23. Judicial review of questions of law: a comparative perspective

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All systems of administrative law resolve similar issues. They elaborate tests for review of law, fact and discretion. Comparative law enables us to analyze diverse approaches to the same issue, while being mindful of legal/cultural reasons for those differences. Comparative discourse facilitates consideration of whether doctrinal variations across legal systems are relatively minor, so that the regimes do the same thing in slightly different ways, or whether doctrinal variants reflect deeper normative divergence.

With that question in mind, this chapter focuses on judicial review of questions of law in the UK, USA, Canada and the EU. The topic is important and is fertile for comparative analysis. The analysis reveals the divergences between the legal systems, and sets out the four principal judicial strategies used. They are judicial substitution of judgment over jurisdictional legal issues; substitution of judgment by the reviewing court on all issues of law; substitution of judgment on certain legal issues and rationality review on others, where the distinguishing criterion is legislative clarity in defining the disputed term; and, finally, substitution of judgment and rationality review where the criterion for the divide is a broader range of functional considerations.

Exigencies of space preclude detailed treatment of the kind found in domestic literature. However, the comparative analysis, drawing on this literature can inform debate over judicial review of law and shed light on the normative differences between the systems, as well as the efficacy of the test for review in each regime.

1. UNITED KINGDOM

1.1 The Early Jurisprudence: Limits to Substitution of Judgment

The United Kingdom courts have exercised judicial review over issues of law for at least three hundred years (Henderson 1963; Rubinstein 1965; Craig 2015, 2016). The dominant approach until the latter part of the twentieth century was the collateral fact doctrine, which was also known as the preliminary or jurisdictional fact doctrine. It was, notwithstanding its nomenclature, used to determine reviewability of questions of law as well as fact.

The essence of the approach was as follows. There were certain preliminary questions that a tribunal or agency had to decide before it could proceed to the merits, such as whether it was properly constituted and whether the case was of a kind referred to in the statute. The tribunal made the initial determination, but its decision was not conclusive. If the court believed that the determination was legally erroneous then the tribunal's

conclusion was a nullity.[1] If, however, the issue was classified as non-jurisdictional then the legal interpretation was for the administrative authority, unless there was an error of law on the face of the record.

The key issue, which was never satisfactorily resolved for three centuries, concerned the legal issues that would be held to be jurisdictional/preliminary/collateral. The rationale for this difficulty is not hard to divine. All statutes granting power to the initial decision-maker are predicated on certain conditions. The statute will state that if X1, X2, X3 etc. exists, then the tribunal or agency may or shall do Y: if an employee is injured in the course of employment then compensation may or shall be given. This statute contains three 'if X' conditions that involve legal issues concerning the meaning of employee, injury, and course of employment. More complex statutes contain a longer list of such conditions. The collateral/preliminary/jurisdictional fact doctrine was premised on the assumption that certain X conditions would be regarded as jurisdictional, with the consequence that the court would substitute judgment on the disputed term, while other X conditions would be regarded as non-jurisdictional and non-reviewable, unless the legal error was on the face of the record.

The problem was that the constituent legal elements of all X factors conditioned jurisdiction. The courts repeatedly applied the test, but with scant explanation as to why a legal factor was jurisdictional/collateral in one case, but not another (Gordon 1931, 557–87.). The most sophisticated judicial attempt to solve the conundrum was unconvincing. Thus Diplock LJ[2] distinguished between two situations. The first was where the tribunal's misconstruction of the statute related to the *kind* of case into which it was meant to inquire. This error would go to jurisdiction and the reviewing court would substitute judgment concerning the legal term. The second situation was where the tribunal misconstrued the statutory description of the *situation* that the tribunal had to determine. This would, at most, be an error of law within jurisdiction, and would only be reviewable if it was on the face of the record.

It was, however, impossible to draw this line with any certainty, because the definition of 'kind' or 'type' was inevitably comprised of statutory descriptions of the 'situation' the tribunal had to determine. The former represented the sum, the latter, the parts. Thus any summary of the *kind* of case into which the tribunal was intended to inquire required consideration of the *situations* the tribunal had to determine, consisting primarily of the statutory terms in the legislation. The distinction between *kind* or *type* on the one hand, and *truth* or *detail* or *situation* on the other, proved illusory (Craig 2016). There was no predictability *ex ante* before the court's decision, and little *ex post facto* rationality to see why cases were decided differently.

1.2 The Early Jurisprudence: Tensions within the Case Law

The difficulties inherent in the collateral fact doctrine were compounded because the courts sometimes applied a more limited test of review. Thus while most cases applied

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[1] *Bunbury v Fuller* (1853) 9 Ex 111, 140.

