauses would be read narrowly in order to preserve the supervisory jurisdiction of superior courts. The more difficult matter, for judges and public lawyers, was to justify this approach as a matter of constitutional principle. The general response was that the purpose of judicial review was to guarantee Parliamentary sovereignty—a privative clause could not oust the supervisory jurisdiction of common law courts, because it would create an executive mini-sovereign that was no longer accountable to Parliament. Thus, judges were entitled to engage in jurisdictional review in order to ensure the supremacy of Parliament as a law-making institution.

Nevertheless, the doctrine of jurisdictional review was confounded in practice. The confusion stemmed from the fact that the formal distinction between collateral or jurisdictional facts and the merits of an administrative decision proved to be unworkable. Writing in 1959, Stanley de Smith noted that “[n]o satisfactory test has ever been formulated for distinguishing matters which go to jurisdiction from matters which go to the merits; and in some cases the courts…have appeared to ignore the distinction altogether.” Even when judges seemed to apply the distinction, they simultaneously undermined it in contradictory dicta in the very same judicial opinion. These conflicting dicta suggested that administrative jurisdiction was bound by political considerations beyond the legislative text, prompting de Smith to observe that “the problem of defining the concept of jurisdiction…has been one of public policy rather than one of logic.”

32 See e.g. An act to prevent and suppress seditious conventicles, 22 Car. II, c. 1.
33 de Smith, Judicial Review, supra note 27 at 222-223; Wade, Administrative Law, supra note 27 at 112.
34 Gordon, “The Relation of Facts to Jurisdiction”, supra note 8; de Smith, Judicial Review, supra note 27 at 75.
35 de Smith, Judicial Review, supra note 27 at 69-70. See also Louis Jaffe, “Judicial Review: Constitutional and Jurisdictional Fact” (1957) 70 Harv. L. Rev. 953 at 959.
36 Ibid. at 68.
For example, when Sir Colville held in *Colonial Bank of Australasia v. Willan* that a privative clause could not “absolutely” deprive a common law court of its supervisory function, but merely “control and limit its action”, he struggled to articulate a coherent account of jurisdictional review. On the one hand, his judgment reiterates the legislative conception of jurisdictional review and the formal distinction between jurisdictional and non-jurisdictional issues:

...it is necessary to have a clear apprehension of what is meant by the term “want of jurisdiction.” There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the fact of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide.

However, after deciding that the initial decision of the Court of Mines was regular on its face and did not contain any jurisdictional errors, Sir Colville proceeded to examine whether any extrinsic evidence showed that the bank had procured the decision through fraud. In fact, it was only “after a full consideration of the case as disclosed in the affidavits” that the Court decided to restore the Court of Mines’ original decision. Thus, even though *Willan* preaches the legislative conception of jurisdictional review, in practice it shows that the Judicial Committee of the Privy Council thought it was entitled to reassess the quality of any available evidence in order to test the legality of the administrative decision on its merits.

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37 *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417 [Willan]. Although decisions from the Judicial Committee of the Privy Council were not technically binding upon courts in the United Kingdom, they were given substantial weight. See Rupert Cross & J.W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991) c. 1. For my purposes, I will treat the decisions of the Judicial Committee on par with those from the House of Lords, because they illustrate how the common law doctrine of jurisdictional review developed.

38 *Willan*, supra note 37 at 442-443.

39 Ibid. at 448.
The dialectic between the legislative and judicial conceptions of jurisdictional review in Willan comes into sharper focus in Rex v. Nat Bell Liquors Ltd., a case in which the Judicial Committee of the Privy Council considered whether an administrative decision could be quashed for lack of evidence.⁴⁰ In that case, a company was fined $200 and had its entire inventory of liquor seized when one of its employees sold twelve bottles of whisky to a police informant. The company sought certiorari on the ground that the conviction could not be reasonably supported by the evidence of an informant who had a previous criminal record. Accordingly, the main issue in Nat Bell Liquors was whether the court was entitled to reassess the sufficiency of the evidence when conducting judicial review.

Writing for the court, Lord Sumner noted that the company’s application was unorthodox because the conviction “was on its face correct, sufficient and complete” and there was no allegation of fraud or bias.⁴¹ In his view, even if an administrative decision was not supported by the evidence it would not trigger jurisdictional review:⁴²

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. … To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all.

Accordingly, Lord Sumner held that any evidence extrinsic from the official record regarding the credibility of the Crown witness was immaterial because it had no bearing on whether the magistrate had jurisdiction.⁴³

However, in the same judgment he blurs the distinction between jurisdictional matters and the merits by uttering his now famous dictum that the function of judicial review “goes to two points: one is the area of the inferior jurisdiction and the qualifications and

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⁴¹Ibid. at 140-141.
⁴²Ibid. at 151-152.
⁴³Ibid. at 165.
conditions of its exercise; the other is the observance of law in the course of its exercise. He gives added support for this more expansive approach to judicial review when he observes that the Summary Jurisdiction Act, which introduced a common form conviction and discouraged inferior judges from stating their findings of fact and reasons for their decisions,

did not stint the [supervisory] jurisdiction of the Queen’s Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record “spoke” no longer: it was the inscrutable face of a sphinx.

The important point, for our purposes, is Lord Sumner’s suggestion that judicial review is only subject to practical constraints, such as the contents of the record, rather than whether the issue is jurisdictional or non-jurisdictional in nature. Thus, it seems that Lord Sumner grasps simultaneously at two very different conceptions of jurisdictional review. The first is the legislative conception of jurisdictional review, where the role of the court is restricted to merely ascertaining whether the administrative decision-maker observed jurisdictional parameters that are distinguishable and logically prior to an inquiry into the merits. The second is the judicial conception of jurisdictional review, which entitles the court to scrutinize the merits disclosed by the record in order to determine whether an administrative decision-maker observed the law while exercising his or her discretionary power. As we shall see shortly, despite the ratio in Nat Bell Liquors that a court cannot quash an administrative decision for lack of evidence, the Court of Appeal would later invoke Lord Sumner’s obiter comments as authority for the proposition that judges are entitled to correct all legal errors disclosed on the face of the record.

The upshot of this doctrinal confusion is that one can identify at least two distinct lines of case authority regarding jurisdictional review. The first line of cases holds that as long as there is some legislative warrant for administrative officials to decide a particular question that legislative warrant entitles them to exercise their discretion unencumbered

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44 Ibid. at 156.
45 Ibid. at 159.
46 See R. v. Medical Appeal Tribunal; Ex parte Gilmore, [1957] 1 Q.B. 574 (C.A.) [Gilmore].
by judicial review. This line of authority is typified by cases like *Liversidge*\(^{47}\) and *Wednesbury*.\(^{48}\) The issue in *Liversidge* concerned the legality of an executive detention order. In that case, the Emergency Powers (Defence) Act, 1939 empowered Cabinet to make such regulations “as appear...to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war”.\(^{49}\) Cabinet subsequently promulgated Regulation 18B of the Defence (General) Regulations, 1939, which stated:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

Robert Liversidge was subsequently detained without charge after the Home Secretary deemed him to be a threat to public safety pursuant to Regulation 18B. Liversidge then sued for false imprisonment and sought to compel the Home Secretary to give particulars to show that he in fact had “reasonable cause” to believe that Liversidge was a security threat.

However, the House of Lords held that despite the express statutory requirement of reasonable cause, neither the statute nor the regulation entitled the court to test whether the Home Secretary in fact had reasonable grounds for issuing the detention order. Viscount Maugham, who wrote the lead judgment for the majority, rejected Liversidge’s argument that the court ought to interpret Regulation 18B in light of a common law presumption which favoured the personal liberty of the subject, saying that “we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.”\(^{50}\) Accordingly, he held that the regulation gave the Home Secretary a discretionary power to detain Liversidge, and that this discretion could not be questioned through judicial review.\(^{51}\)

\(^{47}\) *Liversidge*, *supra* note 16.

\(^{48}\) *Wednesbury*, *supra* note 17.

\(^{49}\) *Emergency Powers (Defence) Act, 1939* (U.K.), 2 & 3 Geo. VI, c. 62, s. 1.

\(^{50}\) *Liversidge*, *supra* note 16 at 219.

\(^{51}\) *Ibid.* at 220.
To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law.

Viscount Maugham further noted that it was inappropriate for the court to scrutinize the substantive basis for the detention order, because the Home Secretary was not required to act judicially in the first place—he could receive hearsay evidence, was not required to give notice, and did not have a legal obligation to respond to any objections against the detention order. In addition, since the Home Secretary had to assess highly sensitive information, it would be dangerous for the court to require disclosure of that information and subject it to independent scrutiny. Finally, any lingering concerns about the Home Secretary’s decision could be assuaged by the fact that the Home Secretary was a member of Cabinet responsible directly to Parliament on matters of state security. Thus, Viscount Maugham was prepared to assume the legality of the detention because the Home Secretary had stipulated reasonable grounds for issuing it. So even though the Home Secretary did not reveal any reasons or supporting evidence for the detention order, Viscount Maugham was prepared to give him the benefit of the doubt by invoking the latin maxim *omnia esse rite acta*—all acts are presumed to have been rightly and regularly performed.52

A similar approach to judicial review is employed in *Wednesbury*.53 That case concerned the legality of a condition imposed on a cinema operation license by a municipal council. The condition prohibited the owner of the cinema from admitting any children under the age of fifteen to any Sunday performance. The owner sought judicial review on the ground that the condition was unreasonable and should be quashed. However, Lord Greene rejected this argument, saying that the court could not intervene merely because it would have decided the matter differently. To make this point, he observed that “[t]he effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another.”54 Like Viscount Maugham in *Liversidge*, he emphasized that the

53 *Wednesbury, supra* note 17.
council was exercising a discretionary power, as opposed to a judicial one, and therefore the court could only interfere if the council had “contravened the law”.\textsuperscript{55} He then elaborated upon the legal errors that would expose an administrative decision to judicial review.\textsuperscript{56}

He then elaborated upon the legal errors that would expose an administrative decision to judicial review.\textsuperscript{56}

For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. He then cited the example of a “red haired teacher, dismissed because she has red hair” in order to clarify the degree of absurdity required to justify judicial intervention. Lord Greene then held that the license condition was not unreasonable on the facts, because the health and welfare of children was clearly a relevant matter for the council to consider. Furthermore, he held that the court had no cause to second guess the weight ascribed to that factor, because “once it is conceded that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case.”\textsuperscript{57}

The main point here is that even though both \textit{Liversidge} and \textit{Wednesbury} recognize that the exercise of administrative discretion is subject to a legal constraint of reasonableness, both cases perceive it to be a flimsy constraint that does not entitle the court to seriously scrutinize the substantive basis or justification for a particular administrative decision. In \textit{Liversidge}, this meant that even though the statute required the Home Secretary to have reasonable cause for detaining Liversidge, the court could not examine whether there was any evidentiary basis for the detention order; and although the court in \textit{Wednesbury} recognized that it could scrutinize the reasonableness of an administrative decision, this meant that the court would only intervene if the administrative decision was “so absurd that no sensible person could ever dream that it lay within the powers of the authority.” In either case, the approach to judicial review enables the government to establish what David Dyzenhaus calls “grey holes” of legality: situations where the legal constraints on

\textsuperscript{55} \textit{Ibid.} at 228.
\textsuperscript{56} \textit{Ibid.} at 229.
\textsuperscript{57} \textit{Ibid.} at 230.
administrative action “are so insubstantial that they pretty well permit government to do as it pleases”. 58

The second, conflicting line of cases regarding jurisdictional review holds that even though administrative officials have been empowered by legislation to decide certain issues, their decisions must comport with fundamental common law values and principles. The important underlying assumption is that since judges are the guardians of common law values and principles, they are entitled to intervene whenever an administrative decision deviates from a judicial conception of what the law, understood in light of common law principles, requires. Two cases which illustrate this more expansive, judicial conception of jurisdictional review are Roberts v. Hopwood 59 and Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw. 60

The issue in Roberts v. Hopwood revolved around s. 62 of the Metropolis Management Act, 1855, which gave metropolitan borough councils a discretionary power to pay its employees “such salaries and wages the board or vestry may think.” 61 From May 1, 1920, the council of the Poplar borough in London implemented a minimum wage of £4 a week for municipal employees in order to offset inflation. However, when the cost of living began to decrease in 1921 the council maintained its wage policy on the basis that it was the minimum wage the council ought to pay as a model employer. At the end of the fiscal year, the district auditor disallowed £5000 in wages because he thought they were excessive relative to the market rate for manual labour and therefore “contrary to law” within the meaning of the Public Health Act, 1875. 62 The auditor then levied a surcharge on the borough councillors in the same amount, seeking to recoup the wages he thought had been distributed illegally as wages. The councillors sought to overturn the surcharge,

59 Roberts, supra note 20.
60 Shaw, supra note 21.
61 Metropolis Management Act, 1855 (U.K.), 18 & 19 Vict., c. 120, s. 62.
62 Public Health Act, 1875 (U.K.), 38 & 39 Vict., c. 55, s. 247.
arguing that the borough council’s policy fell within the ambit of their statutory discretion to set wages.

The House of Lords ultimately decided that the wages were illegal, because the council had no jurisdiction to establish a minimum wage policy. One of the more interesting aspects of the decision is that, as in *Wednesbury*, the court thought the council’s statutory discretion had to be exercised in a reasonable fashion, even though the statute itself did not expressly mention such a qualification. Thus, Lord Atkinson reasoned that “[m]any things are contrary to law though not prohibited by any statute”; and Lord Wrenbury asserted that, even though the statute did not limit the council’s discretion, “[a] discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought…. He must act reasonably.” But unlike *Wednesbury*, the court thought the reasonableness constraint had substantive political content: it held that in order pass the reasonableness threshold, the council had a legal obligation to adopt an efficient wage policy in light of existing market conditions. As Lord Wrenbury puts it:

> Wages in a particular service are such sum as a reasonable person, guiding himself by an investigation of the current rate in fact found to be paid in the particular industry, and acting upon the principle that efficient service is better commanded by paying an efficient wage, would find to be the proper sum. … It is a figure which is not to be based upon or increased by motives of philanthropy nor even of generosity stripped of commercial considerations. It is such figure as is the reasonable pecuniary equivalent of the service rendered. Anything beyond this is not wages. It is an addition to wages, and is a gratuity.

Since the council had admittedly set its wages by considering factors besides market efficiency, Lord Wrenbury thought it was contrary to law and therefore proper for the auditor to impose the surcharge. Lord Atkinson went further, saying that the council acted unreasonably because its policy was driven “by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages”. Thus, *Roberts* provides an example where the court was prepared to enforce a non-statutory parameter of reasonableness, and the court deemed the content

63 *Roberts*, supra note 20 at 596.

64 *Ibid.* at 613.


of that jurisdictional parameter to include free market principles that trumped a fair wage policy for civil servants. In other words, although the judges in *Roberts* professed to be merely enforcing jurisdictional parameters established by Parliament, their decision was driven primarily by the fact that they disagreed with the council’s assessment of the relative merits of political principles and policies.

The court similarly expanded the scope of judicial review in *Shaw* by avoiding the analytical distinction between jurisdictional and non-jurisdictional errors. In that case, Thomas Shaw sought judicial review of a compensation order rendered by the Northumberland Compensation Appeal Tribunal. Shaw argued that the Tribunal had miscalculated his termination benefits, an assertion the lawyer for the Tribunal conceded in argument on judicial review. However, the Tribunals’ lawyer argued that the court could not overturn the Tribunal’s decision, because everyone agreed that the miscalculation was not a “jurisdictional” question in the traditional sense. Nevertheless, at first instance Lord Goddard decided that judicial review would lie to correct any error of law on the face of the record, saying “the question as to how far this court can inquire into the correctness of a decision, as distinct from the jurisdiction of the court which made it, depends on the contents of the documents…which are brought up and laid before this court.” This holding was later affirmed by the Court of Appeal, where Lord Denning opined that judicial review “extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law.” And later, in the same vein, he declared that “[i]f the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision.” But the most interesting aspect of the case is that both Lord Goddard and Lord Denning invoked Lord Sumner’s decision in *Nat Bell Liquors* to justify the expansion of judicial review to include review of non-

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68 *Shaw*, supra note 21 at 715.
69 Ibid. at 715.
71 Ibid. at 352.
jurisdictional issues. The result is that *Nat Bell Liquors*, a decision that once stood for the proposition that judges could not overturn an administrative decision on evidentiary grounds, was now being used to allow judges to correct any error of law that could be detected on the face of the record.

Thus, both *Roberts* and *Shaw* recognize that the exercise of administrative discretion must comply with substantial, non-statutory requirements of legality in order to live up to rule of law standards. In *Roberts*, this meant that even though the Poplar borough council had been given authority under the statute to determine its own wage policy, the court was entitled to intervene if it thought that the council’s wage policy deviated from free market principles; and in *Shaw*, this meant that the analytical distinction between jurisdictional and non-jurisdictional issues was permeable.

**B. Post-Anisminic Jurisdictional Review**

Despite the erratic history of these cases, one gets the sense that the tide was shifting in favour of the judicial conception by the mid-1950s. Early signs of this can be seen when the Court of Appeal in *Shaw* expanded judicial review to correct errors on the face of the record, a proposition that was later extended in *R. v. Medical Appeal Tribunal, Ex parte Gilmore* to allow the court to correct non-jurisdictional errors even when an administrative decision was protected by a privative clause. This general trend was also spurred forward by the Franks Committee Report which recommended Parliament restrain the use of privative clauses, a recommendation that was later implemented by the *Tribunals and Inquiries Act, 1958* when Parliament repealed most privative clauses enacted prior to 1958. Finally, the House of Lords’ decision in *Ridge v. Baldwin* signalled that even in the absence of a jurisdictional question, the court was prepared to intervene when administrative action did not comport with common law principles of natural justice. All of these shifts in the law relating to judicial review gave judges more

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73 *Gilmore, supra* note 46.
74 *Tribunals and Inquiries Act, 1958* (U.K.), 6 & 7 Eliz. II, c. 66, s. 11.
confidence in asserting a robust supervisory jurisdiction over administrative action. Thus, when ECS Wade wrote the preface to the tenth edition of Dicey’s *An Introduction to the Study of the Constitution*, he observed that “[t]wenty years ago [Dicey’s] concept of the rule of law was challenged more vigorously than the principle of parliamentary sovereignty. To-day we find that position has been reversed.”

Nevertheless, the formal justification for judicial review continued to revolve around the principle of Parliamentary sovereignty and judges continued to blur the two conceptions of jurisdictional review behind the veil of implied legislative intent. The consequence of this rhetorical device was that judges could resort to either conception of jurisdictional review without having to confront deeper questions of political principle or regulatory context. As a result, the doctrine became extremely elastic and lost much of its explanatory power.

*Anisminic* provides an excellent case study in this regard, because it shows how the House of Lords simply grafted the judicial conception onto the legislative conception without altering the underlying premise of Parliamentary sovereignty. Anisminic Ltd. was the successor corporation to the Sinai Mining Company that, up until the Suez war, had owned a manganese mining operation in the Sinai Peninsula. During the war, Anisminic’s mine was damaged by invading Israeli forces; after the war, all of Anisminic’s remaining assets were expropriated by the Egyptian government. When the new Egyptian owners began selling ore extracted from the mine, Anisminic threatened to commence legal proceedings against anyone who purchased manganese which had been procured contrary to the principles of international law. In order to stop Anisminic’s campaign, the Egyptian economic authority offered to purchase Anisminic’s interest in the property for £500,000. However, the terms of the agreement expressly preserved Anisminic’s ability to seek compensation from any other government for losses incurred during the war.

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Egypt subsequently transferred £27.5 million to the British government as compensation for all property losses incurred by British subjects. This fund was to be administered by the Foreign Compensation Commission (FCC) pursuant to the terms of the Foreign Compensation Act 1950. The Act included a privative clause, which provided that any “determination by the commission…shall not be called into question in any court of law.” After a four day hearing, the FCC rejected the bulk of Anisminic’s claim and held that Anisminic was only entitled to recover damages caused by the Israeli army. The FCC held that an Order in Council barred Anisminic’s recovery because it required the claimant to be an owner or “successor in title” vis-à-vis the property and a British national. The FCC held that the new Egyptian owners had become Anisminic’s “successor in title” and therefore Anisminic was not entitled to compensation. Anisminic sought judicial review of the FCC’s decision on the ground that the FCC had exceeded its jurisdiction. The main question was whether the Court could entertain the request in light of a privative clause which indicated Parliament’s intent to exclude judicial review.78

The House of Lords overturned the FCC’s decision on the basis that it had exceeded its jurisdiction by adopting an erroneous interpretation of the Order in Council.79 In doing so, the majority opinions perpetuated the confusion between the legislative and judicial conceptions of jurisdictional review. This confusion is most apparent in a famous passage from Lord Reid’s judgment:80

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word “jurisdiction” has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed

78 Parliament’s intent to exclude judicial review was all the more palpable because section 11(3) of the Tribunals and Inquiries Act 1958, supra note 74 provided that privative clauses relating to FCC decisions remained in force, while most other pre-1958 privative clauses were to be interpreted so as to allow for judicial review.

79 Anisminic, supra note 22.

80 Ibid. at 171, 173-174.
to deal with the question remitted to it and decided some question that was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

Lord Pearce similarly elides the legislative and judicial conceptions of jurisdictional review when he says:  
Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

These passages are problematic because they explode the distinction between jurisdictional issues and the merits. If one adopts the logic of Lord Reid and Lord Pearce, there is no logical reason why any aspect of an administrative decision could not in principle be reviewed on a correctness standard. Further evidence of this can be drawn from the fact that Lord Reid asserts confidently that “the question is whether on a true construction of the Order the applicants did or did not have to prove anything with regard to successors in title.” Each of the majority opinions then proceeds to set out in detail why their own true construction of the Order did not allow the FCC to inquire whether Anisminic had a successor in title. Accordingly, the court held that the FCC’s decision should be removed because it deviated from the court’s interpretation of the Order.

After Anisminic, the need to revisit the principles of jurisdictional review was pressing, because the Court had brushed aside an express privative clause to correct an error that most public lawyers thought was not jurisdictional in the traditional sense. The relevant question was: how could the principle of Parliamentary sovereignty either explain or justify judicial review when the court no longer recognized any reasons to restrain themselves when scrutinizing the merits of an administrative decision? William Wade provides a curious response to this question, one which treads the same path as the House

81 Ibid. at 195.
82 Ibid. at 174.
Lords in *Anisminic*. That response stretches the idea of implied legislative intent to provide a *post hoc* rationalization for judicial review. For instance, when Wade addresses the question of “Jurisdiction Over Fact and Law” in the third edition of his landmark treatise, he begins with the legislative conception of jurisdictional review: the scope of administrative jurisdiction is determined by legislative intent.\(^\text{83}\) The remainder of that chapter, however, presents a litany of exceptions:

1. Since enabling legislation is frequently silent or ambivalent about whether a condition should be regarded as jurisdictional, the extent of jurisdiction is unpredictable;\(^\text{84}\)
2. Even in cases where the legislature expressly intends that the administrative decision-maker should be the final authority, courts often intervene in a manner that seems “to strain the ordinary rule that excess of jurisdiction invalidates an order, while error within jurisdiction does not”;\(^\text{85}\)
3. Even in extreme cases where Parliament enacts an explicit privative clause judges will correct errors in administrative judgment; and\(^\text{86}\)
4. Courts will intervene even when they find an error that does not offend any express statutory provision, provided it is disclosed on the face of the record;\(^\text{87}\)

Finally, Wade discusses whether British courts should adopt absence of evidence as a ground of review, a development that would constitute yet another break from the legislative conception of jurisdictional review.\(^\text{88}\)

A finding based on no evidence, as opposed to a finding which is merely against the weight of the evidence, is an abuse of power which judges are naturally loath to tolerate. The [authorities opposed to this ground of review] are founded upon the classical theory of jurisdictional control, in other words the principle of *ultra vires*. But that theory no longer reigns supreme: the doctrine of error on the face of the record infringes it, and there is really no reason why new doctrines as to findings of fact should not infringe it also.

Thus, in the span of little more than ten pages, Wade asserts that legislative intent is both a necessary and unnecessary condition for judicial review. This same curious transition

\(^{84}\) Ibid. at 90.
\(^{85}\) Ibid. at 91.
\(^{86}\) Ibid. at 91, 150-153.
\(^{87}\) Ibid. at 94-98.
\(^{88}\) Ibid. at 99.

However, it would be a mistake to assume that \textit{Anisminic} represents the \textit{de facto} triumph of the judicial conception of jurisdictional review. In the years following \textit{Anisminic}, the case law did not merely gravitate to the pole anchored by a Diceyan conception of the rule of law. If anything, \textit{Anisminic} perpetuated the doctrinal confusion that preceded it by grasping at both poles in the Diceyan dialectic, meaning that judges could continue to employ conflicting approaches to judicial review without having to offer a principled explanation for their decisions.

This confusion is illustrated by two decisions from Lord Denning during the post-\textit{Anisminic} period. The first decision, \textit{R. v. Home Secretary, Ex parte Hosenball}, reasserts the legislative conception of jurisdictional review in a manner reminiscent of \textit{Liversidge} and \textit{Wednesbury}.\footnote{\textit{Hosenball}, \textit{supra} note 18.} The issue in \textit{Hosenball} concerned an order of the Home Secretary to deport Mark Hosenball, an American journalist who had published an article regarding a domestic surveillance program. The original deportation order merely stated that Hosenball was a threat to public safety, but did not provide particulars regarding the allegation. So although Hosenball was allowed to make representations before a special advisory panel regarding the deportation order, he could not respond directly to the allegations made against him because he had no information about the basis for the order. Thus, he sought judicial review of the deportation order on the ground that the Home Secretary had failed to comply with the principles of natural justice.
In the initial passages of his judgment, Lord Denning seemed to sympathize with Hosenball’s argument. He noted that “if this were a case in which the ordinary rules of natural justice were to be observed, some criticism could be directed upon it”. However, he immediately qualified this statement, saying that “this is no ordinary case....and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place.”

After citing *Liversidge* as precedent, Lord Denning asserted that it would be inappropriate for the court to require the Home Secretary to reveal the evidentiary basis for the order, because it would jeopardize important, confidential sources of information. But the most telling passages in Lord Denning’s judgment concern the nature of judicial review in cases regarding national security.

There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task.

Lord Lane later echoes this sentiment when he says that “in the end it is the Secretary of State who must ...be trusted to speak the last word”. Thus, it seems that the function of court in *Hosenball* is limited to ensuring that the decision is in fact made by the official designated by Parliament to make it; and any concerns regarding the substance of that official’s decision cannot be vindicated through judicial review.

The second, conflicting decision was rendered only a year after *Hosenball* in *Pearlman v. Keepers and Governors of Harrow School*. *Pearlman* concerned the legality of an order of a county court judge which held that the installation of a central heating system did not amount to a “structural alteration, extension or addition”. Under the *Leasehold Reform Act, 1967*, Parliament gave tenants who held long term leases a right to purchase the freehold on favourable terms, so long as the rateable value of the freehold did not exceed £1,500. Sidney Pearlman wanted to purchase his leasehold property, but he was barred by statute from doing so because its rateable value was £1,597. In order to purchase the property, Pearlman applied under the *Housing Act, 1974* to reduce the

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93 *Ibid.* at 786.  
94 *Pearlman, supra* note 23.
rateable value of the leasehold in the amount of added value of the improvements he had made to the property. However, a county court judge held that the central heating system Pearlman had installed on the property was not a “structural alteration, extension or addition” within the meaning of the Housing Act. Pearlman challenged this decision on judicial review, even though the Housing Act contained a privative clause stating that the decision of the county court “shall be final and conclusive.”

Despite the privative clause, the Court of Appeal quashed the decision on the ground that the county court judge had misconstrued the Housing Act in denying Pearlman’s application. Lord Denning pointed out that even though the decision was protected by a privative clause “certiorari can still issue for excess of jurisdiction, or for error of law on the face of the record.” Moreover, he pointed out that the conceptual distinction between jurisdictional and non-jurisdictional questions was “rapidly being eroded” after Anisminic, saying that “[s]o fine is the distinction that in truth the High Court has a choice before it whether to interfere with an inferior court on a point of law.” In order to bring clarity to the conflicting case law, Lord Denning made a bold proposition:

I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. … The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.

After considering the facts of the case—especially the substantial alterations to the house made by Pearlman—Lord Denning found that the judge had erred in law when he decided that the heating system was not a “structural alteration, extension or addition”; and since the outcome of the case hinged upon that issue, the privative clause could not prevent the court from overturning the decision and remitting the matter back to the county court.

If one were to read Hosenball and Pearlman in isolation, one might be tempted to conclude that they are merely examples of instrumental adjudication by a judge with a

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95 Ibid. at 68.
96 Ibid. at 70.
cavalier approach to judicial review. But as I have shown throughout this chapter, the manner in which Lord Denning shuttles between the reasoning in *Hosenball* and *Pearlman* is the norm, not the exception, insofar as jurisdictional review is concerned. Even in the wake of *Anisminic*, *Hosenball*, and *Pearlman* there remained considerable confusion regarding the proper scope of judicial review. For instance in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Products Manufacturing Employees Union* the Judicial Committee of the Privy Council rejected Lord Denning’s decision in *Pearlman* to expand jurisdictional review to allow the court to correct any error of law.97 However, that same year Lord Diplock lent support to Lord Denning’s interpretation of *Anisminic* by saying that “[t]he break-through made by *Anisminic*…was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished”,98 a statement he later confirmed in *O’Reilly v. Mackman*.99 But even in light of Lord Diplock’s comments, Wade remained unconvinced that the formula for jurisdictional review had in fact shifted to review for all errors of law, saying “[a]ll that can be said with certainty at the present stage is that there is a medley of contradictory opinions in the appellate courts and the conflict between the rival interpretations of *Anisminic* is unresolved.”100

Finally, even when the House of Lords attempted to clarify the nature of jurisdictional review in *R. v. Hull University Visitor, Ex parte Page*, it did so in an equivocal fashion.101 That case concerned the legality of decision by the University of Hull to dismiss Edgar Page, a senior lecturer in its Philosophy Department. According to the termination letter, Page was being dismissed for redundancy; however, the university statutes expressly stated that no member of the teaching staff could be removed from office except for good cause. Page petitioned the Queen, who was visitor responsible for the university, to


declare his termination to be *ultra vires*. When the Lord President of the Privy Council, the Queen’s representative, rejected his petition Page applied for judicial review to quash the visitor’s decision.

