Judicial Review of Administrative Action: Between Grand Theory and Muddling Through

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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: BETWEEN GRAND THEORY AND MUDDLING THROUGH

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ABSTRACT

It is a truth worth universal acknowledgment that the scholar in search for a meta-theory of judicial review of administrative action is in need of a life. The administrative state comprises a diverse range of state actors and regulators, all operating under the specifics of their own governing laws, which are read alongside a set of generic grounds of judicial review. The generic grounds are indeterminate, and the governing law usually gives no indication of the consequences of an administrative breach of its specific requirements. Statutory silence is the norm with regard to these critical issues, but for constitutional reasons, the whole exercise is now theorised as one of "statutory interpretation". Supplying meaning to statutory text has always involved normative and operational input from the judges themselves. There is nothing new about that, no profound judicial assertion of the power to amend statutory texts to suit their own preferences, and no threat to the survival of the generic principles. Different administrative fields will produce their own inflections of the fit between their governing laws and judicial review's general principles.

PART 1. INTRODUCTION

Judicial review is hardly a hot topic of everyday discussion, and I am rarely asked what it is "about". So rarely, in fact, that the question itself can throw me. To lay inquirers, I can usually brush it off with something harmlessly vacuous, such as judicial control of bureaucracies.2 I admit that "holding bureaucrats to account" is no worse, but I avoid it, because its popular usage suggests denunciation – "calling them out".3 More importantly, any answer has to recognise some unavoidable complexities. If "control" is the key, then we need to know the nature of that control, and the criteria that govern it. Again, what are the criteria if accountability is the key? The trouble is that judicial review has no uniform theme of being about one key subject, whether that be bureaucrats, their control, or their

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1 Law Faculty, University of New South Wales. I am indebted to Joanna Bell, Lynsey Blayden, Chantal Bostock, Paul Daly, Liz Fisher, Matthew Groves and Greg Weeks for their comments on the first draft.

2 See HWR Wade and CF Forsyth, *Administrative Law* (11th ed, OUP, Oxford, UK, 2014), pp 614–615, which says that judicial review is "the law relating to the control of government power", and that its primary purpose is to stop the "powerful engines of authority ... from running amok."

3 To be fair, accountability means many non-pejorative things, and for lawyers and the policy makers, the real issue lies in striking a balance between too much and too little "accountability". See E Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge UP, 2020).

accountability. Its content used to be almost wholly procedural, but even that is no longer true. Judicial review supervises the administration of field-specific laws (the "governing laws"), each with their own structure and purpose, each requiring field-specific accommodations with judicial review's generalities.

Judicial review is first and foremost about the law governing administrative decision-making, and that has a number of components that are inevitably mixed – the general with the specific. There are at times fierce debates as to the sources of the relevant law (common law or statute). Those debates link directly to questions as to the degree to which the law that judicial review applies is or should be context-specific, or general and confined largely to well-established categories. Resolution of those debates depends to some extent upon judicial review's normative drivers, and it will be suggested that those norms will themselves vary between different administrative fields.

There are further issues which deserve their own attention, namely, the administrator's non-statutory settings, which include budgetary issues, and decisional and enforcement structures. No bureaucrat operates in isolation from institutional structures, expectations and constraints, and the High Court has repeatedly emphasised the need for "practical" judgment – judicial review must operate, we are told, in the "real world".[4] That prompts an inquiry as to how courts come to understand an administrative decision-maker's real world settings.

PART 2. STATUTORY INTERPRETATION

Starting in 1985 with its landmark decision in *Kioa v West*,[5] the High Court has entertained two competing versions of the nature of the obligation of public bodies to accord procedural fairness to those directly and individually affected by the exercise of statutory power. Mason J propounded procedural fairness as a set of common law principles that should be recognised as such.[6] The result was that any power-conferring statute should be read down to conform with those principles unless it provided clearly, (indeed, increasingly clearly),[7] to the contrary. Brennan J disagreed.[8] His Honour acknowledged common law developments of procedural fairness doctrine, but insisted that the doctrine obtains its force only by way of statutory interpretation – its operation must be seen as an implied requirement of the governing law. The alternative, according to his Honour, was

4 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 [28], Kiefel CJ, Gageler and Keane JJ.

5 (1985) 159 CLR 550.

6 (1985) 159 CLR 550 at 584.

7 The requisite clarity has markedly increased since *Kioa*, as natural justice attained recognition as a "fundamental right" protected by the principle of legality. See M Groves, "The Principle of Legality and Administrative Discretion: a New Name for an Old Approach?", in D Meagher and M Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, Sydney, 2017) pp 179-183.

8 (1985) 159 CLR 550 at 609.

to give the common law a "free-standing"[9] or "autonomous"[10] force to alter, modify or improve the governing law, and that was something that only the legislature could do.

Critics of Brennan J's interpretivist approach initially focused on its failure to explain judicial review (if there be such)[11] of the exercise of non-statutory (or prerogative) power, although his Honour did reserve the possibility of judicial review of such power.[12] That remains a good point, and it especially resonated in a parallel debate in England, which had definitively opted for judicial review of prerogative power in 1984.[13] The English debates, however, were more wide-ranging, more complicated, and at times, far more intense. Some of this was driven by challenges from so-called common law constitutionalists[14] to the doctrine of unfettered legislative supremacy. Professor Trevor Allan led the academic charge,[15] and Sir John Laws[16] the judicial charge. Heretical as it may sound to Australian readers, the challenge continues to have influential support from both the academy[17] and the bench.[18]

Australians, however, have disavowed any claim for the judicial imposition of common law limits to legislative competence; any limit must come from the Constitution.[19] Where an administrator's power has a statutory source, the High Court said that any attempt to

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9 (1985) 159 CLR 550 at 610.

10 FG Brennan, "The Purpose and Scope of Judicial Review", in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (OUP, Auckland, NZ, 1986), pp 26–27.

11 See A Sapienza, *Judicial Review of Non-statutory Exsecutive Action* (Federation Press, Sydney, 2020).

12 *Kioa v West* (1985) 159 CLR 550 at 611.

13 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

14 See T Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 OJLS 435.

15 See, eg: TRS Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61 CLJ 87; and TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP, Oxford, 2013) ch 5.

