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Introduction

1.1 Vigilance and Restraint: the Variation of the Depth of Scrutiny

One of the key features of the system of judicial review is the variation of the depth of scrutiny by the supervising court when examining administrative decisions. The circumstances of different cases lead to different emphases being drawn between the competing notions of judicial vigilance and restraint.[1] But the *manner* in which this balance is mediated and the depth of scrutiny is modulated differs across time and across jurisdictions. This book examines the methodologies used to vary the depth of scrutiny in English and other Anglo-Commonwealth (Australia, New Zealand and Canada) systems of judicial review over the last 50 years or so.[2]

In this book I identify four schemata which are employed to organise the modulation of the depth of scrutiny:

(a) *scope of review*, based on an array of formalistic categories which determine whether judicial intervention is permissible;[3]
(b) *grounds of review*, based on a simplified and generalised set of grounds of intervention;[4]
(c) *intensity of review*, based on explicit calibration of the depth of scrutiny taking into account a series of constitutional, institutional and functional factors;[5] and

[1] For the adopted language of 'vigilance' and 'restraint', see Michael Fordham, 'Surveying the Grounds' in Peter Leyland and Terry Woods (eds.), *Administrative Law Facing the Future* (Blackstone, 1997) and Michael Fordham, *Judicial Review Handbook* (6th edn, Hart Publishing, 2012), [P14].
[2] See text to n. 60 for extended discussion of the territorial scope of this book, along with an explanation of the jurisdictional descriptors used.
[3] See Chapter 2.
[4] See Chapter 3.
[5] See Chapter 4.

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(d) *contextual review*, based on an unstructured (and sometimes instinctive) overall judgement about whether to intervene according to the circumstances of the case.[6]

These four schemata – loosely drawn from the language and structure of Professor Stanley de Smith's acclaimed judicial review textbook as it changed over its seven editions – provide structure for the study. For each of the schemata, doctrinal, theoretical and normative dimensions are examined.

The *doctrinal* dimension demonstrates that modulation of the depth of scrutiny is ubiquitous in the Anglo-Commonwealth family of common law jurisdictions.[7] The manner in which it manifests itself, however, is not constant or uniform; I identify the different ways the variation of the depth of scrutiny has been organised and given effect – distilling the four schemata described above. De Smith's textbook on judicial review is used to frame this doctrinal study; as well as employing the language seen in the textbook over time to mark the different methodologies, the doctrinal study echoes the subject-matter, comparative approach and life-time of de Smith's textbook.

When identifying the different schemata, I describe the basic character of the different approaches and identify where these approaches are, or have been, deployed. While each method can be seen in a number of jurisdictions at different times, some associations of varying strength are identified. Australia remains strongly committed to the formalistic scope of review approach that was historically applied in English administrative law. English law today still founds itself on a grounds of review approach, but there is some pressure towards the more circumstantial approaches of intensity of review and contextual review particularly when human rights are engaged. Grounds of review also have strong currency in New Zealand, but the preference for methodological simplicity means contextual review also finds strong favour. Canada has long rejected approaches based on doctrinal categories or grounds and the modulation of the depth of scrutiny assumes a central role. However, the way in which the deferential forms of review have been expressed, in contradiction to correctness review, has varied between variegated forms of reasonableness (intensity of review) or a simplified, umbrella form of reasonableness where the depth of scrutiny implicitly floats according to the circumstances (contextual review).

[6] See Chapter 5.
[7] See further Section 1.2.

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The *conceptual* dimension turns to the conceptual foundation and justification for each schemata.[8] Doctrinal diversity is matched by conceptual diversity: scholars support different approaches to the mediation of the balance between vigilance and restraint. Through the lens of the debate on the constitutional underpinnings of judicial review, I draw out the relationship between the manner in which the depth of review is modulated and the constitutional dynamics of judicial review generally, that is, whether the work of judges on judicial review is mandated by reference to legislative intent (the ultra vires school) or independently by the common law (the common law school). By seeking to associate a number of scholars with the different schemata I have identified, I seek to illuminate the conceptual basis of the schemata by inquiring into the scholars' attitudes about the relationship between the administration, legislature and the courts.