As in so many other decisions, the House of Lords’ decision in *Page* incorporates two very different conceptions of jurisdictional review. On the one hand, *Page* represents the triumph of the judicial conception of judicial review, because the court unanimously endorses Lord Denning’s formulation of jurisdictional review in *Pearlman*—that the court is entitled to quash any administrative decision containing an error of law. Thus, Lord Browne-Wilkinson states that “in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law”.

Lord Griffiths adopts a similar position when he says:

> It is in my opinion important to keep the purpose of judicial review clearly in mind. The purpose is to ensure that those bodies that are susceptible to judicial review have carried out their public duties in the way it was intended they should. In the case of bodies other than courts, in so far as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of the law.

Based upon this logic, it would appear that Page was entitled to ask the court to examine the visitor’s decision in order to determine whether he misconstrued the university statutes in dismissing the petition.

Nevertheless, the majority held that once the court had decided that the visitor had jurisdiction in the “narrow” sense articulated in *Anisminic* (i.e. that the visitor was entitled by law to decide whether Page’s dismissal was in accordance with the university statutes) the court was barred from inquiring whether the visitor’s decision was based upon an error of law. The reason for this restrained form of judicial review was that the visitor was entitled to apply the university statutes or “domestic law” without being

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102 *Ibid.* at 702. See also *ibid.* at 706, Lord Slynn.
103 *Ibid.* at 693.
bound by common law principles. In a telling passage, Lord Browne-Wilkinson declares that:\footnote{Ibid. at 702-703. See also ibid. 693-694, Lord Griffiths.}

... the visitor is applying not the general law of the land but a peculiar, domestic law of which he is the sole arbiter and of which the courts have no cognisance. If the visitor has power under the regulating documents to enter into the adjudication of the dispute (i.e., is acting within his jurisdiction in the narrow sense) he cannot err in law in reaching this decision since the general law is not the applicable law. Therefore he cannot be acting ultra vires and unlawfully by applying his view of the domestic law in reaching his decision. The court has not jurisdiction either to say that he erred in his application of the general law (since the general law is not applicable to the decision) or to reach a contrary view as to the effect of the domestic law (since the visitor is the sole judge of such domestic law).

The point here is that while on its face Page asserts that the judicial conception of jurisdictional review is the ordinary approach to judicial review, it invokes the legislative conception of jurisdictional review when explaining why Page was not entitled to \textit{certiorari}. Thus, the dialectic between the judicial and legislative conceptions of jurisdictional review is perpetuated in Page and other cases that adopt its reasoning. Accordingly, it seems that both conceptions remain viable in British public law, so that judges invoke the judicial conception when reviewing “ordinary” administrative decisions,\footnote{See \textit{e.g.} \textit{Boddington v. British Transport Police}, [1999] 2 A.C. 143 (H.L.). However, as we saw in \textit{Hosenball}, whether an administrative decision is “ordinary” remains a slippery question.} or the legislative conception when reviewing the decisions of “special” or “domestic” tribunals.\footnote{See \textit{e.g.} \textit{R. v. Visitors to the Inns of Court, Ex parte Calder}, [1994] Q.B. 1 (C.A.).}

\textbf{C. Proportionality Review under the Human Rights Act}

While judicial review in the United Kingdom has been undoubtedly influenced by the introduction of the \textit{HRA},\footnote{\textit{Human Rights Act 1998} (U.K.), 1998, c. 42.} it still reflects the same fundamental instability that plagued jurisdictional review.\footnote{Hunt, “Sovereignty’s Blight”, \textit{supra} note 15.} As I mentioned at the beginning of this chapter, at least one prominent public lawyer in United Kingdom believes that proportionality review remains susceptible to “a constitutional discourse which selectively invokes democratic positivism and liberal constitutionalism in order to justify or explain a particular decision.”\footnote{Hunt, “Sovereignty’s Blight”, \textit{supra} note 15 at 344.} As with jurisdictional review, the important question is whether and to what
extent judges should scrutinize administrative decisions through judicial review. But even though there is nearly universal agreement that judicial review under the HRA requires some form of proportionality analysis, judges have employed different modes of proportionality review. Moreover, those varying modes of proportionality review are animated by the same dialectic between Parliamentary sovereignty and the rule of law that affects jurisdictional review.

For instance, in R. (Daly) v. Secretary of State for the Home Department, Lord Steyn makes the curious assertion that “the intensity of review is somewhat greater under the proportionality approach”, but that “[t]his does not mean that there has been a shift to merits review.” So even though any administrative decision in the United Kingdom which impairs individual rights under the HRA is subject to proportionality review, the practice of review still hinges on an analytical distinction between questions of law and the merits of a particular administrative decision.

Two particular decisions from the House of Lords illustrate how proportionality review mirrors the instability of jurisdictional review. The first case, Secretary of State for the Home Department v. Rehman, employs a proportionality analysis that resembles Liversidge, Wednesbury, and Hosenball. As in Hosenball, Rehman concerns the legality of an executive deportation order. Shafiq Ur Rehman is a Pakistani citizen who was given a four year visa to work in the United Kingdom as a religious minister. During this period, Rehman married and had two children born in the United Kingdom. However, when Rehman applied for indefinite leave to remain in the United Kingdom, the Home Secretary refused on the ground that Rehman was suspected of being involved with an overseas terrorist organization, and was therefore a threat to national security.

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110 R. (Daly) v. Secretary of State for the Home Department, [2001] 2 A.C. 532 (H.L.) [Daly]. In general terms, proportionality review aims to ensure that an administrative decision is rationally connected to a pressing policy objective, and impairs rights no more than is necessary to accomplish that objective.

111 Ibid. at para. 27.

112 Ibid. at para. 28.

113 Rehman, supra note 19.
Rehman appealed the Home Secretary’s decision to the Special Immigration Appeals Commission [SIAC]. At the appeal hearing, the Home Secretary asserted that “while Mr. Rehman and his United Kingdom-based followers are unlikely to carry out any acts of violence in this country, his activities directly support terrorism in the Indian subcontinent and are likely to continue unless he is deported.” However, SIAC rejected the argument that the Home Secretary was entitled to be the sole judge of whether someone was a national security threat.\textsuperscript{114} After carefully reviewing the evidence, some of which was heard in camera, SIAC concluded that the Home Secretary had failed to establish “to a high civil balance of probabilities” that Rehman was involved in terrorist activities. Furthermore, it held that the Home Secretary had erred in his interpretation of what constituted a threat to national security. According to SIAC, a person could be considered a threat to national security only if (1) “he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people” or (2) if the person is involved in terrorist activities directed at a foreign government that is “likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals”.\textsuperscript{115}

Despite the fact that SIAC was empowered by statute to hear appeals from the Home Secretary’s decision, the House of Lords overturned SIAC’s decision on the basis that it had overstepped its appellate function. With respect to the evidentiary issue, the court conceded that the Home Secretary’s decision had to be both reasonable and proportionate in light of the available evidence.\textsuperscript{116} However, it held that it was inappropriate for SIAC to require the Home Secretary to prove its case, because the Home Secretary was “entitled to have regard to the precautionary and preventative principles” which were not amenable to being proved on a balance of probabilities.\textsuperscript{117} In this respect, Lord Hoffman

\textsuperscript{114} Secretary of State for the Home Department v. Rehman, [1999] I.N.L.R. 517.
\textsuperscript{115} Ibid. at 528.
\textsuperscript{116} Rehman, supra note 19 at paras. 11 and 22, Lord Slynn.
\textsuperscript{117} Ibid. at para. 22.
thought the Home Secretary’s decision was primarily political and discretionary in nature.\footnote{Ibid. at paras. 50, 53.}

What is meant by “national security” is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. But there is no difficulty about what “national security” means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is “in the interests” of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

Accordingly it seems to me that the Commission is not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security. Later on, in a postscript written after 11 September 2001, Lord Hoffmann stated that “such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.”\footnote{Ibid. at para. 62.} Accordingly, the court held that SIAC had erred in requiring the Home Secretary to prove the allegation, and should have given greater latitude to the Home Secretary’s definition of threats to national security. Practically speaking, this meant that SIAC could only question the Home Secretary’s interpretation if it was “one which no reasonable minister advising the Crown could in the circumstances reasonably have held”.\footnote{Ibid. at para. 54.}

By contrast the second case, \textit{Huang v. Secretary of State for the Home Department}, applies a more demanding approach to proportionality review—one very similar to the manner of review employed in \textit{Shaw, Anisminic}, and \textit{Pearlman}.\footnote{Huang, supra note 24.} The issue in \textit{Huang} concerned the legality of a decision by the Home Secretary to refuse a Chinese citizen, Mei Ling Huang, permission to remain in the United Kingdom. The Home Secretary denied Huang’s application because the Immigration Rules allowed “the admission of a parent, grandparent, or other dependent relative of any person present and settled in the United Kingdom” only if the relative was a widow who was at least 65 years old. Thus,
even though Huang’s daughter, son-in-law and two grandsons were British citizens, the
Home Secretary denied her application because she was neither a widow nor over the age
of 65 at the time of her application. Huang then appealed the Home Secretary’s
decision on the basis that it infringed her right to respect for her family life under the
HRA. However, the Immigration Appeal Tribunal rejected Huang’s argument, saying that
Huang could only succeed if she could establish that the Secretary’s decision was
unreasonable in the *Wednesbury* sense. In other words, the Tribunal thought the Home
Secretary’s decision was lawful unless Huang could show that it was so disproportionate
that no reasonable official would ever endorse it.

However, the House of Lords overturned the Tribunal’s decision on the ground that the
Tribunal had misconstrued the proper approach to proportionality review. Lord Bingham,
who wrote the majority opinion, held that the *Wednesbury* standard was inappropriate,
because it was too relaxed and provided inadequate protection for Huang’s rights under
the HRA. Instead, he set out a formula for proportionality review which he thought was
better suited to the HRA:  

> The authority will wish to consider and weigh all that tells in favour of the refusal of leave which
> is challenged…. There will, in almost any case, be certain general considerations to bear in mind: the
> general administrative desirability of applying known rules if a system of immigration control
> is to be workable, predictable, consistent and fair as between one applicant and another; the
> damage to good administration and effective control if a system is perceived by applicants
> internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-
> nationals admitted to the country temporarily from believing that they can commit serious crimes
> and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of
> the law; and so on. … The giving of weight to factors such as these is not, in our opinion, aptly
described as deference: it is performance of the ordinary judicial task of weighing up the
> competing considerations on each side and according appropriate weight to the judgment of a
> person with responsibility for a given subject matter and access to special sources of knowledge
> and advice. That is how any rational judicial decision-maker is likely to proceed.

Accordingly, the court held that the Tribunal had erred in restricting itself to asking
whether the Home Secretary’s decision was patently absurd—it should have gone
through the evidence and reweighed all the relevant legal factors to assess whether the
decision was lawful and consistent with Huang’s rights under the HRA.

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122 At the time of her application, Huang was separated from her husband, who was also a British citizen.
123 *Huang, supra* note 24 at para. 16.
In sum, *Rehman* and *Huang* provide two different approaches to proportionality review, and the main difference between them concerns the degree to which the court thinks it is legitimate to review the substance of an administrative decision. While the court in *Rehman* asserts that an administrative decision must be proportionate, it adopts a form of proportionality review that warns judges not to second guess the merits of an administrative decision. Thus, judicial review is restricted to merely ascertaining whether an administrative decision is unreasonable in the *Wednesbury* sense, so that the court will only intervene if the administrative decision is patently absurd. By contrast, the court in *Huang* asserts that the *HRA* requires judges “to consider and weigh all that tells in favour” of an administrative decision in order to determine whether it is proportionate.

**D. Conclusion**

This chapter highlights three important issues insofar as the practice of judicial review in the United Kingdom is concerned. First, because the doctrine of jurisdictional review hinges upon a formal distinction between jurisdictional issues and the merits of administrative decisions, it fails to provide an adequate normative account of administrative law. In other words, the doctrine of jurisdictional review is “hollow” in the sense that it does not adequately explain why citizens, judges, and other legal officials should respect administrative decisions. Instead, it merely deploys a conceptual distinction which characterizes administrative decisions either as ephemeral (because they are liable to be overturned whenever a judge disagrees with them) or as fiats (because they are the product of discretion). The result is that the doctrine of jurisdictional review is unable to provide an account of administrative law which is autonomous, in the sense that it is not determined by judicial standards of correct judgment on the merits, and is yet accountable by rule of law standards.

Second, the history jurisdictional review suffers from chronic instability. That instability derives from the fact that judges who anchor their decisions in the doctrine of jurisdictional review are forced to choose between two different conceptions of law and, by extension, jurisdictional review when reviewing an administrative decision. The end result is that jurisdictional review fails to produce the benefits which are traditionally
associated with legal formalism, namely clarity, certainty, efficiency, predictability, and consistency in adjudication.\textsuperscript{124}

Finally, because jurisdictional review is both hollow and incoherent its constitutional legitimacy is questionable. While one might attempt to defend either jurisdictional or proportionality review because it gives judges the freedom to impose just outcomes as they see fit, that argument is generally regarded as a poor one. Generally speaking, people expect that judges be guided by the law when exercising judicial review instead of manipulating legal concepts to secure outcomes they perceive to be just. This expectation takes on added significance when judicial perceptions about justice conflict with decisions that have been rendered by officials who have been appointed through the democratic process.

In the chapters that follow, I will examine an alternative approach to judicial review that is guided by a doctrine of curial deference. In the recent years, judges and scholars in the United Kingdom have begun debating whether judges should defer to administrative decisions when subjecting those decisions to proportionality review.\textsuperscript{125} However, courts in the United Kingdom have been reluctant to adopt a doctrine of deference when reviewing administrative decisions.\textsuperscript{126} For example, Lord Hoffmann rejected the idea of deference outright in \textit{R. (ProLife Alliance) v. British Broadcasting Corporation}, saying that “although the word “deference” is now very popular…I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is

\textsuperscript{124} Forsyth, “Showing the Fly the Way Out of the Flybottle”, supra note 3.


\textsuperscript{126} The exception in this regard is \textit{International Transport Roth GmbH v. Secretary of State for the Home Department}, [2003] Q.B. 728 (C.A.).
happening.”

And, as we have already seen, the House of Lords in Huang held that judges should “consider and weigh all that tells in favour” of an administrative decision, and that this exercise “is not…aptly described as deference”. But when we consider the pervasive deficiencies of jurisdictional and proportionality review that have been highlighted in this chapter, it seems that it is worth having a second look at the development of curial deference and its normative structure.


128 Huang, supra note 24 at para. 16.
V. The Evolution of Curial Deference

When comparing British and Canadian administrative law, one is immediately struck by certain constitutional features that distinguish the Canadian legal system from its counterpart. Unlike the United Kingdom, Canada is a federal state that has had a written constitution since confederation in 1867\(^1\) and a constitutionally entrenched *Charter of Rights and Freedoms* since 1982.\(^2\) These documents have clearly influenced how Canadian lawyers and judges have justified judicial review over the past century, and provide a firmer constitutional foothold for judicial review than the unwritten constitutional principles that perform a similar function in the United Kingdom.\(^3\) So while the traditions of both Canadian and British administrative law share much in common, the fact that the judicial role is explicitly recognized by the Canadian constitution suggests that the practice of judicial review in Canada should be more ambitious or aggressive than in the United Kingdom.

It is surprising, then, that the central doctrine of Canadian administrative law is one of curial deference towards administrative decisions. That doctrine has no textual basis in the Canadian constitution, but has evolved through the common law method since the Supreme Court of Canada’s landmark decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*.\(^4\) The approach to judicial review under a doctrine of curial deference is distinguishable from the more traditional approach of jurisdictional review, because it shifts the judicial inquiry away from problematic speculations about whether the legislature intended a legal issue to be “jurisdictional” towards a “pragmatic and functional” analysis of various factors that elucidate the legitimacy of administrative decisions. Thus, the doctrine of deference sounds a

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\(^1\) Prior to the patriation of the Canadian constitution in 1982, this document was referred to as the *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3. Since most of the Supreme Court’s s. 96 case law developed prior to 1982, I will refer to this instrument as the *B.N.A. Act* throughout.


cautionary note that there are important reasons why judges should exercise restraint when conducting judicial review.

In this chapter, I will chart the evolution of curial deference in Canadian administrative law. In part A, I will examine how Canadian judges justified judicial review before the doctrine of curial deference was established by the Supreme Court. Until 1979, judicial review in Canada was driven by the same doctrine of jurisdictional review that dominated public law in the United Kingdom. As a result, the Canadian cases during this period display the same confusion and instability that I identified in the previous chapter. The main difference between Canadian and British administrative law during the pre-deference period concerns the impact of the judicature provisions of the *B.N.A. Act*. Those provisions provide Canadian courts with an additional constitutional warrant for judicial review, one which emboldened the Supreme Court in *Crevier v. Québec (Attorney General)* to assert that the Canadian constitution guarantees some form of judicial oversight even when administrative decisions are protected by an explicit privative clause. The history of jurisdictional review and s. 96 case law demonstrates that Canadian administrative law is both similar to and distinct from British administrative law: it is similar because the doctrine of jurisdictional review was its dominant feature, but it is distinct because the Supreme Court used s. 96 of the *B.N.A. Act* to constitutionally entrench that mode of judicial oversight.

In part B, I will examine how the Canadian Supreme Court made the transition from the doctrine of jurisdictional review to the doctrine of curial deference. That process began in *C.U.P.E.*, when Dickson J. expressed serious concerns regarding the erratic nature of jurisdictional review. Instead, he preferred to focus upon a variety of reasons that show why courts should defer to administrative decisions. This subtle shift marks the beginning of an era of curial deference in Canadian administrative law. However, while Dickson J. attempted to reduce the influence of jurisdictional review, he did not jettison it altogether. As a result, Canadian administrative law has been marred by confusion as the Supreme Court has attempted to reconcile its lingering attachment to jurisdictional review with the idea of curial deference towards administrative decisions.
I will conclude this chapter by outlining the current doctrinal framework of curial deference and highlight a number of outstanding issues which a theory of curial deference should address. As the Supreme Court has clarified its analytical framework, it has pushed jurisdictional review into the background, a move which facilitates a better understanding of the normative basis of administrative authority. However, there are three issues that crop up persistently in Canadian case law concerning (1) the lingering attachment to jurisdictional review, (2) the identification of relevant reasons for curial deference, and (3) the appropriate method of reasonableness review. In the closing section, I will briefly highlight each of these issues in order to set the stage for a more theoretical exegesis of curial deference in the final chapter.

A. The Diceyan Dialectic and the Supreme Court of Canada
The pre-deference era in Canadian administrative law reveals two basic strategies that lawyers and judges employed to justify judicial review. These strategies developed in tandem during the twentieth century, and their development illustrates how the Diceyan dialectic is reflected in the history of Canadian administrative law.5

The first strategy was inherited from the United Kingdom via the common law: the doctrine of jurisdictional review. Jurisdictional review in Canada reached its apogee in Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796,6 when the Supreme Court adopted the House of Lords’ decision in Anisminic Ltd. v. Foreign Compensation Commission.7 However, as in the United Kingdom, Canadian courts were unable to articulate a meaningful distinction between jurisdictional and non-jurisdictional issues. Hence, the practice of judicial review in Canada was unstable, and the case law regarding jurisdictional review during this period spawned a great deal of confusion and academic criticism.

5 In many cases, arguments about jurisdictional review and s. 96 of the B.N.A. Act were dovetailed. See e.g. O. Martineau & Sons Ltd. v. Montreal, [1932] A.C. 113 (J.C.P.C.) and Farrell v. British Columbia (Workers/Workmen’s Compensation Board), [1962] S.C.R. 48 [Farrell].


The second strategy was an argument grounded by s. 96 of the *B.N.A. Act*, a constitutional provision which gives the federal government the exclusive power to “appoint the Judges of the Superior, District and County Courts in each province”.\(^8\) For the better part of the twentieth century, Canadian courts assumed that s. 96 of the *B.N.A. Act* required a rigid separation of powers between the judicial and administrative arms of government. Hence, some early cases from the Supreme Court assert that s. 96 is a constitutional constraint which prevents provincial legislatures from delegating judicial or adjudicative functions *per se* to administrative officials. Over time, however, the Supreme Court began to adopt a more flexible interpretation of s. 96 that permitted provincial legislatures to delegate judicial functions to administrative officials so long as citizens had recourse to judicial review. This shift is exemplified by *Crevier*, where the Supreme Court held that s. 96 of the *B.N.A. Act* provides a constitutional guarantee of jurisdictional review, and that any privative clause which threatens this guarantee is constitutionally invalid.\(^9\) Thus, *Crevier* marks the confluence of jurisdictional review and the Supreme Court’s s. 96 jurisprudence. This confluence, in turn, establishes the high water mark for judicial review that has since receded with the emergence of curial deference in Canadian administrative law.\(^10\)

1. *Jurisdictional Review in Canada*

During the nineteenth and early twentieth centuries, judicial review in Canada was guided by the same doctrine of jurisdictional review which prevailed in the United Kingdom. This is unsurprising because most Canadian judges had either received their legal training in United Kingdom or had cut their teeth on English legal texts in Canadian law schools. And since the Judicial Committee of the Privy Council was the court of last resort in Canada until 1949, cases decided by British courts were held in high esteem. For example, two cases examined in the previous chapter—*Colonial Bank of Australasia v. Willan* and *Rex v. Nat Bell Liquors Ltd.*—were Privy Council decisions and therefore

\(^8\) *B.N.A. Act*, supra note 1, s. 96.


considered to be controlling authorities by Canadian courts. As a result, the confusion embedded in those decisions was also symptomatic of Canadian administrative law for much of the twentieth century.

Judicial review of labour board decisions received the most attention during this formative period, and a close reading of these cases reveals that jurisdictional review in Canada was haunted by the tension of the Diceyan dialectic. As in the United Kingdom, the dialectic led Canadian judges to vacillate between two very different conceptions of law and jurisdiction when reviewing administrative decisions, especially in cases where those decisions were protected by a privative clause. When a court assumed that jurisdictional parameters were determined by historical facts about legislative intent, it would refuse to subject the merits of an administrative decision to judicial scrutiny if that decision was insulated by a statutory privative clause. By contrast, when a court assumed that jurisdictional parameters were determined by judicial interpretation of legislation and common law principles, it would assert a robust supervisory role that entitled a court to intervene whenever it disagreed with an administrative decision on its merits. Thus, depending upon these basic judicial assumptions, a Canadian court could exercise or refrain from exercising its review function without providing an explicit justification for its decision.

Toronto Newspaper Guild v. Globe Printing Co. was the first major decision from the Supreme Court of Canada concerning jurisdictional review. The case concerned an application by the Toronto Newspaper Guild to be recognized as the official bargaining agent for employees working in the circulation department of the Globe Printing Company. The Labour Relations Act gave the Ontario Labour Relations Board broad powers to determine whether an employee was a member of a labour union, the scope of

11 Colonial Bank of Australasia v. Willan (1874), L.R. 5 P.C. 417; Rex v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128 (J.C.P.C.). As in the previous chapter, I will focus primarily upon decisions rendered by the court of last resort in order to identify general doctrinal characteristics instead of sifting through the minutiae of lower court decisions. Since I have already discussed Willan and Nat Bell Liquors in the previous chapter, my discussion will concentrate on decisions rendered by the Supreme Court of Canada after 1949.

the bargaining unit, and whether existing employee preferences warranted union certification. In support of its application, the union submitted a stack of membership cards that had been signed by employees. The union argued that it ought to be certified as the bargaining agent, because a majority of employees in the bargaining unit had signed union cards.

At the certification hearing, Globe’s lawyer alleged that some employees who had signed union cards had since renounced their union memberships. He urged the Board not to certify the union until the union’s representatives could be cross-examined under oath. The Board refused Globe’s request and decided to certify the union on the basis of the union cards that had been filed as evidence. The rationale for the Board’s decision was to avoid setting a precedent which would allow employers to intimidate employees prior to a certification hearing. Globe challenged the Board’s decision through judicial review even though the Act contained a privative clause that was designed to give the Board exclusive authority to determine whether a union should be certified as the official bargaining agent.

The Supreme Court of Canada overturned the Board’s decision, holding that the Board had exceeded its jurisdiction by failing to allow Globe’s lawyer to cross-examine union officials. The majority of the Court held that although the Act did not impose any explicit

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13 The Labour Relations Act, 1948, S.O. 1948, c. 51, ss. 3-4.

14 In a subsequent article, Paul Weiler explained the rationale for the Board’s decision to disregard the employer’s allegation: “One can sense three underlying policy factors in the Board’s decision. First, the administration of the Act required some cut-off point at which membership was to be determined and efficiency of administration required that it be some time before a Board hearing. Second, it was vital that the employer not learn at this stage who had joined the union, even though this might hamper its full presentation of its case, because of the dangers of job discrimination against union members. Third, the Board wanted dissident employees to present their own case against majority union membership in order that it ensure that resignations, petitions, etc. had not been employer-inspired. The Board, at this time, early in the administration of the statute, was just beginning to articulate these considerations for itself and it received very little help from the very vague language then used in the statute—‘member in good standing’.” Paul Weiler, “The ‘Slippery Slope’ of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970” (1971) 9 Osgoode Hall L.J. 1 at 19-20 [“The ‘Slippery Slope’ of Judicial Intervention”].

15 Labour Relations Act, 1948 supra note 13 at s. 5.
procedural obligations on the Board, it had an implied duty to allow Globe to cross-examine union witnesses.\textsuperscript{16}

In the case at bar it was impossible for the board to determine whether any one of the persons alleged to be members of the appellant was in fact a member in good standing if the board refused to enter upon the question as to whether or not, assuming membership to have originally existed, it had continued. This was the very obligation placed upon the board by the statute. By refusing to enter upon it, the board in fact declined jurisdiction. It is well settled that any order pronounced by an inferior tribunal in such circumstances is subject to the supervising jurisdiction of the superior courts, exercisable by way of certiorari.

By deciding to enforce an implied duty under the statute, the Court seemed to adopt the judicial conception of jurisdictional review. The Court reasoned that whenever an administrative tribunal deviates from the process familiar in common law courts, it would exceed its jurisdiction and its decision would be corrected on judicial review. So even though Kellock J. recognized that the privative clause “prohibits the court from questioning any [certification] decision which has been come to within the structure of the statute itself”, he held that it did not “endow the board with the power to make arbitrary decisions.”\textsuperscript{17}

By contrast, the dissenting opinion by Rand J. points out that the Act and the privative clause indicated that the Board was empowered to determine whether the union should be certified. While Rand J. recognized that there were legal limits to the Board’s jurisdiction, he argued that a court could only intervene where the Board had exceeded the “rational compass” of the legislation.\textsuperscript{18}

The real controversy lies in the determination of the boundaries of that contemplated scope; and when, as today, administrative bodies are regulating civil relations which formerly were not within the cognizance of law at all, by what rule or standard are we to test the jurisdictional validity of their decisions? Certainly where the Board is at liberty to inform itself of matters of fact by any means, as it is here, and where it can act if “satisfied” of certain things and where its findings are declared to be final and judicial review excluded, I doubt that the test can be anything less than

\textsuperscript{16} Globe Printing, supra note 12 at 35, Kellock J.

\textsuperscript{17} Ibid. at 38.

\textsuperscript{18} Ibid. at 30.
this: is the action or decision within any rational compass that can be attributed to the statutory language?

Since the statute did not impose any express procedural constraints upon the Board, Rand J. argued that “[i]t is to no purpose that judicial minds may be outraged by seemingly arbitrary if not irrational treatment of questions raised: these views are irrelevant where there is no clear departure from the field of action defined by the statute.”

The contrast between the majority and minority opinions regarding the scope of jurisdictional review roughly maps onto the two poles of the Diceyan dialectic. Rand J.’s opinion is more closely aligned with the principle of Parliamentary sovereignty, suggesting that once the court has determined that the administrative decision falls within the four corners of the statute and is protected by a privative clause, the Board has discretion to decide the legal issues before it. According to this view, a reviewing court should not intervene unless the decision-maker has committed an act tantamount to bad faith. Conversely, the majority adopts a Diceyan conception of the rule of law which entitles the Court to disregard the Board’s decision and evade the privative clause altogether in order to impose an unwritten procedural duty derived from common law tradition. When juxtaposed in this fashion, the majority and minority opinions are curious because, despite their dramatically different understandings of what the law requires, they both claim to be merely enforcing jurisdictional parameters established by the legislature.

The fact that these two views reflect the Diceyan dialectic is noteworthy enough. But even more interesting is the fact that the Supreme Court released three other decisions on the same day in which the majority and minority opinions shuttle between the positions staked out by Kellock J. and Rand J. in Globe Printing. For instance, in British Columbia (Labour Relations Board) v. Canada Safeway Ltd., an employer challenged a

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19 Ibid.

20 The Supreme Court released a total of four decisions on June 8, 1953 in which the Court reviewed decisions rendered by different provincial Labour Boards. The three remaining decisions were British Columbia (Labour Relations Board) v. Canada Safeway Ltd., [1953] 2 S.C.R. 46 [Canada Safeway]; Alliance des Professeurs Catholiques de Montreal v. Quebec Labour Relations Board, [1953] 2 S.C.R. 140 [Alliance]; and Smith & Rhuland Ltd. v. The Queen, ex rel. Andrews, [1953] 2 S.C.R. 95 [Smith & Rhuland].
labour board’s decision that comptometer and power machine operators were not engaged in a “confidential capacity” and were therefore eligible for union representation. The Board justified its decision by stating that if these employees were disqualified from union representation, even mail clerks would be excluded from collective bargaining because they also had access to confidential information. In his majority opinion, Rand J. again asserted that the Court should respect the privative clause, indicating that the legislature intended for the Board to decide the issue. Thus, Rand J. held that the Court ought not to interfere “so long as [the Board’s] judgment can be said to be consonant with a rational appreciation of the situation presented”.

However, unlike Globe Printing, a majority of the Court agreed with Rand J.: the concurring judges also relied upon the privative clause, saying that the Court could not interfere because there was sufficient evidence to support the Board’s decision.

However Kellock J. held fast in dissent, arguing “[a]lthough it is for the Board to determine whether or not a particular person is brought within the statutory definition, the Board may not misconstrue that definition”.

This doctrinal instability was the hallmark of Canadian administrative law during this period: the Supreme Court neglected to subject jurisdictional review to rigorous analysis, and this oversight perpetuated confusion and enabled judges a great deal of latitude when deciding whether to interfere with administrative decisions.