16 See, eg: J Laws, "Is the High Court the Guardian of Fundamental Human Rights?" [1993] PL 59 at 76; J Laws, "Judicial Remedies and the Constitution" (1994) 57 Mod L Rev 213 at 223-227; J Laws, "The Good Constitution" (2012) 71 CLJ 567; and *R (Cart) v Upper Tribunal* [2011] QB 120 at 137-138 [38].

17 See P Craig, *Administrative Law* (Sweet & Maxwell, 8th ed, 2016) ch 1, for the most prominent (and thorough) textbook account of various versions of common law constitutionalism. Craig seems to identify as a common law constitutionalist, but his version of the term accepts Parliamentary supremacy, but not Parliament's monopoly of law-making authority. On that version, I too, would be a common law constitutionalist, but I prefer to confine the term to those who challenge legislative supremacy.

18 Lord Carnwath effectively endorsed the arguments in favour of a "rule of law" limit to legislative supremacy in *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 at 547-548 [130]-[136]. Section 1 of the *Constitutional Reform Act 2005* (UK) preserves "the existing principle of the rule of law". His Lordship said that this recognised or affirmed the judiciary's role in developing that principle and giving it content: at 544 [121] and 547 [132].

19 See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

distinguish between the common law and interpretivist theories "proceeds upon a false dichotomy and is unproductive".[20] That is because one of the common law's principles of statutory interpretation is usually to imply a statutory requirement to observe procedural fairness. Whilst that failed to resolve how a court might require government's non-statutory powers to be exercised comformably with natural justice, it did emphasise that having no more status than an interpretive presumption, procedural fairness was subject to contrary legislative provision. Whether sourced to the common law or to *Interpretation Acts*, principles of statutory interpretation "do not have the rigidity of constitutionally prescribed norms".[21]

Two messages emerge. First, and very clearly, common law constitutionalism is not to be countenanced. No High Court judgment contradicts that position. The issue may be "theoretically ... open", but "[t]he omens are not promising for the proponents of a free-standing common law limitation".[22] Secondly, and perhaps less clearly, that is all that courts need to know about the debate between Mason and Brennan JJ. Maybe so, but that has not deterred further academic inquiry.

Indeed, most of the debates in this Part appear to be conducted almost entirely between academics. That prompts me, at least, to question the purpose of the models deployed to critique the actual practice of judicial review. It is often said that something may be good in theory but bad in practice. Bentham's response was to conclude that a theory incapable of application was a bad theory.[23] One might add that a legal theory which fails to fit the overwhelming body of evidence is in reality a demand for large change, and is therefore in need of strong instrumental or normative justification.

Discussion cannot logically be confined to identifying the source of the obligation to observe procedural fairness, because judicial review's other generic grounds of review are routinely applied to situations where no statute has mentioned them. For example, the prohibition on administrative decision-makers acting "unreasonably" is treated as an implicit statutory requirement in exactly the same way as the requirement to accord natural justice.[24] Logically, therefore, *Kioa*'s question remains – are the generic grounds of judicial review deployed to qualify the governing law, or can it be credible to imply those grounds into that law as a mere matter of statutory interpretation?

At this point, it is necessary to extend the *Kioa* debate a further, and absolutely critical, step. That debate's starting point is that the relevant governing law in the vast bulk of judicial review cases makes zero mention of the generic grounds of review. However, the

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20 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97], Gummow, Hayne, Crennan and Bell JJ.

21 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97], Gummow, Hayne, Crennan and Bell JJ.

22 R French, "Common Law Constitutionalism" (2016) 14 NZJPIL 153 at 163.

23 J Bentham, *The Book of Common Fallacies* Ch 9, § 3, pp 303-307. Different versions of this work have been compiled from Bentham's unpublished (and unfinished) work. I have used an 1824 version edited by "A Friend" and published in London by J and H Hunt.

24 *Kruger v Commonwealth* (1997) 190 CLR 1 at 36; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [29]; and 362 [63]; and *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 549 [4] and 583 [131].

same is also true of most of any governing statute's *explicit* requirements, restrictions or obligations imposed upon administrative decision-makers. Acts will often specify the rules governing the decision-making process or limiting its outcome, but they rarely set out the judicial review consequences (if any) where those rules are breached. A few Acts tell us that breach of specific provisions will *not* affect the validity of the administrative decision, and these "no invalidity" clauses have been more successful than straight-out privative clauses.[25] However, almost no Act tells us which of its rules are so important that their breach spells invalidity. This is to be expected – life is too short, and too unpredictable, to expect anything else from Parliament and its drafters. In the absence of legislative specificity, the courts are left with the job of deciding which statutory requirements are breached on pain of invalidity, and which are not.

The High Court said in *Project Blue Sky Inc v Australian Broadcasting Authority*[26] that it all comes down to statutory interpretation, the question being whether it was a "legislative purpose" to impose invalidity for breach. Where the Act is silent, the court must seek that purpose:[27]

> "by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."

In reality, Brennan J's interpretivist explanation in *Kioa* is no different to the plurality's interpretivist explanation in *Project Blue Sky*. Each has the court imputing meaning to Acts that are silent on the issue. *Kioa* concerns judicial review's generic grounds, and *Project Blue Sky* applies to the specific rules in the governing law.

It is convenient to think of the generic grounds as judicial review's *horizontal* principles, and *Project Blue Sky*'s rules specific to the particular governing statute as its *vertical* rules. Any application for judicial review of an administrative exercise of statutory power requires a consideration of both the generic and the specific. The most difficult task in many cases lies in fixing the meeting point of the horizontal and vertical axes – more specifically, how best to fit the particular with the generic. And once again, the courts routinely characterise that exercise in terms of statutory interpretation.

We used to say that breaches of horizontal principles or vertical rules amounted in themselves to "jurisdictional errors", which is both a conclusory term and the principal gateway to court orders that treat the challenged administrative decision as being void. "Jurisdictional error" now has an additional element, namely, that there must have been more than a fanciful chance that the applicant might have fared better if the horizontal and vertical requirements had been properly observed.[28] This relatively recent development has

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25 Eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212.

26 (1998) 194 CLR 355.

27 (1998) 194 CLR 355 at 389 [91], citation omitted, McHugh, Gummow, Kirby and Hayne JJ.