[2] *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862, 887–905. *cf.* Lord Diplock's view in *Re Racal Communications Ltd* [1981] AC 374.

this doctrine, some decisions adopted the commencement theory of jurisdiction, whereby jurisdiction was said to depend not on the truth or falsehood of the charge, but upon its nature, and was determinable at the commencement not at the conclusion of the inquiry (Craig 2016).[3]

Attempts at reconciliation were said to turn on differences in the legislative instrument. Thus in *R v Commissioners for Special Purposes of Income Tax*[4] Lord Esher MR distinguished between two types of tribunal. There were tribunals which had jurisdiction if certain conditions existed but not otherwise; it was not for the inferior tribunal to rule conclusively on their existence. There could, however, be a tribunal with jurisdiction to determine whether the preliminary conditions existed; here it would be for the inferior tribunal to decide upon all the conditions.

This reconciliation was, however, one of form rather than substance. It was impossible by juxtaposing the relevant legislation to determine why a case fell in one category rather than the other. All statutes say if X1, X2, X3 etc., exists, you may or shall do Y. The answer as to who should determine the meaning of X was dependent upon the theory of jurisdiction. The two groups of cases reflected different answers to that question. Lord Esher's analysis simply reiterated *ex post facto* that divergence, but did not provide an *ex ante* tool to determine which group a case should fall into. A statute might assign the relative meaning of 'if X', between courts and tribunals differently in diverse areas, but this could not be determined by asking whether the statute required certain conditions to exist before a decision was reached, since statutes always did this.

1.3 The Modern Jurisprudence: Substitution of Judgment for Error of Law

The modern jurisprudence dates from the House of Lords' decision in *Anisminic*.[5] It did not formally consign the collateral fact doctrine to history, but nonetheless broadened judicial review. It held that the courts could intervene where the tribunal should not have entered upon the inquiry, and also where having correctly begun the inquiry the tribunal misconstrued the statute so that it failed to deal with the question submitted to it, failed to take account of relevant considerations, or asked the wrong question. These criteria gave the courts far-reaching tools for judicial intervention.

The potential of *Anisminic* became evident in *Page*.[6] Lord Browne-Wilkinson held that *Anisminic* rendered obsolete the distinction between jurisdictional and non-jurisdictional errors of law. Thenceforward, it was to be assumed 'that Parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision *ultra vires*'.[7] In general therefore, 'any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law'.[8] The constitutional foundation was said to be the *ultra vires* doctrine: the law applicable to a decision made

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3 *R v Bolton* (1841) 1 QB 66, 72–4.
4 (1888) 21 QBD 313.
5 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
6 *R v Hull University Visitor, ex parte Page* [1993] AC 682.
7 Ibid., 701.
8 Ibid .,702.

by a tribunal, etc., was the general law of the land, and hence it would act *ultra vires* if its decision was erroneous under the general law.[9] It was, however, only relevant errors of law which would lead to nullity. The error of law had to affect the challenged decision, and differing presumptions existed for administrative bodies and for inferior courts (Endicott 1968).

1.4 The Modern Jurisprudence Qualified: Limits to Substitution of Judgment

The general proposition that all errors of law are reviewable and that the reviewing court will substitute its judgment has been qualified.

South Yorkshire Transport Ltd[10] held that the reviewing court will substitute judgment on a disputed legal term, even where it is open to a range of possible meanings. However where the legal meaning chosen by the court was itself open to a spectrum of possible meanings, it would only intervene if the decision reviewed was irrational.

The Supreme Court in *Cart*[11] established a more significant limit to the test in *Page* for tribunals governed by the Tribunals, Courts and Enforcement Act 2007, which created a two-tier regime of adjudication distinct from the ordinary courts for many areas of administrative justice. The Supreme Court held that there must be some judicial review of such tribunal decisions, since otherwise significant errors of law could be perpetuated. It was, nonetheless, mindful of the status/expertise of the tribunals. This was reflected in the 'restrained' test as to when the courts would review legal issues decided by the Upper Tribunal: the claimant must show that the case raised some important point of principle or practice, or that there was some other compelling reason for the ordinary court to undertake judicial review.

Page has also been affected by the Supreme Court's decision in *Jones*.[12] Case law prior to *Anisminic* provided little guidance as to the law/fact distinction, because the collateral fact doctrine applied to both. The decision in *Page* that all errors of law are jurisdictional meant that the distinction became more significant. There can be analytical disagreement as to whether a question should be one of law or fact,[13] and as to the conclusions that follow from these labels. Thus, as Lord Hoffmann stated, 'there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment'.[14]

This approach informed *Jones*. The Supreme Court held that where a specialized statutory scheme had been entrusted to the new tribunal system, it was for the Upper Tribunal to develop guidance concerning the central legal terms, so as to reduce the risk of inconsistent results by different First-tier panels. Lord Carnwath emphasized that the distinction between law and fact could be affected by policy and expediency, and that relevant

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[9] Ibid.