A number of general points are evident. The scope of review approach is favoured by formalists, who tend to support ultra vires as the constitutional justification of judicial review. They emphasise a strong linkage between judicial methodology and legislative mandate, and seek to minimise judicial discretion. Those supporting the grounds of review schema tend to be aligned with the common law school. They demonstrate more faith in the judicial role and are more open to normative argument by judges. However, they show a preference for substantive values to be translated into the architecture of judicial review doctrine, rather than deployed without structure or constraint. The intensity of review schema garners support from some in the ultra vires school. In a concession to the problems associated with the line-drawing of categorical approaches, a more open-textured approach based on the balancing of competing factors is supported. The overarching emphasis on legislative intent remains but, rather than effected indirectly through doctrinal proxies, it assumes a key role in the explicit calibration of the depth of review. Contextual review is anathema to those from the ultra vires school; it only finds support from some in the common law school or from those who seek to stand outside the ultra vires–common law contest. The centrality of judicial discretion to the contextual review method means those supporting it promote a rarefied role for judges within the constitutional order.

Thus, the different schools of thought on the constitutional underpinnings debate do not map neatly onto the different schemata for modulation

[8] See further Section 1.3.

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of the depth of scrutiny. But some conceptual patterns relating to the nature of institutional relationships within the administrative system can be identified.

Finally, the *normative* dimension evaluates the efficacy and virtue of each schema, assessing their strengths and weaknesses as mechanisms for mediating the balance between vigilance and restraint.[9] I employ Fuller's principles of legality/efficacy to guide this normative enquiry: generality, accessibility, prospectivity, clarity, stability, non-contradiction, non-impossibility, and congruence (with hortatory versatility added too). These principles are a useful means to interrogate the nature of power possessed by the courts in the supervisory jurisdiction and to assess the virtue of the different ways they modulate that power, through the variation of the depth of scrutiny.

While the principles are not intended to operate as a summative checklist to determine an ideal-type schema, a number of more general conclusions are drawn. The scope of review schema tends to harness a two-track style. While ostensibly delivering the rule-structure encouraged by Fuller, closer analysis reveals latent judicial discretion and strong potential for doctrinal manipulation. Thus, its performance against most criteria is weaker than is apparent, particularly due to a lack of congruence between the expression and application of the rules and an overall lack of clarity and coherence. At the other end of the spectrum, contextual review's rejection of doctrinal structure in favour of judicial judgement and instinct means it performs poorly against most criteria. The grounds and intensity of review schemata both perform admirably against Fuller's virtues, although emphasising different qualities. The distinction between the two turns on the extent to which calibration of the depth of review takes place directly, through a judgement based on enumerated conceptual factors, or indirectly, through the animation of doctrinal categories and vacillation between them. Notably, the doctrine–discretion dynamic is manifested differently. None performs perfectly, given the various trade-offs involved. However, the analysis allows us to recognise the strengths and weaknesses of the different schemata when deliberating on appropriate forms of mediating the balance between vigilance and restraint.

In the sections that follow I outline my general approach in expanded detail. I explain more fully each of the analytical dimensions – doctrinal, conceptual and normative – and justify the methodology I adopt for each.

[9] See further Section 1.4.

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1.2 Doctrinal Manifestation: Organisational Schemata and Trends

Variability has been an ever-present feature of judicial review method. While it may seem elementary, my study of the last half century or so seeks to put that proposition beyond doubt. The inherent variability of the supervisory jurisdiction is sometimes lost sight of, as administrative law discourse reacts adversely to particular doctrinal manifestations of variability.