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21 Canada Safeway, supra note 20.
22 Ibid. at 54-55.
23 Ibid. at 47-51, Kerwin J.; 51, Taschereau J.; and 57-58, Estey and Cartwright JJ.
24 Ibid. at 55
Before too long, this confusion drew the ire of academic lawyers. Legal scholars lampooned the reasoning in cases like *Globe Printing*, and the ease with which the Supreme Court shifted between the legislative and judicial conceptions of jurisdictional review. In 1952, one year before the Supreme Court decided *Globe Printing*, Bora Laskin (then a law professor at the University of Toronto) branded the notion of jurisdiction a “comforting conceptualism”, which had been exploited by the judiciary in an unconstitutional manner.\(^{26}\) In a similar vein, Paul Weiler criticized the *Globe Printing* tetralogy.\(^{27}\)

The Court could have used the specific problems in each of the cases in this quartet to illuminate the competing principles and policies of judicial review and development of the collective bargaining policy of our law. It could have formulated its own attitude in a systematic and rational fashion and thus given real guidance and direction to the lower courts and Labour Boards. In my judgment, these decisions—however defensible they are within their own narrow compass—are a total failure in this respect. Perhaps the best index of this fact is that, although there are no other relevant Supreme Court precedents which could have been used for enlightenment, no one of these decisions refers to any one of the others. The Court’s conception of its role was purely adjudicative, oriented towards the disposition of a specific dispute, rather than the task of intelligently developing a coherent fabric of general law.

By 1970, mounting frustration with jurisdictional review spawned a considerable amount of critical literature.\(^{28}\) The general theme of these critiques was that judges were engaging in instrumental reasoning that enabled them to achieve their preferred outcome without providing a meaningful justification for interfering with administrative decisions.


\(^{27}\) Weiler, “The ‘Slippery Slope’ of Judicial Intervention”, *supra* note 14 at 18.

Despite this wave of criticism, the Supreme Court adopted the Anisminic\textsuperscript{29} formulation of jurisdictional review in Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796.\textsuperscript{30} In that case, the International Union of Operating Engineers applied for certification as the bargaining agent for custodians who cleaned and maintained a building owned by the Metropolitan Life Insurance Company. As in Globe Printing, the Labour Relations Act empowered the Labour Relations Board to determine the scope of the bargaining unit, whether an employee was a member of the union, and whether there was sufficient support for union representation within the workplace. However, in the period following the Court’s decision in Globe Printing, the Ontario Legislature had modified the Act to clarify that the Board had exclusive jurisdiction “to determine the form in which and the time as of which evidence of membership in a trade union” should be presented.\textsuperscript{31} Furthermore, Board decisions were protected by a privative clause, which stated that “[n]o decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court”.\textsuperscript{32}

At the certification hearing, Metropolitan Life objected on the grounds the union constitution restricted membership to “operating engineers” and therefore excluded custodial employees. The Board quickly rejected this argument by declaring that it had an established policy regarding union membership: as long as employees applied for union membership, had assumed the financial burdens of membership, and the union was prepared to extend union benefits to the employee, Board certification would not be barred by the formal terms of the union’s constitution.\textsuperscript{33} Since the evidence indicated that the union represented more than 55% of the employees, it decided to certify the union.

\begin{itemize}
\item \textsuperscript{29} Anisminic, supra note 7.
\item \textsuperscript{30} Metropolitan Life, supra note 6.
\item \textsuperscript{31} Labour Relations Act, R.S.O. 1960, c. 202, s. 77(2)(j). By contrast, s. 4(h) of the Labour Relations Act, 1948, supra note 13 simply gave the Board the power to determine whether “a person is a member in good standing of a trade union”.
\item \textsuperscript{32} Ibid., s. 80.
\item \textsuperscript{33} Peter Hogg has offered an explanation for the Board’s policy. First, by requiring employees to tender a nominal union membership fee, the union’s membership list would have more credibility than in situations where only an employee’s signature was required. Second, since work classifications were constantly
\end{itemize}
Metropolitan Life challenged this decision through judicial review, and the Supreme Court held in its favour. Although he had “no doubt that the Board was invested with jurisdiction to decide conclusively…the question of union membership”, Cartwright J. held that the Board had exceeded its jurisdiction by failing to treat the union’s constitution as a binding constraint. Citing Anisminic as authority for this conclusion, he held that the Board had “failed to deal with the question remitted to it (i.e. whether the employees in question were members of the union at the relevant date)” and instead had “decided a question which was not remitted to it (i.e. whether in regard to those employees there has been fulfillment of the conditions [previously established by the Board]).” Like the House of Lords in Anisminic, the Court held that although the Board had jurisdiction in the “narrow” sense, it could lose its jurisdiction in a “wider” sense. Thus, one can say with confidence that at the time Metropolitan Life was decided, the Canadian approach to jurisdictional review mirrored its British counterpart in that they incorporated both the legislative and judicial conceptions of jurisdictional review.

2. Section 96 of the B.N.A. Act

Although the common law regarding judicial review was essentially the same as in the United Kingdom, Canadian judges often buttressed it by mounting a more explicit constitutional argument. As the administrative state expanded in the early twentieth century, it began to attract critical scrutiny. If a litigant wanted to impede this expansion, he or she could argue that the enabling legislation violated the division of powers between Parliament and provincial legislatures under the B.N.A. Act. However, early decisions from the Privy Council adopted a broad interpretation of provincial jurisdiction concerning “Property and Civil Rights” under s. 92(13) of the B.N.A. Act. These passages from changing in the labour market, the Board decided it was unrealistic to deny certification where a union’s constitution did not extend to a certain class of employees. If a constitutional amendment were required, it would unduly delay union certification. See Peter Hogg, “Judicial Review: How Much Do We Need?” (1974) 20 McGill L.J. 157 at 160-161.

34 Metropolitan Life Insurance, supra note 6 at 433.

35 Ibid. at 435.

36 See e.g. Citizens Insurance Co. v. Parsons (1881), 7 A.C. 96 (J.C.P.C); Liquidators of the Maritime Bank of Canada v. Receiver–General of New Brunswick, [1892] A.C. 437 (J.C.P.C); Ontario Liquor License Case, [1896] A.C. 348 (J.C.P.C); Workmen’s Compensation Board v. Canadian Pacific Railway
decisions allowed provincial legislatures to introduce an array of social policies, the most controversial being collective bargaining regimes. Moreover, since the B.N.A. Act gave the provinces exclusive jurisdiction over “[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts”, they were *prima facie* entitled under the constitution to delegate authority over these programs to administrative officials.

In light of the broad constitutional authority of provincial legislatures, litigants shifted their attention to another line of attack grounded by s. 96 of the B.N.A. Act. This seemingly innocuous provision declares that “[t]he Governor General shall appoint the Judges of the Superior, District and County Courts in each province”. The purpose of this provision, and the judicature provisions more generally, was to preserve the independence of superior courts by insulating superior court judges from local political influence. But it also had implications for the expanding administrative state, because a litigant could invoke s. 96 to challenge the appointment of provincial administrative officials.

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40 *B.N.A. Act*, supra note 1, s. 96. Lord Atkin opined in *Toronto Corporation v. York Corporation*, [1938] A.C. 415 at 426 (J.C.P.C.) [*Toronto v. York*] that ss. 96, 99 and 100 of the BNA Act were “three principal pillars in the temple of justice” erected by the B.N.A. Act. Section 96 reserves the appointment of superior court judges for the Governor-General; section 99 provides that all s. 96 appointees shall have tenure during good behaviour and can only be removed from office upon the address of both the Senate and the House of Commons; and section 100 provides that judicial salaries shall be fixed and provided by Parliament.
officials. If a superior court decided that a provincial appointment violated s. 96 of the
*B.N.A. Act*, the entire regulatory program would be paralyzed.\[^{42}\]

Initially, judicial interpretation of s. 96 pivoted on a problematic conceptual distinction
between administrative and judicial functions. This distinction derives from a formal
understanding of the separation of powers, which holds that there should be a strict
division of labour between the legislative, executive and judicial branches of government.
The account of the separation of powers in these early cases is formal because it assumes
that the legislative, judicial, and executive branches of government each perform
analytically distinct roles, but fails to provide an explicit moral or political justification
for this assumption. Hence, these cases assume that the purpose of the separation of
powers is merely to enforce the division of labour between the different branches of
government, rather than to defend any particular set of legal or constitutional values.\[^{43}\]
And since the distinction between legislative, judicial, and administrative functions is
difficult to maintain in practice, cases which invoke the separation of powers argument
appear to establish arbitrary restraints on legislative reform.

The general idea in these cases was that administrative or “ministerial” functions, which
involved the implementation of legislation through administrative discretion, were
political by nature and therefore within the exclusive domain of the executive branch. By
contrast, any “judicial” functions, which involved the adjudication of legal disputes,
could not be delegated to administrative officials under the constitution because it would
compromise citizens’ legal rights. In order to determine whether an impugned function
was administrative or judicial in nature, Canadian judges would ask whether a superior
court or inferior administrative tribunal had performed that particular function prior to

\[^{42}\] This argument has two curious implications. First, even though a province may have exclusive legislative
jurisdiction over a given policy issue, it might be constitutionally barred by s. 96 from delegating judicial or
adjudicative functions to administrative officials. Second, it seems as though s. 96 of the *B.N.A. Act*
restricts only provincial legislative schemes, because the Governor-General is responsible for appointments
Rev. 268 at 272; Bora Laskin, “Municipal Tax Assessment”, *supra* note 41 at 995-996. However, in
also had to comply with s. 96 of the *B.N.A. Act*.

Confederation. If an analogous function had been exclusively assigned to a superior court prior to 1867, any attempt to delegate it to an administrative official was constitutionally suspect; but if an inferior court had exercised an analogous function prior to 1867, the legislative scheme would pass s. 96 muster. This interpretation of s. 96 of the B.N.A. Act obstructed efforts by provincial legislatures to establish modern administrative programs, because the constitutionality of those programs was being judged according to nineteenth century standards of government. This prompted John Willis to observe in 1940 that judicial analysis of s. 96 “inevitably degenerates into the amusing spectacle of a group of judges attempting conscientiously to determine which of a series of pre-1867 functions the functions before them are least unlike.”

In addition to judging modern administrative programs by outdated and controversial political standards, the formal argument was problematic because the purported distinction between “administrative” or “judicial” functions was untenable. Thus, the formal interpretation of s. 96 replicated much of the instability associated with jurisdictional review.

Although the formal separation of powers argument had been lurking in the background for some time, it first gained prominence in Canadian administrative law in Toronto v. York. In 1916, the city of Toronto entered into an agreement to supply the town of York with water at a fixed rate. In 1936, the provincial legislature passed The Township of York Act, which incorporated the agreement and provided a new mechanism for revising the water rate. Section 2 of the Act stated that the Ontario Municipal Board could vary the rate and that the Board’s decision on the matter “shall be final and conclusive and shall not be subject to appeal.” The town of York filed a variation application with the Ontario Municipal Board.

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44 Willis, “Section 96”, supra note 39 at 534.

45 Ibid. at 536; Peter Hogg, Constitutional Law of Canada looseleaf (Toronto: Thomson Carswell, 1997) at 7-26. For instance, the Privy Council defined a “judicial power” by providing a set of negative propositions in Shell Co. of Australia v. Federal Commissioner of Taxation, [1931] A.C. 275 at 297 (J.C.P.C.): “1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another party.”


47 Toronto v. York, supra note 40.

Municipal Board and, in the course of the proceedings, the Board made a series of orders directing the city of Toronto to disclose documents, allow inspection of its waterworks, and submit its Commissioner of Works to an examination under oath. Toronto applied for judicial review to quash these orders, arguing that the Board was constitutionally barred from using remedies that had been traditionally exercised by superior courts.

The Privy Council upheld the Board’s orders on the basis that the Board’s jurisdiction was primarily “administrative” rather than “judicial” in nature. The Court recognized that the Board was designed to implement progressive policy objectives. However, in obiter comments, Lord Atkin stated that certain aspects of the legislation, which gave the Board the same rights and privileges as a superior court, were constitutionally invalid.

It is difficult to avoid the conclusion that, whatever be the definition given to Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But, making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is pro tanto invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect.

Though Lord Atkin preserved the Board’s power to require discovery, he maintained that the B.N.A. Act did not allow a provincial legislature to delegate judicial functions to administrative officials wholesale.

In later cases involving s. 96, both the Canadian Supreme Court and the Privy Council continued to equivocate about the distinction between administrative and judicial

49 For instance, s. 45 of The Ontario Municipal Board Act, 1932, S.O. 1932, c. 27 states: “45. The board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, shall have all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination or witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor.”

50 Toronto v. York, supra note 40 at 427.
functions. While they wanted to preserve the formal separation of powers, they did not want to frustrate the development of the administrative state. In Reference re Adoption Act, the Supreme Court of Canada assessed the constitutional validity of an array of provincial legislative schemes concerning alimony, adoption, and the welfare of children.\(^{51}\) Each policy program was being administered and adjudicated by administrative officials. When asked to assess the constitutionality of these programs, the Supreme Court held that mere delegation of judicial functions to administrative officials did not offend s. 96 of the B.N.A. Act. Duff C.J. observed that provincial magistrates had been administering similar programs since Confederation and that their role had evolved with the expansion of the administrative state.\(^{52}\) So long as the legislation did not fundamentally undermine the operation of superior courts, provinces could continue to delegate legal responsibilities to administrative officials.\(^{53}\) In order to determine the whether the scheme offended s. 96, Duff C.J. advocated a holistic, rather than piecemeal, assessment of the regulatory powers, because the intermingling of administrative and judicial functions was inevitable in a modern society. As long as the scheme was broadly analogous to the jurisdiction of inferior courts and provincial magistrates prior to Confederation, that scheme would not offend s. 96.\(^{54}\)

This holistic approach was later endorsed by the Privy Council in Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.\(^{55}\) In that case, an employer had dismissed six employees who were members of the United Steel Workers of America. The union complained to the Saskatchewan Labour Relations Board that the employer had unlawfully discriminated against the employees. After the hearing, the Board found that the dismissals were discriminatory, and ordered the employer to reinstate the employees with compensation for lost wages. The employer sought judicial review, even though The Trade Union Act declared that the Board’s “proceedings, orders and decisions


\(^{52}\) Ibid. at 510.

\(^{53}\) Ibid. at 508-512.

\(^{54}\) Ibid. at 514.

shall not be reviewable by any court of law". The Saskatchewan Court of Appeal held that the Board’s order was tantamount to the remedy of specific performance and, since this remedy was an exclusive power of superior courts prior to Confederation, the remedial provisions of *The Trade Union Act* were unconstitutional and invalid.

The Privy Council allowed the appeal, stating that the legislation did not infringe s. 96. Lord Simonds, who wrote the leading opinion, asserted that the appropriate question was not whether the Board exercised judicial powers, but whether the extent of those powers rendered the Board analogous to a superior court. Furthermore, he stated that there was no reason to assume that administrative officials were incapable of discharging their function in a judicial manner:

> For wide experience has shown that, though an independent president of the tribunal may in certain cases be advisable, it is essential that its other members should bring an experience and knowledge acquired extra-judicially to the solution of their problems. The members of the board are to be equally representative of organized employees and employers and in a certain event of the general public. That does not mean that bias or interest will lead them to act otherwise than judicially, so far as that word connotes a standard of conduct, but it assuredly means that the subject-matter is such as profoundly to distinguish such a tribunal from the courts mentioned in s. 96.

On the facts, Lord Simonds thought that the Board’s function was clearly administrative, because it was designed to secure a specific policy objective (*viz.* peaceful industrial relations) rather than to merely enforce common law contractual rights. Since this policy objective was alien to the common law, the collective bargaining regime did not offend s. 96.

Towards the end of his judgment, however, Lord Simonds considers a second line of argument, namely, whether the privative clause itself was unconstitutional. Lord Simonds held that s. 96 would not allow a provincial legislature to exclude judicial review, because the privative clause “would not avail the tribunal if it purported to exercise a

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56 *The Trade Union Act, 1944*, S.S. 1944, c. 69, s. 15.


58 *John East Iron Works, supra* note 55 at 145, 148-149.


60 *Ibid.* at 150.
jurisdiction wider than that specifically entrusted to it by the Act." This reasoning foreshadows how s. 96 analysis began to shift away from the problematic distinction between judicial and administrative functions towards the idea that some form of judicial review is guaranteed by the Canadian constitution.

Lord Simonds judgment thus exposes two different themes, both of which concern the interpretation of s. 96 of the *B.N.A. Act*. The first theme concerns a watered down or qualified version of the formal separation of powers argument first raised in *Toronto v. York*. In subsequent decisions where the Supreme Court follows this line of argument, the Court fails to provide a principled explanation of why it is constitutionally inappropriate for provincial legislatures to delegate judicial functions to administrative officials. For instance, in *Re Residential Tenancies Act, 1979* the Supreme Court held that an administrative program, designed to allow tenants and landlords to bring their disputes before an administrative tribunal in an efficient and expeditious manner, was unconstitutional. In that case, the Court set out a revised analytical framework for s. 96 to determine whether an impugned administrative power would offend s. 96. However, that framework still hinges upon whether the delegated function is broadly analogous to the powers within the exclusive jurisdiction of superior courts at the time of Confederation.

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continues to be controversial and unstable.\textsuperscript{65} Thus, in \textit{Reference re Amendments to the Residential Tenancies Act (N.S.)}, the Supreme Court held that a Nova Scotia statute, which established essentially the same administrative program for resolving landlord/tenant disputes, was constitutionally valid because the administrative powers created by the statute had not been historically exercised by superior courts.\textsuperscript{66} Hence, it seems that the Court is still unable to articulate a coherent distinction between administrative and judicial functions or explain why, as a matter of constitutional principle, it is impermissible for a provincial legislature to delegate so-called judicial functions to administrative tribunals.\textsuperscript{67}

By contrast, the second theme in Lord Simond’s opinion seems to have more constitutional traction. It accepts that administrative officials may perform both judicial and administrative functions, but asserts that administrative decisions must be subject to some form of independent review. Thus, instead of assuming that only superior courts are capable of wielding adjudicative power, this argument seeks to preserve the rule of law by ensuring that administrative decisions can be scrutinized in an independent forum. So the question is not whether or to what extent a legislature may delegate particular functions to administrative officials, but rather whether there are good constitutional arguments for ensuring that citizens are able to test the legality of administrative decisions through judicial review.

This second line of argument emerges in \textit{A.G. Québec v. Farrah} and is further clarified in \textit{Crevier}, cases in which the Supreme Court examined whether privative clauses infringe s. 96 of the \textit{B.N.A. Act}.\textsuperscript{68} The issue in \textit{Farrah} concerned the constitutional validity of s. 58(a) of the Quebec \textit{Transport Act}.\textsuperscript{69} The \textit{Act} required anyone operating a transportation


\textsuperscript{66} \textit{Reference re Amendments to the Residential Tenancies Act (N.S.)}, supra note 65.

\textsuperscript{67} See Peter Hogg, \textit{Constitutional Law of Canada} (Toronto: Thomson, 2007) at 231-234.


\textsuperscript{69} \textit{Transport Act}, L.Q. 1972, c. 55.
business to apply to the Quebec Transportation Commission for a license. If someone disagreed with the Commission’s licensing decision, he or she could appeal the decision to a Transport Tribunal, which consisted of provincially appointed judges. When Joseph Farrah obtained a license from the Commission, some of his competitors appealed the Commission’s decision to the Tribunal. However, before the appeal could be heard, Farrah challenged the Tribunal’s jurisdiction, arguing that the Act infringed s. 96 because the Tribunal exercised judicial functions analogous to a superior court.

The Supreme Court held that the Act infringed s. 96, but the two judges who wrote the leading opinions provided slightly different explanations why it was unconstitutional. Pratte J. invoked the formal separation of powers argument by carefully tracing the powers which had been historically exercised by superior courts.\(^{70}\) He argued that Canadian superior courts had inherited the same supervisory jurisdiction traditionally exercised by Court of King’s Bench in the United Kingdom. This supervisory jurisdiction was not an appellate function—it was limited to correcting jurisdictional errors and non-jurisdictional errors apparent on the face of the record.\(^{71}\) Pratte J. held that this supervisory role was an integral feature of the constitution at Confederation and therefore could not be usurped by the provincial legislature.\(^{72}\) Thus, he held that while a privative clause could restrict review of non-jurisdictional errors it could not prevent a superior court from correcting jurisdictional errors. In effect, this meant that a provincial legislature was constitutionally barred from using a privative clause to exclude jurisdictional review.\(^{73}\)

Laskin C.J. reached the same result, but different reasoning. He began by distancing himself from the formal separation of powers argument, arguing that s. 96 no longer

\(^{70}\) Farrah, supra note 68 at 649-656.

\(^{71}\) Ibid. at 651-652.

\(^{72}\) Ibid. at 654.

\(^{73}\) Ibid. at 655-656.
prevented a provincial legislature from delegating judicial functions to administrative officials.\textsuperscript{74}

I begin this assessment with two propositions which, in my opinion, admit of no challenge. First, it is open to a Province to endow an administrative agency, which has adjudicative functions, with power to determine questions of law in the exercise of its authority under a valid provincial regulatory statute such as the one involved in the present case. Indeed, it is difficult to appreciate how such an agency can operate effectively if it is precluded from interpreting and applying the statute under which it exercises its jurisdiction. Second, it is also open to a Province to establish an administrative tribunal as part of a valid regulatory statute and to invest such a tribunal with power to make decisions on questions of law in the course of exercising an appellate authority over decisions of the primary agency.

Applying the foregoing considerations to the present case, it would, in my view, be competent for the Province to invest the Transport Tribunal with power to decide questions of law in the course of hearing appeals from decisions of the Transport Commission. Although such a power involves the exercise of a judicial function, it is not on that account alone beyond the constitutional authority of a Province to repose in a provincially appointed board. The case law supports an even wider authority in this respect, authority to vest unreviewable power to determine all questions of law which arise in the course of the exercise of the provincial tribunal’s statutory functions.

Like Pratte J., Laskin C.J. conceded that a privative clause could restrict judicial review to some extent, but he thought that the cumulative effect of the \textit{Transport Act} offended s. 96 of the \textit{B.N.A. Act} because it completely extinguished an individual’s ability to seek judicial review. By establishing an unreviewable appellate tribunal, Laskin C.J. thought the provincial legislature was setting up the Tribunal as a substitute for s. 96 courts.\textsuperscript{75}

The upshot of \textit{Farrah} is that the Supreme Court’s interpretation of s. 96 slowly began shedding some of the baggage associated with the formal separation of powers argument. This shift becomes clearer in \textit{Crevier}, a case concerning the constitutionality of the Quebec \textit{Professional Code}, which created a uniform system for professional disciplinary proceedings in the province of Quebec.\textsuperscript{76} In \textit{Crevier}, two optometrists were found guilty of professional misconduct. Both optometrists appealed the decision to the Professions Tribunal, which acted as a general appellate tribunal for all disciplinary committees established under the \textit{Professional Code}. The Tribunal overturned the convictions, but the prosecutor challenged the Tribunal’s decision despite the privative clause in the

\textsuperscript{74} \textit{Ibid.} at 642-643.

\textsuperscript{75} \textit{Ibid.} at 647.

\textsuperscript{76} \textit{Professional Code}, R.S.Q. 1977, c. C-26. The \textit{Code} applied to a variety of professional corporations including doctors, dentists pharmacists, optometrists, veterinarians, lawyers, notaries, social workers, architects, engineers, accountants, etc.
The Court of Appeal held that the Code did not violate s. 96 because (1) historically speaking, supervision of professional disciplinary bodies was not an exclusive function of superior courts and (2) the privative provisions of the Code did not exclude the superior court’s ability to correct jurisdictional errors.

Nevertheless, the Supreme Court held that the Code infringed s. 96. In his judgment for a unanimous Court, Laskin C.J. once again ignored the formal separation of powers argument which had previously been characteristic of s. 96 jurisprudence. This shift was necessary, because from an historical perspective it was clear that superior courts had not exercised exclusive jurisdiction over professional disciplinary proceedings. Instead, Laskin C.J.’s concern was the legislature’s attempt to immunize Tribunal decisions from judicial review.

In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal as a s. 96 court.

However, Laskin C.J. seemed to discount the fact that superior courts had always maintained its power of jurisdictional review when confronting privative clauses. In particular, he failed to consider how both Anisminic and Metropolitan Life preserved jurisdictional review notwithstanding an explicit privative clause. Thus, he could simply have stated that the privative clause did not affect jurisdictional review. Had Laskin C.J. pursued this option, the Court could have preserved a regulatory regime that clearly fell

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77 As in Farrah, supra note 68, this provision purported to exclude those provisions in the Quebec Code of Civil Procedure that provide for judicial review.


79 On this point, compare the historical analysis of judicial functions employed in Re Residential Tenancies Act, 1979, supra note 63. See also David Mullan, “The Uncertain Constitutional Position of Canada’s Administrative Appeal Tribunals” (1982) Ottawa L. Rev. 239 at 254-255 [“Administrative Appeals Tribunals”].

80 Crevier, supra note 9 at 234 and 236.

within provincial jurisdiction under the Constitution and was generally regarded good policy.\textsuperscript{82}

This raises an important question: why did the Chief Justice, who had opposed judicial meddling with administrative decision-making throughout his academic career, feel compelled to declare the entire statutory regime unconstitutional when he could have preserved judicial review through less drastic measures?\textsuperscript{83} The most plausible interpretation of Laskin C.J.’s judgment is that he thought it more appropriate to address the problem posed by privative clauses as a constitutional issue. This seems to be a more forthright approach than the traditional method of assuming that the legislature intended for superior courts to correct administrative decisions regarding jurisdictional issues. Instead of assuming that the legitimacy of judicial review derives from legislative intent, Laskin C.J.’s argument treats it as a constitutional guarantee.\textsuperscript{84} Fifteen years later L’Heureux-Dubé J. lent credence to this interpretation of \textit{Crevier v. Pasienchyk v. Canada Labour Relations Board} when she stated that “as a matter of constitutional law, a legislature may not, however clearly it expresses itself, protect an administrative body from review on matters of jurisdiction”.\textsuperscript{85}

\textbf{B. The Doctrine of Curial Deference: A Fresh Start?}

Starting in the mid-1970s, the Supreme Court of Canada began developing what has now become the doctrine of curial deference. There are two important differences between curial deference and jurisdictional review. First, curial deference shifts the focus of judicial review away from speculations about legislative intent and jurisdictional parameters towards more concrete reasons for respecting administrative decisions. Second, these reasons have normative significance in the sense that they provide substantive arguments why judges should employ a more forgiving standard of review.


\textsuperscript{83} Mullan, “Administrative Appeals Tribunals”, \textit{supra} note 79 at 248-250.


The logic of curial deference therefore asserts that administrative institutions have legal authority to interpret and determine the content of the law, and that judges ought to respect administrative decisions.

The idea of curial deference was first hatched in the United States in the wake of President Franklin Roosevelt’s New Deal. Beginning in the 1940s, the United States Supreme Court recognized that administrative agencies have an autonomous interpretive role. For instance, when the Supreme Court upheld the decision of the Director of the Bituminous Coal Division in *Gray v. Powell*, the Court did not base its decision on the grounds that it thought the Director’s decision was correct on its merits. Instead, Reed J. argued that the Court ought not to interfere with the decision because it was reasonable.\(^86\)

\[^86^\] Gray v. Powell, 314 U.S. 402 at 411 (1941).

In a matter left specifically by Congress to the determination of an administrative body…the function of review placed upon the courts…is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner.\(^86\)

In light of the more efficient and expert administrative process, which “gave promise of a better informed, more equitable, adjustment of the conflicting interests”, Reed J. suggested that the Court should respect the Director’s decision unless it was “so unrelated to the tasks entrusted by the Congress to the Commission as in effect to deny a sensible exercise of judgment”.\(^87\) This line of reasoning continued to develop in subsequent cases\(^88\) as American judges abandoned the doctrine of jurisdictional review.\(^89\)

\[^87^\] Ibid. at 413.


The development of curial deference in the United States culminated in the landmark decision of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* As in *Gray*, the Supreme Court in *Chevron* upheld an administrative decision not because it agreed with it, but rather because it thought it was a reasonable interpretation of an ambiguous statutory provision. Thus, Stevens J. held that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” Today, the language of American administrative law is dominated by *Chevron* deference instead of jurisdictional review.

While there is no direct evidence of cross-pollination between American and Canadian administrative law, it is clear that both American and Canadian administrative law share the same basic concern that judges ought to respect administrative decisions. As in the United States, the Canadian doctrine of curial deference evolved through the common law method and was spurred forward by academic commentary. Beginning in the early 1970s two Canadian jurists, Noel Lyon and Justice Brian Dickson (as he then was), began laying the initial groundwork for the doctrine of curial deference.

In a series of comments and articles between 1971 and 1989, Lyon began developing an account of judicial review that would preserve a supervisory role for superior courts.

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91 Ibid. at 844.

while avoiding the problems associated with jurisdictional review. First, he took the position that s. 96 of the B.N.A. Act guaranteed some measure of judicial review that could not be extinguished by a privative clause. He argued that s. 96 preserved the rule of law by guaranteeing citizens the ability to ask an independent court to review administrative decisions. But Lyon also recognized that the Supreme Court had stonewalled important legislative policies by reading the formal separation of powers into s. 96. In light of this history, Lyon advocated an interpretation of s. 96 that would preserve judicial review while leaving considerable room for the legislature to introduce new regulatory regimes and delegate powers to administrative officials. Thus, it was perfectly acceptable for legislatures to delegate judicial functions to administrative officials, so long as “governments and their agents must, when called upon in a court of law to do so, show legal authority for all their acts and decisions.”

Second, Lyon argued that jurisdictional review was incapable of striking the right balance between the rule of law and legitimate legislative reform, because it had become a “conceptual morass”. He thought the concept of jurisdiction was inadequate because it was both too narrow (in the sense that it hinged upon judicial speculations about legislative intent) and too malleable (in the sense that virtually any legal issue could be characterized as jurisdictional or non-jurisdictional). Thus, he argued that jurisdictional review should be abandoned altogether in favour of a new approach that was more complex and contextual in its orientation. Instead of asking whether the administrative decision involved a jurisdictional issue, Lyon argued that “[t]he legal latitude given a tribunal in determining its powers should be related to the nature of the tribunal, the kind

94 Lyon, “Is Amendment of Section 96 Really Necessary?”, supra note 93.
95 Ibid.
96 Lyon, “Comment No. 2”, supra note 93 at 657.
98 Ibid.
of scheme it is administering, and the particular words used in the statute from which the challenged powers are said to flow.”