28 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134-135 [29]-[31]; and *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 444-445 [44]-[46]. Nettle, Gordon and Edelman JJ continued to dissent from this

shifted an error's "immateriality" from a factor relevant only to the exercise of the remedial discretion, to the very definition of jurisdictional error, and as with that concept's other elements, its new home is attributed to statutory interpretation.

In summary, "statutory interpretation" is said to explain the key components of any judicial review case -- the generic grounds of review, the *Project Blue Sky* identification of the "jurisdictional" elements specific to the governing statute, fitting those two elements together, and the threshhold requirement of "materiality" for any of the decision-maker's errors. Given the typical statutory silence on each of those components, one must ask whether statutory interpretation is in truth being offered as explanation or justification. The answer turns to some extent on context, and to some extent on one's understanding of "statutory interpretation". That can take theorists into very deep waters, but the courts have wisely kept close to the shore.

Professor Wade remained an interpretivist throughout, but never through conviction. He argued that it was constitutionally imperative to explain judicial review in terms of statutory interpretation, because the court could point to no other warrant for engaging in judicial review. The judge's only "safe ground", he said, was to fit all of its principles into the "will of Parliament", even though the imputation of the generic review grounds to Parliamentary will was highly artificial – the equivalent, he said, of fitting them to the legendary bed of Procrustes.[29]

It was both wrong and unnecessary for Wade to look to statute as the source of the English High Court's judicial review jurisdiction. Queen's Bench had long been regarded as having an *inherent* judicial review jurisdiction. Australia's Supreme Courts inherited that jurisdiction, and the High Court said in *Kirk v Industrial Court (NSW)*[30] that it is constitutionally entrenched. As for the High Court itself, its judicial review jurisdiction is also entrenched, with at least one source being s 75(v) of the Constitution. Wade's view would have accorded with long-standing judicial usage, if he had meant only to source the *grounds* of judicial review to legislative will, and that would align with Brennan J's interpretivist stance. And like Brennan J, Wade's real concern had been to avoid any charge of the common law limiting legislative supremacy. Both saw that as a credible charge whenever a court's interpretation of an Act contradicted legislative *intention*. However, the High Court now believes that it has escaped that charge by disowning both the reality and the normative basis of legislative intention.

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development; it suffices to refer to their judgments in *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34.

29 The relevant passage appears *verbatim* in the current edition as it has from that textbook's inception; see HWR Wade and CF Forsyth, *Administrative Law* (OUP, Oxford, 11th ed, 2014) pp 28-29. See also at p 31, which accepts Professor Allan's claim of an "inescapable tension" between legislative supremacy and common law developments of fundamental common law rights, but cautions that the judiciary would undermine their own legitimacy were they to acknowledge this.

30 (2010) 239 CLR 531.

The High Court now accepts the language of legislative intent, but only on condition that we know that this is "something of a fiction".[31] What counts is the legislative text -- not the subjective intentions of the Minister who had carriage of the relevant Bill, not the subjective intentions of those who supported the Bill,[32] nor any objective intention manifested otherwise than through the authoritative text itself and permissible interpretive resources.[33] Legislative intention has become the product of statutory interpretation, not its tool.[34]

Legislation is necessarily drafted in light of the canons of statutory interpretation, and where the drafters and judges are *ad idem*, it is indeed "unproductive"[35] to debate the existence or meaning of legislative "will" or "intent". In those circumstances, the judges are right to assume that legislative drafters know how the courts will read their work. The real problems arise whenever the courts spring a surprise on the drafters, by coming up with a signicantly strengthened canon (as in fact occurred in *Kioa*), or even one that is entirely new.

Judicial treatment of privative clauses provides an obvious example. The *Wade and Forsyth* text regards *Anisminic Ltd v Foreign Compensation Commission*[36] as "an outstanding example" of judicial defiance of Parliament's intentions.[37] At issue in *Anisminic* was the meaning of what we in Australia would regard as a weak privative clause, protecting "determinations" from being "questioned in any court of law". *Anisminic* said that the protection applied only to valid determinations – invalid determinations had no legal existence. In response to a slightly more explicit clause, Lord Carnwath basically demurred[38] on the ground that the UK Parliament cannot ban access to the courts, an approach that places him within my definition of a common law constitutionalist.

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31 *Zheng v Cai* (2009) 239 CLR 446 at 455 [28], French CJ, Gummow, Crennan, Kiefel and Bell JJ. This is sometimes based on theories that it is impossible to guarantee how three or more options were ranked by group decision-makers who had to choose between three or more options. Gageler J is not convinced; see S Gageler, "Legislative Intention", (2015) 41 Monash University L Rev 1.

32 There is to be no "psychoanalysis of individuals involved in the legislative process": *Singh v Commonwealth* (2004) 222 CLR 322 at 336 [19], Gleeson CJ. The "collective mental state" of the legislators is "a misleading metaphor": *Zheng v Cai* (2009) 239 CLR 446 at 455 [28], French CJ, Gummow, Crennan, Kiefel and Bell JJ.

33 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264 [31].

34 J Goldsworthy, "The Principle of Legality and Legislative Intention", in D Meagher and M Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, Sydney, 2017) Ch 4 at p 57. In the same essay (at p 55), Goldsworthy quotes Hayne J's judgment in *Momcilovic v R* (2011) 245 CLR 1 at 141 [341]: "'Intention' is a conclusion reached about the proper construction of the law in question and nothing more."

35 See above, n 20.

36 [1969] 2 AC 147.

37 HWR Wade and CF Forsyth, *Administrative Law* (11th ed, OUP, Oxford, UK, 2014), p 28 n 67.

38 *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 at 547-548 [130]-[136].