[10] *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23; *R (on the application of BBC) v Information Tribunal* [2007] 1 WLR 2583.

[11] *R (Cart) v Upper Tribunal* [2011] UKSC 28; *Eba v Advocate General for Scotland* [2011] UKSC 29.

[12] *R (Jones) v First-tier Tribunal* [2013] UKSC 19.

[13] *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929.

[14] *Moyna*, Ibid., [44]; *Lawson v Serco* [2006] ICR 250, [34].

factors included the relative expertise of the tribunal and court. He was, moreover, willing to give interpretive weight to a tribunal's conclusion on an issue of law.[15] It remains to be seen how much interpretive weight the courts are willing to give, and what test of review is used in such instances.[16]

1.5 The Modern Jurisprudence: Normative Assumptions

Few will shed tears over the demise of the jurisdictional fact doctrine. It is nonetheless important to consider why the courts persisted with it for so long. The implicit message in the modern case law is that the earlier jurisprudence failed to realise that the distinction between jurisdictional and non-jurisdictional legal error was unnecessary/illogical. This comforting picture of modern superiority over dated formalism is misleading. The courts adopted the jurisdictional fact doctrine or the commencement theory in part because they believed that these best incorporated a balance between judicial control and tribunal autonomy (Craig 1995). The courts did not believe that they should substitute judgment on every legal issue, nor did they feel comfortable deciding the precise meaning of all statutory conditions. They also realized that some judicial control was required. The jurisdictional fact doctrine and the commencement theory were the tools for preserving control, while giving some leeway to tribunal autonomy. These tests were defective, but we should not forget their underlying rationale.[17]

The approach whereby the reviewing court substitutes judgment on all issues of law has been defended academically (Gould 1970), but has also been challenged (Beatson 1984; Williams 2007; Daly 2011; Aronson 2015; Craig 2016). There is no *a priori* reason why the courts' view on the legal meaning of a statutory term should always be preferred to that of the agency. It is not demanded by constitutional theory, nor is it supported by judicial practice. For 300 years the collateral fact doctrine was premised on the existence of non-jurisdictional errors of law that were only reviewed if there was an error on the face of the record. The modern approach in *Page* is based on the presumption that the courts' interpretation of phrases such as 'employee', or 'resources' is necessarily to be preferred to that of the agency, and that substitution of judgment is the only way to control agency interpretations. Neither assumption is well founded. The courts' interpretation may not necessarily be better than the agency's, and control may be maintained through a rationality test rather than substitution of judgment. This has been recognized more recently by the Supreme Court in *Cart*, *Jones* and subsequent jurisprudence.

The *ultra vires* principle provided the conceptual justification in *Page* for the proposition that all legal issues are subject to review and substitution of judgment. However Sir John Laws has cogently argued that this was a 'fig-leaf' to conceal the reality of

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[15] *Jones* [2013] UKSC 19, [65]; *N v Advocate General for Scotland* [2014] UKSC 30, [26]–[28]; *Pendragon plc v Revenue and Customs Commissioners* [2015] UKSC 37, [49]–[51]; *AM v Secretary of State for Work and Pensions* [2015] UKSC 47, [45].

[16] *Revenue and Customs Commissioners v Atlantic Electronics Ltd* [2013] EWCA Civ 651; *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber)* [2014] EWCA Civ 1554; *ZP (South Africa) v Secretary of State for the Home Department*, 2 July 2015.

[17] For a different view of the UK case law, see the structural argument in Cane 2016, Ch. 6, and the response in P. Craig, 'Structuralism and Administrative Law: Reflections', forthcoming.

judicial intervention (Laws 1992). There was moreover a duality latent in the meaning of the *ultra vires* principle in *Page* (Craig 1998). On the one hand, it connoted the idea of presumed legislative intent, in the sense that Parliament intended that all errors of law should be open to challenge. On the other hand, it was equated with the general law of the land, including the common law. It was no longer based exclusively on legislative intent, and simply became the vehicle through which the common law courts controlled the administration.

2. UNITED STATES OF AMERICA

2.1 *Chevron*

Chevron[18] is the modern foundation in the US for error of law, even though it was not considered especially novel at the time (Merrill 2006). It has nonetheless been cited over 7,000 times and has generated very considerable scholarship.[19] The case established a two-part test for judicial review.[20]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question in issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The conceptual foundation for the two-part test provided by Justice Stevens was cast primarily in terms of delegation.[21]

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute. Sometimes the legislative delegation to the agency is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Justice Stevens also made reference to agency expertise and accountability in addition to delegation (Shapiro and Fisher 2013). Thus 'considerable weight' should be given to agency interpretation when a decision involved reconciliation of conflicting policies, where the competing interests had not been fully resolved by Congress, and where the agency had particular expertise in the matters within its remit.[22]

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18 *Chevron USA Inc v NRDC* 467 US 837 (1984).
19 For valuable overviews: Sunstein (1990); Merrill and Hickman (2001).
20 *Chevron*, n 18, 842–3.
21 Ibid., 843–4.
22 Ibid., 844, 865–6.