Third, Lyon argued that a court should not instinctively assess the legality of administrative decisions according to its own standard of correct legal interpretation. The suggestion here is that the function of the courts in policing the rule of law in administrative decision is to establish parameters of legal tolerance rather than superimposing legally “correct” answers. However, such an approach seems unlikely as long as the courts formulate their review function in the narrow, technical terms of jurisdiction and collateral matters, terms that condition judicial thinking in terms of “answers”. If the courts were to view labour relations as a problem of accommodating law and policy, not as one of conflict between law and policy, they would then recognize that their function is to ensure that when boards make decisions that involve questions of law, whether jurisdictional or not, they make a decision that is legally acceptable not legally correct.

By adopting a more forgiving standard of reasonableness, Lyon left room for administrators to interpret the law in light of the purposes and principles inherent in the regulatory context.

This shift away from jurisdictional review marks the early stages of curial deference in Canadian administrative law, but the Court’s reluctance to jettison the concept of jurisdiction stunted its development over the next 25 years. For instance, when a unanimous Supreme Court affirmed the original decision of the Saskatchewan Labour Relations Board in Service Employees’ International Union v. Nipawin District Staff Nurses Association, Dickson J. avoids a correctness assessment of the merits, saying that “if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.” But, in the very next paragraph, he reiterates the broad catalogue of jurisdictional errors set out in Anisminic and adopted by the Supreme Court in Metropolitan Life, saying:

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers

99 Lyon, “Comment No. 1”, supra note 93 at 382.
100 Ibid. at 379 [emphasis original].
102 Ibid.
outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts”.

In later decisions, Dickson J. continued to conflate the reasonableness standard with the Anisminic catalogue of jurisdictional errors.\textsuperscript{103} As a result, the Canadian Supreme Court would spend the next twenty years attempting to extricate curial deference from jurisdictional review.

Further evidence that the Supreme Court was striking out in a new direction is provided by \textit{C.U.P.E. v. New Brunswick Liquor Corporation}.\textsuperscript{104} That case concerned the legality of a decision rendered by the New Brunswick Public Service Labour Relations Board. In the context of a labour dispute a union filed a complaint, alleging that the employer’s practice of using managers to operate retail liquor outlets violated s. 102(3)(a) of the \textit{Public Service Labour Relations Act}, which declared that “the employer shall not replace the striking employees or fill their position with any other employee”.\textsuperscript{105} The Board agreed, and ordered the employer to cease its stopgap strategy. The employer sought judicial review on the grounds that the Board had misinterpreted the statutory provision, even though the Board’s decision was protected by a privative clause.

In a unanimous decision, Dickson J. upheld the Board’s decision. He began by making an important observation—that the meaning of the statutory provision in question was ambiguous. This fact alone might have been sufficient to dispose of the case; however, Dickson J. went further by expressing general doubts about jurisdictional review. The main problem was that the distinction between jurisdictional and non-jurisdictional issues was “very difficult to determine”, and often led courts to overreach their role. In order to remedy this problem, Dickson J. declared that “courts, in my view, should not be alert to


\textsuperscript{104} \textit{C.U.P.E.}, supra note 4.

brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so. “

Instead of asking whether the issue was jurisdictional, Dickson J. identified various reasons why the Court should respect the Board’s status as the primary decision-maker. He pointed out that the statute contained a privative clause, which declared that the Board’s decisions should not be challenged through judicial review. Furthermore, the privative clause had a rationale that was “straightforward and compelling”: the Board had unique expertise, experience, and sensitivity in administering the Act. So instead of searching out legislative intent regarding the content of s. 102(3)(a), Dickson J.’s judgment focused on different political and practical reasons to explain why the Court should defer to the Board’s interpretation of the statute. Those reasons made it inappropriate for the Court to review the Board’s decision on a correctness standard. Instead, Dickson J. held that the Court could only intervene where the Board’s decision was so patently unreasonable that it could not be rationally justified by the statute. However, despite his doubts about jurisdictional review, Dickson J. again conflated the reasonableness standard with the catalogue of errors developed in Anisminic and endorsed in cases like Metropolitan Life and Nipawin.

In the remainder of this chapter, I want to focus upon three important issues that are framed by Dickson J.’s judgment in C.U.P.E. The first issue concerns the relationship between jurisdictional review and curial deference. While jurisdictional review has been gradually marginalized in the years following C.U.P.E., it has not been abandoned as it has been in the United States. As a result, there are still many cases in which the Supreme Court has invoked the doctrine of jurisdictional review to justify judicial intervention.

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106 C.U.P.E., supra note 4 at 233.
107 Ibid. at 235-236.
108 Ibid. at 237.
However, the Court has not addressed how, if at all, jurisdictional review can be reconciled with the logic of curial deference.

The second issue concerns the analytical and normative structure of curial deference. Of particular relevance in this regard has been the emergence of the “pragmatic and functional” analysis that the Supreme Court established in the years following *C.U.P.E.* The pragmatic and functional approach shifts the focus of judicial review away from a search for jurisdictional parameters, and towards a variety of contextual factors that highlight the legitimate authority of administrative institutions. Hence, by identifying some of the relevant factors for the pragmatic and functional approach, we can gain some insights into the normative basis for curial deference.

The third issue concerns the distinction between correctness review and reasonableness review within the doctrine of curial deference. Under correctness review, a reviewing court is entitled to proceed directly to determine its own opinion about the legality of a particular administrative decision, but when employing reasonableness review a court is supposed to exercise greater restraint—it should only intervene if it is satisfied that an administrative decision is unreasonable in light of the relevant law. However, even if it is possible to draw a theoretical distinction between correctness and reasonableness review, it is often difficult to demonstrate how this distinction can be maintained in practice. Hence, there remains a great deal of controversy and confusion about whether there are degrees of reasonableness or whether it is possible for a court to conduct reasonableness review without having its analysis of administrative decisions collapse into correctness review of the merits.

1. *Two Steps Forward, One Step Back: Curial Deference and the Ghost of Jurisdictional Review*

As we saw in the previous section, although Dickson J. expressed concerns about jurisdictional review in *C.U.P.E.*, he did not supplant it with a fully-fledged doctrine of curial deference. Rather, he advocated a subtle shift away from jurisdictional review towards a more purposeful assessment of the regulatory context. Hence, in the aftermath of *C.U.P.E.* it was difficult to discern whether and to what extent the practice of judicial
review had changed, because the Supreme Court would often make bald assertions to justify its decisions. During this period there is one set of decisions which simply invokes the doctrine of jurisdictional review with little or no discussion about how C.U.P.E. had diminished the importance of jurisdictional inquiries;\(^{110}\) and another set of decisions declares that a standard of “correctness” applies to jurisdictional issues, and reserves the C.U.P.E. standard of “patent unreasonableness” for non-jurisdictional issues.\(^ {111}\) However, as in the pre-deference era, neither set of decisions adequately distinguishes jurisdictional from non-jurisdictional issues—the Court continued to assume that the distinction was self-evident and uncontroversial.

For example, when the Court quashed the decision of the Canada Labour Relations Board in *Syndicat des employés de production du Québec & de l’Acadie v. Canada (Labour Relations Board)* the Court adopted a very broad approach to jurisdictional review.\(^ {112}\) Although Beetz J. acknowledged Dickson J.’s admonition in *C.U.P.E.* to avoid casting a big net for jurisdictional errors, he thought that there was “no doubt” that the Board’s decision to refer a labour dispute to an arbitrator was a jurisdictional question.\(^ {113}\) In language reminiscent of *Anisminic*, he declared that a jurisdictional issue was “one which describes, limits and lists the powers of an administrative tribunal” and could arise at any point in administrative proceedings “whether at the start of the hearing, during it, in the findings or in the order disposing of the matter.”\(^ {114}\) In effect, Beetz J. turned the ideal of curial deference on its head by expanding the scope of jurisdictional review while formally acknowledging the importance of judicial restraint. Hence, jurisdictional review

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\(^ {112}\) *Syndicat des employés de production du Québec & de l’Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412 [L’Acadie].

\(^ {113}\) *Ibid.* at 437.

\(^ {114}\) *Ibid.* at 420.
remained much as it had always been, and the C.U.P.E. standard of patent reasonableness could be used by a reviewing court to scrutinize issues that might otherwise be deemed non-jurisdictional.\textsuperscript{115} However, legal academics criticized the decision, arguing that the Court had lost its appetite for deference by subjecting non-jurisdictional issues to judicial scrutiny.\textsuperscript{116}

Despite this regression, there is evidence to suggest that lower courts simply ignored Beetz J.’s formulation of jurisdictional review in \textit{L’Acadie}.\textsuperscript{117} This might explain why the Supreme Court revived the more deferential approach in \textit{U.E.S., Local 298 v. Bibeault} by establishing a heuristic device now known as the “pragmatic and functional” approach.\textsuperscript{118} In that case, a local school board exercised its right to terminate a contract for janitorial services when the employees of the company providing the services went on strike. When the school board found a replacement subcontractor, a contest arose between two unions. One union represented nearly all of the employees of the new subcontractor and submitted a certification application. However, the union representing the employees of the original subcontractor applied to maintain its certification with respect to the undertaking, arguing that ss. 45 and 46 of the Quebec \textit{Labour Code} preserved its rights under a collective agreement where an employer “alienated” its business to a third party. The Labour Commissioner held that the rights under the collective agreement remained in force because the employer’s decision to hire a new subcontractor amounted to an “alienation” of the undertaking within the meaning of the \textit{Code}.

\textsuperscript{115} In \textit{Blanchard, supra} note 111, a decision released the same day as \textit{L’Acadie}, the Supreme Court held that the \textit{C.U.P.E.} standard of patent unreasonableness applied to both findings of law and fact. Traditionally speaking, the doctrine of jurisdictional review was reluctant to extend judicial review to findings of fact.


\textsuperscript{117} Mullan, “The Supreme Court of Canada and Jurisdictional Error”, \textit{supra} note 116 at 92-96.

As in *L’Acadie*, the Supreme Court’s decision in *Bibeault* provides a conflicted rationale. While Beetz J.’s judgment pays lip service to the *C.U.P.E.* rationale of deference, it ultimately fails to live up to that rationale. Beetz J. conceded initially that the doctrine of jurisdictional review was problematic, because there was no coherent method for identifying jurisdictional issues.\(^{119}\)

The theory of the preliminary or collateral question does not appear to recognize that the legislator may intend to give an administrative tribunal, expressly or by implication, the power to determine whether certain conditions of law or fact placed on the exercise of its power do exist. It is not always true that each of these conditions limits the tribunal’s authority; but except where the legislator is explicit, how can one distinguish a condition which the legislator intended to leave to the exclusive determination of the administrative tribunal from a condition which limits its authority as to which it may not err? One can make the distinction only by means of a more or less formalistic categorization. Such a categorization often runs the risk of being arbitrary and which may in particular unduly extend the superintending and reforming power of the superior courts by transforming it into a disguised right of appeal.

Thus, Beetz J. stated that the Court should follow *C.U.P.E.*’s lead by not deeming an issue to be jurisdictional where legislative intent was unclear or uncertain. However, like Dickson J. in *C.U.P.E.*, Beetz J. did not reject jurisdictional review outright. Instead, he developed a more sophisticated method for determining whether an issue was jurisdictional (and hence subject to correctness review) or non-jurisdictional (and hence subject only to review for patent unreasonableness). Beetz J. stated that “[t]he formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis”, which requires the Court to consider\(^{120}\)

not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

According to Beetz J., this pragmatic and functional method was superior because it enabled the Court to better understand the nature of the regulatory regime and the scope of administrative jurisdiction.

However, when it came to reviewing the Commissioner’s decision, Beetz J. did not allow the Commissioner any latitude for administrative judgment. Beetz J. immediately characterized the relevant provisions of the *Labour Code* as jurisdictional, because they applied “automatically” and therefore did not require interpretation. Thus, he held that the

\(^{119}\) *Ibid.* at 1084.

\(^{120}\) *Ibid.* at 1088.
commissioner was merely responsible for “recording” the transfer of the collective bargaining agreement under the statute. Furthermore, since the statutory provisions did not expressly grant the commissioner a discretionary power to transfer rights under the collective agreement, Beetz J. thought that it would be inappropriate to defer to the Commissioner’s decision. Finally, because the legislature had plucked the term “alienation” from the Quebec Civil Code, Beetz J. thought that the labour commissioner had no expertise or special insight regarding its meaning. At bottom, Beetz J.’s opinion was hostile to the notion of curial deference, because it enabled the Court to directly determine its own interpretation of the Labour Code with little or no regard for the Commissioner’s original decision.

In the years following Bibeault, the inability of the Court to reconcile jurisdictional review with curial deference caused a schism on the Supreme Court. One camp, led by Sopinka J., took the position that despite Dickson J.’s concerns about jurisdictional review, C.U.P.E. had not diminished the significance of jurisdictional review. Sopinka J. thought that the pragmatic and functional approach was simply a form of purposive statutory interpretation, which judges could use to determine legislative intent and jurisdictional parameters. The result of this reasoning was that a reviewing court could review an administrative decision according to a standard of correctness whenever it perceived that legislative intent, broadly construed, was ascertainable. This meant that the C.U.P.E. standard of “patent unreasonableness” applied only to those scenarios where the legislature expressly delegated authority over the question to an administrative decision-

\[121\] Ibid. at 1093-1094.
maker or had enacted a privative clause to prevent reviewing courts from interfering with an administrative decision.\textsuperscript{125}

However, even with respect to non-jurisdictional issues, Sopinka J. argued that the court still had to identify its own standard of “correct” judgment in order to assess the reasonableness of an administrative decision. In his concurring judgment in \textit{C.A.I.M.A.W. v. Paccar of Canada Ltd.}, Sopinka J. stated that the reasonableness of an administrative decision could only be determined once the court had identified the correct legal outcome on the merits.\textsuperscript{126}

\begin{quote}
Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is “reasonable” or “patently unreasonable” it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made. … [C]urious deference does not enter the picture until the Court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness.
\end{quote}

However, this conception of reasonableness scrutiny is not easily reconcilable with the idea of curial deference. First, it seems to permit a reviewing court to directly determine its own interpretation of the law even though the court does not have primary responsibility for the decision. Second, even if the court decides to defer, the court will find itself in an awkward position vis-à-vis the rule of law. In cases where the court defers to an administrative decision it thinks is incorrect, but falls within an acceptable margin of appreciation, the court gives the impression that it is complicit in an act of injustice: it will seem as though the court is turning a blind eye towards an incorrect determination of a party’s legal rights.\textsuperscript{127}

By contrast, the opposing camp led by Wilson J. took the position that \textit{C.U.P.E.} had significantly curtailed jurisdictional review. She argued that Sopinka J.’s attachment to jurisdictional review and the correctness standard would undermine efficient and expert modes of administrative decision-making. According to Wilson J., a reviewing court

\begin{footnotes}
\item[125] Evans, “Jurisdictional Review”, \textit{supra} note 123 at 264-265.
\item[127] See David Mullan, “Of Chaff Midst the Corn”, \textit{supra} note 109.
\end{footnotes}
should not label an issue as jurisdictional unless the legislature had expressly determined the outcome on that issue in the enabling legislation. Wilson J. accepted that there were cogent reasons to defer to an administrative decision, even in situations where the legislation did not include a privative clause. This more restrained approach recognizes that administrative decision-makers are better equipped to answer questions that are left unresolved by the legislature and fall within the general parameters of the regulatory framework.

In light of this recognition, Wilson J. argued that administrative decisions should only be overturned if they are patently unreasonable. Unlike Sopinka J., she argued that a reviewing court should not attempt to identify the correct outcome in order to determine the reasonableness of an administrative decision. Instead, she argued that so long as the court was satisfied the administrative decision was not patently unreasonable there was no need for judges to consider how they would have decided the matter.

2. The Structure of Curial Deference

In retrospect, it seems that the Supreme Court never directly resolved the debate between Sopinka J. and Wilson J. It is more accurate to say that the Court continued to tinker with the pragmatic and functional approach in the years that followed Paccar. During this period, some of the problems latent in C.U.P.E. have been mitigated and others have emerged as the structure of curial deference has been clarified and elaborated.

a) The Pragmatic and Functional Approach

The most significant development is that the pragmatic and functional approach has been reoriented in a way that marginalizes jurisdictional review. The revised pragmatic and functional approach requires a reviewing court to examine a variety of contextual factors

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128 P.S.A.C. #2, supra note 124 at 976-979, L’Heureux-Dubé J.
designed to respond to a question about relative institutional legitimacy: “Who should answer this question, the administrative tribunal or a court of law?” Practically speaking, this means that judges are more concerned with identifying and evaluating factors that identify the appropriate standard of review rather than speculating about legislative intent and jurisdictional parameters.

This shift is apparent in Pezim v. British Columbia (Superintendent of Brokers) when the Court held that the main purpose of the pragmatic and functional analysis is to identify the appropriate standard of review, rather than the parameters of administrative jurisdiction. In that case, three corporate officials were charged with violating disclosure requirements under the British Columbia Securities Act. The officials had authorized the issuance and reevaluation of stock options after learning the results of a geological test from one of its mining properties, but prior to releasing that information to the general public. The British Columbia Securities Commission held that although the officials were not guilty of insider trading, they had violated their obligation to disclose information regarding the value of its shares in a timely manner. The Commission held that the drilling results from the geological survey constituted a “material change” to corporate assets within the meaning of s. 67 of the Act, and that corporate officials were required to disclose the information to the public before granting new share options to corporate directors, employees, and their associates. The Commission decided that corporate officials had violated the Act, suspended them from trading in shares for one year, and ordered them to pay a portion of the costs incurred by the Commission to prosecute the charges. The British Columbia Court of Appeal overturned the Commission’s decision, stating that the drilling results did not constitute a material change because they did not alter the character of any physical assets owned by the company.

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The Supreme Court of Canada held that the Court of Appeal erred by substituting its own interpretation of “material change” for the Commission’s. On its face, the Supreme Court’s decision seems unusual, because the Court of Appeal was exercising its appellate jurisdiction under the Act. Nevertheless, Iacobucci J. maintained that the primary question before the Court concerned the appropriate standard of review to be applied to the Commission’s decision. This task required the Court to weigh and consider a variety of factors: the fact that securities regulation was a complex undertaking requiring specialized knowledge and expertise, the fact that the Act gave the Commission broad powers to pursue its mandate, the fact that the Commission was responsible for developing its own policies, and the fact that the Act provided individuals with a statutory right of appeal. Thus, Iacobucci J. held that

...having regard to the nature of the securities industry, the Commission’s specialization of duties and policy development role as well as the nature of the problem before this court, considerable deference is warranted in the present case notwithstanding the fact that there is a statutory right of appeal and there is no privative clause.

In light of these considerations, Iacobucci J. concluded that the appropriate standard of review fell somewhere between the “correctness” and “patent unreasonableness” standards established in C.U.P.E.

The Court emphasized the importance of administrative expertise again in Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., a case concerning a decision of the Canadian Competition Tribunal. During a hearing to determine whether Southam had violated the Canadian Competition Act, the Tribunal heard extensive circumstantial evidence regarding the cross-elasticity of demand in the local newspaper market in order to determine whether Southam’s acquisitions had unlawfully lessened competition for real estate advertising in the region. After hearing evidence and argument for forty days, the Tribunal concluded that Southam had violated

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135 Pezim, supra note 133 at paras. 1 and 57.
136 Ibid. at para. 84.
137 Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748 [Southam].
the *Competition Act*, and ordered the company to divest itself of one of its acquired publications.

As in *Pezim*, the Tribunal’s decision was challenged via a statutory right of appeal, and once again the Supreme Court recognized that the relative institutional competence of the Competition Tribunal required a more restrained form of judicial scrutiny.¹³⁸ Thus, Iacobucci J. held that expertise “is the most important of the factors that a court must consider in settling on a standard of review”. Furthermore, he pointed out that an appellate court was “likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal’s decisions” and was therefore “less able to secure the fulfillment of the purpose of the *Competition Act* than is the Tribunal.”¹³⁹

When addressing the particular attributes of the Tribunal, Iacobucci J. stated:¹⁴⁰

> The particular dispute in this case concerns the definition of the relevant product market—a matter that falls squarely within the area of the Tribunal’s economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest indicium of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more, indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.

Since the Tribunal had considerable economic expertise, Iacobucci J. reviewed its decision according to the intermediate standard alluded to in *Pezim*—a standard dubbed “reasonableness, *simpliciter*”. Thus, instead of attempting to reassess the evidence in light of the *Act*, Iacobucci J. said that the Court should ask whether the Tribunal’s decision was “supported by any reasons that can stand up to a somewhat probing examination.”¹⁴¹

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¹³⁸ A similar convergence between a superior court’s appeal and review functions has been recently suggested in the United Kingdom. See *E. v. Secretary of State for the Home Department*, [2004] Q.B. 1044 at paras. 40-43.


Nevertheless, Iacobucci J.’s comments about administrative expertise seem to be undercut by other passages in *Southam* which suggest that judges possess greater expertise with respect to general questions of law. Since *Bibeault*, the Supreme Court recognized that the question of deference depends, to some degree, on the character or nature of the problem before the administrative decision-maker.\(^\text{142}\) In *Southam*, Iacobucci J. drew a distinction between questions of law, questions of fact, and mixed questions of law and fact.\(^\text{143}\) In Iacobucci J.’s view, “questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.”\(^\text{144}\) Although he recognized that this distinction was difficult to draw in practice, Iacobucci J. suggested that it was nevertheless relevant to a proper determination regarding the standard of review. Where the question before the Tribunal involves (as it did in *Southam*) a complex assessment of the evidence in light of statutory principles, Iacobucci J. suggests that a greater degree of curial deference is warranted. However, in situations where the Tribunal’s decision establishes a new legal principle or a novel interpretation of the statute, Iacobucci J. infers that a lesser degree of curial deference is warranted.\(^\text{145}\) Thus, it seems that there are conflicting signals in *Southam* regarding the significance of institutional expertise. On the one hand, the Court clearly recognizes that an administrative institution may be better placed to interpret the law in light of the evidence brought before it, because it is more likely to settle upon an outcome that will fulfill the purposes and objectives of the statute. On the other hand, there is a suggestion that judges possess relative expertise regarding general questions of law, which suggests that a reviewing court should not shrink from imposing its own interpretation of the law if it conflicts with an administrative decision.

At this point, it is worth noting that the assumption that judges possess relative expertise on general questions of law is a controversial one. For instance, in *Canada (Attorney

\(^{142}\) *Bibeault*, supra note 118.

\(^{143}\) *Southam*, supra note 137 at paras. 34-45.

\(^{144}\) Ibid. at para. 35.

\(^{145}\) Ibid. at para. 45.
General) v. Mossop, the Supreme Court invoked this line of argument to overturn an otherwise reasonable administrative decision regarding human rights. The case concerned an application for bereavement leave filed by a public servant named Brian Mossop. Mr. Mossop took an absence from work in order to attend the funeral of his partner’s father. However, his application was denied by his employer because the collective agreement only allowed bereavement leave for the death of “immediate family” members, which was defined in a manner which excluded homosexual relationships. Mossop filed a complaint with the Canadian Human Rights Commission, claiming that he was the victim of discriminatory treatment. But in order to succeed, Mossop had to satisfy the Canadian Human Rights Tribunal that his employer had discriminated against him on the basis of his “family status”. The Tribunal held in Mossop’s favour, saying that the meaning of “family status” should be interpreted in light of the general purpose of the Act using the same broad and purposive approach employed by the Supreme Court when interpreting human rights under the Charter. However, the Tribunal’s decision was overturned by the Federal Court of Appeal on the ground that, since there was no privative clause in the Act, there was no reason for the court to defer to the Tribunal’s interpretation of “family status”. The court also held that the Tribunal’s decision was incorrect, because the broad and purposive approach employed by the Tribunal conflicted with Parliament’s implied intent to exclude protection on the grounds of sexual orientation.

Like the Federal Court of Appeal, the Supreme Court held that the Tribunal’s decision should be overturned. The two leading judgments for the majority, written by Lamer C.J. and LaForest J., both held that the Tribunal was not entitled to deference because it had no expertise regarding statutory interpretation. Even though Lamer C.J. recognized that

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147 The declared purpose of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 2 at the time read as follows: “The purpose of this Act is to extend the laws in Canada to give effect...to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.”
administrative expertise may justify curial deference in the absence of a privative clause, he nevertheless argued that the Court was entitled to subject the Tribunal’s decision to correctness review. Since the meaning of “family status” was a straightforward question of statutory interpretation, he thought there was no reason to believe that the Tribunal was better suited to answer it.\footnote{148} LaForest J. went further in his concurring opinion, stating:\footnote{149}

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal’s decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

By contrast L’Heureux-Dubé J., writing in dissent, held that the absence of a privative clause did not mean that the Court should automatically presume that it was entitled to impose its own interpretation of the statute. She thought that the Act gave the Human Rights Commission and the Tribunal “broad powers in a highly specialized and sensitive area” to investigate human rights complaints, foster public understanding of the Act, undertake research programs related to the advancement of human rights, develop policy, and to discourage discriminatory practices through both formal and informal means.\footnote{150}

Hence, she concluded that even in the absence of a privative clause, the Tribunal was entitled to deference because of its experience and understanding in the specialized field of human rights. After reviewing the Tribunal’s reasoning, which was designed to provide broad and purposive protection for basic human rights, she concluded that the decision was “in accordance with the proper principles of interpretation of human rights legislation” and therefore should not be disturbed.\footnote{151}

Since \textit{Mossop}, there have been a number of conflicting cases from the Supreme Court regarding whether human rights tribunals are entitled to curial deference. In those cases where the Court overturns a tribunal’s decision, it has usually characterized the nature of

\begin{footnotesize}
\footnote{148} Ibid. at paras. 25-26.
\footnote{149} Ibid. at para. 45.
\footnote{150} Ibid. at paras. 86-87.
\footnote{151} Ibid. at para. 141.0
\end{footnotesize}
the issue at stake as a general question of law which should be reviewed according to a correctness standard.\textsuperscript{152} By contrast, in those cases where the Court upholds a tribunal’s decision it tends to justify a more deferential posture on the grounds that the issue at stake is one of fact or mixed law and fact.\textsuperscript{153} However, a close examination of these cases shows that the distinction between questions of law and fact is permeable and controversial.\textsuperscript{154} But, more importantly, when one views \textit{Mossop} in light of more recent developments in the field of human rights, it seems that the Tribunal’s reasons in that case provided a more enlightened approach for interpreting anti-discrimination legislation than the majority opinion from the Supreme Court.\textsuperscript{155}

In spite of the controversy regarding the role of expertise within the doctrinal framework of curial deference, the Supreme Court continued to clarify the pragmatic and functional approach in \textit{Pushpanathan v. Canada (Minister of Citizenship and Immigration)}, a case concerning the legality of a deportation order.\textsuperscript{156} When Veluppillai Pushpanathan first arrived in Canada in 1985, he applied for refugee status on the grounds that his affiliation with dissident Tamil organizations in Sri Lanka qualified him as a political refugee under international law. However, he did not pursue his application for refugee status because he was granted permanent residency under an independent government program. In 1987, Pushpanathan and seven acquaintances were arrested and charged with conspiracy to traffic in narcotics after Pushpanathan sold heroin to an undercover police officer. Mr. Pushpanathan pled guilty to the offence and was sentenced to an eight year prison term.

\textsuperscript{152} See \textit{e.g. Gould v. Yukon Order of Pioneers}, [1996] 1 S.C.R. 571.


\textsuperscript{154} In this regard, it is noteworthy that David Mullan treats \textit{Mossop} as a deviation from the \textit{C.U.P.E.} doctrine. See Evans et al., \textit{Administrative Law}, 3\textsuperscript{rd} ed., supra note 10 at 733. For a critique of the Supreme Court’s approach in this field, see Alison Harvison Young, “Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference” (1993) 13 Admin. L.R. (2d) 206.


\textsuperscript{156} \textit{Pushpanathan v. Canada (Minister of Citizenship and Immigration)}, [1998] 1 S.C.R. 982 [\textit{Pushpanathan}].
After being released on parole, Pushpanathan renewed his application for refugee status after receiving a conditional deportation order from the Department of Immigration. The order would not be enforced if Pushpanathan could prove that he was entitled to refugee status under the United Nations *Convention Relating to the Status of Refugees*.\(^\text{157}\) According to the *Convention* and the Canadian *Immigration Act*, the Canadian government could refuse to grant refugee status where an individual had committed “acts contrary to the purposes and principles of the United Nations.”\(^\text{158}\) The Immigration and Refugee Board refused Pushpanathan’s application for refugee status on the ground that trafficking in narcotics was an offence contrary to the purposes and principles of the United Nations. This decision was upheld by both the trial\(^\text{159}\) and appellate\(^\text{160}\) divisions of the Federal Court on the basis that the Board had adopted a reasonable interpretation of the relevant provisions of the *Immigration Act* and the *Convention*.

The Supreme Court overturned the Board’s decision on the ground that it had incorrectly interpreted both the *Convention* and the *Immigration Act*. However, Bastarache J. elaborated the pragmatic and functional approach in order to identify the appropriate standard of review for the Board’s decision. The pragmatic and functional approach outlined by Bastarache J. focuses on the following contextual factors to determine the degree of curial deference that should be afforded to an administrative decision:

1. Privative Clauses – Bastarache J. held that where the legislature has enacted a privative clause to restrict judicial review, the court should treat it as a reason to adopt a more deferential standard of review. By contrast, where the enabling statute provides a broad statutory right of appeal, he held that a less deferential standard is appropriate. However, Bastarache J. emphasized that the presence of a privative clause was neither a necessary nor a sufficient condition for deference: it was merely one factor for the

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\(^{158}\) *Ibid.* at art. 1(F)(c).


court to assess when attempting to identify the appropriate standard of review.  

(2) Expertise – Bastarache J. also held that expertise is an important, if not the most important, factor for determining the appropriate standard of review. Where an administrator has specialized knowledge or some institutional advantage (whether procedural or remedial in nature), Bastarache J. stated that courts should treat relative institutional advantages as a reason for deference.

(3) The Purpose of the Act as a Whole, and the Provision in Particular – In situations where the legislative scheme delegates authority to an administrative institution to strike a balance amongst a variety of different interest groups, Bastarache J. held that courts should apply a more deferential standard of review. By extension, where the legislative scheme requires the administrative decision-maker to adjudicate more discrete disputes between individual interests, he held that a less deferential posture should be adopted.