If *Anisminic* furrows the English brow, try to imagine their reaction if they were to read our *Hickman* formula. The privative clause in *R v Hickman; Ex parte Fox and Clinton*[39] was considerably more explicit than *Anisminic*'s, but Sir Owen Dixon (Australia's high priest of strict and complete legalism) translated the entire clause into a convoluted form of words that bore no resemblance whatsoever to its original language. No-one could pretend that the legislative drafter should have predicted *Hickman*, whose formula became so "tortuous"[40] that the High Court eventually took a more simple route, and "Anisminicked" an even stronger-looking privative clause.[41]

One can readily draw other examples of unexpected, unforewarned, judicial push-back against legislation whose drafting seemed abundantly clear. Parliament has repeatedly tried to oust the procedural fairness rule, or at least corral its content, in the context of the *Migration Act 1958* (Cth), and successive Ministers from both sides of politics have been very clear as to their intentions. However, they have largely failed.[42] Even where the courts have accepted provisions declaring that explicit statutory procedures are taken to have replaced the common law requirements of procedural fairness, most of the actual substance of those requirements has been judicially injected into the ever-flexible reasonableness ground.[43]

When courts strain against the drafting in these cases, they never actually say that a law is morally offensive (henceforth, "evil"), because that is not their call. Rather, they say that it appears to infringe fundamental or important democratic or common law values or rights. In those circumstances, the courts insist that the drafting be pellucidly clear before they accept Parliament's evil intent. One of the longer term dangers of tempting the Minister to go back to Parliament with a more clearly drafted amendment is that a law can gradually become more complex, and from a values perspective, even worse. Sometimes labelled the principle of legality, the judicial call for greater drafting clarity amounts in these cases to a "manner and form" requirement. That is sometimes explained not in terms of drafters *knowing* the relevant interpretive canons, but as what Ministers and even the Parliament itself must *do* when their goal is to pass an evil law. In essence, the Parliamentary actors must openly acknowledge their evil intentions. That is partly to ensure that Parliament will not do something bad through sheer inadvertence,[44] and partly because drafting clarity is

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39 (1945) 70 CLR 598.

40 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 167 [68], Gummow, Hayne, Heydon and Crennan JJ.

41 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Ironically, the Minister had assured Parliament that the privative clause would receive a *Hickman* response. However, he had (understandably) missed one of *Hickman*'s material elements, not that this mattered in the end.

42 The story is best told in G Hooper, "Three Decades of Tension: From the Codification of Migration Decision Making to an Overarching Framework for Judicial Review" (2020) 48 Federal L Rev 401.

43 See *BVD17 v Minister for Immigration and Border Protection* (2019) 373 ALR 196 at [34].

44 *Coco v R* (1994) 179 CLR 427 at 437-438; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 581 [105]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Al-Kateb v Godwin*

in such circumstances a facet of democratic accountability, since it makes the relevant legislators risk paying the political price for their action.[45]

As Goldsworthy notes, however, evil is in the eye of the judicial beholder, and the judicial demand that legislators be democratically honest to their electors has occurred in contexts where the political class has honestly, proudly and openly rejected liberal norms.[46] The public knows, for example, that legislation relating to "unauthorised maritime arrivals"[47] (commonly known as boat people) is both a vote-winner, and *meant* to be cruel. In effect, its cruelty is publicly touted as a deterrent. More importantly, the drafters have left no room for doubting legislative intent. The same is true of the law allowing the Minister to order the removal from Australia of non-citizens who fail the "character" test, even though they may have lived here for almost their entire life. The Federal Court accepted that "harsh or even cruel"[48] treatment cannot in the latter circumstances constitute reviewable unreasonableness. Even so, however, that court uses the unreasonableness ground to require that decision-makers openly acknowledge "the human consequences" of their decisions.[49]

Examples of statutory interpretation in defiance of evident legislative intentions are criticised from a number of perspectives, and I am not philosophically equipped to pursue them. This paragraph may therefore upset some purists,[50] especially those who criticise major shifts in precedent before laying a sound philosophical foundation.[51] However, it is difficult to see why a drafter's declared intentions should *always* prevail over poor and incomplete drafting. Drafters sometimes miss what were evidently their targets, and any philosophical difficulty in explaining that is no reason to declare that the drafter hit the

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(2004) 219 CLR 555 at 565 [19]; and *Lee v Crime Commission (NSW)* (2013) 251 CLR 196 at 310 [313].

45 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 583 [106]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]; and *Momcilovic v R* (2011) 245 CLR 1 at 46 [43].

46 J Goldsworthy, "The Principle of Legality and Legislative Intention", in D Meagher and M Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, Sydney, 2017) Ch 4 at pp 52-54.

47 *Migration Act 1958* (Cth) s 5AA.

48 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at 640 [41] (internal quotation marks and references omitted).

49 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at 630 [3], Allsop CJ (Markovic J agreeing). The Federal Court has repeatedly endorsed that statement; see eg: *Minister for Home Affairs v Omar* (2019) 373 ALR 569 at [37]; and *GBV18 v Minister for Home Affairs* [2020] FCAFC 17 at [32(d)].

50 I am in good company. A former Chief Justice defended judicial resort to the "principle of legality" even though it is a "rough beast" that might eventually benefit from academic refinement. See R French: "Foreword", D Meagher and M Groves (eds) *The Principle of Legality in Australia and New Zealand* (Federation Press, Sydney, 2017) pp v-viii; and "The Principle of Legality and Legislative Intention" (2019) 40 *Statute Law Review* 40.

51 See L Burton Crawford, "Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power" (2019) 30 PLR 281 at 298.

bullseye. When faced with an unfair contract or an unfair Act, clients pay their lawyers good money to hunt for loopholes. That is part of the skill set of any good practising lawyer, and there is no compelling reason to leave it behind upon appointment to the bench.

There are, of course, solid constitutional objections to judges amending statutes, and no judge would claim otherwise. The pure intentionalist school of statutory interpretation implies that the judges are either fooling themselves, or engaged in a giant conspiracy to fool their audience. The first alternative is simply not credible, and belief in the second alternative would probably qualify for lifelong membership of Mar-A-Lago. There is no *a priori* distinction between judicial legislation and "interpretive practice". What is unduly "activist" in one era can be entirely normal in another, indicating the extent to which the distinction turns on both public and professional culture.[52] It also turns on professional practice.[53]

Common law judges are *expected* to add meaning (or effect)[54] to statutes – there can be no other explanation of (for example) the *Project Blue Sky* exercise. They have a long and rightly proud tradition of civilising some fairly brutal statutes. Such interpretive canons as require greater than usual clarity when Parliament wants to do something evil are part of that tradition, and they offend the separation of powers only if legislative meaning is tied too closely to the legislators' actual intentions.