Deference: 'That's a dreadful word', says New Zealand's Chief Justice.[10]

Anxious scrutiny: '[J]udges devise catch-phrases devoid of legal meaning', a judge of the UK's Supreme Court complains, 'in order to describe concepts which they are unwilling or unable to define.'[11]

Variegated standards of unreasonableness: An experience 'marked by ebbs and flows of deference, confounding tests and new words for old problems', cautions Canadian Supreme Court judges, 'but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges.'[12]

Jurisdictional and non-jurisdictional error: '[T]he old insistence upon preserving the chimerical distinction between jurisdictional and non-jurisdictional error of law might be interred, without tears', encourages an Australian High Court judge.[13]

These remarks, all from judges drawn from final appellate courts in the Anglo-Commonwealth, provide some insight into the strength of feeling exhibited towards some of the doctrines which have played key roles in modulating the depth of scrutiny in judicial review. A similar set of pejorative comments from scholars, lawyers and bureaucrats could readily be recited. The animated discourse about these doctrines, along with uncomplimentary views about the labels ascribed to them, suggest the modulation of the depth of review in judicial review remains controversial.

The first part of the chapters that follow is devoted to a close study of the key doctrines in judicial review across the Anglo-Commonwealth over the last half-century. As well as demonstrating that variability is commonplace, the purpose is to elicit how the variation of the depth of

[10] *Ye* v. *Minister of Immigration* (NZSC, transcript, 21–23 April 2009, SC53/2008) 179 (Elias CJ).
[11] Lord Sumption, 'Anxious Scrutiny' (ALBA annual lecture, London, November 2014) 1.
[12] *Dunsmuir* v. *New Brunswick* [2008] 1 SCR 190 (Bastarache and LeBel JJ) [1].
[13] *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2000) 179 ALR 238, [212] (Kirby J).

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scrutiny has been differently expressed and the schematic nature of the methodologies associated with that variation. The trends over time are captured, as mentioned earlier, by an analysis of the language, structure and organising principles in de Smith's distinguished textbook, *Judicial Review of Administrative Action*.[14] De Smith's textbook, while not assuming any exalted function in judicial review, provides a series of cues about the nature of the system of judicial review it expounds. It is a convenient entry-point for the examination of Anglo-Commonwealth judicial review doctrine because it adopts a similar style and set of parameters to my study in this book (points I explain in more detail shortly).

Over its seven editions, de Smith's textbook contains a subtle linguistic change in the way in which the supervisory jurisdiction is explained and its principles organised. This study draws out the key shifts as they relate to the modulation of the depth of scrutiny. Most notably, the nomenclature adopted to denominate much of the nature and circumstances of judicial intervention has changed over time: from 'scope of review' to 'grounds of review' to – perhaps, at least formatively – 'intensity of review'. Hinted at, but not yet prominently recognised, is a form of 'contextual review'.

The change in nomenclature, I argue, is not merely linguistic. The evolution in the denomination of judicial intervention speaks to change in the underlying style of review. The organisational transition – from scope to grounds to intensity, along with some limited recognition of context – points to a move away from legal formalism and categorical approaches towards more open-textured and explicitly circumstantial approaches. The linguistic developments are, I suggest, helpful to mark out the different judicial review methodologies and schemata employed over time and throughout the Anglo-Commonwealth, at least in general terms. The various schemata represent different ways to organise and execute the supervisory task. And, importantly, different ways to mediate the balance between restraint and vigilance. Each schema provides distinct ways to modulate the depth of scrutiny to take account of context and the limitations of judicial supervision.

Some care needs to be taken in relation to the definition of these schemata, however. They are constructed in order to capture the dominant methodologies operating in systems of judicial review at different times and in different places. Thus, I construct these schemata recognising a

[14] De Smith, *Judicial Review of Administrative Action* (1st edn–7th edn, Stevens/Sweet & Maxwell, 1959–2013). The textbook is referred to as 'de Smith', along with the appropriate edition number.

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number of limitations in the way they sketch the doctrine they describe. First, they are necessarily generalised précis, limited in the extent to which they can capture the vast and nuanced doctrines existing at any point in time. But the value lies in capturing the essence and emphasis of the different approaches. Secondly, there is some overlap between the given schema and instances where underlying doctrines could plausibly be categorised under multiple schemata. Judgements have been required in a number of situations; I have tried to address the doctrine under the schema which is most emblematic of the underlying methodology and explained my basis for doing so. Thirdly, in some cases, behind the prevalent methodology, some elements of the other approaches may also be seen. This might arise due to a degree of doctrinal diversity within the jurisdiction. Alternatively, in some cases, courts may employ a blend of styles; for example, it is possible that a more formalised scope of review style might be adopted for preliminary matters such as amenability to review, while the heart of the supervision is conducted with a grounds or intensity of review style. Or, for example, in a jurisdiction principally employing a grounds of review approach, aspects of intensity of review or contextual review may appear in a subsidiary way, within particular grounds of review. However, this diversity or blending does not compromise the analysis. A project with these parameters necessarily has a meta-level focus. The key concern is the dominant style and the nature of the methods that are foregrounded in the judicial analysis; inevitably, the schemata are not watertight compartments. The distinctive aspects are captured in my study; outlying instances do not undermine the definition of the emblematic judicial style.

