

A Question about Administrative Law

ONE OF THE most puzzling questions in public law concerns the status of administrative law: do administrative officials have legitimate authority to interpret the law? Surprisingly, common law jurists have only addressed this issue indirectly when responding to a different question concerning the legitimacy of judicial review: when are judges entitled to quash an administrative decision? Over the last century, much ink has been spilt discussing the legitimacy of judicial review without much regard for the legitimacy of administrative law.

Nevertheless, there is broad consensus that the administrative state plays a vital role in contemporary society. Scholars agree that administrative institutions have pervasive legal influence,¹ but only modest attempts have been made to explore the normative foundations of these institutional arrangements and how other legal officials, including judges, should respond to administrative decisions. At best, the question regarding the administrative law has been relegated to a sidebar in persistent debates regarding the proper ambit of judicial review.² Hence, public law scholarship tends to focus on legislative intent or the parameters of administrative ‘jurisdiction’, which are determined by legislatures or courts, rather than articulating why administrative decisions are worthy of respect in a democracy committed to the rule of law. This preoccupation generates a hollow conception of administrative law, because it is portrayed merely as a species of political power that emerges when the law runs out.³

¹ Peter Strauss, ‘The Place of Agencies in Government: Separation of Powers and the Fourth Branch’ (1984) 84 *Columbia Law Review* 573; Paul Craig, *Administrative Law*, 6th edn (London, Sweet & Maxwell, 2008) chs 2 and 4; SA de Smith, Lord Woolf and JL Jowell, *Judicial Review of Administrative Action*, 5th edn (London, Sweet & Maxwell, 1995) ch 1; HWR Wade and Christopher Forsyth, *Administrative Law*, 10th edn (Oxford, Oxford University Press, 2009) ch 1.

² See, eg Christopher Forsyth (ed), *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000).

³ See, eg Ronald Dworkin’s doughnut analogy, which has been used frequently as a starting point for analysing administrative discretion. Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 31; Denis Galligan, *Discretionary Powers: a legal study of official discretion* (Oxford, Clarendon Press, 1986) ch 1; TRS Allan, ‘Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction’ [2003] *Public Law* 429, 435.

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In this book, I will argue that administrative law should be approached from a different direction, one which aims to explain its constitutional legitimacy from the ground up rather than attempting to identify the point at which judicial review is triggered. Thus, instead of focusing our attention on jurisdictional parameters, we should ask more directly whether administrative officials have legitimate authority to interpret the law, what the normative basis of that legitimacy is, and how it ought to be incorporated into a constitutional framework unified by the rule of law.

The contrast between these different approaches underscores a conspicuous doctrinal schism within the common law world. The schism divides administrative lawyers in the United Kingdom and other Commonwealth countries from their counterparts in the United States of America and Canada. Much of this book examines the history behind this schism, but the basic differences can be gleaned from a brief overview of three landmark cases.

I. JURISDICTIONAL ERROR

Anisminic Ltd was a British corporation which owned a manganese mine located in the Sinai Peninsula. Prior to the Suez-Sinai war, Anisminic estimated the value of its mine to be £4.5 million, but Israeli forces damaged approximately £500,000 worth of property during the war and the Egyptian government expropriated the remaining assets after the Israeli army withdrew. Anisminic subsequently mounted a public relations campaign to dissuade its former clients from purchasing manganese from the Egyptian authority which took over the mine. In order to placate Anisminic, the Egyptian government agreed to purchase all of the remaining assets for £500,000, but the agreement stated that the settlement did not prejudice Anisminic's ability to seek compensation from any other state.

Almost two years later, the United Arab Republic paid £27.5 million to the United Kingdom as compensation for property damage incurred by its citizens during the war. This fund was to be distributed by the Foreign Compensation Commission, pursuant to the Foreign Compensation Act 1950 and its related regulations.⁴ Among other things, the Act declared that any 'determination by the commission of any application made to them ... shall not be called into question in any court of law'.⁵ Anisminic applied for compensation, but after a four-day hearing the Commission rejected the bulk of its claim on the basis that Anisminic had failed to prove that the Egyptian economic authority was not its 'successor in title' within the meaning of the

⁴ Foreign Compensation Act 1950 (UK), 14 Geo VI, c 12.

⁵ *ibid* s 4(4).

regulations.⁶ Anisminic then brought an application for judicial review to overturn the Commission's decision.