(4) The Nature of the Problem – Finally, Bastarache J. held that courts should apply a more deferential standard of review where the issue at stake is a question of fact as opposed to a general question of law, which courts are better suited to resolve. Since administrative decision-makers receive evidence directly from the parties, they possess a “signal advantage” for determining whether evidence is credible and cogent. Although Bastarache J. recognized that it may be appropriate for a court to defer to

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161 Pushpanathan, supra note 156 at paras. 30-31.

162 Ibid. at paras. 32-34. “Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.”

163 Ibid. at para. 36.
an administrative determination of law, he suggested that such deference might not be appropriate unless the legislature had clearly delegated this authority to the administrative decision-maker.\footnote{Ibid. at paras. 37-38.}

When Bastarache J. examined the facts of \textit{Pushpanathan} in light of these factors, he determined that the Board’s decision should be judged according to a standard of correctness. Although the Board’s decision was protected by a privative clause,\footnote{\textit{Immigration Act}, R.S.C. 1985, c. I-2, s. 67(1).} the \textit{Immigration Act} also provided a right of appeal on questions of “general importance”.\footnote{Ibid. at s. 83(1).} Furthermore, because the issues before the Board concerned the interpretation of an international treaty, Bastarache J. held that it would be inappropriate to defer to the Board’s interpretation because it had no experience or expertise in dealing with international treaties. Thus, after deciding that a narcotics offence was not contrary to the purposes and principles of the UN, Bastarache J. held that the case should be remitted back to the Board for redetermination.

The important point here is that the Supreme Court’s decision in \textit{Pushpanathan} continued to shift the focus of judicial review away from jurisdictional review. As Bastarache J. points out “it should be understood that a question which “goes to jurisdiction” is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis.”\footnote{Ibid. at para. 28.} The \textit{Pushpanathan} version of the pragmatic and functional approach has now been extended to virtually all forms of administrative power, including statutory grants of broad discretionary authority.\footnote{Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 [Baker].} In all of these contexts the purpose of the pragmatic and functional approach is to identify the appropriate standard of review to be used to judge the legality of an administrative decision. If a reviewing court concludes that the pragmatic and functional analysis reveals no reasons for believing that the administrative decision-maker is better suited to decide the question, the court is entitled to undertake its own reasoning process.
in order to impose the outcome it perceives to be correct.\textsuperscript{169} Conversely, if a reviewing court concludes that there are strong reasons for believing that the administrative decision-maker is better suited to decide the question, the court can only intervene if the administrative decision cannot be rationally supported by the relevant legislation,\textsuperscript{170} is clearly irrational,\textsuperscript{171} or is so flawed that no amount of deference can justify the outcome.\textsuperscript{172} Finally, where a reviewing court concludes that there are conflicting reasons for deference the court applies an intermediate standard of “reasonableness \textit{simpliciter}”, which enables the court to intervene when an administrative decision is not supported by reasons that can withstand a “somewhat probing examination.”\textsuperscript{173}

The last major Supreme Court decision concerning the pragmatic and functional approach is \textit{Dunsmuir v. New Brunswick}, a case concerning the dismissal of a public employee.\textsuperscript{174} Over two years of employment with the provincial Department of Justice, David Dunsmuir received three formal reprimands from his employer regarding his job performance. After issuing the final reprimand, the regional director informed Dunsmuir that he would be subject to a performance review. However, while preparing for the performance review, the director sent a formal termination letter to Dunsmuir’s lawyer. After he received the letter, Dunsmuir grieved his dismissal pursuant to s. 100.1 of the \textit{Public Service Labour Relations Act} [\textit{PSLRA}], which gives non-unionized public employees the right to grieve any “discharge, suspension or a financial penalty”\textsuperscript{175}. In support of his grievance, Dunsmuir sought to introduce a volume of documents at the adjudication hearing. However, the Department objected to the admission of the evidence on the grounds that the adjudicator was not entitled under the \textit{PSLRA} to inquire into the reasons for the dismissal. In support of this argument, the Department invoked s. 20 of the \textit{Civil Service Act} [\textit{CSA}] which states that “Subject to the provisions of this Act or any

\textsuperscript{170} \textit{C.U.P.E.}, supra note 4 at 237.
\textsuperscript{171} \textit{P.S.A.C. #2}, supra note 124 at 963.
\textsuperscript{172} \textit{Ryan}, supra note 169 at para. 52.
\textsuperscript{173} \textit{Southam}, supra note 137 at para. 56 [\textit{Southam}].
\textsuperscript{174} \textit{Dunsmuir v. New Brunswick}, [2008] 1 S.C.R. 190 [\textit{Dunsmuir}].
\textsuperscript{175} \textit{Public Service Labour Relations Act}, R.S.N.B. 1973, c. P-25, s. 100.1.
other Act, termination of the employment of a deputy head or an employee shall be
governed by the ordinary rules of contract."\(^{176}\)

The adjudicator held that the PSLRA entitled him to consider the documents in order to
determine the true reasons for the dismissal,\(^{177}\) and drew authority for this conclusion
from a recent decision of the New Brunswick Court of Appeal,\(^{178}\) stating:\(^{179}\)

…the employer cannot avoid an inquiry into its real reasons for a discharge…by simply stating
that cause is not alleged. A grieving employee is entitled to an adjudication as to whether a
discharge purportedly with notice or with pay in lieu of notice was in fact for cause, either
disciplinary or non-disciplinary, and I have jurisdiction to make such a determination.

After inquiring into the facts, the adjudicator found that Dunsmuir had not been
terminated for cause. Nevertheless, he held that the employer had breached its common
law duty of fairness by cancelling the performance review and failing to provide
Dunsmuir with an opportunity to respond to the Department’s concerns about his job
performance. Accordingly, the adjudicator concluded that the dismissal was unlawful on
procedural grounds, and ordered the Department to reinstate Dunsmuir.

The fact that the Supreme Court seized Dunsmuir as an opportunity to reassess the
pragmatic and functional approach is not surprising. One Supreme Court justice in
particular, LeBel J., had expressed concerns that cases like Pezim, Southam, and
Pushpanathan had unduly complicated judicial review.\(^{180}\) More specifically, he was
concerned that the judges had become obsessed with the pragmatic and functional
approach instead of focusing their attention upon the substantive reasonableness of
administrative decisions.\(^{181}\) In some cases, this meant that judges would repeat the

176 Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20.
177 Section 97(2.1) of the PSLRA, supra note 175 states that “Where an adjudicator determines that an
employee has been discharged or otherwise disciplined by the employer for cause and the collective
agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the
employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for
the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.” This
 provision expressly applies to non-unionized employees by virtue of s. 100.1(5) of the Act.
181 Toronto (City) v. Canadian Union of Public Employees, [2003] 3 S.C.R. 77 [Toronto v. CUPE].
pragmatic and functional analysis and employ multiple standards of review in the same case if it thought that an administrative decision raised more than one legal issue.\textsuperscript{182} Furthermore, he expressed concern that the tripartite distinction between correctness, reasonableness, and patent unreasonableness was no longer tenable so that the patent unreasonableness standard “shaded uncomfortably into what should presumably be its antithesis…correctness review.” \textsuperscript{183} So by the time \textit{Dunsmuir} came along, it was no longer a question of whether the Court would attempt to revise the structure of curial deference, but rather of when or how these changes would come about.\textsuperscript{184}

But even if the Supreme Court had cause to revise the doctrinal framework in \textit{Dunsmuir}, it remains debatable whether its decision clarifies the foundations of curial deference. At the outset, the majority opinion in \textit{Dunsmuir} seems problematic because Bastarache and LeBel JJ. seem to confuse two distinct narratives in Canadian administrative law: the narrative of curial deference and the narrative of jurisdictional review. When discussing the purpose of judicial review, the majority opinion highlights the tension between curial respect for administrative decisions and the role of the judiciary in maintaining the rule of law. For instance in their opening remarks Bastarache and LeBel JJ. make the keen observation that:\textsuperscript{185}

\begin{quote}
Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
\end{quote}

However, only two paragraphs later, they conjure up the ghost of jurisdictional review, saying\textsuperscript{186}

\begin{footnotesize}
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\item \textsuperscript{182} \textit{MacDonell v. Québec (Commission d’accès à l’information)}, [2002] 3 S.C.R. 661.
\item \textsuperscript{183} \textit{Toronto v. CUPE}, supra note 181 at para. 66.
\item \textsuperscript{184} \textit{Council of Canadians with Disabilities v. Via Rail Canada Inc.}, [2007] 1 S.C.R. 650.
\item \textsuperscript{185} \textit{Dunsmuir}, supra note 174 at paras. 27-28.
\item \textsuperscript{186} \textit{Ibid.} at para. 30.
\end{itemize}
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In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. … In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

Further attention is drawn to jurisdictional review in later passages, which declare that “[a]dministrative bodies must...be correct in their determinations of true questions of jurisdiction or vires” and define jurisdictional issues as situations “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.” In light of the tortured history of curial deference since *C.U.P.E.*, this lingering fascination with jurisdictional review is likely to cause confusion in future cases.

Nevertheless, Bastarache and LeBel JJ. did manage to simplify the pragmatic and functional analysis to some extent by stating that there was no need for judges to inquire into the *Pushpanathan* factors where the appropriate standard of review is already established by precedent. Furthermore, they simplified the analysis by eliminating the patent unreasonableness standard of review, leaving only correctness and reasonableness review. In order to draw further attention to these revisions, Bastarache and LeBel JJ. renamed the pragmatic and functional approach the “standard of review analysis” even though the analysis is essentially similar to the framework set out in *Pushpanathan*.

But perhaps the strongest passages in the majority decision concern the meaning of reasonableness review. In this regard, Bastarache and LeBel JJ. declare that:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

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189 *Ibid.* at para. 34.
What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.

However, when it comes to reviewing the adjudicator’s actual decision in *Dunsmuir*, the Court fails to implement these ideas. In a majority decision spanning one hundred and eighteen paragraphs, only four paragraphs are actually devoted to assessing the adjudicator’s actual reasons for deciding to investigate the reasons for Dunsmuir’s dismissal. Ultimately, Bastarache and LeBel JJ. held that the adjudicator’s decision was unreasonable because they thought the CSA gave the Department a legal right to dismiss Dunsmuir without having to provide any reasons for his dismissal.

The main point regarding reasonableness review in *Dunsmuir* concerns the dissonance between what one might call the spirit of reasonableness review—that reasonableness review “is concerned mostly with the existence of justification, transparency and intelligibility” in administration—and the Court’s ultimate decision. The Court’s decision in *Dunsmuir* is problematic because although the Court recognizes the importance of justification, transparency, and intelligibility, it held that the adjudicator had acted unreasonably in requiring executive officials to provide genuine reasons to support its decision to terminate Dunsmuir’s employment. The irony of this is that Court treats the adjudicator’s decision, one which was designed to enhance justification, transparency and intelligibility in the public employment context, as an unreasonable exercise of administrative authority. In this respect, the Court’s decision fails to live up to the spirit of reasonableness review.

*b) Reasonableness Review*

In order to develop a deeper appreciation for reasonableness review, one needs to consider the manner in which judges evaluate reasonableness. Recall that in *Paccar*, Sopinka J. and Wilson J. disagreed about whether a court should determine its own views about the merits when evaluating the reasonableness of an administrative decision. As

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with the pragmatic and functional approach, the Court has continued to experiment with
different methods of reasonableness review in the years following *Paccar*.

For instance, although the Court unanimously agreed in *National Corn Growers
Association v. Canada (Import Tribunal)* that the Canadian Import Tribunal’s decision—
that American grain subsidies was causing “material injury” to Canadian corn producers
within the meaning of s. 42 of the *Special Import Measures Act*—was entitled to curial
deferece, they disagreed about how to determine whether the Tribunal’s decision was
unreasonable. Gonthier J. held that judicial review “requires some analysis of the
relevant legislation and the way in which the Tribunal has interpreted and applied it to the
facts”. Accordingly, he proceeded to ask whether it was unreasonable for the Tribunal
to interpret s. 42 in light of Canada’s international obligations under GATT; whether it
was unreasonable for the Tribunal to conclude that s. 42 applied to “potential” as well as
“actual” imports; and whether it was unreasonable for the Tribunal to conclude that
American subsidies had caused, was causing or was likely to cause material injury to
Canadian producers. After concluding that it was reasonable for the Tribunal to
interpret its enabling legislation in light of Canada’s international obligations; that it was
reasonable on such an interpretation for the Tribunal to consider existing as well as
potential damage to Canadian producers; and that the Tribunal’s factual findings were
supported by the evidence, Gonthier J. held that the Tribunal’s decision should not be
overturned.

While Wilson J. agreed with Gonthier J. that the Tribunal’s decision was not
unreasonable, she objected to Gonthier J.’s detailed approach to reasonableness review.
In her view, Gonthier J.’s method failed to appreciate “a growing recognition on the part
of courts that they may simply not be as well equipped as administrative tribunals or
agencies to deal with issues which Parliament has chosen to regulate through bodies

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193 *Corn Growers, supra* note 129.
exercising delegated power”.

Moreover, Wilson J. thought that Gonthier J.’s approach reflects “the very kind of meticulous analysis of the Tribunal’s reasoning that C.U.P.E. made clear courts should not conduct.” Instead, Wilson J. held that a reviewing court should simply ask whether the administrative decision was reasonable without considering exactly how the decision was reached.

In my view…the only issue which this Court may consider, once it accepts that the interpretation of a given provision is a matter that falls within the tribunal’s jurisdiction, is whether the Tribunal’s interpretation of the provision is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation.” Thus, if one determines that the Canadian Import Tribunal’s interpretation of s. 42 of the Act is not “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation”, then the inquiry must come to an end.

Despite her apparent disagreement with Gonthier J., it is important to point out that both judges recognized the importance of ensuring that the Tribunal’s decision was subject to some form of judicial review. The difference between them is more a matter of degree, in the sense that Wilson J. thought the court could assess reasonableness without rehearsing the Tribunal’s reasoning process. On this point, Gonthier J. responded “I do not understand how a conclusion can be reached as to the reasonableness of a tribunal’s interpretation of its enabling statute without considering the reasoning underlying it, and I would be surprised if that were the effect of this Court’s decision in C.U.P.E.”.

The problem highlighted byCorn Growers thus concerns whether it is possible for a court to assess the reasonableness of an administrative decision without having its evaluation collapse into a form of correctness oversight that is contrary to the idea of curial deference. On the one hand, Gonthier J.’s opinion asserts that reasonableness can only be assessed if a reviewing court is able to trace the reasoning process employed by an administrative official to justify his or her decision. On the other hand, Wilson J.’s opinion warns that this approach to reasonableness review is misleading because it effectively enables a court to impose its ideas about correct legal judgment under the guise of a deferential standard of review. These different approaches to reasonableness

196 Ibid. at 1336.
197 Ibid. at 1349.
198 Ibid. at 1350.
199 Ibid. at 1383.
review raise two important questions: (1) whether Gonthier J.’s approach preserves the distinction between reasonableness and correctness oversight; and (2) whether Wilson J.’s approach is sufficiently rigorous to satisfy the rule of law.

The Court’s decision in *Baker v. Canada (Minister of Citizenship and Immigration)* offers some additional insight into these questions.²⁰⁰ Mavis Baker arrived in Canada in 1981 with a temporary visitor’s visa, but remained in the country for the next eleven years without applying for permanent residency. During this time, she supported herself by working as an illegal domestic and had four children, all of whom were Canadian citizens by virtue of being born in Canada. However, after receiving treatment for post-partum depression subsequent to the birth of her fourth child in 1992, she received a deportation order. After seeking legal advice, Ms. Baker applied for a “humanitarian and compassionate” exemption that would permit her to remain in Canada while her application for permanent residency was being processed. Despite the fact that four of her children were Canadian citizens, her request was denied without reasons. When her lawyer requested an explanation for the decision from Officer Caden, the official responsible for the decision, the Department of Immigration provided the case notes compiled by Officer Lorenz, the investigating officer. The relevant portions of Officer Lorenz’s notes stated:²⁰¹

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are not H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity.

After receiving the file notes, Baker applied for judicial review claiming that the decision to deny the exemption was procedurally unfair, biased, and unreasonable. However in order for Baker to succeed, she had to convince the Federal Court that Officer Caden’s decision was unreasonable.

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²⁰⁰ *Baker, supra* note 168.

When the matter came before the Federal Court (Trial Division), Simpson J. had the advantage of seeing Officer Lorenz’s file notes because they were included as part of the record. But even though she was prepared to consider the notes, Simpson J. considered them in a peculiar fashion—one that reflects the sort of reasonableness review recommended by Wilson J. in *Corn Growers*. First, Simpson J. held that since Officer Caden had not given any reasons for his decision, she had to assume that Caden had acted in good faith after considering relevant legal principles. Second, although Simpson J. conceded “that failure to consider the best interests of a child when making a decision about whether to deport a parent would be an error”, she held that there was no such error in Baker’s case because “the notes made by Officer Lorenz…make it clear that the best interests of the child…were before Officer Caden.”

She even pointed out how Officer Lorenz referred repeatedly to the children in capital letters and considered evidence showing that the children would suffer if their mother were deported. Thus, Simpson J. upheld the decision to refuse the exemption, saying that “[n]o blatant error is to be found in the officer’s [Lorenz’s] notes. His expressions of personal opinion were unfortunate, but they do not taint the decision-maker [Caden].”

Baker appealed Simpson J.’s decision on the grounds that neither Officer Caden nor Simpson J. had given adequate consideration to the fact that Canada was a signatory to the *International Convention on the Rights of the Child*, which states that in all government decisions concerning children “the best interests of the child shall be a primary consideration.” However, when the matter came before the Federal Court of Appeal, Strayer J.A. (speaking for a unanimous Court) adopted an approach to reasonableness review very similar to Simpson J.:  

In the present case the Motions Judge found as a matter of fact that the situation of the children was a “significant factor in the decision-making process” by Officer Caden. It would not advance the appellant’s cause, therefore, for this Court to say that the welfare of the Canadian children of a deportee must be a factor, where raised by that deportee, in any determination as to the existence of adequate humanitarian grounds for exempting him or her from deportation. No one disputes

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203 Ibid. at para. 44.
that such is the case. What is implied, if not expressed, in the question is whether the best interests of the children must as a matter of law be given more weight than many other factors. If they must be “a primary consideration”, this implies that there may be other equally important considerations which along with the children’s interests have priority over lesser considerations. “Primary consideration” in this context must be taken as the equivalent of “more important factor” and not merely as a reference to the act of taking into account, as the learned Motions Judge found occurred here, the interests of the children. In other words the question relates to the substance of, not the procedure for, a decision as to whether humanitarian or compassionate grounds justify an exemption from deportation.

Strayer J.A. then rejected the argument that the Convention constrained the Minister’s discretion on the matter. He declared that the Convention did not have domestic legal effect because to give it legal effect would offend the separation of powers, because it would enable the executive to alter legislation which granted the Minister an unfettered discretion to grant the exemption.206

Thus, both Simpson J. and Strayer J.A. adopt a similar approach to reasonableness review, one which limits the role of judicial review to ascertaining simply whether the administrative decision-maker has nominally recognized relevant facts and principles in the reasons which accompany their decision.207 So long as relevant legal principles are recognized in the decision, it makes no difference how those principles actually figure in the outcome. The argument that both judges use to support this approach attempts to demarcate appropriate boundaries for reasonableness review—that in order to avoid descending into correctness review, judges ought to restrict their scrutiny to a formal review of the decision-maker’s reasons rather than scrutinizing whether the substantive reasoning for the decision is capable of justifying the outcome.208 Accordingly, the fact that Officers Lorenz and Caden recognized that Baker had four Canadian born children before refusing her request was sufficient to pass the threshold of reasonableness review. Whether the administrative officials considered that fact as weighing either in favour or against Baker’s application was a matter for them to decide, and a matter which was

206 Ibid. at para. 20.


208 Prior to Baker, the catalogue of reviewable errors associated with abuse of administrative discretion were (1) failure to consider relevant legal considerations, (2) considering legally irrelevant considerations, (3) acting in bad faith, (4) acting under dictation, (5) wrongful delegation of discretionary power, (6) fettering one’s discretion and (7) unreasonable exercise of discretion. After Baker, it seems that the traditional catalogue has been subsumed under ordinary reasonableness review.
beyond the scope of judicial review. So the fact that Officer Lorenz thought that the interests of the children were an *aggravating* consideration, one that weighed in favour of deporting Baker, was neither here nor there for the purposes of reasonableness review.

Despite the decisions of the lower courts, the Supreme Court held that the decision to deny the exemption was both biased and unreasonable and should therefore be overturned. One of the most important aspects of *Baker* is that it establishes that administrative officials have a common law duty to give reasons for their decisions. Writing for a unanimous court, L’Heureux-Dubé J. held that an administrative official has an obligation to provide reasons in situations “where the decision has important significance for the individual” because it would be unfair to subject a person to such an important decision without explaining the rationale for the outcome.\(^ {209}\) Furthermore, she held that this duty was flexible so that the extent of the duty to provide reasons would shift according to the nature of the regulatory context and the personal interest at stake. In this particular case, L’Heureux-Dubé J. concluded that Officer Lorenz’s notes satisfied the duty to give reasons.

However, since the file notes disclosed an outrageous rationale, the Court held that the decision should be quashed even though it recognized that the administrative decision was entitled to deference\(^ {210}\) According to L’Heureux-Dubé J., it was not sufficient for Officer Lorenz to merely mention the children in his reasons; in order to pass the threshold of reasonableness, the interests of the children had to be considered in an appropriate fashion.\(^ {211}\)

> [F]or the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H&C claim even when children’s interests are given this consideration. However, where the interests of the children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable.

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\(^{209}\) *Ibid.* at para. 43.

\(^{210}\) After conducting a pragmatic and functional analysis of the regulatory context, L’Heureux-Dubé J. held that the appropriate standard of review was reasonableness, *simpliciter.* *Ibid.* at paras. 57-.

\(^{211}\) *Baker,* supra note 168 at para. 75.
Thus, the decision to refuse the exemption was unreasonable because it was inconsistent with relevant legal values—the declared objectives of the Act, the principles of the international Convention on the Rights of the Child, and the guidelines that had been issued by the Minister of Immigration. In light of this, the Court held that it was appropriate for it to intervene and overturn the administrative decision.

The salient point here is that Baker places the reasoning of the administrative decision-maker at the centre of the inquiry once the reasonableness standard of review has been identified as the appropriate measure of legality. The priority of administrative reasons in Baker challenges Sopinka J.’s suggestion in Paccar that the court’s legal opinion is the touchstone for determining reasonableness. As Iacobucci J. points out in Law Society of New Brunswick v. Ryan:

> The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result.

This means that curial deference must ultimately be “earned” by the administrative decision-maker “by openly demonstrating the justifications for the decisions they have reached and by demonstrating the reasons why their decision is worthy of curial respect.” So long as the reasons given by the administrative official provide adequate justification for the ultimate decision by demonstrating that he or she was “alert, alive or sensitive” to relevant legal principles, it would be inappropriate for the court to intervene.

Despite the unanimous approval of L’Heureux-Dubé J.’s approach in Baker, there remains considerable controversy regarding reasonableness review. That controversy is

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212 Ibid. at para. 65.
213 Ryan, supra note 169 at para. 56.
apparent in *Canada (Citizenship and Immigration) v. Khosa.* As in *Baker, Khosa* is a case concerning an application for special relief under the *Immigration and Refugee Protection Act [IRPA]*. Sukhvir Khosa is an Indian citizen, and had resided in Canada since he was fourteen years old. When he was eighteen, Khosa was convicted of a criminal offence after the car he was driving struck and killed a pedestrian. The trial judge concluded that Khosa had been involved in street racing at the time of the accident, convicted him of criminal negligence causing death, and imposed a conditional sentence of two years less one day. After Khosa’s conviction and sentence appeals were exhausted, the Department of Immigration issued a deportation order on the grounds that Khosa had been convicted of a serious criminal offence.

After receiving the order, Khosa applied for special relief under the *IRPA* to remain in Canada on humanitarian and compassionate grounds. Earlier decisions from the Immigration Appeal Division and the Supreme Court identified a variety of factors which were relevant to Khosa’s application. Those factors include: (1) the seriousness of the offence; (2) the possibility of rehabilitation; (3) the length of time spent, and the degree to which the individual facing removal is established, in Canada; (4) the family and community support available; (5) the family in Canada and the dislocation to the family that removal would cause; and (6) the degree of hardship that would be caused to the individual facing removal. However, despite the fact that Khosa had been living in Canada since he was fourteen, had recently married a Canadian resident, and had few relatives in his native India the IAD dismissed his application. After summarizing the evidence and acknowledging the list of relevant factors, the tribunal member responsible for the decision stated “I do not see the appellant’s actual establishment in Canada at present as a particularly compelling feature of the case and simply note that it is a factor to be weighed along with all the other circumstances.” Instead, the IAD focused on the fact that Khosa still maintained that he was not street racing at the time of the accident.

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This prompted the IAD to state that “[t]he appellant’s failure to acknowledge or take responsibility for his specific reckless conduct does not suggest that any purpose would be served by staying the present removal order.”

When the Supreme Court reviewed IAD’s decision, the judges unanimously agreed that the appropriate standard of review was reasonableness. However, there was disagreement about how to assess whether the IAD’s decision was reasonable. Binnie J., who wrote the majority opinion, held that the Court should not “reweigh” whether Khosa was entitled to special relief because Parliament had entrusted that decision to the IAD. Although he recognized the relevance of Baker to the case at hand, he did not apply the same “alert, alive and sensitive” approach to reasonableness review recommended by L’Heureux-Dubé J. Instead, Binnie J. held that the IAD’s decision was reasonable because the tribunal had considered each of the relevant legal factors and had decided that “most of the factors did not militate strongly for or against relief.”

In other words, since the IAD was primarily responsible for the decision, the threshold for reasonableness was satisfied by the fact that the tribunal had mentioned the relevant legal factors when weighing the evidence.

Although Fish J. agreed with Binnie J. that the IAD was entitled to deference he dissented, saying that “deference ends where unreasonableness begins.” For Fish J., it was not sufficient for the IAD to simply mention the relevant legal factors as it was assessing the evidence. In order to qualify as reasonable, the IAD’s decision had to further explain why it had focused so much on Khosa’s refusal to accept responsibility and why it had discounted ample evidence regarding his ties to the community and prospects for rehabilitation.

While Mr. Khosa’s denial of street racing may well evidence some “lack of insight” into his own conduct, it cannot reasonably be said to contradict — still less to outweigh, on a balance of

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219 Ibid. at para. 24.
220 Khosa, supra note 216 at paras. 61-64.
221 Ibid. at para. 65.
222 Ibid. at para. 160.
223 Ibid. at para. 149.
probabilities – all of the evidence in his favour on the issues of remorse, rehabilitation and the likelihood of reoffence.

The IAD’s cursory treatment of the sentencing judge’s findings on remorse and the risk of recidivism are particularly troubling. While the findings of the criminal courts are not necessarily binding upon an administrative tribunal with a distinct statutory purpose and a different evidentiary record, it was incumbent upon the IAD to consider those findings and to explain the basis of its disagreement with the decision of the sentencing judge. The majority decision at the IAD mentions only in passing the favourable findings of the criminal courts and does not explain at all its disagreement with them.

Moreover, Mr. Khosa’s denial of street racing is, at best, of little probative significance in determining his remorse, rehabilitation and likelihood of reoffence. In light, particularly, of the extensive uncontradicted and unexplained evidence to the contrary, Mr. Khosa’s denial of street racing cannot reasonably support the inference drawn from it by the majority of the IAD.

The disagreement between the majority and dissenting approaches to reasonableness review in Khosa revolves around whether a court should reweigh or retrace the reasoning process employed by an administrative official. Binnie J., like Wilson J. in Corn Growers, takes the view that reasonableness can be assessed without reweighing the administrative rationale, whereas Fish J., like L’Heureux-Dubé J. in Baker, holds that a reviewing court should consider whether the reasons provided by the administrative decision-maker are “alert, alive and sensitive” to relevant legal principles. Thus, the questions raised by Khosa are essentially the same as those raised by Corn Growers: (1) whether Fish J.’s approach risks collapsing reasonableness review into a form of correctness oversight; and (2) whether Binnie J.’s approach provides sufficient rule of law safeguards against arbitrary administrative decisions.

C. Taking Stock and Looking Ahead

After navigating some of the more important twists and turns of Canadian administrative law over the past century, it is worth considering whether we can draw any general conclusions about these developments. Looking back, we can identify roughly three different phases of judicial review in Canadian administrative law. From the turn of the century until the C.U.P.E. decision in 1979, Canadian administrative law mirrored the doctrinal structure of jurisdictional review in Britain. Although the Supreme Court’s constitutional jurisprudence added another wrinkle to the story, the judicial attitude was essentially Diceyan in its inspiration: the legislative and judicial branches of government were the exclusive sources of law in the Canadian legal system, and reviewing courts regarded the decisions of “inferior” administrative institutions with suspicion. In order to
preserve the rule of law, judges employed the doctrine of jurisdictional review, an approach so elastic that judges could expand or contract the scope of judicial review without having to offer a principled justification for their decisions. The Supreme Court’s interpretation of s. 96 of the *B.N.A. Act* further restricted the operation of the administrative state, because it precluded legislatures from delegating to administrative officials adjudicative functions that had historically been exercised by superior courts. This era is typified by cases like *Globe Printing, Metropolitan Life, Toronto v. York*, and *Re Residential Tenancies*.

The character of the pre-*C.U.P.E.* era can be contrasted with the current attitude of curial deference, which pushes jurisdictional review into the background and recognizes that administrative institutions play a valuable role in determining the content of the law. This attitude still preserves a role for judicial review, but requires judges to consider the legitimacy of administrative institutions when scrutinizing administrative decisions. Where the standard of review analysis reveals cogent reasons for the court to defer to an administrative decision, judicial review is restricted to evaluating whether an administrative decision is reasonable. This current attitude is represented by cases like *Corn Growers, Pezim, Pushpanathan, Baker* and *Khosa*.

The intervening era represents a period of transition from heavy handed judicial review to curial deference. The attitude during this era was confused about how to reconcile judicial supervision of administrative action with critiques of overzealous judicial intervention. The result of this confusion is cases like *C.U.P.E., Bibeault*, and *Paccar*, which all claim to recognize the legitimacy of the administrative state, but still cling to the doctrine of jurisdictional review that undermines or obscures the normative underpinnings of administrative authority.