The organisational framework for the doctrinal study, and ultimately the book as a whole, is drawn, as mentioned, from de Smith's textbook. The parameters of the study – subject-matter, timeframe and comparative focus – are cast relatively broadly, echoing the parameters of de Smith's textbook and taking into account the meta-perspective adopted. Below, I rationalise the reliance on de Smith's work and justify the parameters employed for the doctrinal study. In doing so, I explain how my treatment engages with existing scholarship and how this book makes an original contribution.

Organisational Framework: De Smith's Textbook on Judicial Review

The employment of de Smith to frame and organise the doctrinal study is useful in a schematic project of this kind. Judges are situated actors, called on to focus on individual cases. Under the common law style of reasoning,

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they rarely address the architecture of the system of judicial review or turn their attention to the overarching schema.[15] As Galligan explains, the courts 'rarely make efforts to draw out the generalised features of their decisions' or 'attempt to construct a pattern of interlocking rules'; instead, 'each decision is largely a fresh exercise of discretion according to the variables of the situation'.[16] Administrative law textbook writers therefore have an important and palpable structuring and organising role. Taggart recognised the value of studying textbooks in order to chart an intellectual history of a discipline: 'textbooks [allow] us to draw textual and contextual pictures, and to identify significant events and changing concepts'.[17] Further, the assistance of a textbook makes this project possible. While I pay close attention to an extensive corpus of case law across the jurisdictions, the identification and tracing of general schematic trends sometimes requires a degree of approximation that can only be filled by reference to secondary, not primary, sources. It is simply not feasible otherwise. Indeed, the cataloguing project undertaken by de Smith represented a doctorate in its own right. Hence, reliance on secondary sources is, in some cases, essential to generate schemata, in order that the theoretical and normative dimensions of the schema can also be examined.

De Smith's textbook is, in particular, especially suitable for this task. Its *lifespan*, definition of *subject-matter*, *comparative focus*, *style* of exposition and overall *standing* mean it provides a convenient foundation for the doctrinal study.

First, the *lifespan* of de Smith's textbook is just over a half-century, with seven editions published between 1959 and 2013. Although the authorship, structure and organisational language changed over that period, de Smith's original style was retained throughout. The original edition was a published version of a PhD thesis completed at the London School of Economics and Political Science in 1959.[18] De Smith completed one further edition while occupying the Chair in Public Law at the LSE (1968) and another while holding the Downing Professorship of the Laws of

[15] Lord Diplock's seminal speech in *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 (*CCSU*) and the Supreme Court of Canada's landmark decision in *Dunsmuir*, above n. 12, are two obvious exceptions.

[16] D.J. Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257, 268.

[17] Michael Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century' (2005) 43 Osgoode Hall LJ 223, 228.

[18] S.A. de Smith, *Judicial Review of Administrative Action: A Study in Case Law* (PhD thesis, London School of Economics and Political Science, 1959).

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England at Cambridge University (1973).[19] After de Smith's death in 1974, the fourth edition was updated by John Evans (1980), an academic who went onto a distinguished career at Osgoode Hall Law School and later served on the Canadian Federal Court of Appeal.[20] The first four editions of de Smith's text are very similar in character, continuing de Smith's original structure and style throughout.