To return to Wade and Brennan, it is submitted that their concern for maintaining legislative supremacy was unnecessary. Neither of them committed to interpretation being tied to actual legislative intent. Indeed, Brennan J famously celebrated the "increasingly sophisticated" imputation of the common law grounds of review into administrative statutes.[55] Only the true common law constitutionalists challenge legislative supremacy. The mainstream has always seen legislation as a dynamic process, with the ball passing on occasions from Parliament to the courts and back again. So long as Parliament has the capacity to overturn an unwanted judicial interpretation, its supremacy is assured. In the meantime, Parliament must live, as it has always done, with the fact that the courts, too, make law, as part of their interpretive role.

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52 See B Friedman, "Letter to Supreme Court (Erwin Chemerinsky is Mad. Why You Should Care.)" (2016) 69 *Vanderbilt Law Review* 995.

53 See: J Pojanowski, "Statutes in Common Law Courts" (2013) 91 *Texas L Rev* 479; J Pojanowski, "Reading Statutes in the Common Law Tradition" (2015) 101 *Virginia L Rev* 1357; and J Pojanowski, "Neoclassical Administrative Law" (2020) 133 *Harvard L Rev* 852. Pojanowski argues that statutory interpretation in common law systems is necessarily piece-meal, a dynamic exchange between courts which accept legislative supremacy and legislatures that disagree with judicial interpretations. I agree, but caution that his appeal to institutional relationships between and within the branches, and his concerns with relative institutional competence, are almost entirely American.

54 The High Court hinted in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395-397 questioned the substance of a distinction between meaning or interpretation on the one hand, and effect or construction on the other. One could conceivably, however, use "construction" in acknowledgment of the meaning that courts necessarily *add* to statutes.

55 *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 36.

Legislative supremacy does not equate to a legislative *monopoly* over law-making. The legitimacy of public power is not dependent upon it originating in Parliament. Legislation itself does not originate in Parliament. Its genesis might have been an official law reform report, or recommendations made by unions or private sector interest groups. Whatever its genesis, its journey must then proceed to the Executive branch, and from there to the Parliament, the administrative institutions given the carriage of the new law's implementation, and (very sporadically and occasionally) to the courts, and perhaps back again for amendment or supplementation. Public power has several sources, public and private.[56] More than that, its shape evolves over time; its statutory form is in a sense only the beginning.

PART 3. GENERAL PRINCIPLES, SPECIFIC RULES AND INSTITUTIONAL CONSIDERATIONS

Lord Steyn said in *R (Daly) v Secretary of State for the Home Department*:[57] "In law context is everything." That has been much-quoted in England,[58] but less so in Australia and always with circumspection.[59] He cannot have intended to be taken literally; context is certainly important, but not *everything*. Some of the critics of the High Court's interpretivist approach fear that pulling focus from the general to the specific, from the horizontal principles to the vertical rules, will weaken public law's doctrinal stability, and therefore its capacity to guide decision-makers and courts.[60]

I am not so sure that the High Court has in fact pulled focus in any profound sense from the general to the specific. Some of the cases usually cited for such a shift seem to me to resort to loophole hunting within the governing statute where the generic principles seem to be insufficient or even to have been legislatively blocked. Tribunal decision-making in migration, for example, must conform to a highly detailed set of procedural rules in the primary and secondary legislation. The obvious intent was to afford safe harbour to tribunals that followed the letter of the rules. That led the courts to focus on the procedural requirements that tribunals "invite" appellants to attend their "hearings". The result was to

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56 See J Allsop, "Foreword", in N Williams (ed), *Key Issues in Judicial Review* (Federation Press, Sydney, 2014) p vi: "[P]ower and its exercise, and whether it is exercised according to lawful authority in a just and decent civil society, is not a matter of pure logic or categorised rules. Power is not linear. It is not always structured and exercised in an ordered way. It can be amorphous and can only be controlled effectively by reference to basal concepts of reason and justice."

57 [2001] 2 AC 532 at 548.

58 Eg: *HM Advocate v R* [2004] 1 AC 462 at 493; *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 255; *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 at 667 [35]; *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 at [60] and [94]; and *In re JR38* [2016] AC 1131 at 1171 [114].

59 *Siemens Ltd v Schenker International (Aust) Pty Ltd* (2004) 216 CLR 418 at 460 [128], Kirby J: ".. with only a little overstatement ...".

60 W Bateman and L McDonald, "The Normative Structure of Australian Administrative Law" (2017) 45 *Federal L Rev* 153; and S Young, "The Blue Sky Effect: a Repatriation of Judicial Review or a Search for Flexibility?" (2020) 27 AJAL 165 at 178-179.

require tribunals to engage intellectually with appellants' cases, because such invitations must surely have been intended to be "real and meaningful".[61]

There are shifts, of course, but nothing so profound as yet to threaten the very existence of the standard grounds of review.[62] Of course, if context were indeed everything, there would be no general rules, no principles to flesh out the bare bones of the specific governing law, and no way of predicting the judicial review consequences (if any) of an administrative breach of any of the myriad requirements of that governing law. In that scenario, it could all come down to the personal preferences of the particular judge. In fact, however, judicial review's general principles must mesh with the specifics of the particular governing law.

The real difficulty lies in making that "fit" between general and specific, the horizontal and vertical axes of judicial review. In their joint judgment in *Hossain v Minister for Immigration and Border Protection*,[63] Kiefel CJ, Gageler and Keane JJ said that this calls for "qualitative judgments" on the part of the courts in setting "appropriate limits" to administrative power:[64]

> "The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the *appropriate* limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that decison-making is a function of the real world."

I added my own emphasis to "appropriate" in that passage because it highlights how far the courts have travelled from "legislative intent". Lisa Burton Crawford sees it as "extraordinary", bordering on an admission that statutory interpretation in administrative law is "what *the courts* think the limits of executive power should be".[65] I agree that that was the meaning of that aspect of *Hossain*, but do not share her sense of shock. It is one thing to call (as she does) for greater articulation of the values behind interpretive stances, but another to criticise the High Court's embrace of institutional considerations (which is surely what its reference to the "real world" signifies) unless and until it has developed a theory of good administration.

Further, it is difficult to imagine the capacity of judges entirely to shed their own views about the appropriate limits of executive power in cases before them; nor should they try. To be clear, I am not advocating the deployment of a judge's idiosyncratic opinions on how best to manage Departmental business; that is not their training, and decidedly not their expertise. However, Parliament's legislative output leaves so much unsaid. That is partly a consequence of its finite resources in terms of time, and partly because some difficulties

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61 *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 562 [41]. Note, however, that *SCAR*'s authority is still questioned: *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 at 563 [246].