Despite the contrast between the different phases of judicial review, they all share a common desire to uphold the rule of law—they just have different views on what the rule
of law is and how it should be maintained. As I argued in chapter two, the Diceyan version of the rule of law contains a controversial assumption about institutional responsibility, in the sense that Dicey assumed that the judiciary was the exclusive guardian of the rule of law. Dicey thought that the judiciary had a monopoly on legal interpretation, and therefore the content of rule of law was contingent upon judicial opinion. This explains why Dicey’s theory of statutory interpretation revolved around judicial interpretation, and why Dicey’s constitutional theory was so hostile to the notion of administrative law. If administrative officials were entitled to interpret the law, it would threaten the primacy of the judiciary and, ipso facto, the integrity of the rule of law. Hence, Diceyan ideology prescribes an interventionist style of judicial review, one that is comfortable with an elastic notion of jurisdictional review that gives judges a great deal of latitude to second guess administrative action.

The doctrine of curial deference is also motivated by the desire to maintain the rule of law, but refrains from imposing the same institutional constraints as its Diceyan counterpart. In this respect, it adopts a protestant conception of the rule of law, which recognizes that democratic legislatures, judges, and administrative institutions all play important roles in maintaining the rule of law by participating in the processes which determine the content of the law. This conception of the rule of law thus rejects the formal separation of powers, which assumes that the legislative, judicial and executive functions of government operate in exclusive domains. Nevertheless, although administrative institutions are entitled determine the content of the law, their decisions also remain susceptible to judicial review. It’s just that the manner of that review recognizes the legitimacy of administrative decisions and is relatively circumspect in its orientation when compared with jurisdictional review. This means that administrative officials are required to justify their actions by providing reasons, and the sufficiency of

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225 As David Dyzenhaus puts it “Legislatures and administrative tribunals have a role in the determination of the values considered fundamental to the Canadian social, political and legal order, as do the parties who challenge the state to show that its exercises of public power are accountable to these underlying values.” David Dyzenhaus, “Constituting the Rule of Law” (2001-2002) 27 Queen’s L.J. 445.
those reasons is judged according to a standard of reasonableness instead being judged according to judicial standards of correct legal judgment.

Looking forward to the future of curial deference, there are three major questions that require further attention. The first concerns the ambiguous role of jurisdictional review within the doctrine of curial deference. This question is raised by the confused narratives of judicial review expressed by the Supreme Court in *Dunsmuir*. The second question concerns whether the standard of review analysis can be further simplified and refined beyond the measures taken in *Dunsmuir*. The third question concerns the method of reasonableness review, an issue raised in both *Dunsmuir* and *Khosa*. 
VI. Curial Deference and the Integrity of Administrative Law

In the previous chapter I examined how the Supreme Court of Canada negotiated the transition from jurisdictional review to a doctrine of curial deference towards administrative decisions. Since this doctrinal shift was accomplished by gradually reinterpreting the constitutional relationship between legislative, judicial, and administrative institutions, Canadian courts have frequently been tempted to revert to jurisdictional review from time to time. Nevertheless, the history of Canadian administrative law over the past thirty years reveals a deliberate attempt to break free from the jurisdictional rationale. As the pragmatic and functional approach developed, reliance upon the concept of administrative jurisdiction has gradually waned and the practice of judicial review has shifted its focus to a contextual analysis of relevant reasons for respecting administrative decisions.

In this chapter, I want to build upon the historical, doctrinal, and theoretical themes from the previous chapters in an attempt to elucidate a principled understanding of curial deference. I will argue that curial deference is best explained and justified by developing a deeper understanding of the idea of legitimate administrative authority that I outlined in chapter three. In that chapter, I drew an analytical distinction between administrative jurisdiction and legitimate administrative authority. I argued that the concept of administrative jurisdiction fails to explain the legitimate legal authority of administrative institutions because (1) it assumes that the legal parameters of administrative jurisdiction are determined exclusively by the legislative or judicial branches of government, and (2) that beyond those parameters administrative officials are free to exercise political discretion beyond the reach of the rule of law. By contrast, I argued that the concept of legitimate administrative authority is motivated by substantive reasons of political morality which entitle administrative institutions to interpret the law, and which require judges and other public officials to respect administrative decisions. However, I also emphasized that just because an administrative institution is entitled to interpret law does not render it a law unto itself, because the legality of administrative action also depends upon the character of the reasons offered in support of particular administrative decisions.
This understanding of curial deference therefore means that while judges should recognize relevant reasons for respecting administrative decisions, they should still subject the substance of those decisions to judicial review. This deeper understanding of curial deference provides important insights about modern democratic constitutionalism, because it elucidates the legitimate authority of administrative institutions while ensuring that decisions issues by administrative officials are consistent with the rule of law and constitutional values.

In what follows, I will argue that this conception of curial deference provides a superior analytical framework for judicial review because it enables participants to better understand the legitimacy of administrative institutions and, in turn, develop a better understanding about the appropriate constitutional function of judicial review. In Part A, I will revisit the Diceyan dialectic in order to show why traditional constitutional theory is unable or ill-equipped to provide an adequate account of legitimate administrative authority. In Part B, I will identify and critique three different responses to the reality of the administrative state which are motivated by the logic of Diceyan constitutional theory—correctness review of the merits, curial submission to administrative discretion, and non-doctrinal judicial review. I will argue that these responses, which continue to exert considerable influence both at common law and in public law theory, do not adequately account for the legitimacy of the administrative state: they either enable judges to simply substitute their judgment for that of administrative officials or enable administrative officials to wield discretionary power without the rule of law. In part C, I will distinguish and elaborate a conception of curial deference as an alternative to these approaches. I will argue that a doctrine of curial deference is preferable to the alternatives of correctness review, curial submission, and non-doctrinal judicial review because it provides an analytical framework which recognizes important political reasons for respecting administrative decisions, but which also enables judges to scrutinize the substance of administrative decisions for compliance with the rule of law. However, while curial deference addresses some of the shortcomings associated with jurisdictional review, I will argue that it does not provide a utopian solution to the Diceyan dialectic because it does not determine the appropriate outcome in any given case. In other words,
the perils associated with the Diceyan dialectic—correctness review and submission to discretion—remain ever present dangers when judges engage in judicial review of administrative action. Nevertheless, even though the doctrine of curial deference does not dissolve the dialectic, it enhances our understanding of the complex issues of legality and legitimacy that are thrown up by judicial review, and enables participants to debate those issues in a more rational and forthright manner.

A. Restating the Diceyan Dialectic

In chapter two, I identified a dilemma rooted in the inability of orthodox constitutional theory to adequately explain or justify the prevalence of administrative legal authority in modern democratic legal systems. This dilemma, which I called the Diceyan dialectic, assumes that legitimate legal authority under a democratic constitution is wielded exclusively by either the legislative or judicial branches of government. The upshot of the Diceyan dialectic is that people who subscribe to this constitutional framework cannot reconcile the idea of autonomous administrative legal judgment with the rule of law. Thus, when confronted with the reality of the modern administrative state—the vast array of government institutions empowered by legislation to decide how best to administer new and sometimes complex regulatory regimes—judges influenced by Diceyan constitutional theory tend to portray the character of administrative action in one of two ways.

The first account assumes that administrative officials exercise a form of political discretion which is ultimately justified by the Diceyan conception of Parliamentary sovereignty—the principle that Parliament has “the right to make or unmake any law whatever” and that no other legal institution has the right to set aside Parliamentary legislation.1 According to this view, which is most commonly associated with the traditional ultra vires theory of judicial review, the legal parameters of administrative jurisdiction are established by historical facts about legislative intent, and so long as administrative officials observe those statutory limits they are free to exercise their discretionary power in whatever way they choose. Judges who are attracted to this pole in

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the dialectic tend to defer to administrative decisions so long as there is an indication that
the legislature intended that an administrative official determine the matter, and they will
refrain from subjecting the substance of administrative decisions to judicial scrutiny. In
other words, the first account concedes that administrative officials are free to exercise
independent judgment, but asserts that it is inappropriate for judges to scrutinize the
legality of that judgment beyond jurisdictional parameters.

The second account, which is motivated by a Diceyan conception of the rule of law,
asserts that the legality of administrative decisions is determined both by positive
statutory constraints and the full range of common law materials which lie within the
exclusive domain of the judiciary. According to this view, the legality of an
administrative decision is ultimately contingent upon whether it complies with judicial
assessments about correct legal procedure and substance, and these assessments construe
the legal parameters of administrative jurisdiction more broadly than mere legislative
directives. In practice, any issue can be construed as “jurisdictional” by judges wedded to
a Diceyan conception of the rule of law, because they believe that judges have a
monopoly on interpreting the law under the constitution. Judges who are attracted to this
pole in the dialectic rarely see any reason for deferring to administrative decisions,
because they assume that it is the exclusive province of the judiciary to interpret and
determine what the law requires. Hence, while judges who take this view often pay lip
service to the idea that they should respect an administrative assessment of the merits,
they see no reason to defer to an administrative decision with which they disagree.

Historically speaking, judges have vacillated between these two very different views
regarding the character of administrative action when discussing the important

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2 David Dyzenhaus refers to this judicial posture as “submissive deference”, because it requires judges to
submit to a positivist understanding of legislative intent. See David Dyzenhaus, “The Politics of Deference:
Judicial Review and Democracy” in Michael Taggart, ed., The Province of Administrative Law (Oxford:


4 Marbury v. Madison, 5 U.S. 137 at 177 (1803): “It is emphatically the province and duty of the Judicial
Department to say what the law is.” For a critique of this conception of the judicial role see David
Dyzenhaus, “Formalism’s Hollow Victory”, supra note 3.
interrelationship between democracy, the rule of law, and judicial review. The result, as Murray Hunt observes, is “a constitutional discourse which selectively invokes democratic positivism and liberal constitutionalism in order to justify or explain a particular decision, but which lacks an overarching coherent vision of democratic constitutionalism”. This instability is manifest when judges apply the traditional doctrine of jurisdictional review that still governs the practice of judicial review in most Commonwealth countries. When the history of jurisdictional review is laid bare, it seems like “a verbal coat of too many colors” because judges employ conflicting conceptions of law and administrative jurisdiction.

This doctrinal instability carries two serious problems in its train: one theoretical and the other more practical in nature. The theoretical problem is that the jurisdictional rationale fails to provide a distinct, normative account of administrative authority—one which is both autonomous (in the sense that the substance of administrative decisions is not determined by the legislative or judicial branches of government) and legitimate (in the sense that it elucidates good reasons for citizens and other public officials to respect administrative decisions). This gap is striking, because it shows that constitutional theory has not yet come to grips with the development of the modern administrative state, in which a vast array of administrative officials are empowered to determine how best to implement legislative principles and policies. In order to adequately explain and understand this phenomenon, public lawyers need to break away from the continuing influence of Diceyan constitutional theory and begin to cultivate a richer understanding of the constitutional legitimacy of the modern apparatus of government.


The practical problem is that because the traditional doctrine of jurisdictional review does not provide an adequate account of legitimate administrative authority, judicial review is frequently granted or refused in an arbitrary or unprincipled manner. When judges apply the doctrine of jurisdictional review, judicial review shuttles between simply enforcing the statutory parameters of administrative discretion and engaging in heavy handed correctness review of the merits without providing an adequate justification for their decisions. Thus, there is a persistent risk that judicial review premised upon the idea of administrative jurisdiction will fail to fulfill its proper constitutional function: it will either simply rubber stamp administrative decisions of dubious legal substance or (what is equally disturbing) upset legitimate administrative decisions without providing an adequate justification for judicial intervention.

B. Responding to the Administrative State

There are four possible responses to the theoretical and practical problems associated with jurisdictional review and which are rooted in Diceyan constitutional theory. The first two simply concede that the Diceyan dialectic is insoluble, and recommend that we cope with that reality by maintaining the doctrine of jurisdictional review and aligning it with one pole of the dialectic. By contrast the third response advocates a “non-doctrinal” approach to reasonableness review of administrative decisions, whereby judges exercise a broad discretion to intervene or defer to administrative decisions depending upon their assessment of what justice demands under the circumstances. However, even though the non-doctrinal approach discards the doctrine of jurisdictional review, it fails to construct an adequate analytical framework in its place. Thus, judges who are attracted to the non-doctrinal approach remain prone to the same problems associated with jurisdictional review and the Diceyan dialectic. I will argue in favour of a fourth alternative—a doctrine of curial deference, which rejects jurisdictional review and replaces it with an analytical framework which enables judges to identify relevant reasons for respecting administrative decisions while simultaneously subjecting those decisions to reasonableness review.

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1. Correctness Review of the Merits

Correctness review of the merits is illustrated by cases like *Anisminic Ltd. v. Foreign Compensation Commission*, *Metropolitan Life Insurance Company v. International Union of Operating Engineers*, and *R. v. Lord President of the Privy Council, ex parte Page*, where courts adopt a broad approach to jurisdictional review that mirrors a Diceyan conception of the rule of law.\(^9\) When judges subject an administrative decision to correctness review, they undertake their own legal assessment of the merits to determine a result they perceive to be correct.\(^10\) Lord Griffiths articulates this approach in a passage from his opinion in *Page*.\(^11\)

In the case of bodies other than courts, in so far as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of law.

The assumption that drives correctness review is that judges retain a monopoly with respect to determining a correct interpretation of law. Hence, these cases establish the proposition that a court is entitled to intervene any time it disagrees with an administrative interpretation of law, even when the legislature declares explicitly that it wants to restrict judicial review by enacting a privative clause.

Despite the apparent debate in the United Kingdom between proponents of the modified *ultra vires* and common law theories of judicial review—the two dominant schools of thought in contemporary English public law—they all endorse the reasoning employed by the House of Lords’ in *Anisminic*.\(^12\) The modified *ultra vires* theory provides a theory of judicial review that gravitates towards Dicey’s conception of the rule of law, because it assumes that judges determine the content and meaning of legal norms. Instead of relying upon historical facts about legislative intent to determine the content of law, the modified *ultra vires* theory ultimately hinges upon the convergent behaviour of judges. So despite

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\(^11\) *Page*, supra note 9 at 693.

the fact that H.W.R. Wade asserts that the defining feature of the British constitution is the principle of Parliamentary sovereignty, he argues that Parliamentary sovereignty is ultimately contingent upon the “political fact” of judicial recognition because “it is always for the courts, in the last resort, to say what is a valid Act of Parliament.”\textsuperscript{13} Later, in his Hamlyn Lectures, Wade expressly invokes the famous devices of legal positivism—Hans Kelsen’s \textit{grundnorm}, Sir John Salmond’s ultimate legal principle, and Hart’s rule of recognition—all of which are grounded in social facts about judicial behaviour as opposed to arguments grounded in critical or political morality.\textsuperscript{14} Practically speaking, Wade argues that the parameters of administrative jurisdiction and the scope of judicial review ultimately “lies in the keeping of the courts.”\textsuperscript{15} Thus, according to Wade’s version of the \textit{ultra vires} doctrine, judges “can make the doctrine mean anything they wish by finding implied limitations in Acts of Parliament”.\textsuperscript{16} This means that judges are entitled to intervene any time they disagree with an administrative interpretation of legislation. Furthermore, it means that privative clauses are both useless and irrelevant, since judges are free to ascribe an intention to Parliament in order to justify judicial intervention in spite of Parliament’s express desire to restrict judicial review.

Mark Elliott’s more sophisticated version of the modified \textit{ultra vires} doctrine is essentially similar to Wade’s: it insists that the principle of Parliamentary sovereignty is the central principle of the British constitution, but asserts that the content of legislation is ultimately determined by judicial interpretation of that legislation in light of common

\textsuperscript{13} H.W.R. Wade, “The Basis of Legal Sovereignty” (1955) Camb. L.J. 172 at 189 ["Legal Sovereignty"]. Of note is the fact that Wade’s positivist theory of Parliamentary sovereignty predates the publication of H.L.A. Hart, \textit{The Concept of Law} (Oxford: Clarendon Press, 1961) by approximately five years. While Mark Elliott, infra note 17 asserts that Wade’s constitutional theory is an example of the traditional, Austinian version of the \textit{ultra vires} theory, a close examination of Wade’s scholarship shows that it is more Hartian than Austinian in its orientation because of the way in which Wade prioritizes judicial recognition of Parliamentary will. Hence, when Wade describes the British constitution, he declares that “[a]ll law students are taught that Parliamentary sovereignty is absolute. But it is the judges who have the last word. If they interpret an Act to mean the opposite of what it says, it is their view which represents the law.” H.W.R. Wade & Christopher Forsyth, \textit{Administrative Law}, 9\textsuperscript{th} ed. (Oxford: Oxford University Press, 2004) at 82 [\textit{Administrative Law}].


\textsuperscript{15} Wade, “Legal Sovereignty”, supra note 13 at 189.

\textsuperscript{16} H.W.R. Wade & Christopher Forsyth, \textit{Administrative Law}, supra note 13 at 37.
law values. Judicial interpretation of Parliamentary intent depends upon judicial perceptions about the rule of law that are manifested in common law principles of good administration: principles of formal legality, procedural fairness, and substantive reasonableness.

However, Elliott argues that the substantive content of these common law principles is determined by the prevailing “empirical” attitudes amongst judges. This explains Elliott’s sanguine attitude towards privative clauses and the House of Lords’ decision in Anisminic. Even though the House of Lords disregarded an express statutory provision which was designed to restrict judicial review, Elliott argues that the decision was correct because “it is the function of the judiciary to ensure that, so far as possible, legislation is interpreted in a manner which is consistent with the rule of law.”

Thus, the modified ultra vires theory projects the Diceyan conception of the rule of law, which enables judges to bootstrap themselves to the apex of the constitutional order. Although the modified ultra vires rationale formally recognizes that Parliament is entitled to establish and empower administrative institutions by statute, a court can intervene whenever it disagrees with an administrative decision on its merits. Ultimately, the limits of administrative jurisdiction are what judges say they are, and the modified ultra vires theory does not recognize any reasons why judges should respect administrative assessments about what the law requires. The consequence, as Paul Craig correctly points out, is that the modified ultra vires theory is “capable only of performing a residual role by implicitly legitimating what the courts have chosen to do.”

However, it seems that the common law theory—the chief rival to the modified ultra vires account of judicial review—gravitates to the same pole of the Diceyan dialectic.

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18 Elliott, *Constitutional Foundations*, supra note 17 at 100-104.


Unlike the modified *ultra vires* theory, common law theorists do not assert that the sole purpose of judicial review is to enforce Parliamentary intent. Rather, they argue that judicial review is justified by common law values which have normative force independent of Parliamentary will. Instead of arguing that judges are entitled to enforce rule of law values as a matter of implied legislative intent, common law theorists argue that judges are entitled to enforce rule of law values as part of their inherent jurisdiction over the common law.

Proponents of the common law model argue that the principles of judicial review are in reality developed by the courts. They are the creation of the common law. The legislature will rarely provide any indications as to the content and limits of what constitutes judicial review. When legislation is passed the courts will impose the controls which constitute judicial review which they believe are normatively justified on the grounds of justice, the rule of law, etc. They will therefore decide on the appropriate procedural and substantive principles of judicial review which should apply to statutory and non-statutory bodies alike. Agency action which infringes these principles will be unlawful.

Although legislation remains relevant to judicial review, the justification for enforcing principles of good administration is provided directly by the common law. But, like the modified *ultra vires* theory asserted by Wade and Elliott, the content of those values falls to be determined by judges since the common law is the exclusive domain of the judiciary. Thus, the difference between the modified *ultra vires* and common law theories of judicial review seems to be simply a difference of description: the normative content and character of judicial review remains essentially the same. As Sir John Laws points out, in terms strikingly similar to Wade’s, administrative “jurisdiction” is a protean word whose meaning is ultimately determined by courts because “the judges have, in the last analysis, the power they say they have.”

To sum up, both the modified *ultra vires* and the common law theories of judicial review accept the proposition asserted by the House of Lords in *Anisminic*—that a court is

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entitled to overturn an administrative decision any time it disagrees with an administrative interpretation of law. What both camps seem to overlook, however, are serious democratic and practical objections to this proposition.\textsuperscript{27}

The democratic objection is that correctness review enables judges to brush aside decisions reached through fair democratic process to delegate primary responsibility on particular legal issues to administrative officials. Put more simply, correctness review discounts the legitimacy or normative significance of the democratic decision-making process. One of the realities of both law and politics is the fact of reasonable disagreement on questions of common concern to members of a political community, a situation that John Rawls calls the “fact of reasonable pluralism”\textsuperscript{28} and Jeremy Waldron refers to as “the circumstances of politics”.\textsuperscript{29} When a common decision is needed, but people reasonably disagree about what that decision should be all things considered, fair democratic process provides a legitimate means of resolving that disagreement. It is legitimate because it provides a respectful decision-making process. First, it respects people’s opinions, including those who dissent from the majority view, by not requiring anyone to repress or renounce sincerely held views about justice in order to arrive at a common decision. Second, it employs a dispute resolution process which gives “each individual’s view the greatest weight possible in this process compatible with an equal weight for the views of each of the others.”\textsuperscript{30} Accordingly, when a democratic legislature establishes an administrative institution to decide a question of common concern, citizens and other legal officials like judges have good reason to respect that institutional

\textsuperscript{27}To be fair, some proponents of the common law theory of judicial review do recognize a role for curial deference towards administrative decisions. However, the relationship between the common law theory of judicial review and the idea of curial deference remains undeveloped. See \textit{e.g.} Lord Justice Laws’ opinion in \textit{International Transport Roth GmbH v. Secretary of State for the Home Department}, [2003] Q.B. 728 (C.A.).


\textsuperscript{30}\textit{Ibid.} at 114.
settlement and the decisions rendered by the administrative decision-maker. At the very least, this means that it would be inappropriate, given the moral and political context, for citizens and judges to gainsay an administrative decision simply because it does not match their own assessment of what justice requires under the circumstances.

This argument about democratic legitimacy surfaces in John Griffith’s theory of the political constitution. Griffith’s critique of orthodox public law doctrine in Britain makes a plea for judicial restraint which asserts that disagreements about legal rights are best resolved by politicians who are accountable through the democratic process. Griffith argues that the advantage of the political constitution “is not that politicians are more likely to come up with the right answer but that …they are so much more vulnerable than judges and can be dismissed or at least made to suffer in their reputation.” More recently, Griffith has explicitly linked his political constitution to the idea of constitutional democratic legitimacy, saying:

It is the Queen (which today means the Queen’s Ministers) who makes statute law and confers powers on public authorities, but she must do so by a particular process which requires that she takes the advice and obtains the consent of both Houses of Parliament. By “the rule of law” we mean that we recognise the authority and the legitimacy of laws so made and interpreted, that we deny recognition to “arbitrary” laws otherwise made, and that laws bind the law-makers.

According to Griffith, if one recognizes the normative significance of the democratic process and thus of legislative decisions to delegate authority to administrative officials, the appropriate role or function of judicial review should not be to superimpose judicial conceptions of the public good on top of existing administrative decisions.

34 Griffith, “The Political Constitution”, supra note 33 at 118.
This concern about democratic legitimacy isn’t simply a theoretical point for Griffith, because his historical survey regarding the practice of judicial review in Britain reveals that the judiciary’s conception of justice and the public interest often fails to demonstrate adequate concern and regard for individual interests and redistributive policies in a variety of different legal contexts.36 This historical critique of judicial review points toward a second, more practical objection to correctness review—an objection which asserts that correctness review is irrational because it enables generalist judges to substitute their legal assessments for the considered opinions of administrative officials who possess relative expertise regarding specialized regulatory regimes and the delicate balance between public and private interests.37

This practical objection to correctness review surfaces in John Willis’s and Harry Arthurs’s functionalist critiques of judicial review. Both Willis and Arthurs argue that it is irrational for judges to assume a free hand in reviewing administrative decisions because they tend to make nonsense of regulatory regimes established by legislation.38

37 Kavanagh “Deference or Defiance?”, supra note 32 at 187: “When is it appropriate to defer to the judgment of another? I want to suggest that the primary reason for deferring to the judgment of another is when that person’s judgment is worthy of respect. A’s judgment will be worthy of respect from B if A possesses some qualities superior to those possessed by B, that is, if A has some skill, expertise, or knowledge that B does not possess, or at least not to the same degree. So the reason for deferring to doctors’ advice is that they possess medical training and expertise that we lack. Even in examples in which the relationship between A and B is not one between an expert and a layperson with no specialist knowledge, the primary rationale for deference is respect for the acknowledged superior claims or qualities of the other. When we defer to the judgments of our friends, partners, or family about what to do, it is generally because we believe that their judgment is likely to be sound.” See also Jeffrey Jowell, “Judicial Deference and Human Rights: A question of Competence” in Paul Craig & Richard Rawlings, eds., Law and Administration in Europe: Essays in Honour of Carol Harlow (Oxford: Oxford University Press, 2003) 67 [“Judicial Deference and Human Rights”]; Jeffrey Jowell, “Judicial Deference: servility, civility or institutional capacity?” [2003] P.L. 592 [“Judicial Deference”]; Jeffrey Jowell & Jonathan Cooper, “Introduction” in Jeffrey Jowell & Jonathan Cooper, eds., Delivering Rights: How the Humans Rights Act is Working (Oxford: Hart Publishing, 2003); Colin Diver, “Statutory Interpretation in the Administrative State” (1985) 133 U. Pa. L. Rev. 549; King, “Judicial Restraint”, supra note 8 at 425-426.
Instead of focusing solely upon the legitimacy of the democratic process, both Willis and Arthurs assert that administrative institutions are better positioned to make expert assessments regarding the purpose of the regulatory regime in light of the public interest. Accordingly, judges should not engage in correctness review when an administrative decision-maker possesses superior institutional competency, institutional expertise or coordinative capacity with respect to certain legal questions. Since some administrative officials hear evidence first hand, they are better positioned to weigh that evidence than a court reviewing the record of the original decision-making process; administrative institutions often possess not only theoretical expertise but technical, experiential, and procedural advantages which make them better suited to deciding how to best implement a complex regulatory regime; and because of their institutional memory and relative permanence, administrative institutions are better positioned to develop a coherent and principled approach to implementing legislative policies than judges who encounter those policies on a more ad hoc basis. Of course, not every administrative decision-maker possesses all of these advantages, but most administrative decision-makers possess at least some of them.

39 In this context, institutional competency refers to procedural advantages that administrative institutions possess in assessing facts relevant to the implementation of an administrative program. It refers to superior fact-finding abilities or procedural acumen possessed by administrative decision-makers relative to the legal process employed by courts.

40 In this context, institutional expertise refers to a variety of ways in which an administrative institution may possess superior knowledge about how best to implement a given regulatory regime. It includes theoretical expertise, technical expertise or experiential knowledge about how to translate legislative policy and principle into practice through administration.

41 In this context, coordinative capacity refers to the ability of administrative institutions to generate what Waldron calls signals of “legal salience”, which enable members of a political community to escape prisoner’s dilemma problems on issues of common concern. See Waldron, “Authority for Officials”, supra note 32 at 52-55.

Both the democratic and practical objections provide cogent reasons for believing that correctness review of administrative decisions is illegitimate and irrational. How should the practice of judicial review be altered to reflect the importance of these legitimacy concerns? One alternative is for judges to refrain from scrutinizing the substance of administrative decisions once they have verified that the legislature has delegated responsibility over a particular question to an administrative decision-maker, an attitude which can be described as curial submission to administrative discretion.

2. Curial Submission to Administrative Discretion

Cuiral submission occurs when judges prioritize the principle of Parliamentary sovereignty and refrain from scrutinizing the merits of administrative decisions. Following the aphorism from *R. v. Bolton*, curial submission assumes that “[t]he question of jurisdiction does not depend on the truth or the falsehood of the charge…it is determinable at the commencement, not at the conclusion of the inquiry.” Under this approach, judicial review is restricted to a very narrow category of “jurisdictional” issues, and judges defer blindly to administrative decisions without questioning administrative assessments of any residual “non-jurisdictional” or “intra-jurisdictional” legal questions. In other words, the jurisdictional parameters delineate a zone of non-justiciable administrative discretion that is immune to judicial review. Judges who adhere to this view often assume that privative clauses or statutory delegations of power to administrative officials preempt judicial scrutiny of the merits. So long as there is legislative warrant for an administrative official to decide a particular question, that warrant entitles that official to determine the issue in whatever way he or she deems appropriate.

This submissive approach is reflected in D.M. Gordon’s argument that because the analytical distinction between jurisdictional and non-jurisdictional issues is untenable, judges should only verify that the administrative official has the “capacity to take

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cognizance” by asking “[w]as the tribunal that so found the tribunal whose opinion was made the test?”46 Dickson J. expresses a similar idea in C.U.P.E. v. New Brunswick Liquor when he warns that “courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.”47 The suggestion is that once a court has determined that the legislature has delegated authority over a question to an administrative decision-maker or enacted a privative clause to immunize a certain administrative decision from judicial review, the court should refrain from scrutinizing the justification for that decision. Thus, Gordon argues that even when an administrative decision lacks an evidentiary foundation48 or disregards statutory procedural guarantees49 such flaws will not discredit or undermine an administrative official’s jurisdiction.

Curial submission to administrative discretion provides a pragmatic strategy for coping with the tensions built into the Diceyan dialectic, but it is also vulnerable to some important objections. First, while it purports to trim the scope of jurisdictional review, experience suggests that jurisdictional review cannot be confined so easily. For instance, despite Dickson J.’s caution in C.U.P.E., the Canadian Supreme Court frequently resurrects a more invasive form of jurisdictional review which does not adhere to Gordon’s narrow definition of that concept.50 The consequence is that these cases are vulnerable to the same concerns about democratic legitimacy and practical rationality that are directed at correctness review. Thus, it seems that as long as the idea of jurisdictional review remains floating around judges will be constantly tempted to justify judicial

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49 Ibid. at 463.

intervention by stretching and manipulating the concept of jurisdictional error instead of developing a more forthright justification for interfering with administrative decisions.

Second, even if we assume that this approach can adequately confine jurisdictional review, there is strong evidence to suggest that curial submission to administrative discretion does not provide adequate rule of law safeguards. If the judiciary’s only role is to verify that the decision has been rendered by the legal official designated by the legislature, most official decisions regarding administrative interpretations of law would escape any meaningful form of independent scrutiny. The end result is that curial submission is premised solely upon the process by which administrative decision-makers are constituted without considering the substantive character of their more particular decisions.