The fifth edition of de Smith's text (1995) was subject to substantial restructuring and rewriting.[21] Most obviously, the text was rewritten under new guardianship: Lord Woolf and Professor Jowell took over as authors.[22] The production of the fifth edition also followed a vigorous period of change within English judicial review.[23] No longer was judicial review, as de Smith famously described it, 'sporadic and peripheral';[24] instead, Woolf and Jowell argued that 'the effect of judicial review on the practical exercise of power has now become constant and central'.[25] Regardless of the restructuring and rewriting of the text, Woolf and Jowell attempted to remain faithful to de Smith's original style.[26] De Smith's method of crystallising a line of cases into a series of propositions remained, as did the commitment to a broad corpus of case law (both historic and international, particularly from the Commonwealth).[27]

The sixth edition of the text (2007) was published over a decade after the fifth edition.[28] It contained some significant changes, driven by changes within the system of judicial review.[29] The emblematic change was the revision of the title of the text, with 'Judicial Review' standing solitary without its former 'of Administrative Action' counterpart; this recognised a slightly broader focus also incorporating judicial review of legislation in

[19] 'Professor S.A. de Smith' (1974) 33 CLJ 177 (obituary) and 'Professor S.A. de Smith' (1974) 37 MLR 241 (obituary).
[20] 'The Honourable John Maxwell Evans': www.justice.gc.ca.
[21] De Smith (5th edn), vii.
[22] *Ibid.* Woolf and Jowell were assisted in the 5th edition by Andrew le Sueur.
[23] *Ibid.*, specifically noting the dramatic change. In the subsequent edition, Woolf, Jowell and le Sueur described the 1980s and early 1990s as involving a large increase in applications, increased 'sophistication' in grounds and judicial reasoning, and 'burgeoning academic literature': de Smith (6th edn), v.
[24] De Smith (5th edn), vii.
[25] *Ibid.*
[26] *Ibid.*, vii–viii.
[27] *Ibid.*, viii.
[28] De Smith (6th edn), v. A supplement was published 1998: de Smith (5th edn, suppl.).
[29] *Ibid.*, v–vi.

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some situations.[30] There was also a minor change to the panel of authors, with Andrew Le Sueur joining Woolf and Jowell as a joint author.[31] The seventh, and current, edition (2013) was published six years after the sixth.[32] The final edition follows the same format and style as the sixth, largely enlarging aspects of the commentary and references.

Secondly, the definition of the parameters of the textbook – its *subject* and *comparative* focus – is consistent with the general focus of this book. De Smith's focus was conveyed by the original title: 'Judicial Review of Administrative Action' (while the title of recent editions has been truncated, the principal focus on the role of judges in the traditional administrative law domain remains). This focus on supervision of administrative decision-making, broadly defined, is echoed in this book.[33] The textbook is principally focused on English administrative law but also draws on Commonwealth case law. De Smith explained in the original edition: 'On some … matters we shall be able to find strong persuasive authority in the decisions of courts in Commonwealth countries'.[34] This practice continued through the editions which followed.[35] The current authors record their continuing commitment to 'refer to the experience of other jurisdictions … without any pretence at creating a work of comparative law'.[36] This comparative focus coincides with the comparative brief of this study and my concern with the judicial methodology within a broader common law of judicial review.

Thirdly, the textbook's *style of exposition* was analytical and almost scientific in character. 'It is about "the law" and touches only occasionally on the prophets.'[37] De Smith was generally content to catalogue and describe the law as it was. 'By gathering in the cases so assiduously,' Harlow remarks, 'in some sense [he] petrified the law, preserving it, like amber,

[30] *Ibid.*, vii. The authors preferred the term 'public functions'. The rise of human rights and impact of European Community law led to primary legislation being brought into the province of judicial review and thus ambit of the text expanded slightly.
[31] Catherine Donnelly joined the 6th edition as an assistant editor.
[32] De Smith (7th edn). Catherine Donnelly and Ivan Hare joined the editorial panel. A further supplement was published in 2009: de Smith (6th edn, suppl.).
[33] See text to n. 46.
[34] De Smith (1st edn), 25.
[35] In later editions, this non-English case law was grouped under the heading 'Comparative Perspectives', with Canada, New Zealand, and Australia featuring prominently.
[36] De Smith (7th edn), vi.
[37] J.A.G. Griffith (1960) 18 CLJ 228 (book review), 229.

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