Scholars who later became justices of the Supreme Court rationalized *Chevron* in terms of Congressional intent, that is, courts deferred to agencies because of instruction from Congress. They recognized that the intent was largely fictional, based on what a hypothetical reasonable legislator might have wanted (Breyer 1986; Scalia 1989), but felt that *Chevron* provided a rule of law against which Congress could legislate (Scalia 1989).

Chevron has appeal from a comparative law perspective. It recognizes that issues may be characterized as 'law' for the purposes of judicial review, but that this does not always demand substitution of judgment by the reviewing court. The recognition of agency interpretive autonomy over statutory terms, subject to control through rationality review, is an attractive feature of US law, irrespective of whether one accords primacy to delegation, expertise or political legitimacy as the rationale for the two-part test. *Chevron* has, however, proven problematic, as the subsequent discussion reveals.

2.2 The Relation Between Parts 1 and 2: Intentionalism v Textualism

The relationship between the two parts of *Chevron* is central,[23] since the court is the decider under part one and the overseer under part two (Strauss 2008). This relationship is determined primarily by part one of the test, because if Congress is deemed to have spoken to the meaning of the term that is determinative. There has, however, been disagreement concerning the way to decide if Congress has addressed the precise meaning of the term at issue.

Those who subscribe to intentionalism build on Justice Stevens' brief footnote in *Chevron*, where he said that if a court employing traditional tools of statutory construction ascertained that Congress had an intention on the precise question at issue then that was the law and must be given effect.[24] He viewed the 'traditional tools of statutory construction' broadly, taking account of general legislative history, the history of the particular legislation before the court, and its textual wording. This approach to *Chevron* step one was opposed by textualists, who contended that it should be limited to construction of the legislative text, to the exclusion of matters such as legislative history, and broader policy debates. Thus whereas intentionalists focus on resolvability through consideration of a broad range of factors to decide whether Congress has spoken to the question, textualists seek to confine step one to clarity, as determined by the wording of the legislative text (Scalia 1989). The tension between the contending views is exemplified in the following cases.

Cardozo-Fonseca[25] was concerned with whether the burden of proof standards in two statutory provisions were in substance the same, as the government contended, or whether they were different. Justice Stevens resolved the case under *Chevron* step one, and concluded that the tests were different. He reached this conclusion by taking account of the respective legislative texts and legislative history. Justice Scalia concurred, based on the wording of the statutes, but disagreed with Justice Stevens' approach to step one.

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[23] For debate as to whether *Chevron* is best conceived in terms of a two-part or one-part test, see Stephenson and Vermeule 2009, and Bamberger and Strauss 2009.

[24] *Chevron*, n 18, fn 9.

[25] *Immigration and Naturalization Service v Cardozo-Fonseca* 480 US 421 (1986).

This approach would, said Justice Scalia, lead to substitution of judgment whenever traditional tools of statutory construction enabled the court to give some meaning to the disputed term, but this would make 'deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue'.[26] He concluded that 'this is not an interpretation but an evisceration of *Chevron*'.[27]

The approach in *Cardozo-Fonseca* can be contrasted with *Rust*.[28] The case was concerned with whether legislation prohibiting use of federal grants for programmes where abortion was a method of family planning prevented counselling of pregnant women as to their options, including abortion. Chief Justice Rehnquist took a narrow view of *Chevron* step one, concluding briefly that the statute did not speak to the issues of counselling or referral. He concluded that the agency's interpretation was permissible under step two. Justice Stevens dissented. He reached this conclusion on the basis of *Chevron* step one, taking into account the wording of the statutory provision, the statute as a whole, and the importance of free speech within US society.

The battle between intentionalists and textualists continued into the new millennium. The preponderant view is that textualism is in the ascendancy (Pierce 1995; Jellum 2007), although one study found that legislative history was commonly used (Eskridge and Baer 2008). The interpretation accorded to *Chevron* step one shapes the relationship between courts and the executive. The greater the judicial role within step one, the less opportunity there will be for agency interpretation within step two. Conversely the less the judicial role within step one, the greater the opportunity for agency interpretation at step two.

The implications of textualism are not, however, self-evident. There has been academic concern that textualism would cede too much interpretative authority to agencies (Popkin 1993). There has, however, also been concern voiced that textualism undermines agency autonomy, because the court will regularly conclude that the meaning is clear from the text itself and thus resolve the case at step one, even where linguistic precision does not exist (Pierce 1995). Justice Scalia, a textualist, often decided cases at step one, where others might have doubted whether the requisite linguistic precision existed (Scalia 1989).