This type of reasoning is apparent in a line of cases that are considered embarrassing by rule of law standards: Liversidge v. Anderson,51 R. v. Home Secretary, ex parte Hosenball52 and, more recently, Secretary of State for the Home Department v. Rehman.53 In Liversidge, the Court held that it could not inquire into the reasons for an executive detention order—the order was valid so long as the Home Secretary satisfied the statutory requirement of stipulating that he had reasonable cause for believing that Liversidge was a threat to national security.54 In Hosenball, the Court of Appeal held that a deportation order was legally valid even though the Home Secretary had refused to disclose his reasons for believing that a journalist was a threat to national security.55 And in Rehman, the House of Lords was prepared to accept the Home Secretary’s decision that Rehman was a threat to national security without testing the government’s assertion that there was a national emergency or its basis for declaring Rehman a national security

52 R. v. Home Secretary, Ex parte Hosenball, [1977] 1 W.L.R. 766 (C.A.) [Hosenball].
53 Secretary of State for the Home Department v. Rehman, [2003] 1 A.C. 153 (H.L.) [Rehman].
54 Brian Simpson points out that the evidence against Liversidge was, in fact, so thin that the Home Secretary’s decision was “very close to being an example of an order made in bad faith”. A. W. Brian Simpson, In the Highest Degree Odious: Detention without Trial in Wartime Britain (Oxford: Clarendon Press, 1992) at 421.
55 See Hosenball, supra note 52.
threat. These cases are embarrassing because they assume the legality of executive decisions which interfere with a fundamental individual right—the right to physical liberty—without requiring administrative officials to give a public justification for their decisions or to ensure that those decisions are, in fact, reasonable in light of relevant legal standards. In effect, the reviewing judges in these cases help create what David Dyzenhaus aptly calls “grey holes” of legality, because although they assert that there are rule of law constraints on administrative decision-making which are enforced through judicial review “the constraints are so insubstantial that they pretty well permit government to do as it pleases.” This is an accurate description of the outcome in *Hosenball*, where Lord Denning declares “[t]here is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task.”

This inadequacy by rule of law standards explains why Gordon’s “pure” theory of jurisdictional review has been rejected or quietly ignored by most public lawyers. It also explains why scholars who are generally critical of correctness review stop short of advocating outright abolition of judicial review. For instance, scholars who advance the democratic objection to correctness review, like Waldron and Griffith, still assert that judicial review is necessary to maintain the rule of law under a democratic constitution. Despite his strong criticisms regarding judicial review of legislation, Waldron accepts “that officials may properly be required by courts to act in accordance with legal authorization”; and while generally critical of judicial review of administrative action, Griffith cautions that cutting off judicial review altogether would exacerbate what he

59 *Hosenball*, supra note 52 at 783.
calls the problem of “executive authoritarianism.” Likewise, many scholars who advance the practical objection to correctness review, like John Willis and Harry Arthurs, still retain a place in their constitutional framework for judicial review or some other form of independent oversight in order to guard against arbitrary administrative decisions. This same ambivalence is also present in cases like *C.U.P.E. or Associated Picture Houses Ltd. v. Wednesbury*, in which judges express a desire to both respect administrative decisions and to assert a constitutional role for judges to intervene in the event that those decisions are unreasonable. This theoretical and doctrinal ambivalence frames an important challenge for public lawyers—the challenge of crafting an appropriate analytical framework for judicial review, one which recognizes relevant democratic and practical reasons for curial deference while still enabling judges to vindicate the rule of law in a meaningful fashion.

3. Non-Doctrinal Review

One prominent public lawyer, T.R.S. Allan, has attempted to answer this challenge by developing a “non-doctrinal” approach to judicial review. Instead of adhering to the doctrine of jurisdictional review, Allan’s non-doctrinal approach gives judges a broad discretion to determine whether justice demands judicial restraint or intervention in light of the circumstances of a particular case. The distinguishing feature of Allan’s model is that it reorients the debate about judicial review as a debate about the legitimacy of constitutional relationship between Parliament, courts, and the executive in a constitutional democracy which respects both the rule of law and the separation of

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64 Murray Hunt, “Sovereignty’s Blight”, *supra* note 5.

65 King, “Institutional Approaches to Judicial Restraint”, *supra* note 8 at 411-414.
powers. However, a close examination of Allan’s model reveals that it is vulnerable to some of the same criticisms which apply to correctness review and curial submission.

In a series of articles Allan outlines an explicit, normative approach to judicial review as an alternative to the sterile formalism of the ultra vires debate. According to Allan, the ultra vires debate is unhelpful and unproductive because it is preoccupied merely with providing an accurate description of relevant sources of law under the constitution. By contrast, Allan’s non-doctrinal approach attempts to illuminate a principled relationship between the executive and an independent judiciary under a constitution inspired by the rule of law. Allan argues that this relationship cannot be fully articulated by the traditional ultra vires doctrine, because facts about Parliamentary intent fail to convey important practical and normative constraints on legislative authority; nor can it be adequately explained by resorting directly to common law values, because common law principles lack the necessary content to resolve disputes in abstraction from concrete facts about a particular case.

Accordingly, Allan asserts that a proper understanding of constitutional interdependence is realized through a mode of judicial interpretation that reconciles the principle of Parliamentary sovereignty with the rule of law. But since this relationship is the product of an exclusive dialogue between the legislature and the judiciary, Allan’s

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68 T.R.S. Allan, “Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority” (2004) 63 C.L.J. 685 [“Legislative Supremacy”]. A practical constraint on parliamentary authority concerns the inability of the legislature to establish prospectively comprehensive legislative codes; a normative constraint concerns limitations on parliamentary authority that underwrite the legitimacy of legislative action.


characterization of administrative jurisdiction remains hollow. Thus, when describing the role of administrative institutions, he states that “[t]he lawful scope of discretion, or non-justiciable sphere of policy, is simply the residue after the pertinent legal requirements have been identified” through judicial interpretation of legislative intent.\(^{71}\) In other words, while Allan recognizes a place for administrative judgment within his constitutional framework, his model fails to explain the legitimate authority of administrative decision-makers. This hollowness has consequences—in the absence of an adequate normative account of administrative authority, administrative decisions seem like an incorrigible threat to the rule of law which must be counterbalanced by a robust form of judicial review.

Instead of developing a deeper understanding of the administrative arm of government, Allan focuses his attention on achieving a synthesis between Parliamentary sovereignty and the rule of law. This synthesis, which Allan argues is the essential objective of judicial review, is desirable because it elucidates the necessary interrelationship between courts and legislatures.\(^{72}\) At the same time, however, he asserts that the structure of this constitutional relationship cannot be captured by a doctrinal framework which can provide prospective guidance for judges.\(^{73}\) These doubts derive from Allan’s concern that doctrinal analysis is liable to lapse into the sort of arid, conceptual formalism that distracts judges from substantive reasoning about the problems encountered in constitutional adjudication.\(^{74}\)

Administrative law…needs to break free of its exaggerated dependence on conceptual reasoning and its largely formal interpretation of the rule of law; and debates over the foundations of judicial review must move from conceptual abstraction to legal and political substance. The objectivity of judicial decision can be demonstrated only in the defence of specific conclusions with respect to concrete events; questions about the nature and pedigree of the heads of review, abstractly conceived, are unlikely to yield illuminating answers. It is, of course, well established that review must be distinguished from appeal: the court’s role is to ensure the legality, rather than the correctness, of administrative decisions. But these distinctions can have no meaning without determinate criteria of legality; and it is precisely these criteria that conceptual analysis alone is powerless to generate. If the distinction between appeal and review, or between the “merits” and

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\(^{71}\) Allan, “Doctrine and Theory”, \textit{supra} note 67 at 435.

\(^{72}\) Ibid.


\(^{74}\) Ibid. at 434.
legality, must be negotiated afresh in each case, according to the nature of the tribunal, or its functions, or the effects of its decision on the complainant or on others, legal doctrine can make only a modest contribution to the actual practice and justification of judicial review.

Thus, Allan argues that instead of revising existing administrative law doctrines to address concerns about the relationship between Parliament and the judiciary, courts ought to negotiate the appropriate intensity of judicial review afresh on a case-by-case basis.\textsuperscript{75} Given the irreducible complexity of modern administration, the best approach is one that will give judges a broad discretion to vindicate those constitutional values that animate constitutional theory, political morality, and the regulatory context.\textsuperscript{76}

Although Allan advances the inquiry by shifting the discussion about judicial review towards an explicit, normative discussion about the appropriate relationship between courts and legislatures, his model is problematic. Like the ultra vires and common law theories of judicial review, the non-doctrinal approach overlooks important democratic and practical reasons which legitimate administrative decisions under a constitution grounded by the rule of law. The first signal of this oversight concerns the relevance of privative clauses: although Allan sometimes seems inclined to afford privative clauses interpretive weight,\textsuperscript{77} he nevertheless endorses the House of Lords’ reasoning in \textit{Anisminic} as an example of how the rule of law can be vindicated through judicial review.\textsuperscript{78} This should raise some questions, considering the fact that the House of Lords did not afford the privative clause or the Foreign Compensation Commission’s decision any weight at all in \textit{Anisminic}.\textsuperscript{79} Hence, it seems that the non-doctrinal approach is attracted to the same form of correctness review which is endorsed by the ultra vires and

\begin{itemize}
\item \textsuperscript{75} Allan, “Doctrine and Theory”, supra note 67 at 434. See also Allan, “Parliament’s Will”, supra note 69 at 45.
\item \textsuperscript{76} Ibid. at 437.
\item \textsuperscript{77} Allan, “Constitutional Dialogue”, supra note 67 at 577 [emphasis original]: “An approach more truly respectful of legislative intent…would recognize the clause as pertinent to the division of powers between court and agency, even if not conclusive. The gulf between common law doctrine and legislative intent would then disappear: the result of an ouster clause would vary with the context according to the true construction of the statute, in the circumstances arising.”
\item \textsuperscript{78} Allan, “Constitutional Foundations”, supra note 67 at 104: “The courts’ standard treatment of ouster clauses, exemplified in \textit{Anisminic}, may be quite properly understood…as the consequence of a mode of interpretation dictated by the rule of law.”
\item \textsuperscript{79} Dyzenhaus, \textit{The Constitution of Law}, supra note 56 at 107-108.
\end{itemize}
common law theories of judicial review, at least insofar as the issue of privative clauses is concerned.

But the questions become more pressing as Allan attempts to distinguish his position from the *ultra vires* and common law camps. In the wake of the *ultra vires* debate Allan expressed support for what he called “qualified judicial deference” to “legitimate official discretion”, an approach which would require judges to “accept the validity of many [administrative] decisions whose correctness they doubt or deny”. But at the time it was unclear what normative significance Allan attributed to “legitimate official discretion”, because it seemed that qualified deference does not constrain judicial evaluation of the merits very much:

> The appropriate degree of deference to executive discretion is determined by the court’s assessment of the balance of public and private interests in the light of the reasons presented to it, informed by the evidence adduced in their support. It represents in a sense the *outcome*, rather than the guiding principle, of the court’s decision. There is no additional requirement of judicial restraint on constitutional grounds: placing further weight on the public side of the scale denies the countervailing private right its due.

Accordingly, Allan argued that a court ought to defer to executive judgment “just in so far as, and no further, than such deference seems appropriate in all the circumstances.” Given Allan’s skepticism about the capacity of legal doctrine to structure judicial review, his model does not identify any particular factors for the court to consider when determining the appropriate approach of judicial review. Instead, its application hinges on the *Wednesbury* standard of reasonableness review, because that standard is flexible enough to accommodate the type of nuanced contextual assessments that judicial review requires. *Wednesbury* entitles judges to intervene where an administrative decision “is so unreasonable that no reasonable authority could have ever come to it” or “is so

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84 *Wednesbury*, *supra* note 63 at 230.
outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.”

This non-doctrinal position is, incidentally, almost identical to the one adopted by the House of Lords in Huang v. Secretary of State for the Home Department when it rejected the idea of deference outright—at least in the context of immigration appeals.\(^{86}\) When describing the appropriate standard of review to be applied by the Immigration Appeals Tribunal to decisions rendered by an immigration officer, Lord Bingham held that the Tribunal “will wish to consider and weigh all that tells in favour” of the officer’s decision.\(^{87}\) Furthermore, he noted that this assessment should not be described in terms of deference, but rather that “it is the performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter.”\(^{88}\) But the difficulty with the court’s decision in Huang is that, in the absence of any explicit recognition of factors which counsel judicial restraint, this sort of scrutiny collapses into correctness review of the merits.

The disagreement between Sopinka J. and Wilson J. in C.A.I.M.A.W. v. Paccar of Canada Ltd. revolves around this same point.\(^{89}\) Sopinka J. argued that unreasonableness review required the court to first determine its own view on the merits of the case, all things considered, before pronouncing upon the reasonableness of the administrative decision under review. By contrast, Wilson J. warned that Sopinka J.’s approach conflated the correctness standard with reasonableness review and would frequently

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\(^{85}\) Council of Civil Service Unions v. Minister for the Civil Service, [1985] A.C. 374 at 410 (H.L.) [GCHQ].


\(^{87}\) Ibid. at para. 16. Thus, the court rejected the previous standard of review approved by the Court of Appeal in Edore v. Secretary of State for the Home Department, [2003] 1 W.L.R. 2979 (C.A.), which held that the Appeals Tribunal ought not to intervene so long as the initial administrative decision was reasonable, even though the Tribunal did not agree with the details of the decision.

\(^{88}\) Ibid.

cause the court to second guess the tribunal’s decision under the guise of curial deference.

In his more recent writings on deference, Allan’s non-doctrinal approach fulfills Wilson J.’s prophecy in Paccar. In a passage that reneges completely on his initial idea of “qualified deference”, Allan claims that:  

A judge who allows his own view on the merits of any aspect of the case to be displaced by the contrary view of public officials—bowing to their greater expertise or experience or democratic credentials—forfeits the neutrality that underpins the legitimacy of constitutional adjudication.

And, later, in the same vein:

No judge should “defer” to any opinion he thinks doubtful, even if he must appraise its cogency in light of the evidence and arguments presented, without opportunity for the extensive inquiries that other branches of government may be able to conduct.

Although Allan does not reconcile these statements to his more tentative forays on the subject of “qualified judicial deference to legitimate executive discretion”, the prospects for reconciliation do not seem promising because his current position leaves no room for administrative decisions which deviate from judicial standards of correct legal judgment.

In light of these more recent comments about judicial review, it seems that Allan’s non-doctrinal approach is vulnerable to the same democratic and practical objections that confront the orthodox approach to jurisdictional review, whether conceived in terms of the ultra vires doctrine or the common law theory of judicial review. Despite acknowledging the delicate patterns of constitutional interdependence in modern democratic societies, Allan’s theory gives judges a carte blanche to intervene any time an administrative decision deviates from their conception about what justice or the public interest demands under the circumstances. As Jeff King points out, this approach to judicial review is problematic:

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91 Ibid. at 694. See also Ibid. at 672, 682.
94 Ibid. at 413.
It should by now be clear that there is vast disagreement about the meaning of rights and justice, and Jeremy Waldron is hardly alone in recognizing this issue. Any theory putting such great emphasis on the objective nature of rights is bound to license the imposition of judicial values to a greater than desirable or credible extent. Furthermore, Allan gives no attention to the problem of judicial fallibility, both on moral issues and on matters of fact and human behaviour. Such fallibility has historically been evident with respect to moral issues such as whether a union should be liable in damages for trade disruptions arising from strike action, whether paying women the same wages as men is illegal for being ‘eccentric socialistic philanthropy’, whether working time laws illegally infringe a constitutionally protected freedom of contract, or, more recently, whether providing care for the sick or elderly is a ‘function of a public nature’.

Thus, it seems that the non-doctrinal model is inadequate because it fails to give adequate regard to the democratic and practical reasons for respecting administrative decisions under a democratic constitution. In short, where there is reasonable disagreement about the requirements of justice or the public interest there is no good reason for assuming that judicial conceptions of justice or the public interest should have priority over the decisions of administrative institutions which have been established through fair democratic process and which possess relative institutional expertise or competence.

However, if the non-doctrinal approach seeks to avoid the charge of judicial supremacism by softening the constraints of reasonableness review, it also raises the spectre of judicial quietism due to its reliance on *Wednesbury*. The *Wednesbury* approach to judicial review is cause for concern, because it envisions only very thin rule of law safeguards—the court is only entitled to intervene when an administrative official has committed a particularly egregious error which can be detected on the face of the decision. When the *Wednesbury* formulation of reasonableness review is applied to the cases I branded earlier as being embarrassing by rule of law standards—*Liversidge, Hosenball* and *Rehman*—it is difficult to see how this approach to reasonableness review would vindicate the rule of law. The main problem with *Liversidge* is not that the decision to detain Mr. Liversidge was outrageous on its face, but rather that the Home Secretary had failed to give any reasons at all to justify indefinite detention. In each of these cases, the court was prepared to assume that the administrative officials had acted in good faith, since there was no evidence to suggest that their decisions were tainted by bad faith, bias or other form of reviewable error. Thus, the problem with *Wednesbury* review is that it

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95 *Wednesbury*, supra note 62.
does little to address the concern about “grey holes” of illegality, where administrative officials are entitled to do as they please and judicial review provides a veneer of legality for the inscrutable exercise of political discretion.

This critique of the non-doctrinal approach shows that it is prone to instability of the Diceyan dialectic in much the same way as the other models of judicial review we have examined up to this point. On one hand, the non-doctrinal approach encourages a form of correctness review that is vulnerable to important democratic and practical objections. On the other hand, if the non-doctrinal approach is modified to avoid the charge of judicial supremacism by retreating to the Wednesbury formulation of reasonableness review, it seems that it cannot provide adequate rule of law safeguards in cases where important individual interests are at stake.

However, this does not necessarily mean that the non-doctrinal approach cannot resort to other common devices besides Wednesbury review in order to finesse questions regarding relative institutional legitimacy and the rule of law in judicial review. Twentieth century administrative law is littered with conceptual distinctions that function as proxies for a more fine-grained normative approach. The most prominent of these is the dogged (and inherently confused) distinction between jurisdictional and non-jurisdictional errors, but the list goes on: judicial/quasi-judicial/administrative functions, questions of

96 See T.R.S. Allan, “Doctrine and Theory”, supra note 67; T.R.S. Allan, “Constitutional Dialogue”, supra note 67 at 570: “If, of course, it were possible to construct a purely analytic or conceptual distinction between jurisdictional and non-jurisdictional errors, capable of application with little or no regard for the specific administrative context, it would make more sense to argue that the common law did all the necessary work. Even the slightest acquaintance with the relevant case-law, however, is enough to confirm what is really an obvious consequence of the breadth of the terrain ruled by the principles of administrative law—that the proper scope of review, and the practical effect of analytic distinctions between different species of error, depend on such variables as the identity of the official, the nature of his decision, and the relevant statutory framework. The distinction between jurisdictional and non-jurisdictional errors, like the related distinctions between law, fact, and policy, acquire a concrete content only in relation to specific instances of administrative action, where they reflect the court’s conclusions about the most appropriate division of responsibility between court and agency in all the circumstances.”

process/substance,\textsuperscript{98} justiciable/non-justiciable issues, questions of law/fact, void/voidable errors,\textsuperscript{99} etc. Add to this the ancient idea that judicial review is (by nature) a discretionary remedy, and you have an impressive array of instruments which judges can use to regulate the scope of judicial review in light of the circumstances.\textsuperscript{100} But as Allan points out, this conceptual apparatus comes at a price: the conceptual distinctions and the regulative strategies they serve ultimately short-circuit the type of substantive analysis that would address the difficult question of relative institutional legitimacy squarely.\textsuperscript{101}

\textit{C. Curial Deference and the Integrity of Administrative Law}

In order to face up squarely to the tension of the Diceyan dialectic, we need to develop a more nuanced assessment regarding the legitimacy of administrative institutions and the legality of their more concrete decisions. Such an approach is apparent in the doctrine of curial deference which has emerged in Canadian administrative law over the last thirty years and the scholarship of public lawyers like David Dyzenhaus, Murray Hunt, Jeffrey Jowell, Aileen Kavanagh, and Jeff King.\textsuperscript{102} This approach is both similar to and distinguishable from Allan’s non-doctrinal model. It is similar in the sense that it aims to elucidate an explicit, normative account of institutional relationships in a democratic legal system committed to the rule of law. However, it is distinguishable because (1) it explicitly recognizes the importance of democratic and practical reasons which legitimate the authority of administrative institutions, (2) it provides a doctrinal framework to guide


\textsuperscript{100}King, “Judicial Restraint”, supra note 8 at 414-422.


judicial review by drawing attention to relevant factors which justify curial deference towards administrative decisions, and (3) it provides an account of reasonableness review which avoids the charge of judicial quietism associated with the *Wednesbury* formulation of reasonableness review. Thus, the doctrine of curial deference responds to the reality of the administrative state by recognizing the normative significance of good reasons for curial deference, while articulating an approach to reasonableness review which enables judges to scrutinize the substance of administrative decisions in order to maintain the rule of law.

Under the framework of curial deference, judges are asked to conduct two separate types of contextual assessment. The first assessment focuses upon what might be called “first order” or “institutional” reasons for curial deference—substantive reasons that explain which legal official or institution bears primary responsibility for deciding a particular legal issue under a democratic constitution. ¹⁰³ Put simply, institutional reasons for curial deference generate a principled response to the question “Who should answer this question, the administrative tribunal or a court of law?”¹⁰⁴ For instance, when the legislature delegates authority over a legal issue to an administrative decision-maker, that delegation provides the court with a reason (rooted in respect for the legitimacy of the democratic law-making process) for recognizing that decision-maker as the primary decision-maker with respect to that issue. Similarly, if the facts disclose a reason for believing that the tribunal has greater institutional competence, expertise, or coordinative capacity regarding a particular issue, the court has a practical reason for respecting the tribunal’s judgment on that issue.¹⁰⁵ These examples merely illustrate the types of considerations that may figure in the institutional assessment. While institutional reasons for deference are often intertwined with the merits of a particular legal issue, it is important to distinguish them from an assessment about how the particular issue should be decided. Otherwise, judicial review is liable to collapse into a wholesale correctness

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¹⁰³ For further elaboration regarding the distinction between the first and second order assessment, see Kavanagh, “Deference or Defiance?”, supra note 32 at 190.


¹⁰⁵ I have grouped institutional competence, expertise, and coordinative capacity as practical reasons for deference because they are all broadly consistent with Joseph Raz’s account of practical authority.
review of the merits, a tendency which raises serious objections about its constitutional legitimacy.

However, while institutional reasons for deference have normative significance for judges and other legal officials, those reasons do not obviate the need for judicial review.\textsuperscript{106} If they did, administrative officials would be free to operate outside the rule of law whenever there are good institutional reasons for respecting their authority, and there would be no practical means of requiring them to account legally for their decisions. Hence, Sir William Wade argues that an individual’s access to judicial review is a “constitutional fundamental” that cannot be extinguished by legislative fiat,\textsuperscript{107} a suggestion that resonates through Rand J.’s assertion in \textit{Roncarelli v. Duplessis} that “there is no such thing as absolute and untrammelled [administrative] ‘discretion’”,\textsuperscript{108} and Laskin C.J.’s decision in \textit{Crevier v. Québec} which holds that a privative clause purporting to preclude judicial review outright is constitutionally invalid.\textsuperscript{109} These statements all adopt the view that curial deference is not an all-or-nothing proposition—even when there are cogent institutional reasons for deference, there are also good institutional reasons for preserving recourse to an independent review of the merits.\textsuperscript{110} Further support for this idea can be drawn from the fact that critics of judicial review, with the notable exception of D.M. Gordon, all accept that some form of judicial review is necessary to maintain the rule of law.\textsuperscript{111}

\textsuperscript{106} Kavanagh, “Defending Deference”, \textit{supra} note 101; King, “Judicial Restraint”, \textit{supra} note 8; Hunt, “Sovereignty’s Blight”, \textit{supra} note 5.


\textsuperscript{110} The idea here is akin to John Rawls’s notion of imperfect procedural justice, which holds that the justice of a particular political decision is judged partially by reference to fair process and partially through a substantive evaluation of the merits of the decision in light of independent criteria. See John Rawls, \textit{A Theory of Justice}, revised ed. (Cambridge: Harvard University Press, 1999) at 73-78.

\textsuperscript{111} \textit{Supra} notes 59-64 and accompanying text.
So even if we assume that there are strong reasons for deferring to an administrative decision-maker, we must reconcile those reasons with a fundamental constitutional principle which asserts that there is an important role for judicial review in scrutinizing the legality of administrative decisions. If that role is to be a meaningful one, in the sense that it does not simply rubber stamp administrative decisions when concerns are raised about their legality, judicial review must extend beyond an assessment of institutional reasons to engage in some sort of assessment of the “second order” or “merit” reasons that are used to justify a more particular outcome. Accordingly, judges should proceed to examine whether the actual decision rendered by an administrative official is legally acceptable or “reasonable” on its merits. This raises important questions for a theory of curial deference: how do institutional reasons for deference shape judicial review of the merit reasons which aim to justify a particular administrative decision? What does it mean to review an administrative decision according to a standard of “reasonableness” as opposed to the old fashioned “correctness” standard whereby judges impose their own assessment of merits? And what are the problems and pitfalls associated with each phase of this contextual analysis?

1. Institutional Reasons for Curial Deference

The first order assessment I have in mind is similar to the pragmatic and functional analysis the Supreme Court of Canada established in *U.E.S., Local 298 v. Bibeault*, elaborated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, and recently renamed “the standard of review analysis” in *Dunsmuir v. New Brunswick*.[112] This assessment draws a reviewing court’s attention away from an attempt to identify jurisdictional issues in the abstract towards a more concrete analysis regarding various contextual factors which legitimate the authority of an administrative institution or official. These factors—the presence/absence of a privative clause or statutory appeal provision, the different types of expertise possessed by the decision-maker, the purpose of the Act, the nature of the problem, etc.[113]—highlight either democratic or practical reasons for a reviewing court to respect an administrative interpretation of law. In other

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words, institutional reasons for curial deference explain why judges should assign weight to the judgment of administrative officials.\textsuperscript{114} As David Dyzenhaus puts it, when there are institutional reasons for deference “the tribunal’s interpretation makes a difference to the structure of the interpretative context” so that “[t]he issue for the court is not then what decision it might have reached had the tribunal not pronounced, but whether the reasons offered by the tribunal justify its decision.”\textsuperscript{115}

Practically speaking, this means that the Supreme Court of Canada has been moving away from what might be called a “categorical” approach designed to identify jurisdictional errors towards a more “contextual” approach to judicial review. This development generates a legal doctrine that avoids the theoretical and practical problems (lack of normative coherence and arbitrariness) associated with jurisdictional review. First, it elucidates a coherent normative account of legitimate administrative authority by drawing attention to democratic and practical reasons which explain why citizens, judges, and other public officials ought to respect the authority of administrative institutions. So long as the institutional assessment reveals valid reasons for curial deference, a court should adopt a more forgiving form of reasonableness review instead of attempting to determine whether the administrative decision matches judicial opinion about what the correct outcome should be. Thus, institutional reasons make a qualitative difference by warranting a shift from correctness to reasonableness review, a shift which distinguishes the doctrine of curial deference from more traditional modes of jurisdictional review.

Second, the institutional assessment alleviates the arbitrariness of jurisdictional review because instead of adopting the all-or-nothing approach to judicial review, it focuses judicial attention on an array of concrete reasons which underpin the legitimacy of administrative institutions. So instead of vacillating between correctness review and a perfunctory review of administrative decisions, judges should generally apply a standard of reasonableness review whenever there are relevant institutional reasons for curial deference.

\textsuperscript{114} Kavanagh, “Deference or Defiance?”, \textit{supra} note 32 at 185.

\textsuperscript{115} David Dyzenhaus, “The Politics of Deference”, \textit{supra} note 2 at 303.
However, while the standard of review analysis in Canadian administrative law has moved the institutional assessment into the foreground, it has not managed to displace the arbitrariness associated with jurisdictional review altogether. Despite Bastarache J.’s statement in *Pushpanathan* that a jurisdictional issue is “simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional approach”,\(^\text{116}\) the Court still frequently speaks of jurisdictional issues that can be identified without engaging in a contextual assessment of institutional reasons for curial deference.\(^\text{117}\) For instance, while the majority opinion in *Dunsmuir* begins by declaring that the principal function of judicial review is “to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes”\(^\text{118}\) it later conflates this characterization of the judicial role with a form of jurisdictional review whereby “the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the appropriate standard of review is accomplished by establishing legislative intent.”\(^\text{119}\) This confusion is exacerbated by the further comment that “[a]dministrative bodies must…be correct in their determinations of true questions of jurisdiction or *vires*”, which the majority defines as situations where an administrative decision official “must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.”\(^\text{120}\) As I stated earlier, so long as there is a conception of jurisdictional review which is detached from an assessment of institutional reasons for deference, that conception is likely to confuse discussions regarding the constitutional legitimacy of both administrative institutions and the practice of judicial review.

A similar concern arises when a reviewing court assumes that relevant institutional reasons for curial deference are negated or counterbalanced in situations where an

\(^{116}\) *Pushpanathan*, supra note 112 at 28.

\(^{117}\) See, e.g., *City of Nanaimo*, supra note 50; *United Taxi Drivers’ Fellowship*, supra note 50; *Dunsmuir*, supra note 50.

\(^{118}\) *Dunsmuir*, supra note 50 at para. 28.


\(^{120}\) *Ibid.* at para. 59.
administrative decision involves a question of law.\textsuperscript{121} Like the distinction between jurisdicational and non-jurisdicational issues, the analytical distinction between questions of law and fact is a dubious abstraction.\textsuperscript{122} Iacobucci J. recognized the problematic nature of the law/fact distinction in \textit{Canada (Director of Investigation and Research) v. Southam}, saying that “the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.”\textsuperscript{123} But besides being a dubious analytical distinction, this device trades on the controversial assumption that judges are generally entitled to second guess administrative decisions because the judiciary is uniquely equipped to determine what the law requires. This suggestion ignores, without adequate justification, the normative significance of relevant institutional reasons for curial deference which show that administrative institutions have a legitimate role in interpreting law when determining how to pursue their regulatory mandate in a manner consistent with fundamental legal values, legal principles expressed through legislation, and the common law.

