

INDEX

- abuse of discretion. *see* discretion
- abuse of power
 - contextual review and, 238
 - ground of, 77, 80, 135, 151, 200, 213, 231
 - legitimate expectation and, 91, 108, 145, 236
 - restraint of, 105, 138
 - unreasonableness and, 106
- accessibility. *see* public accessibility
- administrative law
 - in Commonwealth jurisdictions, 17
 - federalism and, 38
 - as judicial creation, 127
 - judicial review and, 12
 - unification of, 178
- Allan, Trevor, 210, 249
- Aronson, Mark, 60, 62, 66, 67
- Australia
 - assessment of efficacy, 254
 - comparative analysis, 16
 - deference, 65
 - depth of scrutiny, 61
 - federalism and administrative law, 38
 - formalism, 2, 37, 46, 57, 60, 65, 245, 254
 - grounds of review, 75, 111
 - jurisdictional error, 5, 39, 64, 66, 67, 69, 70
 - legal reasoning, 71
 - legality-merits dichotomy, 42, 43
 - process/quality dichotomy, 61
 - proportionality, 45
 - scope of review, 37, 64, 65, 66, 67, 69, 70, 71
 - unreasonableness and, 43
- Canada
 - abuse of discretion, 113
 - assessment of efficacy, 256
 - comparative analysis, 16
 - contextual review, 204, 233
 - deference, 19, 179, 185, 190, 192, 193, 205, 233
 - depth of scrutiny, 2
 - grounds of review, 75, 113
 - intensity of review, 113, 154, 185, 188, 190, 192, 193
 - unreasonableness, 5, 204
- candour
 - assessment of efficacy, 250, 253
 - contextual review, 240
 - grounds of review, 144
 - intensity of review, 196
 - performance level, 250, 253
 - principle of, 30
 - scope of review, 72
- clarity
 - assessment of efficacy, 250
 - contextual review, 237
 - grounds of review, 129
 - intensity of review, 193
 - principle of, 29
 - scope of review, 33
- ‘classic model’ of judicial review, 47
- coherence
 - assessment of efficacy, 250, 251
 - contextual review, 199, 238, 252
 - grounds of review, 140
 - intensity of review, 194
 - principle of, 29
 - scope of review, 71

- common law school
 - constitutional bases of judicial review, 3
 - and contextual review, 3, 22, 199, 212, 218, 225
 - formalism and, 225
 - and grounds of review, 3, 75, 116, 121, 127
 - and intensity of review, 145, 148, 182
 - judicial review and, 2, 248
 - position of, 21, 248
- Commonwealth jurisdictions
 - administrative law in, 17
 - deference, 19, 47
 - differences and similarities between, 246
 - focus of current study on, 19
 - sharing of ideas and doctrines, 17
- competence
 - constitutional, 220
 - institutional, 150, 174, 176, 181, 184, 192, 220
 - judicial, 125, 217, 221, 237
- conceptual foundations of judicial review
 - common law school. *see* common law school
 - contextual review, 209, 229
 - depth of scrutiny, 3, 20
 - grounds of review, 115, 129
 - intensity of review, 166, 182
 - legislative intent (*ultra vires*) school. *see ultra vires*
 - scope of review, 57, 62
 - summary overview of, 247
- congruence
 - assessment of efficacy, 250, 253
 - contextual review, 240
 - grounds of review, 253
 - intensity of review, 196
 - principle of, 30
 - scope of review, 72
- constitutional bases of judicial review
 - common law school, 3
 - and conceptual dimension of depth of scrutiny, 3, 20
 - and intensity of review, 1
 - ultra vires* school and, 3
- contextual review, 3
 - assessment of efficacy, 250
 - Canada, 204, 233
 - candour, 240
 - clarity, 237
 - coherence, 199, 239, 252
 - common law school and, 3, 22
 - conceptual foundations of, 209, 229
 - congruence, 240
 - de Smith's exposition of, 200
 - discretion and, 3
 - doctrinal manifestation of, 200, 209, 244
 - England and Wales, 200, 207
 - generality, 230
 - hortatory versatility, 241
 - introduction to, 199
 - New Zealand, 201
 - non-contradiction, 239
 - non-impossibility, 239
 - normative assessment of, 230, 250
 - normative reasoning, 246
 - practicality, 239
 - prospectivity, 237
 - public accessibility, 235
 - scheme of, 2
 - stability, 238
 - summary overview of, 242
 - transparency, 235
- Cooke, Lord, 102, 152, 201
- Craig, Paul, 11, 21, 93, 96, 116, 117, 248
- Daly, Paul, 167, 232
- de Smith, Stanley
 - contextual review, 200
 - depth of scrutiny, 2
 - differences and similarities between jurisdictions, 246
 - distinctions between law, fact and discretion, 35, 51
 - doctrinal form of review, 245
 - functional dichotomies in scope of review, 54
 - grounds of review, 75, 76
 - intensity of review, 147
 - Judicial Review of Administrative Action*, 6, 15