There are in reality paradoxes and tensions within both the intentionalist and textualist approaches to *Chevron* step one. The tensions in intentionalism can be exemplified by *Brown and Williamson Tobacco*.[29] The issue was whether the Food and Drug Administration (FDA) could denominate nicotine as a drug and regulate it. The majority opinion, delivered by Justice O'Connor, ruled against the FDA and adopted a broad view of *Chevron* step one. Thus in determining whether Congress had spoken to the question the court should consider the particular statutory provision within the overall statutory regime. The court should also consider: the fit between the statute under review and other related statutes; the history of tobacco-specific legislation in previous decades; prior agency practice that had denied regulatory authority over tobacco; and the likelihood that Congress would have delegated such an issue to the agency. Justice Breyer spoke for the dissent, which also decided the case on *Chevron* step one. The factors taken into

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[26] Ibid., 454.
[27] Ibid.
[28] *Rust v Sullivan* 500 US 173 (1991).
[29] *FDA v Brown and Williamson Tobacco Corporation* 529 US 120 (2000). Compare *Massachusetts v EPA* 549 US 497 (2007).

account were not significantly different from those used by the majority. They included the statutory language, its purpose, legislative history, related statutes, and the import of prior agency denial of authority over tobacco. The premise of *Chevron* is that where there is no unambiguously expressed legislative intent on the precise question, the case should be resolved at step two. The majority and dissent both believed Congress had unequivocally addressed the question, but they reached sharply divergent conclusions as to the answer. There is no judicial recognition that given their divergent views of the same materials Congress might not have had an unequivocal view of the issue, so that the case should have been decided at step two. This reveals a deeper tension. Insofar as intentionalism leads the judiciary to consider a broad range of factors to decide whether Congress addressed the meaning of the term, there is greater potential for disagreement as to what those factors indicate. Judicial resolvability is not therefore indicative of Congressional clarity.

There are also tensions inherent in textualism, because the very meaning of the textualist approach can vary. Thus although its proponents deprecate resort to legislative history, narrow textualist approaches seek to divine the precise meaning of the term from the linguistic/dictionary definition, while broader textualist approaches consider also the language and design of the overall statute. There are also tensions in textualism because statutory language will often be open to varying interpretations, depending upon a view of the legislative purpose and other precepts that colour statutory interpretation (Pierce 1995).[30] These tensions are exemplified by *Sullivan*.[31] The case concerned construction of the Secretary of Health powers' under social security legislation that entitled him to make 'proper adjustment or recovery' where a beneficiary had received 'more or less than the correct amount of payment'. The Secretary of Health adopted 'netting' regulations, whereby over and under payments in subsequent months were treated cumulatively. The claimants argued that this method of calculation was inconsistent with legislative provisions mandating that waivers of overpayment could, on certain conditions, be made. Justice Scalia wrote the majority opinion. He took a narrow textualist/dictionary approach to the statutory terms, concluded that the legislative text did not speak unequivocally to the precise question, and held that the netting technique was reasonable pursuant to *Chevron* step two. Justice Stevens, speaking for the dissent, disagreed. He considered the provisions concerning waiver of overpayment in the context of the overall statutory purpose, and concluded that the netting regulations would defeat that purpose.[32]

2.3 Step Zero: Additional Complexity

The new millennium witnessed further complexity, through a step zero that has to be satisfied before *Chevron* deference can be engaged (Sunstein 2006).

In *Mead*[33] the Court held that *Chevron* deference was not applicable to a tariff classification ruling by the Customs Service, because there was no indication that Congress

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30 See, e.g., *Environmental Defense v Duke Energy Corp.* 549 US 561 (2007).
31 *Sullivan v Everhart* 494 US 83 (1990).
32 Ibid., 107.
33 *US v Mead Corporation* 533 US 218 (2001).

intended it to have the force of law, although it might be entitled to respect according to its persuasive weight.[34] An agency determination qualified for *Chevron* deference only when Congress delegated authority to the agency to make rules carrying the force of law, which could be shown by power to engage in formal adjudication, or notice and comment rulemaking, or by some other indication of comparable congressional intent.

Justice Scalia dissented, arguing that whereas there had been a presumption of agency authority to resolve ambiguity in their governing statutes, there was now no such presumption, which the agency had to overcome by showing some affirmative legislative intent to the contrary. The new doctrine was, said Justice Scalia, unsound in principle because there was no necessary connection between the formality of the procedure and the power of the agency administering it to resolve questions of law authoritatively, and because it created an artificial incentive to engage in rulemaking. It was also unsustainable in practice, because the inclusion by the majority of 'some other indication of comparable congressional intent' so as to trigger *Chevron* deference would engender confusion in lower courts.