62 Cf: J Basten, "Judicial Review: Can we Abandon Grounds?" (2018) 93 *AIAL Forum* 22; and G Kennett, "Duties to Consider" (2019) 26 *AJ Admin L* 60 at 61-62.

63 (2018) 264 CLR 123.

64 (2018) 264 CLR 123 at 134 [28], internal quotation marks and footnotes omitted.

65 L Burton Crawford, "Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power" (2019) 30 PLR 281 at 294 (original emphasis).

cannot be predicted with sufficient accuracy to make provision for them. In any event, the legislature knows that when it has set the basic policy parameters, it can usually leave most of the considerable detail to the administrative institutions, and beyond them, some of it to the courts.

Most Acts that establish large administrative institutions are necessarily incomplete; so, too, are most Acts investing those institutions with regulatory or other administrative tasks. Lord Sales referred to this as the phenomenon of the "absent legislator", and concluded that it is and always has been the proper role of judges to pick up where the legislature left off.[66]

The pervasiveness of the incomplete statute is surely the premise of the task set by *Project Blue Sky* in determining which breaches of the governing law's requirements should result in invalidity. The rules of natural justice provide another example. One can well understand the frustrations of successive governments of both persuasions wrestling with judicial overturns of migration decision-making for failure to comply with the constantly evolving rules of procedural fairness – hence the increasing level of process detail in the primary and secondary legislation. In other substantive areas, however, the courts have been left largely to their own devices to rule on the specifics of procedural fairness for specific administrative and institutional contexts. Put another way, the specific content of the rules of procedural fairness have long been variable to context, and no-one seems to have seen that as constitutionally dubious. We expect courts to make law about statutes, and when they do that in administrative law settings, they necessarily consider the fairness and the workability of the options before them.

Hossain's joint judgment had relied heavily on the joint judgment of six of the Court's seven members in *Kirk v Industrial Court (NSW)*.[67] *Kirk* had been a major turning point for judicial review, retaining the general grounds of review, but as potential examples of jurisdictional error, rather than as a rigid taxonomical framework.[68] Regardless of whether the decision-maker's error falls within one of the established grounds or was a violation of some other legal requirement,[69] it cannot count as "jurisdictional" unless the reviewing court thinks that it was sufficiently grave. *Kirk*'s critical conclusion was that judging an error's gravity is "almost entirely functional".[70]

The emphases in *Kirk* and *Hossain* on "functionality", an error's "gravity" and "materiality", and "qualitative" assessments of administrative decision-making in "real world" settings may not have been precise, but their tendency was unmistakeable. Ultimately, much more is in play (and indeed, must be) than any textually focused reading of the statute law. If functionality and the real world mean anything, they require the court

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66 P Sales, "Law, Democracy, and the Absent Legislator", in E Fisher, J King and A Young (eds), *The Foundations and Future of Public Law* (OUP, Oxford, 2020) Ch 10.

67 (2010) 239 CLR 531.

68 (2010) 239 CLR 531 at 574 [73].

69 Which could be in the governing law or elsewhere. One of the errors in *Kirk* itself was a violation of a fundamental rule of criminal evidence – the prosecution had called a defendant.

70 (2010) 239 CLR 531 at 570 [64], quoting L Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard L Rev* 953 at 963.

to have some sense of the administrator's institutional settings,[71] but there would be problems in taking that too far. Courts sometimes talk of "good administration", but usually in the context of accepting the legitimacy of administrative arrangements.[72] That is a far cry from proactively advising government how to organise itself.[73]

We have no relevant equivalent of the Brandeis brief – a statement as to the way the administrative institution is structured, funded, and governed; its degree of independence (if any) from Ministerial control; its priorities, and as to how it sets its goals, whether they be KPIs for adjudicative decision-making, or enforcement strategies and priorities if they be regulatory. Furthermore, it would be difficult to devise proper procedures for receiving and testing such evidence. Tribunals, for example, are allowed to assist courts by presenting background material, but are usually forbidden to advocate for anything that is or could be contentious. The reason is that the tribunal should not place itself in a position where it could subsequently be challenged for bias.[74]

Judgments occasionally recount written and oral submissions about the general feasibility of operationalising an applicant's view of how things should have been done,[75] but formally admissible evidence appears to be rare. There are very few judicial review cases in which the arguments have been tested by reference to admissible evidence about institutional structures, goals, strategies and budgets. There was a recent exception in a challenge to the Victorian government's imposition of a curfew as part of its COVID-19 strategy. That was in *Loielo v Giles*,[76] but the evidence went all one way, and was needed to repel the plaintiff's allegation that the relevant official had acted under unlawful dictation from the Premier.

It therefore appears that a judge's sense of an administrator's "real world" settings comes partly through submissions, but more generally through the fact that judges themselves also live in the "real world", with at least some knowledge of the relevant political, budgetary and institutional factors.[77] That is not to issue a general call for formal briefs – the problems of proceeding down that track are evident. However, it does show that

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71 Brennan J said in *Kioa v West* (1985) 159 CLR 550 at 37 that in the process of finding the law, the court "needs to remember that the judicature is but one of three *coordinate* branches of government", (emphasis added). This implies that its interpretive role demands an understanding of the particular administrative scheme as a whole. See L Blayden, "Institutional Values in Judicial Review of Administrative Action: Re-Reading *Attorney General (NSW) v Quin*" (2021) **xyz** *Federal L Rev* (forthcoming).

72 See J Basten, "The Foundations of Judicial Review: the Value of Values" (2020) 100 AIAL Forum 32 at 47, citing *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 194 [54] and 198 [69].

73 See *Minister for Immigration and Multricultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12 [32], Gleeson CJ: "The constitutional jurisdiction does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration."

74 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

75 Eg, *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [31], [94] and [120].

76 [2020] VSC 722.

77 To digress, it is therefore small wonder that comparative administrative law is even more fraught than other branches of comparative law.

whatever "statutory interpretation" might encompass, it is not the only thing that judicial review courts must do.