- reasonableness, 36
- scope of review, 34, 66, 71
- unreasonableness, 36
- deference
 - adjudicative, 174
 - arising of, 182
 - 'classic model' of judicial review, 47
 - degrees of, 182, 185, 192
 - doctrinal form of, 5, 168, 171
 - due deference, 174
 - epistemic, 167, 232
 - and human rights, 14, 163, 177, 201, 221
 - intrinsic, 173
 - judicial commitment to, 193
 - and legality-merits dichotomy, 42
 - non-doctrinal form of, 125, 217, 221, 232
 - practical application of, 179
 - proportionality and, 124, 163
 - recognition of, 123, 201
 - rejection of, 65, 203, 214, 215
 - and respect, 224, 232
 - unreasonableness and, 43, 191, 205
- depth of scrutiny
 - binary nature of, 64
 - conceptual dimension of, 3
 - conclusions from current study, 243, 257
 - doctrinal dimension of, 2
 - modulation of, 82, 245
 - normative dimension of, 4
 - schemata for analysis of, 1, 24
 - variation of, 1, 5, 13, 24, 33, 61
- Diplock, Lord, 52, 72, 76, 79, 88
- discretion
 - abuse of discretion, ground of, 113, 124, 156
 - and common law reasoning, 8
 - and contextual review, 3
 - formalism and, 3
 - and Fuller's legality principles, 24, 25, 27, 29
 - law and fact distinguished from, 51, 63
 - and legality-merits dichotomy, 42, 43, 44
 - limits of, 113
 - and scope of review, 4
- doctrinal manifestations of judicial review
 - contextual review, 201, 209, 244
 - depth of scrutiny, 2, 5
 - grounds of review, 76, 115, 244
 - intensity of review, 148, 166, 244
 - organisational framework for study of, 7
 - scope of review, 33, 56, 244
 - summary overview of, 244
- duty to provide reasons. *see* reasons
- Dyzenhaus, David, 56, 67, 209, 224, 249
- Elliott, Mark, 171
- England and Wales
 - assessment of efficacy, 255
 - 'classic model' of judicial review, 47
 - comparative analysis, 16
 - contextual review, 200, 207
 - deference, 47
 - distinctions between law, fact and discretion, 51, 63
 - doctrinal manifestations of judicial review variability, 5
 - error of fact, 97
 - error of law, 54
 - and European law, 19
 - formalism, 47
 - functional dichotomies in scope of review, 54
 - grounds of review, 2, 75, 76, 79, 245
 - human rights, 2
 - intensity of review, 148, 158, 185
 - jurisdiction, concept of, 48, 70
 - legality principle, 86
 - non-justiciability, 100
 - procedural fairness, 54
 - proportionality, 92
 - scope of review, 34, 47, 63, 66, 70, 71, 245
 - subordinate legislation, source of, 56
 - unreasonableness. *see* unreasonableness
- unreviewable administrative acts and decisions, 55