Mead must be seen in the light of *Barnhart*.[35] The plaintiff contested a Social Security Administration regulation that a claimant for disability benefits did not suffer 'impairment' if the problem was not expected to last at least 12 months. The agency adopted the 12-month rule after notice-and-comment, but the agency had initially taken this view through less formal means. The Court held that the less formal measures did not preclude *Chevron* deference. *Mead* was construed as saying that *Chevron* deference would depend on 'the interpretive method used and the nature of the question at issue'.[36] Justice Breyer, giving the opinion of the Court, concluded that:[37]

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Step zero created practical problems for lower courts, which struggled to decide whether *Chevron* deference is warranted, more especially given the interpretation accorded to *Mead* in *Barnhart* (Bressman 2005; Sunstein 2006). The outcome will, moreover, often be the same irrespective of whether it is reached through *Chevron* deference, or through judicial assessment tempered by according due weight to the agency under *Skidmore* (Sunstein 2006). These concerns have been voiced within the Supreme Court.[38] There is the further problem that the Supreme Court has used versions of deference in addition to those in *Chevron* and *Skidmore* (Eskridge and Baer 2008).

There are also difficulties with step zero in terms of principle, insofar as *Mead* states that *Chevron* deference only applies to agency determinations with the force of law. The historical meaning of 'force of law' has been superseded in recent years (Sunstein 2006;

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[34] Pursuant to the ruling in *Skidmore v Swift & Co* 323 US 134 (1944).
[35] *Barnhart v Walton* 535 US 212 (2002). See also *Gonzales v Oregon* 546 US 243 (2006).
[36] Ibid., 222.
[37] Ibid.
[38] *Department of Environmental Conservation v EPA* 540 US 461, 517–518 (2004).

Merrill and Watts 2002). Formal agency adjudication and notice and comment rulemaking are now regarded as the primary exemplars of this test, the best explanation being that they ensure some measure of formal agency deliberation, transparency and participation. This is nonetheless problematic. The criteria for formal adjudication are narrow,[39] with the consequence that an agency might feel compelled to use rulemaking. Moreover the interpretation of *Mead* in *Barnhart* marked a shift to functional criteria, cast in terms of agency expertise, the interstitial nature of the legal inquiry, etc., and away from the form through which the agency decision was made.

2.4 Rejection of the Jurisdictional/Non-Jurisdictional Divide: Avoidance of Yet Further Complexity

The difficulties faced by US courts would have been further compounded if *City of Arlington*[40] had gone the other way. The issue was whether *Chevron* should be held inapplicable to jurisdictional issues, which would be decided by the court itself, with no deference to agency interpretation. This was the view favoured by the dissent. The majority held that when a court reviewed an agency's interpretation of a statute that it administered, the question was always whether the agency was within the bounds of its statutory authority. There was no distinction between jurisdictional and non-jurisdictional issues. The salient question was always whether the agency had gone beyond what Congress permitted it to do, and there was no principled basis for demarcating an arbitrary subset of 'jurisdictional' questions from the *Chevron* framework.

Three hundred years of UK legal history attests to the difficulty of dividing jurisdictional and non-jurisdictional issues. The view favoured by the dissent would have further exacerbated difficulties faced by lower courts as they sought to apply what would have been a new step minus one, then step zero and finally the two-part *Chevron* test itself.

3. CANADA

The Canadian Supreme Court has 'ebbed' and 'flowed' on the test for review of error of law (L'Heureux-Dube 1997; Brown and Evans 1998, Chs. 14–15; Mullan 2003). There were remnants of reasoning in terms of jurisdictional error, but the general approach was to use varying intensities of review: correctness, reasonableness *simpliciter*, and patent unreasonableness. The Supreme Court in *Pushpanathan*[41] identified factors that would be taken into account when deciding on their applicability, including: the existence or not of a privative clause; the relative expertise of the decision-maker; the purpose of the legislation; the contested provision; and whether the problem involved law, fact or elements of both. The Canadian approach was, therefore, 'functional and pragmatic'. Insofar as the term jurisdictional was used it was as a label for a provision that a court

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[39] *Dominion Energy Brayton Point, LLC, v EPA* 443 F 3d 12 (2006).

[40] *City of Arlington, Texas v FCC* 569 US __ (2013).

[41] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982; *Dr Q v College of Physicians and Surgeons of British Columbia* [2003] 1 SCR 226; *Voice Construction Ltd v Construction & General Workers Union* [2004] 1 SCR 609.

determined must be answered correctly, in accord with the preceding approach (Huscroft 2006). The precise balance of the functional and pragmatic criteria could, however, be problematic (Mullan 2003; Keyes 2006).

The leading decision is now *Dunsmuir* (Mullan 2008).[42] It reduced the tests for review to correctness and reasonableness, abolished the distinction between reasonableness *simpliciter* and patent unreasonableness, and renamed the test the 'standard of review analysis' rather than the 'pragmatic and functional analysis'. The correctness test connoted judicial substitution of judgment. Rationality review embraced process, how the decision was reached, its transparency and intelligibility; and substance, whether it was within the range of reasonable outcomes. Deference, construed as respect for the primary decision-maker, informed the rationality test on fact and law.