To return to *Loielo*, one of the grounds in the challenge to a curfew order was that the officer who made it had not properly considered the human rights implications as she had been required to do under the Victorian *Charter*. It was true that she had held the relevant power to make a curfew order for only two days, and had worked in the Health Department for only five weeks, and the judge remarked on the absence of any evidence as to why it was decided to vest her with the relevant power rather than someone else.[78] Nevertheless, her appointment was not challenged, and she was an Associate Professor working on COVID who had spent five days thinking of nothing else but the implications of ordering a curfew. In that period, she had read the *Charter* herself, and had considered information from the Department and government lawyers. The State submitted that the court "should recognise her institutional competence",[79] and that appears to be what the court eventually did.[80] It is interesting to speculate if it would have made any "real world" difference if someone more obviously suited had been the person nominated to hold the relevant power. It appears likely that recognition of "her institutional competence" is short-hand for saying that in reality, she was a perfectly acceptable person to speak for an entire Department.

The obvious analogy is with cases in which the challenge is to a decision formally made by a Minister. Courts have long accepted institutional arragements whereby the Minister can sign off on a Departmental briefing note. If the note accurately summarises the substance of the underlying file, the Minister need not read the file itself. I am not aware of any Act that makes provision for this arrangement.

PART 4. NORMATIVE CONSIDERATIONS

It is not possible to separate an inquiry as to what judicial review is about from an inquiry as to what it should be about.

For adherents of true "legislative intent", it is about the courts implementing legislative will, whatever that means – nothing less, and crucially, nothing more. Writing of rule-making by national agencies in the United States, Richard Stewart called this the "transmission belt" theory of agency legitimacy, as opposed to a legitimation model based upon agency "expertise".[81]

Lisa Burton Crawford has not pledged allegiance to the transmission belt, but she appears to adhere to it unless and until someone comes up with a theory of statutory interpretation that pushes beyond legislative intent. She recently excoriated the High Court for pushing statutory interpretation beyond any pretence at a divination of legislative intent, at least where the court has offered no alternative theory other than the judge's view as to the "appropriate" limits to Executive power. Without a theory, she said, the court was

78 [2020] VSC 722 at [7].

79 [2020] VSC 722 at [254].

80 See [2020] VSC 722 at [259]-[260].

81 R Stewart, "The Reformation of American Administrative Law" (1975) 88 Harvard L Rev 1667 at 1675-1711.

operating in a "normative vacuum".[82] Writing jointly with Janina Boughey,[83] it would appear that her preference is for an hierarchical and tidy constitutional order, with no overt acknowledgment of a judicial source of law interwoven with statutory law.

Writing in *Attorney General (NSW) v Quin*[84] of the limits of judicial review in Australia, Brennan J said:[85]

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction *simply* to cure administrative injustice or error. The merits of administrative action, *to the extent that they can be distinguished from legality*, are for the repository of the relevant power and, subject to political control, for the repository alone."

I have emphasised Brennan J's qualifications ("simply", and "to the extent ..."), because it was always clear that he was no believer in value-free judging. His moral commitments were clearly important; after all, he wrote the principal judgment in *Mabo v Queensland (No 2)*.[86] And only a year before *Mabo*, he wrote extra-judicially:[87]

> "In the long history of the common law, some values have been recognised as the enduring values of a free and democratic society and they are the values which inform the development of the common law and help to mould the meaning of statutes. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice, and immunity from retrospective and unreasonable operation of laws. To ensure that effect is given to these values when they stand in the way of an exercise of power, especially the power of governments, a judiciary of unquestioned independence is essential."

Whatever else passed along a transmission belt from Parliament to the administration and the courts, Brennan J was clear that it was not to the exclusion of the court's function of *adding* its own "values" to Acts. He was equally clear that one of the components of statutory interpretation was judicial creativity. The courts added more than values – they added the default rules for the exercise of administrative power, in the form of the generic grounds of judicial review:[88]

> "In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power ..."

Nevertheless, Mike Taggart was appalled by the first passage that I have quoted from *Quin*, arguing that it hid his Honour's real reasons for deciding any particular case:[89]

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82 L Burton Crawford, "Immaterial Errors, Jurisdictional Errors and the Presumptive Limits of Executive Power" (2019) 30 PLR 281 at 293.

83 See: J Boughey and L Burton Crawford, "Jurisdictional Error: Do We Really Need It?", in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, (Hart Publishing, Oxford, 2018), Ch 19; and J Boughey and L Burton Crawford, "The Centrality of Jurisdictional Error: Rationale and Consequences" (2019) 30 *PLR* 18.

84 (1990) 170 CLR 1.

85 (1990) 170 CLR 1 at 35-36, emphases added.

86 (1992) 175 CLR 1.

87 G Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32 at 40. For this reference, I am indebted to J Basten, "The Foundations of Judicial Review: the Value of Values" (2020) 100 AIAL Forum 32 at 43.

88 (1990) 170 CLR 1 at 36.

89 M Taggart, "'Australian Exceptionalism' in Judicial Review" (2008) 36 *Federal L Rev* 1 at 28.

> "Here is the rub: there is no bright line distinction; they [namely, legality and merits] overlap and where the line is drawn involves normative commitments and judicial discretion."

For Taggart, Brennan J's prime sin was to pretend that judicial values and creativity were not involved. Taggart said that the various grounds of review are manipulable, and always leave judges with room for applying their values. Each formulaic ground of review had its opposing and equally formulaic basis for judicial restraint, and he argued that picking and choosing between them could be explained only by bringing the court's values to the surface. In essence, our High Court should be less formalist, less legalistic, more open to admitting normative preferences rather than hiding them behind fig leaves, and more open to articulating and developing those norms in the search for an overarching value structure.

Whilst vigorous in denouncing fig leaves, and in "calling out" terrible results (as he saw them), Taggart was noticeably light on the detail of his "normative" corrections, and they were all doctrinal. He propounded doctrines aimed at pushing the courts from rules to principles: abuse of power, variable intensity review (especially for unreasonableness), and a wider conception of individual rights together with a preparedness to go beyond rights-talk where justice demanded. These doctrinal suggestions were not offered for the sake of clarity, so much as to enable courts to avoid administrative injustice or error, the very thing that Brennan J had said was off-limits. Taggart's doctrines were pathways to direct appeals to judges' senses of injustice, although paradoxically, he offered Canadian-style "deference" as a countervailing basis for judicial restraint.