- error of fact
 - arising of, 83
 - ground of, 90, 97, 110
- error of law
 - arising of, 83
 - ground of, 61, 80, 101, 131, 155
 - jurisdictional, 5, 39, 48, 54, 64, 66, 67, 69, 70
 - non-jurisdictional, 5, 41, 49, 54
 - ultra vires and, 122
 - unidentifiable, 89
- European law, English law and, 19
- fact. *see* error of fact; law and fact
- federalism and administrative law, 38
- formalism
 - assessment of efficacy, 254
 - 'classic model' of judicial review, 47
 - common law school and, 225
 - decline of, 245
 - discretion and, 3
 - in legal and judicial culture, 46
 - and scope of review, 2, 3, 33, 36, 54, 57, 61
 - scope of review and, 62
 - and ultra vires, 3, 57, 224, 247
- Forsyth, Christopher, 57, 62
- Fuller, Lon, 4, 23, 249
- generality
 - contextual review, 230
 - grounds of review, 130
 - intensity of review, 184
 - performance level, 250
 - principle of, 27
 - scope of review, 63
- grounds of review
 - assessment of efficacy, 250
 - Australia, 111
 - Canada, 113
 - candour of, 144
 - circumscription of
 - England and Wales, 99
 - method of, 82
 - New Zealand, 111
 - clarity of, 139
 - classification of
 - England and Wales, 82
 - method of, 82
 - New Zealand, 107
 - coherence of, 140
 - common law school and, 3, 75, 116, 121, 127
 - conceptual foundations of, 115, 129
 - conceptual reasoning, 246
 - congruence of, 144
 - de Smith's exposition of, 76
 - and depth of review, 244
 - doctrinal manifestation of, 76, 115, 244
 - doctrinal reasoning, 246
 - England and Wales, 76, 79, 245
 - essence of, 115
 - evolution of
 - England and Wales, 88
 - method of, 82
 - New Zealand, 108
 - generality of, 130
 - hortatory versatility of, 144
 - and intensity of review, 102, 106, 113, 116, 119, 124, 125
 - introduction to, 75
 - language of, 76
 - New Zealand, 102, 245
 - non-contradiction within, 140
 - non-impossibility of, 141
 - normative assessment of, 130, 250
 - practicality of, 141
 - process/quality dichotomy, 61
 - prospectivity of, 139
 - public accessibility of, 135
 - reformulation of
 - England and Wales, 99
 - method of, 82
 - New Zealand, 108
 - scheme of, 1
 - scholarship on, 21
 - stability of, 139
 - summary overview of, 145
 - transparency of, 135
 - tripartite formulation of, 59, 75, 76, 79, 102
 - ultra vires and, 59
- Hickman, Tom, 116, 125, 221, 249, 256
- hortatory versatility

- contextual review, 241
- grounds of review, 144
- intensity of review, 196
- performance level, 250, 253
- principle of, 31
- scope of review, 73
- human rights
 - contextual review, 2
 - deference and, 14, 163, 177, 200, 221
 - intensity of review, 2, 13, 127, 159
 - legality and, 86
 - proportionality and, 92, 95, 109, 117, 177
 - and public wrongs, 86, 124
 - rise of, 15, 17
 - role in development of judicial review, 246
 - unreasonableness and, 159
- Hunt, Murray, 176
- illegality
 - complaint of, 144
 - finding of, 121
 - ground of, 75, 79, 91, 106, 107, 131, 138, 144, 220, 227
 - instance of, 84
 - and legality principle, 86
 - proportionality and, 93, 96
- impropriety. *see* procedural impropriety
- intensity of review
 - abuse of power, 151
 - assessment of efficacy, 250
 - Canada, 154, 185, 188, 190, 192, 193
 - candour of, 196
 - clarity of, 193
 - coherence of, 194
 - common law school and, 145, 147, 167, 179
 - conceptual foundations of, 166, 182
 - conceptual reasoning, 246
 - congruence of, 196
 - correctness standard of, 168
 - de Smith's exposition of, 148
 - deference and, 167, 169, 171, 176, 179
 - doctrinal manifestation of, 148, 166, 244
 - efficacy of, 148
 - England and Wales, 148, 158, 185, 190
 - form of, 147
 - formulations of, 151
 - full intensity (correctness) review, 151
 - generality of, 184
 - and grounds of review, 113, 116, 119, 120, 124, 125, 147
 - hortatory versatility of, 196
 - introduction to, 147
 - legislative intent principle and, 169
 - manifest unreasonableness standard of, 168
 - New Zealand, 165, 185, 190
 - non-contradiction within, 194
 - non-impossibility of, 194
 - normative assessment of, 183, 250
 - practicality of, 194
 - prospectivity of, 191
 - public accessibility of, 191
 - scheme of, 1
 - selection of appropriate standard of review, 170
 - stability of, 194
 - style of, 147
 - summary overview of, 198
 - transparency of, 191
 - ultra vires and, 3, 145, 147, 167, 169, 171, 177
 - unreasonableness standard of, 168
 - variable intensity, 120, 124
- irrationality
 - deference and, 138
 - ground of, 75, 79, 84, 85, 89, 91, 99, 106, 107, 108, 131, 132, 135, 144, 150, 162, 200
 - proportionality and, 93, 94, 95
 - test of, 44, 161
- Joseph, Philip, 218, 249
- judicial candour. *see* candour
- judicial review
 - and administrative law, 12
 - approach by current study, 12, 32
 - balance of vigilance and restraint. *see* vigilance and restraint