The problems associated with the fact/law distinction is apparent in cases like \textit{Canada (Attorney General) v. Mossop}, where the Supreme Court curtailed the ability of the Federal Human Rights Tribunal to determine whether Mr. Mossop’s employer had committed discriminatory conduct under the Canadian \textit{Human Rights Act}.\textsuperscript{124} In concurring opinions, both Lamer C.J. and LaForest J. held that this issue was a matter of statutory interpretation and therefore a question of law reserved for superior courts to

\textsuperscript{121} \textit{Canada (Director of Investigation and Research) v. Southam}, [1997] 1 S.C.R. 748 [\textit{Southam}]. See also \textit{Dunsmuir}, supra note 50 at paras. 158-173, Deschamps J.

\textsuperscript{122} King, “Judicial Restraint”, \textit{supra} note 8 at 414-422.

\textsuperscript{123} \textit{Ibid.} at para. 35.

decide. In a line of reasoning which underlines the problematic assumption behind the
distinction, LaForest J. observes:  

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a
human rights context. It does not extend to general questions of law such as the one at issue in this
case. These are ultimately matters within the province of the judiciary, and involve concepts of
statutory interpretation and general legal reasoning which the courts must be supposed competent
to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the
tribunal’s decisions on questions of this kind on the basis of correctness, not on a standard of
reasonability.

By contrast, L’Heureux-Dubé J. orients her analysis around an assessment of the relevant
institutional reasons for deference. In particular, she points out that the Act did not
attempt to provide an exhaustive definition of the relevant grounds of discrimination,
which indicates that the legislature invested the Tribunal with the authority to determine
whether the impugned behaviour constituted discrimination within the meaning of the
statute. Moreover, she drew attention to the Tribunal’s special experience or expertise in
administering the Act in light of the purposes of the statute and emerging understandings
of human rights. Hence, she concluded that the Tribunal’s decision that the employer’s
denial amounted to discrimination was entitled to a large degree of curial deference,
despite the fact that the Tribunal’s decision involved a general question of law.

My point is that insofar as curial deference is concerned, the distinction between
questions of law, fact and mixed law and fact is a distraction—if one takes institutional
reasons for deference seriously, as Dickson J. did in C.U.P.E. when he recognized the
reasons for respecting the Board’s authority to interpret its governing statute, an
administrative decision may be entitled to deference even though the issue at stake is
characterized as a question of law. As long as there are cogent institutional reasons for
believing that the administrative decision-maker is authorized to resolve a particular
issue, the fact that the issue concerns a question of law does not negate the institutional
reasons for deference. The appropriate question to ask is: which institution, as between
the court and the administrative decision-maker, has primary responsibility for deciding
this legal issue?

125 Mossop, supra note 124 at para. 45.
Accordingly, judges should apply a standard of reasonableness review whenever there are institutional reasons for respecting the authority of an administrative decision-maker on a given legal issue. Among other things, this means that the threshold for curial deference is lower than is generally assumed in Canadian administrative law so that judges should generally review administrative decisions according to a standard of reasonableness unless it can be shown that there are no institutional reasons for deference. Moreover, it means that judges do not have to engage in an intricate weighing exercise to determine the precise degree of deference or intermediate standard of review to assign to any particular permutation of institutional reasons. It just requires judges to verify that an administrative official has been duly authorized or has some measure of relative practical expertise regarding the legal issues at hand. So long as that is the case, courts should respect an administrative decision regarding those issues, even if it involves an administrative assessment of constitutional norms, statutes extraneous to the regulatory regime, regulatory guidelines, common law principles, or international law.

This is a radical proposition, because it asserts that administrative decision-makers and common law courts should be considered full partners in the democratic rule of law project, whereby administrative officials help determine what the existing law contained in constitutions, statutes, common law and fundamental legal values require in particular cases. The upshot of this is that administrative officials have legitimate constitutional authority to interpret the law in the same rich, evaluative, and purposive manner as common law courts; and common law courts have good reasons for respecting

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127 David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2001) 27 Queen’s L.J. 445 at 487-504 [“Constituting the Rule of Law”]. In his article, Dyzenhaus invokes McLachlin J.’s dissenting opinion in Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854 at para. 70 wherein she states: “In my view, every tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the Charter does not change the matter. The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-makers that touch the people must conform to it…. [I]f Parliament confers on the tribunal the power to decide questions of law, that power must, in the absence of counterindications, be taken to extend to the Charter, and to the question of whether the Charter renders portions of its enabling statute unconstitutional.”

128 Dyzenhaus, The Constitution of Legality, supra note 102 c. 3.
administrative interpretations of law. Practically speaking, this means that in cases where curial deference is warranted, correctness review of the merits is replaced by reasonableness review of the merits.

2. Reasonableness Review

As I noted earlier, just because there are good institutional reasons for curial deference towards administrative institutions does not entail that the substance of administrative decisions should be immune from judicial review. The conception of administrative authority that drives the doctrine of curial deference is not simply a one-way projection of authority or administrative fiat. Respect for administrative authority does not mean that citizens have to accept the outcome no matter what. It just means that the threshold for judicial intervention is more onerous than simply establishing that a judicial interpretation of law differs from an administrative one. Thus, the doctrine of curial deference requires judges to scrutinize an administrative decision according to a more forgiving standard of review—a standard of reasonableness instead of correctness.

According to correctness review, judges proceed directly to determine how they would have answered the legal issues before the administrative decision-maker, all things considered. By contrast, when judges employ reasonableness review, they are discharging a constitutional duty to ensure that an administrative decision is supported by a reasonable justification.\textsuperscript{129} The problem is that the task of reasonableness review requires judges to walk a tightrope—it requires them to review the merits of an administrative decision while simultaneously respecting the administrative official’s assessment of the merits.\textsuperscript{130} As a result, reasonableness review is sometimes couched in obscure language stating that “an unreasonable [administrative] decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing

\textsuperscript{129} Iacobucci J. aptly describes this distinction in Ryan, \textsl{supra} note 10 at 269 when he states that: “[w]hen undertaking correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative decision was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons.”

\textsuperscript{130} David Dyzenhaus refers to this predicament as a “paradox of rationality.” See David Dyzenhaus, \textsl{The Constitution of Legality, supra} note 128 at 128.
examination.”131 This formulation clearly has something to do with the tightrope and the fact that while judges perceive that they are not entitled to meddle willy-nilly with administrative decisions, they still have a constitutional duty to evaluate the legality of those decisions.

Allan’s non-doctrinal model judicial review provides one method for walking the tightrope of judicial review: the *Wednesbury* reasonableness standard which states that a reviewing court should only interfere with an administrative decision if it is “so unreasonable that no reasonable authority could ever have come to it”132 or “is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.”133 Thus, *Wednesbury* restricts judicial scrutiny of the merits to detecting particularly egregious forms of irrationality and prejudice like absurdity, bad faith or manifest bias on the face of an administrative decision. But I also pointed out that this approach to reasonableness review is problematic because it fails to provide an adequate rule of law antidote for cases like *Liversidge, ex parte Hosenball* and *Rehman*. The problem with those cases was not that the reasons provided by the administrative officials disclosed manifest error, but rather that the administrative officials had failed to give any reasons at all to justify their decisions. As a result, it seems that even if the judges in those cases had scrutinized the administrative decision according to the *Wednesbury* standard, they would not have intervened.

A more constructive approach to reasonableness review can be gleaned from John Rawls’s ideas about the relationship between political legitimacy and public reason. Rawls’s notion of public reason asserts that the legitimacy of certain political decisions depends upon the character and quality of the reasons offered to justify those decisions.134

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131 Southam, supra note 121 at para. 56.
132 *Wednesbury*, supra note 63 at 230.
133 *GCHQ*, supra note 85 at 410.
When the idea of public reason is applied to administrative action, it means that an administrative decision must be justified by the type of reasons that people in a pluralist democracy might reasonably accept. In this respect, Rawls’s conception of public reason includes a criterion of reciprocity—public officials and citizens must be prepared to offer a justification for their political actions that is reasonably acceptable to persons who subscribe to different moral or political views.  

Furthermore, Rawls emphasizes that in order to satisfy the requirements of public reason, our justifications for political decisions must be open to public scrutiny:

Public reasoning aims for public justification. We appeal to political conceptions of justice, and to ascertainable evidence and facts open to public view, in order to reach conclusions about what we think are the most reasonable political institutions and policies. Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.

In this respect, reasonably acceptable premises and reasoning are provided by the array of formal and informal legal resources within a democratic society. Thus, an administrative decision fails to satisfy the requirements of public reason if it fails to provide a public justification or if the reasons offered as a justification are not expressed in terms that are reasonably consistent with publicly articulated legal standards which are acceptable to free and equal citizens.

The point here is that the authority of an administrative decision depends partially upon whether the substance of that official’s decision is reasonable in the sense that it provides a justification which adequately reflects publicly acceptable indicia of legality instead of the private reason of the administrative decision-maker. To borrow a phrase from Lord Halsbury, the exercise of administrative authority must be consistent with “the rules of

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136 Ibid. at 786.
137 Ibid.
reason and justice, not according to private opinion.”139 However, this does not mean that an administrative decision must comply with judicial assessments about correct legal interpretation—it simply demands that the administrative decision evinces a justification that people in a pluralist democracy might reasonably accept.

Further support for this conception of reasonableness review can be drawn from Allan’s account of the rule of law, which employs the Rawlsian idea of public reason instead of the Wednesbury standard of reasonableness review.140 The closely related ideals of the rule of law and deliberative democracy…share a conception of public reason, appropriately interpreted. Neither citizen nor legislator should be expected to divorce his moral and ethical convictions from his political judgments, but those judgments must be open to reasoned reflection in the light of an open debate about justice, conducted as far as possible in terms of common values and general knowledge. The demands of both justice and community must be reconciled on the basis of existing tradition, subject to continuing reflection and inquiry. …The objective is twofold: first, that each individual should be fairly treated, in accordance with publicly avowed and defensible principles, equally applicable to all; and secondly, that the content of those principles and the conception of the common good they presuppose, are equally susceptible to the influence of each person’s moral convictions, according to their rational strength in public debate.

Under this framework, it would be inappropriate for a judge to quash an administrative decision merely because he or she disagrees with the merits of that decision. Rather, the appropriate constitutional function of judicial review is to ensure that the second order merit reasons which support an administrative decision provide a reasonable public justification for that decision.141

This understanding of reasonableness review may sound hollow or even dangerous to neo-Diceyan lawyers and judges who harbor deep suspicions about administrative authority and believe that an independent judiciary should have the last word on matters of legal substance. As we saw earlier in this chapter, Allan remains critical of attempts to construct a doctrine of curial deference that tolerates administrative decisions which deviate from judicial standards of correct judgment.142 However, if reasonableness review

140 Allan, Constitutional Justice, supra note 138 at 301.
142 TRS Allan, “Human Rights”, supra note 82.
is pursued properly in practice it shows how the doctrine of curial deference can avoid the problematic tendencies of the Diceyan dialectic while still maintaining a meaningful commitment to the rule of law.

\[ a) \] The Duty to Give Reasons

First, in order to meet the threshold of reasonableness review, administrative decision-makers must provide publicly accessible reasons for their decisions. This is one of the breakthroughs made in *Baker v. Canada (Minister of Citizenship and Immigration)* when the Supreme Court of Canada recognized that administrative decision-makers have a general duty to provide reasons for their decisions and that the requirements of this duty will vary according to the regulatory context and the personal interest at stake.\(^{143}\) It also surfaces more recently in one of the most important passages *Dunsmuir v. New Brunswick* when Bastarache and LeBel JJ. articulate the purpose of reasonableness review:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

At the very least, this means that it would be inappropriate for judges to simply assume that an administrative official has acted reasonably in cases where that official has failed or refused to provide an explanation for his or her decision. In light of the fact that until quite recently common law judges have resisted the idea that administrative decision-makers owe a duty to provide reasons for their decisions, the reasons requirement is no small matter.\(^{144}\) By requiring administrative officials to provide public reasons for their decisions, they are held accountable for their actions. This is an important principle of the rule of law as it ensures that decisions are made with a clear understanding of the reasons behind them. It also helps to promote transparency and accountability, which are essential for the legitimacy of the law.

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\(^{143}\) *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 43 [Baker]. It is worth noting that shortly after *Baker* was decided, the Supreme Court of Canada held that judges have a common law duty to give reasons in criminal proceedings. See *R. v. Sheppard*, [2002] 1 S.C.R. 869.

\(^{144}\) The traditional default position at common law has been that administrative officials do not owe a general common law duty to give reasons for their decisions. See e.g. *Public Service Board of New South Wales v. Osmond*, (1986) 159 C.L.R. 656 (H.C.). In this regard, it is noteworthy that judicial recognition of a common law duty for administrative officials to give reasons has lagged behind legislative reform on this issue. In the United States, the duty to give reasons was an important feature of the federal Administrative Procedure Act; in the United Kingdom, the duty to give reasons was recommended by the Donoughmore Committee in 1932 and partially introduced by the *Tribunals and Inquiries Act* in 1958. While the House of Lords recognized an exceptional duty to give reasons in *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531 (H.L.), it still falls short of the general duty to give reasons recognized by the Supreme Court of Canada in , *supra* note 143.
decisions, judicial review serves essential rule of law values without collapsing into a form of correctness review.

In this respect, the duty to give reasons serves essential rule of law values in both an instrumental and intrinsic sense. Transparency and intelligibility are instrumentally valuable to the extent that when administrative officials “are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are”.\(^{145}\) In providing a public justification, administrative decision-makers must account for the gravitational force exerted by other publicly articulated legal standards\(^{146}\) and show how their decision can be justified in light of constitutional values, statutory values and principles, regulatory statements, common law precedent, and the principles of international law.\(^{147}\) This practice of providing public justification for administrative decisions also enhances public respect for administrative institutions and the administration of justice in a more general sense, because those decisions are expressed in terms that are reasonably acceptable to persons who might otherwise disagree with the outcome on the merits.

But the transparency and intelligibility of an administrative decision also has intrinsic value because it conveys concern and respect for the individuals who are being asked to abide by an outcome that is justifiable in terms of the public good.\(^{148}\) Instead of being treated as mere legal subjects who are prone to the arbitrary whims of administrative officials, people who are affected by administrative action are entitled to an official explanation and to have that explanation reviewed by an independent institution to ensure that it is consistent with the legislative policies, common law principles, and constitutional values that underwrite the normative integrity of the legal system as a

\(^{145}\) Lon Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) Harvard L. Rev. 630 at 636.


\(^{147}\) As L’Heureux-Dubé J. puts it in Baker, supra note 143 at para. 56 “though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.”

\(^{148}\) Dyzenhaus & Taggart, “Reasoned Decisions and Legal Theory”, supra note 138.
whole, as well as the more specific legislative objectives which animate a particular regulatory regime. In this way, the reasons requirement demonstrates to affected individuals that their interests are taken seriously and aims to explain, in reasonable terms, why those individuals should respect the outcome as legitimate even if it has a negative impact on their interests.

b) Substantive Reasonableness

Second, appropriate reasonableness review does not merely ensure that the reasons provided by the administrative decision-maker are free of patently egregious forms of irrationality and prejudice—absurdity, bad faith, or manifest bias. The justificatory requirement of reasonableness review is both more articulate and demanding than Holmes J.’s “puke test”;\(^\text{149}\) by which a court accepts an administrative decision so long as it considers relevant factors and the outcome of the decision does not provoke a visceral reaction from the court. Holmes J.’s test is an inadequate formula for reasonableness review because “it describes a reaction and not a reflective response” to the reasons provided by the administrative decision-maker; it describes an arbitrary approach to judicial review which cannot be justified in rational terms.\(^\text{150}\) But, more importantly, the puke test fails to provide an adequate safeguard for the essential values that permeate the rule of law ideal, chief amongst which is the value of equal concern and respect for persons subject to the law.

Earlier in this chapter, I pointed out how the significance of fair democratic process is related to the idea of equal concern and respect. However, the normative significance of equal concern and respect is not limited to concerns about democratic process so that the function of judicial review is exhausted once the court has verified that the administrative decision has been rendered by the public official designated by the legislature. Democratic values like equal concern and respect have pervasive relevance because they permeate the normative structure of the entire democratic legal order including the legitimacy of legislation and the common doctrines that form the backbone of


\(^{150}\) David Dyzenhaus, “Constituting the Rule of Law”, *supra* note 127 at 494.
Hence, judicial review does not adequately vindicate fundamental democratic principles when it merely verifies that the decision was rendered by the appropriate official and is not patently absurd or tainted by\textit{ mala fides}. Reasonableness review requires the court to verify that the reasons provided by the administrative decision-maker constitute a plausible justification for the decision in light of shared values which “enable a person to see that his case has been given the careful consideration which it may deserve, and thereby more readily accept the outcome as a reasonable accommodation between private and public interests.”\footnote{152}{Allan, “Procedural Fairness”, supra note 151 at 500.}

Practically speaking, this means that reasonableness review must be more rigorous than Holmes J.’s puke test or the\textit{ Wednesbury} standard for reasonableness review:\footnote{153}{\textit{Wednesbury}, supra note 63; GCHQ, supra note 85.} it entitles judges to reweigh or rehearse the reasoning process used by the administrator to ensure that there is a genuine public justification for the decision under review. So not only does reasonableness review exclude the most egregious forms of abuse of arbitrariness, but also more subtle forms of unreasonable and illegitimate administrative action like rationalization and inconsistency. The former refers to a form of reasoning which “is so implausible that it challenges the minimal standards of evidence and argument” that are generally acceptable in a free and democratic society.\footnote{154}{Ibid.} The latter refers to a form of arbitrary reasoning tantamount to discriminatory treatment because it fails to adequately justify differential treatment of similarly situated individuals.\footnote{155}{Ibid.} In order to provide an adequate safeguard against these threats to the rule of law, judges must assess the reasons provided by the administrative decision-maker in order to determine whether they constitute an adequate justification under the circumstances.\footnote{156}{David Dyzenhaus, “The Deep Structure of \textit{Roncarelli v. Duplessis}” (2004) 53 U.N.B.L.J. 111 at 135-136.} However, like the reasons...
requirement, this justificatory threshold does not necessarily entail correctness review, because it leaves room for a significant degree of autonomous administrative judgment—the administrative decision will withstand reasonableness review so long as the merit reasons disclose a genuine attempt to justify the decision in terms of relevant legal standards.

Of particular concern here is that judges should test the veracity of pro forma reasons, “canned” responses or administrative “box ticking” exercises which do not provide genuine justifications of public power. This is another important lesson to be drawn from Baker v. Canada—reasonableness review must be more rigorous than simply ensuring that administrative officials formally recognize relevant considerations, exclude irrelevant considerations and do not disclose outrageous arguments on the face of their decisions. In this respect, it is striking that while the lower courts in Baker thought that the reasoning disclosed by Officer Lorenz’s notes was unfortunate, they did not think there was a reviewable error since Baker’s children were mentioned in the notes as a relevant consideration. However, when the Supreme Court rehearsed the reasoning process disclosed by the notes, they not only thought that the decision to deny Baker’s request was unreasonable, but also that it was tantamount to bad faith. Officer Lorenz assumed that because Baker suffered from mental illness, had been employed as a domestic worker, and had dependent children she would be a strain on the Canadian welfare system and that therefore there were insufficient humanitarian and compassionate grounds for allowing her to remain in the country. When this line of reasoning was compared with the available evidence and the values underlying a variety of legal materials (the objectives of the statute, the principles of international law, and intra-departmental guidelines) which established the importance of the children’s interests and preserving family relationships in decisions of this nature, it was apparent that Officer Lorenz had failed to provide a reasonable justification for the decision to refuse Baker’s application. The decision failed to provide an adequate justification for deporting Baker
because the reasons provided by Officer Lorenz were not “alert, alive and sensitive” to the interests of Baker’s children.\textsuperscript{157}

c) Reasonableness Review and the Importance of the Interest at Stake

Third, the justificatory demands of reasonableness review are related to the individual’s stake in the outcome or, as Ronald Dworkin calls it, the risk of “moral” harm borne by the individual who is expected to abide by the outcome.\textsuperscript{158} As L’Heureux-Dubé J. points out in \textit{Baker}, “the more important the decision is to the lives of those affected and the greater the impact on that person or those persons, the more stringent the procedural protections that will be mandated.”\textsuperscript{159} In the context of reasonableness review, appropriately tailored to walk the tightrope of curial deference, this means that the reasons provided by the administrative decision-maker should be capable of bearing the justificatory weight required by the nature of the interest affected. This justificatory threshold is clearly violated where an administrative decision-maker merely flips a coin or fails to give any public reasons to justify whether a person should be deported or detained indefinitely. But in other, more controversial, cases the appropriate threshold of justification can be established by looking at existing public standards of justification across a range of different regulatory contexts.\textsuperscript{160} In this sense, reasonableness review ensures that administrative decisions are consistent with egalitarian values that are expressed through existing legal standards which indicate the weight which the political community ascribes to a particular interest.

\textsuperscript{157} \textit{Baker, supra} note 143 at para. 75. See also \textit{Gray v. Ontario (Disability Support Program, Director)} (2002), 59 O.R. 3d 364 (Ont. C.A.), where the Ontario Court of Appeal held that \textit{Baker} required an administrative tribunal to actually disclose its reasoning process instead of simply describing the evidence and stating its conclusion.

\textsuperscript{158} Ronald Dworkin, “Principle, Policy, Procedure” in Ronald Dworkin, \textit{A Matter of Principle} (Cambridge: Harvard University Press, 1985) at 80: “We must distinguish...between what we might call the bare harm a person suffers through punishment, whether that punishment is just or unjust—for example, the suffering or frustration or pain or dissatisfaction of desires that he suffers just because he loses his liberty or is beaten or killed—and the further injury that he might be said to suffer whenever his punishment is unjust, just in virtue of that injustice. I shall call the latter the “injustice fact” in his punishment, or his “moral” harm. ... The latter is an objective notion which assumes that someone suffers a special injury when treated unjustly, whether he knows or cares about it, but does not suffer that injury when he is not treated unjustly, even though he believes he is and does care.”

\textsuperscript{159} \textit{Baker, supra} note 143 at para. 25.

\textsuperscript{160} Dworkin, “Principle, Policy and Procedure”, \textit{supra} note 158 at 89.
A recent case from the Supreme Court of Canada highlights the pitfalls associated with a proportionate justificatory threshold. Recall that in *Baker*, the Court held that reasonableness review required it to not only ensure that the immigration officers responsible for the decision considered Baker’s children before rendering a decision, but to ensure that the reasons for the decision took account of the children’s interests in an appropriate fashion by being “alert, alive and sensitive” to relevant legal principles. One of the main reasons why the Court demanded this threshold of justification was because of “the profound importance” of the decision to someone in Baker’s position.\(^{161}\)

A similar interest is at stake in the recent case of *Canada (Citizenship and Immigration)* v. *Khosa*.\(^{162}\) As in *Baker*, the principal issue before the Court concerned a decision of the Immigration Appeal Division (IAD) that Sukhvir Khosa was not entitled to special relief from deportation on humanitarian and compassionate grounds under the *Immigration and Refugee Protection Act*. Since Khosa had been convicted of a criminal offence, the IAD was required by law to consider a variety of legal factors in order to determine whether there were humanitarian and compassionate grounds for allowing Khosa to remain in the country. Those factors included: (1) the seriousness of the offence leading to the removal order, (2) the possibility of rehabilitation, (3) the length of time spent, and the degree to which the individual facing removal is established in Canada, (4) the family and community support available to the individual facing removal, (5) the family in Canada and the dislocation to the family that removal would cause, and (6) the degree of hardship that would be caused to the individual facing removal to his country of nationality.\(^{163}\) Despite the fact that Khosa had been living in Canada since he was fourteen, was married to a Canadian resident, and had few relatives in his native India a majority of the IAD dismissed his application for special relief. More specifically, the member of the IAD who wrote the majority opinion stated “I do not see the appellant’s actual establishment

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\(^{161}\) *Baker*, supra note 143 at para. 43.


\(^{163}\) These factors were first established in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 and confirmed by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84.
in Canada at present as a particularly compelling feature of the case and simply note that it is a factor to be weighed along with all the other circumstances.” Instead, the IAD focused on the fact that Khosa denied that he had been engaged in street racing when he lost control of his vehicle and killed a pedestrian. In the Board’s view, this denial showed that Khosa posed a continuing risk to Canadian society, even though the sentencing judge had expressly declared that Khosa posed little risk of reoffending and had no prior criminal record.

When the case came before the Supreme Court, there was no dispute that the appropriate standard of review was reasonableness—the same standard applied by the Court in Baker. But when it came to applying that standard, the majority opinion uses a different justificatory threshold from the “alert, alive and sensitive” approach. Instead Binnie J., writing for the majority, simply states that a reviewing court should not reweigh the evidence because “[t]he decision was entrusted by Parliament to the IAD, not to judges.” In doing so, the Court fails to enforce an appropriate standard of reasonableness review in at least three different ways. First, by declaring that the Court can review an administrative decision without reweighing its substantive content, the Court resurrects a conception of reasonableness review that is more akin to Holmes J.’s puke test or Wednesbury unreasonableness than the standard required by the complex, evaluative, and principled legal approach to determining whether someone was entitled to special relief under the Act. Second, the Court fails to hold the IAD to a justificatory standard that affords adequate regard, in an objective sense, for the nature of the interest affected, namely Khosa’s interest in remaining with his family in Canada. Thirdly, by failing to hold the IAD to an appropriate standard of justification, the Court fails to treat Khosa’s interest as deserving an equal degree of concern and respect relative to the justificatory standard applied by the Court in Baker.

A more consistent approach to reasonableness review is provided by Fish J.’s dissent in Khosa, but it is important to point out how that dissent remains true to the Baker standard

165 Khosa, supra note 164 at paras. 61-62.
of “alert, alive and sensitive” without collapsing into a heavy handed form of correctness review. To demonstrate this point, it is worth revisiting the salient passages from Fish J.’s dissent concerning his assessment of the IAD’s decision:¹⁶⁶

While Mr. Khosa’s denial of street racing may well evidence some “lack of insight” into his own conduct, it cannot reasonably be said to contradict—still less outweigh, on a balance of probabilities—all of the evidence in his favour on the issues of remorse, rehabilitation, and likelihood of offence.

The IAD’s cursory treatment of the sentencing judge’s findings on remorse and the risk of recidivism are particularly troubling. While findings of the criminal courts are not necessarily binding upon an administrative tribunal with a distinct statutory purpose and a different evidentiary record, it was incumbent upon the IAD to consider those findings and to explain the basis of its disagreement with the decision of the sentencing judge. The majority decision at the IAD mentions only in passing the favourable findings of the criminal courts and does not explain at all its disagreement with them.

Moreover, Mr. Khosa’s denial of street racing is, at best, of little probative value in determining his remorse, rehabilitation and likelihood of reoffence. In light, particularly, of the extensive, uncontradicted and unexplained evidence to the contrary, Mr. Khosa’s denial of street racing cannot reasonably support the inference drawn from it by the majority in the IAD.

Note that at no point does Fish J. determine his own assessment of the evidence or ask what the correct outcome on the facts should be. The important point for Fish J. is that the IAD failed to provide an adequate public justification in that it failed to explain why Khosa should not be given special relief to remain in the country on humanitarian and compassionate grounds. By framing his objection in this way, Fish J. leaves open the possibility—albeit a remote possibility, considering the interest at stake and the detailed list of considerations outlined in Canadian law for decisions of this nature—that the IAD could provide sufficient reasons to support its decision. But in order to meet that justificatory threshold, the IAD would have to explain why the failure to express remorse should be the dominant factor in the decision and why it was giving such short shrift to the other relevant legal considerations and the sentencing judge’s evaluation of Khosa’s prospects for rehabilitation. In other words, Fish J. accepts that the IAD might be able to justify the outcome, but that it had failed to lay a reasonable foundation, in light of existing legal resources and values, for the outcome in its reasons. Hence, although he agreed “that the decisions of the IAD are entitled to deference” he held that “deference ends where unreasonableness begins.”¹⁶⁷

¹⁶⁶ Ibid. at paras. 149-151 [emphasis original].
¹⁶⁷ Ibid. at para. 160.
D. Conclusion

In this chapter, I have provided an analytical framework which shows how it is possible for reviewing judges to walk the tightrope of curial deference—how they can both respect the legitimate authority of administrative institutions and institutions while still ensuring that their decisions are consistent with the rule of law. In this closing section, I want to briefly address a lingering concern about this general approach to judicial review. This concern is based upon an epistemic worry that the framework of curial deference which I have advocated is incapable of marking the important boundary between reasonable and unreasonable administrative decisions. Put differently, the worry is that reasonableness review is pitched onto a slippery slope to correctness review which threatens a theory of curial deference.168

While there is some truth to this concern, it is important to clarify that the doctrine of curial deference does not provide a utopian resolution to the Diceyan dialectic. Rather it sets out an analytical framework which enables people to traverse the difficult and complex terrain of judicial review by drawing attention to important concerns about institutional legitimacy, but which nevertheless stops short of equating reasonableness review with judicial opinions about correct legal content. Thus, the doctrine of curial deference is not designed to determine a new set of sharp analytical boundaries to replace old conceptual distinctions like jurisdictional/non-jurisdictional issues, but to sketch out a mode of judicial review which satisfies basic democratic values and principles of rationality while leaving room for administrative assessments of those values and principles.169 Nevertheless, it is true that the parameters of this framework remain controversial and, therefore, it cannot enable us to escape the Diceyan dialectic altogether. At each stage of the analysis—the judicial assessments of institutional reasons and the merits—there is a risk that judges might succumb to the pull of heavy handed


correctness review or, alternatively, fail to adequately scrutinize administrative decisions in light of relevant legal values and principles.

Although one should be aware of the constant pull of the Diceyan dialectic, this concern does not undermine the usefulness of curial deference as a guide to judicial review. Too often, public law theory portrays the judicial role as a Herculean task which is discharged once an independent court determines the content of the law by its own lights. But the theory of curial deference suggests that this approach may not be well suited to complex questions about institutional interrelationships and collaborative methods of legal interpretation under a democratic constitution. This does not mean that judges should refrain from scrutinizing administrative decisions; it just means that they need a more complex and nuanced understanding of judicial review. Thus, the principal virtue of curial deference is not that it can determine the appropriate limits of judicial review in uncontroversial terms, but rather that it gives judges a better analytical framework to appreciate the nature of their constitutional responsibilities. That framework provides a roadmap which enables judges to conduct a case-by-case assessment of regulatory context in a careful, honest, and articulate fashion so that judges can explain why an administrative decision is or is not acceptable in terms of constitutional values and legal principles. In other words, the principal value of curial deference is not that it determines good outcomes, but that it facilitates and promotes a culture of justification amongst government institutions. If the doctrine can serve this function, we can gain important insights about judicial review of administrative action.

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