At around the same time, Tom Poole also advocated a middle ground between rules and principles, criticising Australia for being too rule-bound, and England for being too values-based.[90] Like Taggart, he sought a happy midway point between rules and values. He gave no real particulars, and perhaps none can be given. Debates continue as to whether English law has become too unpredictable, wedded to a methodology of "all things considered", context, and values.[91]

Dean Knight's critique of Australian judicial review accepted conclusions such as Taggart's, but without the particulars.[92] He assessed judicial review doctrine in England, New Zealand, Australia and Canada against Lon Fuller's well-known criteria for the rule of law: generality, accessibility, prospectivity, clarity, stability, non-contradiction, non-impossibility, and congruence.[93] Like Taggart, Knight saw Australian law as impenetrable, and therefore seriously lacking in internal coherence, clarity, and accessibility – key rule of law components. At the same time, he was critical of England's turn to standards that were so highly evaluative as to be almost intuitive. Replacing overly broad administrative discretions with overly broad judicial standards failed several of Fuller's criteria. Like

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90 T Poole, "Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights", in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State* (Hart Publishing, Oxford, 2008) Ch 1.

91 See: HWR Wade and CF Forsyth, *Administrative Law* (11th ed, 2014) p 222 ("pragmatic but not principled"); and *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 at 538 [98] and 547 [131], Lord Carnwath ("pragmatic and principled").

92 D Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP, Cambridge, 2018).

93 LL Fuller, *The Morality of Law* (Yale University Press, 1964).

Taggart and Poole before him, Knight can perhaps be seen to seek a middle ground between tight rules and broad values.[94]

Writing more recently, Will Bateman and Leighton McDonald depicted the rise of the interpretivist rationale for delineating the limits of administrative power as a shift from a "grounds approach" to a "statutory approach".[95] They saw this as a profound shift of emphasis, rather than something absolute. As they saw it, the grounds remained, but a court's starting point in individual cases had now to be the governing law rather than a set of essentially normative principles of good administration. They saw the upside of the statutory approach as cloaking judicial review in the democratic clothes of legislative will. One might doubt whether the very existence of Australian judicial review needs democratic legitimation, given that it is constitutionally based.[96] They saw the downside of the statutory approach as risking a reduction in the "normative" content (their term) of judging in judicial review cases. They argued that the generic grounds provide the basic norms of good administration, thereby legitimating the administrative state. In essence, Bateman and McDonald regretted the very developments which Taggart had advocated – the generic grounds losing their rigidity, with a consequent reduction in the "legitimating" guidance that they afforded administrative decision-makers.

Americans still debate the legitimacy of the administrative state; some of them even debate its necessity. Ever since the New Deal, they have debated the "democratic" legitimacy of agency administration, but it is submitted that we have no need to import that particular culture war. Such of our administrative agencies as are independent of direct Ministerial control are independent for good reason, and make no pretence to democratic representivity. As for the remainder, their democratic legitimacy is founded upon the concept of responsible government. Judicial review's generic grounds of review hopefully add incrementally to the civility and decency of the administrative state, but their doctrinal evolution as depicted by the shift from grounds to statute scarcely threatens that state's legitimacy.

Also writing recently, John Basten[97] and Lynsey Blayden[98] have each come at the issue through the language of values rather than norms. Each accepts that there is more to the court's role than statutory interpretation, and each concludes that the common law is just one of the external sources shaping judicial review. For Basten, the grounds and statutory approaches are themselves incomplete:[99]

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94 A similar argument appears in T Poole, "Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights", in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State* (Hart Publishing, Oxford, 2008) Ch 1.

95 W Bateman and L McDonald, "The Normative Structure of Australian Administrative Law" (2017) 45 *Federal L Rev* 153

96 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

97 J Basten, "The Foundations of Judicial Review: the Value of Values" (2020) 100 AIAL Forum 32.

98 L Blayden, "Institutional Values in Judicial Review of Administrative Action: Re-Reading *Attorney General (NSW) v Quin*" (2021) **xyz** *Federal L Rev* (forthcoming).

99 J Basten, "The Foundations of Judicial Review: the Value of Values" (2020) 100 AIAL Forum 32 at 41.

> "[T]he implied limits on powers derive from values, or standards, which are found in our legal and political systems of government, including constitutional principles governing the institutional structure of the government."

Blayden's argument is similar, with a focus on the institutional context of the leading High Court cases. That context includes considerable respect for the political institution of responsible government, and the prevalence of merits appeal tribunals.

Joanna Bell's account is entirely English, but her conclusions are apposite.[100] She argues that any unified normative account of judicial review will necessarily be too abstract, and will sacrifice explanatory power in the pursuit of intellectual coherence, a coherence that is simply lacking in the administrative state as a whole.[101] Echoing doubts expressed almost 50 years ago,[102] she wonders whether we have administrative law or administrative laws.[103]

PART 5. CONCLUSIONS

It should be clear by now that I am deeply sceptical of any attempt at a singular, authoritative mission statement of judicial review that fits all cases, let alone of the values that should guide or inform judicial review. Our administrative arrangements are hugely diverse, and necessarily untidy. Values compete; sources of law compete; the laws and their purposes compete. It is a positive strength of the common law system that we can resolve our particular disputes in a reasonably predictable fashion without having to pin any particular value system to our legal masts. That may be untidy, but it is surely more than simply muddling through. Judicial review's default positions on rationality and fair process necessarily adapt to field-specific contexts, and it would be a mistake to think of the resulting complexity as being either intellectually or morally incoherent. One can certainly *advocate* for coherence that deliberately chooses unity over genuine difference, but that would be an agenda for change, not an account of our present arrangements. And for this author, at least, it is difficult to see why the law should now choose any one person's vision of the good society.

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100 J Bell, *The Anatomy of Administrative Law* (Hart Publishing, Oxford, 2020).

101 J Bell, *The Anatomy of Administrative Law* (Hart Publishing, Oxford, 2020) pp 230-237.

102 R Stewart, "The Reformation of American Administrative Law" (1975) 88 Harvard L Rev 1667 at 1807-1813, discussing whether it remains meaningful to talk of administrative law, or whether we are forced to accept a "Nominalist Thesis" that tracks each major administrative agency.

103 J Bell, *The Anatomy of Administrative Law* (Hart Publishing, Oxford, 2020) pp 211-227.