- judicial review (*cont.*)
 - 'classic model' of, 47
 - comparative analysis, 16
 - conceptual foundations of. *see* conceptual foundations of judicial review
 - conclusions from current study, 243, 257
 - contextual. *see* contextual review
 - depth of scrutiny. *see* depth of scrutiny
 - doctrinal manifestations of. *see* doctrinal manifestations of judicial review
 - grounds of. *see* grounds of review
 - intensity of. *see* intensity of review
 - normative assessment of. *see* normative assessment of judicial review
 - scope of. *see* scope of review
- Judicial Review of Administrative Action.* *see* de Smith, Stanley
- jurisdiction, concept of, 48, 70
- jurisdictional error, 5, 39, 48, 54, 64, 66, 67, 69, 70
- justiciability
 - intensity of review in relation, 148
 - non-justiciability. *see* non-justiciability
- law and fact
 - discretion distinguished from, 35, 86
 - distinction between, 83
- legality
 - application of, 86
 - efficacy, assessment of, 257
 - Fuller's principles of, 4, 23, 249
 - merits and, 33, 42, 43, 66
 - standards of legality and standards of review distinguished, 125
- legislative intent. *see* ultra vires school
- legitimate expectation
 - and abuse of power, 91, 108, 145
 - claim of, 236
 - ground of, 90, 119, 136, 142, 145
 - protection of, 98
 - recognition of, 78, 90, 104
 - rejection of, 43, 46, 89
 - test of, 236
 - undermining of, 151
- matter. *see* subject-matter
- merits, legality and, 33, 42, 43, 66
- mistake. *see* error
- Mullan, David, 113, 158, 179, 248
- New Zealand
 - abuse of power, 108
 - assessment of efficacy, 255
 - comparative analysis, 16
 - contextual review, 2, 201
 - deference, 5, 203
 - error of fact, 109
 - grounds of review, 2, 102, 245
 - human rights, 109
 - intensity of review, 106, 165, 185, 190
 - legitimate expectation, 108
 - proportionality, 109
 - scope of review, 245
 - unreasonableness, 165
- non-contradiction
 - assessment of efficacy, 250, 251
 - contextual review, 239
 - grounds of review, 140
 - intensity of review, 194
 - principle of, 29
 - scope of review, 71
- non-impossibility
 - assessment of efficacy, 250, 252
 - contextual review, 239
 - grounds of review, 141
 - intensity of review, 194
 - principle of, 30
 - scope of review, 72
- non-jurisdictional error, 5, 41, 49, 54
- non-justiciability
 - absolute, 124
 - application of, 111
 - intensity of review in relation, 151, 153
 - partial, 111
 - primary, 100
 - principle of, 99, 177
 - secondary (modified review), 100, 101
- normative assessment of judicial review
 - contextual review, 230, 250
 - depth of scrutiny, 4, 23
 - grounds of review, 130, 250
 - intensity of review, 183, 250

- scope of review, 63, 250
- summary overview of, 249
- practicality
 - assessment of efficacy, 250, 252
 - contextual review, 239
 - grounds of review, 141
 - intensity of review, 194
 - scope of review, 72
- principle of legality, 4, 23, 249
- procedural fairness, applicability of, 54
- procedural impropriety
 - ground of, 75, 79, 91, 101, 106, 130, 137, 144, 220
 - instance of, 89
 - and legality principle, 133
 - unfairness. *see* unfairness
- process grounds of review, 61
- proportionality
 - deference and, 124, 163
 - fair balance test of, 154
 - as ground of review, 92, 109, 116, 125
 - and human rights, 92, 95, 109, 117, 177
 - and merits review, 43
 - rejection of, 46
 - structured review of, 153
 - test of, 208
 - unreasonableness and, 95, 189, 215
- prospectivity
 - assessment of efficacy, 250
 - contextual review, 237
 - grounds of review, 139
 - intensity of review, 191
 - principle of, 28
 - scope of review, 68
- public accessibility
 - assessment of efficacy, 250, 251
 - contextual review, 235
 - grounds of review, 135
 - intensity of review, 191
 - principle of, 27
 - scope of review, 68
- public functions, 10, 144
- public law. *see* administrative law
- public wrongs
 - deference and, 14
 - human rights and, 86, 124
 - reasonableness and, 86
- reasonableness
 - and public wrongs, 87
 - and quality of decision, 61
 - and scope of review, 36
 - unreasonableness. *see* unreasonableness
- reasoning
 - addition of, 214
 - 'bottom-up', 71
 - categorical, 255
 - conceptual, 147, 246
 - doctrinal, 68, 139, 198, 220, 230, 245, 254
 - duty to provide reasons, 178, 227
 - elaboration of, 182
 - examination of, 142
 - force of, 177
 - from generalisations, 222
 - methodical, 26
 - mistake and, 98
 - normative, 199, 242, 245, 246, 248, 251
 - openness of, 67, 68, 166, 184, 235, 248
 - pragmatic, 83
 - process of, 28, 60, 84, 105, 111, 135, 136, 142, 170, 174, 194, 198, 237, 249
 - proportionality and, 94
 - quality of, 201, 202, 205, 249
 - reverse-reasoning, 235, 241, 253
 - rule-based, 60
 - scrutiny of, 226, 233
 - separate reasons, 104, 206
 - style of, 8, 47, 59, 64, 65, 71, 166, 173, 200, 211, 245, 246, 251, 254
 - substantive, 57, 106, 248
 - 'top-down', 71
- reasons
 - for classification of review grounds, 144
 - for comparative focus, 16
 - for deference, 192, 200, 214, 228, 229
 - for degree of scrutiny, 84
 - for judicial intervention, 66, 235, 236, 241, 253
 - for limiting grounds of review, 101
 - for new grounds of review, 136