The correctness test was applicable to 'true' jurisdictional issues, whether the tribunal had authority to make the inquiry; and questions of law that were of central importance for the legal system and outside the agency's area of expertise, such as issues of constitutional interpretation, or the jurisdictional divide between two agencies. Rationality review would be appropriate where there was a privative clause; the tribunal had expertise over a discrete administrative regime; the review was of fact or discretion; or there was an issue of law that did not warrant correctness review, because the factual and legal issues were closely intertwined, and/or where the agency was interpreting its own statute.

The *Dunsmuir* decision is to be broadly welcomed, but there are nonetheless issues that are unresolved (Daly 2011), as is apparent from the separate judgment by Justice Binnie (Mullan 2008). The resurrection of jurisdictional error is likely to create problems. The impact of statutory rights of appeal on the *Dunsmuir* approach to standards of review is moreover unclear. The majority's decision is framed in relation to administrative tribunals, and hence its application to other forms of administrative decision-making will evolve over time. Last but not least, the decision is equivocal as to whether there might still be differentiation within the rationality standard, dependent upon the more particular degree of deference that the court believes is appropriate in the instant case.

4. EUROPEAN UNION

EU law provides an interesting contrast to US and Canadian law. There has been almost no analysis of the meaning of law, nor has there been discussion of the test when the courts undertake such review. This is so even though there is much judicial review, and issues of law frequently require resolution.

The initial decision-maker, normally the Commission, will be accorded authority on certain conditions, derived from a Treaty article or EU legislation. A claimant will contend that the Commission has erred in the interpretation of these conditions. There are thousands of such cases in EU law. The EU courts' general approach is to substitute judgment on questions of law. They lay down the meaning of the disputed term, and if the Commission interpretation is at variance with this, it will be annulled. The general

[42] *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

assumption is that the meaning of a term in the Treaty or EU legislation is a question of law for these purposes (Craig 2012, Ch. 15).

The EU courts have sometimes tempered the force of this proposition. They have on occasion characterized language in a Treaty article or in Union legislation as involving discretion rather than pure questions of law. They have also on occasion characterized the issue as the factual application of a legal concept to an individual case. They will then focus on the evidentiary basis for the Commission's finding and will accord it some discretion when determining whether the facts justify the application of the legal concept. However, review of both fact and discretion has become more intensive over time (Craig 2012, Ch. 15).

It might be argued that the EU approach is not fundamentally different from that in the other systems discussed. Thus although the EU courts' default position is substitution of judgment for error of law, this is qualified by classifying an issue as fact or discretion when the courts wish to accord greater autonomy to the initial decision-maker. This remains different from the position in the US and Canada, but the variation is less significant than might appear.

There is some force in this view, but it does not tell the whole story. The reality is that reclassification is not very common, and there are differing normative assumptions that render the contrast between the legal systems more marked. The very great majority of EU Member States are based on civil law not common law. For those of a civil law persuasion it is axiomatic that courts decide issues of law. The conceptual premise of US, Canadian law, and to a lesser extent UK law, that some interpretive autonomy over legal issues should be accorded to agencies, whether on grounds of delegation, expertise or accountability, would in general not be accepted by those in the civil law tradition.

The rationale for this position is eclectic. It might be based on interpretation of the country's constitution, which entrusts resolution of legal issues to courts. It might be thought to be axiomatic that courts decide all questions of law. Courts might be unwilling to accept that administrators could be better placed to interpret legal issues than courts. Positivist conceptions of law may incline judges against the conclusion that there can be diverse, reasonable interpretations of the same legal term. There may well be countries where for historical reasons less trust is placed in the executive. There may be institutional considerations, as in the case of the French Conseil d'Etat, where the judges spend time within the administration and are, therefore, less likely to be swayed by arguments of relative expertise.

It is therefore unsurprising that the CJEU, composed of a judge from each Member State, has taken the same position. They come with their civil law training, which inclines them to conclude that the CJEU should substitute its judgment on issues of law. Even if a particular judge were to find the US or Canadian approach attractive, there would be constraints against its adoption, since the CJEU gives a single ruling, and hence the judge would be unlikely to persuade others to adopt such an approach. Equally important is the fact that CJEU judgments are binding on all national courts. Thus even if the judge could persuade his fellow judges of the merits of the US or Canadian approach, he would rightly be cautious about issuing a CJEU judgment that would be regarded by national courts as at variance with civil law tradition.