The House of Lords held that the Commission had exceeded its jurisdiction by misconstruing the 'successor in title' provision.⁷ However, the majority opinions in *Anisminic* advanced two very different conceptions of 'jurisdictional' error. In the lead judgment for the Court, Lord Reid drew a distinction between jurisdiction in its 'narrow and original' sense and jurisdiction in its 'wider' sense. The narrow sense of jurisdiction referred to whether the legislature had empowered an administrative decision-maker to 'enter on the inquiry in question'.⁸ In this sense, the Commission was authorised to decide whether Anisminic was entitled to compensation, because it had been expressly empowered by an Act of Parliament to decide that question. If further support for this conclusion was needed, it could be drawn from the privative clause in the statute, which stated that the Commission's decisions could not be challenged in court.

Nevertheless, Lord Reid concluded that the Commission's authority was subject to additional legal constraints, which he associated with administrative jurisdiction in its 'wider' sense.⁹ He stated that:¹⁰

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

Even though he thought the Commission had jurisdiction in the narrow sense, Lord Reid held that the Commission had exceeded its jurisdiction in the wider sense because it had deviated from what he considered to be the 'true construction' of the regulation. The result is that, even though Lord Reid recognised that there were two different conceptions of jurisdiction in play, he asserted that both sets of parameters had been established by Parliament. Thus, Lord Reid and the other judges who sided with the

⁶ Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 (SI 1962/2187), s 4(1).

⁷ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

⁸ *ibid* 171.

⁹ *ibid* 195 (Lord Pearce).

¹⁰ *ibid* 170.

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majority claimed that they were not, in fact, disregarding parliamentary intent by quashing the decision, despite the privative clause which signalled Parliament's desire to insulate the Commission's decision from judicial interference.¹¹

Lord Reid's opinion in *Anisminic* highlights three chronic problems with the doctrine of jurisdictional error. The first concerns a point I made earlier: that administrative law is perceived primarily in terms of its outer limits. Lord Reid's opinion focuses exclusively upon the parameters of the Commission's jurisdiction, which he assumes are established by either Parliament or via judicial interpretation of Parliament's will. As a result, Lord Reid's approach involves a hollow conception of administrative law that does not adequately explain the legitimate authority of administrative officials.

The second problem is that this framework for judicial review is incoherent. This incoherence is rooted in the fact that the term 'jurisdiction' trades upon conflicting conceptions of law. Lord Reid's 'narrow' conception identifies the parameters of administrative jurisdiction by reference only to positive law established by Parliament, whereas his 'wider' conception asserts additional legal parameters established through judicial interpretation of what the law (understood more broadly than legislative commands) requires. So in addition to being hollow, the doctrine of jurisdictional error in *Anisminic* is radically unstable because it incorporates conflicting ideas regarding the nature of jurisdictional parameters.

This confusion is particularly acute when judges attempt to grapple with the interpretive problem posed by privative clauses. If judges disagree with an administrative decision, they can circumvent the privative clause by assuming that Parliament intended for courts to enforce unwritten limits associated with jurisdiction in the 'wider' sense; conversely, they can justify judicial quiescence by adopting the 'narrow' sense of jurisdiction and interpreting the enabling legislation and privative clause strictly.

The third problem concerns the constitutional legitimacy of judicial review. If the doctrine of jurisdictional error were only hollow and incoherent, it might be possible to defend it as a rhetorical veneer which enables judges to achieve outcomes that are consistent with their own sense of equity or justice. But that argument is usually regarded as a poor one. Generally speaking, we expect that judges will respect the law instead of manipulating legal analysis to secure outcomes they personally prefer, especially when judicial interpretation of the law conflicts with decisions made

¹¹ See, eg *ibid* 208 (Lord Wilberforce): 'The courts, when they decide that a "decision" is a "nullity", are not disregarding the preclusive clause. For, just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so, as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed ... In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive'.

by other legal officials who have been authorised through the democratic process to decide a particular question on behalf of the community. This belief is shared by judges who, like Lord Reid, attempt to justify their decisions by invoking express or implied notions of parliamentary intent instead of mounting the bolder claim that judges are entitled to prioritise their own assessments regarding the substantive merits of an administrative decision.

If we accept the idea that administrative officials have legitimate authority to interpret the law and that judges should not interfere with an administrative decision merely because they disagree with its substance, then we have good reasons for exploring an alternative theory of administrative law to guide the practice of judicial review. More particularly, we have good reasons to consider whether the doctrine of judicial deference, which prevails in Canada and the United States, provides a sounder account of the constitutional relationship between the judiciary and the administrative state.