- reasons (*cont.*)
 - for non-doctrinal approach to deference, 221, 222
- respect, deference and, 224, 232
- restraint. *see* vigilance and restraint
- scope of review
 - assessment of efficacy, 250
 - Australia, 37, 64, 65, 66, 67, 69, 70, 71
 - candour of, 72
 - clarity of, 68
 - coherence of, 71
 - conceptual foundations of, 57, 62
 - congruence of, 72
 - de Smith's exposition of, 34
 - discretion and, 4
 - doctrinal manifestation of, 33, 56, 244
 - doctrinal reasoning, 245
 - England and Wales, 34, 47, 63, 66, 70, 71, 245
 - formalism, 245
 - formalism and, 2, 3, 33, 36, 54, 56, 57, 60, 62, 65
 - functional dichotomies in, 54
 - generality of, 63
 - hortatory versatility of, 73
 - introduction to, 33
 - language of, 33, 34, 35, 69, 73
 - New Zealand, 245
 - non-contradiction within, 71
 - non-impossibility of, 72
 - normative assessment of, 63, 250
 - practicality of, 72
 - prospectivity of, 68
 - public accessibility of, 67
 - reasonableness and, 36
 - scheme of, 1
 - stability of, 70
 - summary overview of, 73
 - transparency of, 67
 - ultra vires and, 22, 33, 57, 58
 - unreasonableness and, 36
- scrutiny. *see* depth of scrutiny
- stability
 - assessment of efficacy, 250, 252
 - contextual review, 238
 - grounds of review, 139
 - intensity of review, 194
 - principle of, 29
 - scope of review, 70
- subject matter, distinctions between law, fact and discretion, 35, 51
- subordinate legislation, source of, 56
- Taggart, Michael, 116, 122, 248
- transparency
 - contextual review, 235
 - grounds of review, 135
 - intensity of review, 191
 - performance level, 250, 251
 - principle of, 27
 - scope of review, 67
- ultra vires and error of law, 122
- ultra vires school
 - as constitutional basis of review, 3
 - formalism and, 3, 57, 225, 247
 - and grounds of review, 59
 - and intensity of review, 145, 147, 169, 171, 177, 182
 - rejection of, 118, 211, 218
 - and scope of review, 22, 33, 57, 58
- unfairness
 - ground of, 89, 108, 110
 - instance of, 98
 - procedural. *see* procedural impropriety
 - remedy for, 127
- United States, deference doctrine, 19
- unreasonableness
 - and abuse of power, 106
 - and contextual review, 238
 - deference and, 205
 - heightened scrutiny review of, 152, 159
 - and law/fact/discretion distinction, 51, 86
 - light-touch review of, 152, 162
 - and merits review, 43
 - proportionality and, 95, 125, 189, 215
 - reformulation of, 99

and scope of review, 36	vigilance and restraint
‘super- <i>Wednesbury</i> ’ form of, 101	balance of, 243, 257
variable intensity review of, 151	deference. <i>see</i> deference
variegated standards of, 5, 124, 151, 165	introduction to, 1
<i>Wednesbury</i> formulation of, 44, 51, 86, 95, 99, 124, 152	<i>Wednesbury</i> unreasonableness. <i>see</i> unreasonableness
unreviewable administrative acts and decisions, 55	