5. CONCLUSION

5.1 One Test or Two: Contending Arguments

It might be argued that the EU approach is to be preferred, either because courts should, as a matter of principle, substitute judgment on all issues of law, and/or because of the difficulties evident in US, Canadian and UK jurisprudence. The contrasting premise is that judicial control over issues of law does not always demand substitution of judgment, and that some interpretive autonomy should sometimes be afforded, subject to rationality review. There have been difficulties in deciding upon the criteria to determine the divide between substitution of judgment and rationality review, but this does not undermine the soundness of the premise itself.

In certain respects the EU approach renders life 'easier' because there is only one test, substitution of judgment, which is applicable to all issues of law analytically defined. This is, however, to say no more than that the presence of only one arbiter on the meaning of such issues produces greater certainty than a division of responsibility. This 'certainty', however, comes at a price. The agency would be reduced to a mere fact-finder, no weight would be accorded to its opinion on the legal interpretation of the statutory terms, the courts would be embroiled in the minutiae of all legal issues and the law/fact/discretion distinction would be manipulated as an escape device when the court wished to accord greater latitude to the agency. Certainty concerning the legal test for review should, moreover, not be confused with certainty of outcome, since it can be difficult to predict whether the reviewing court will find that the agency's interpretation was correct.

5.2 Two Tests: the Criteria for the Divide

Legal systems that use two tests have used different criteria to determine when courts should substitute judgment and when some interpretive autonomy should be accorded to the decision-maker.

The Canadian approach is still pragmatic and functional, notwithstanding the disavowal of this label in *Dunsmuir*. The line between substitution of judgment and rationality review is demarcated through consideration of the range of factors set out above. These are sensible considerations, with the caveat that the jurisdictional factor should be dropped. UK law provides 300 years of history to show that it is impossible to demarcate between 'true' or 'narrow' jurisdictional inquiries as to whether the agency had authority to make the inquiry and other statutory conditions in the enabling legislation. The distinction is unsustainable in theory (Craig 2016, Ch. 16), nor is it justified in normative terms (Craig 2016, Ch. 16; Sunstein 2006).

The principal thrust of the US approach in *Chevron* has, by way of contrast, been on legislative clarity as to the disputed term. This is the criterion for substitution of judgment within step one, the rationale for proceeding to step two being express or implied delegation to the agency to decide on the meaning of ambiguous terms, subject to judicial control through rationality review. This is so notwithstanding the differences between intentionalists and textualists, and notwithstanding the fact that expertise and accountability also featured in the *Chevron* reasoning.

There is an interesting contrast with the pre-*Chevron* case law, where the court some-

times substituted judgment, and sometimes used rationality review. Commentators pre-*Chevron* rationalized the jurisprudence by adverting to factors that might be influencing the judicial choice as to the test for review. The list included the nature of the disputed statutory term, the statutory language, purpose and context, agency expertise, and the cogency of the agency's explanation for its interpretation (Davis 1972, Ch. 30; Jaffe 1965, Ch. 14). These explanations, therefore, included statutory clarity, but also broader functional considerations. There are some hints of a revival of this approach within US law, most markedly in the judgments of Justice Breyer in *Barnhart*,[43] and *Long Island Care at Home*,[44] which echo his earlier academic writing (Breyer 1986).

It might be argued that this broader functional approach would engender greater uncertainty concerning the appropriate test for review, but certainty has not been a conspicuous feature of the US jurisprudence. Indeed the most detailed empirical study of Supreme Court decisions concluded that the existing deference regime was complex in theory and unpredictable in practice; the Court applied a plethora of doctrines concerning deference in addition to *Chevron*; individual Supreme Court Justices differed over the inter-relation of these different deference doctrines; and that in over 50 per cent of cases studied the Supreme Court applied no deference doctrine at all, reaching the decision through independent judgment, (Eskridge and Baer 2008). The same authors proposed criteria to decide when deference ought to be afforded to agencies that are close to, although not identical with, the approach adopted in Canada.[45]

There will inevitably be differences of view as to the criteria that should determine the divide between substitution of judgment and rationality review. The *Chevron* focus on legislative clarity as to the disputed term has, however, been problematic, and it is not self-evident that this should be the primary or sole criterion. The reality is that other factors underlie the Court's rulings, as attested by the fact that agency success rates are positively correlated to agency expertise, statutory subject matter, and consistency in agency interpretation over time (Eskridge and Baer 2008). A better approach would be one that ceases to make the legal criterion for the two-part test turn so predominantly on the search for legislative clarity to the exclusion of other functional considerations. This would accord with past academic discourse, and it might better capture the reality of judicial decision-making.

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[43] *Barnhart*, n 35.
[44] *Long Island Care at Home, Ltd v Coke* 551 US 158, 165 (2007).
[45] Whether the agency interpretation is made pursuant to a Congressional delegation of law-making authority; whether the agency is applying special expertise and using its understanding of the facts to carry out Congressional purposes; and whether the agency interpretation is consistent with larger public norms, including constitutional values.

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