II. JUDICIAL DEFERENCE

In 1977, the Canadian Union of Public Employees (CUPE) commenced a legal labour strike directed against the New Brunswick Liquor Corporation. During the strike, the Corporation began using management personnel to operate its retail stores. This tactic provoked the union to picket stores owned by the company throughout the province. The union also lodged a complaint with the Public Service Labour Relations Board, alleging that the Corporation had violated section 102(3)(a) of the Public Service Labour Relations Act, which stated that ‘the employer shall not replace the striking employees or fill their position with any other employee’.¹² The Board agreed, and ordered the Liquor Corporation to stop using managers as replacement employees. The Corporation challenged the Board’s decision by applying for judicial review, even though section 101 of the Act stated that ‘every order, award, direction, decision, declaration, or ruling of the Board ... is final and shall not be questioned or reviewed in any court’.¹³

The Canadian Supreme Court unanimously upheld the Board’s decision. However, Dickson J did not rely upon the jurisdictional rationale set out in *Anisminic*.¹⁴ Instead, he began by observing that the provincial legislature had not determined the meaning of section 102(3)(a). Although an interpretation of the provision was a question of law, he declined to characterise it as a ‘jurisdictional’ issue, saying that ‘courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial

¹² Public Service Labour Relations Act, RSNB 1973, c P-25.

¹³ *ibid* s 101(1).

¹⁴ *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227.

review, that which may be doubtfully so'.¹⁵ Because the dispute fell within the Board's statutory mandate and the legislation stated that judges should not interfere with the Board's decision, Dickson J held that it was inappropriate for the Court to intervene, saying:¹⁶

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

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

Accordingly, Dickson J held that the Court could not intervene merely because it disagreed with the Board's interpretation of the statute. Instead, he concluded that judicial intervention could only be justified where the Board's decision was 'so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review'.¹⁷ After considering the Board's rationale for its decision, which was to prevent labour disputes from escalating in a manner which compromised the public interest, Dickson J held that the Board's interpretation of the provision was not patently unreasonable, and upheld the Board's decision.

A similar approach is apparent in *Chevron USA v Natural Resources Defense Council*, a case in which the Supreme Court of the United States held that judges should defer to reasonable administrative interpretations

¹⁵ *ibid* 233.

¹⁶ *ibid* 235–36.

¹⁷ *ibid* 237.

of law.¹⁸ The case concerned the legality of the Environmental Protection Agency's interpretation of the Clean Air Act. In 1977, Congress amended the Act in order to impose more demanding air quality standards in States which had not attained national ambient air quality standards.¹⁹ The amendments aimed to reduce air emissions by requiring noncompliant States to implement stringent permit requirements for 'new or modified major stationary sources' of air pollution.²⁰ However, the legislation did not determine the meaning of the term 'stationary source'—it was ambiguous whether 'stationary source' referred to a discrete apparatus within an industrial plant or whether it applied to the industrial complex as a 'bubble' or integrated whole.²¹ Ultimately, the EPA adopted the 'bubble' definition of 'stationary source', and its decision was challenged by environmental action groups on the ground that it was contrary to Congress's objective of accelerating State compliance with national air quality standards.

As in *CUPE*, the Supreme Court of the United States upheld the EPA's decision without resorting to jurisdictional analysis.²² Instead, Stevens J held that the meaning of the Act was ambiguous, because neither the statute nor the legislative history determined how the Act should be construed. In his view, Congress had adopted an open-ended definition of 'stationary source' in order to strike a compromise between conflicting interest groups.²³ In light of the circumstances, Stevens J held that the Court should respect the EPA's interpretation of the Act, saying:²⁴

In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those

¹⁸ *Chevron USA Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984).

¹⁹ Clean Air Act Amendments of 1977 Pub L No 95-95, 91 Stat 685.

²⁰ *ibid* s 129; 42 USC § 7502.

²¹ *ibid*: '(i) "Stationary sources" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act. (ii) "Building, structure, facility, or installation" means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more continuous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel'.

²² *Chevron* (n 18 above) 842–43. Instead of asking whether the issue under review is jurisdictional in nature, *Chevron* set out a two-step process for determining the legality of an administrative decision. Under step one, the reviewing court asks whether Congress has directly addressed the precise question at issue. If Congressional intent is clear, the court must give effect to Congress's intent regardless of the administrative interpretation of the statute. However, if Congressional intent is not clear, the court must proceed to step two, which requires the court to defer to an administrative interpretation provided that it is reasonable.

²³ *ibid* at 851.

²⁴ *ibid* at 865–66.

with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Therefore, Stevens J concluded that in situations where Congressional intent is unclear, courts should not simply impose their own construction of the statute.²⁵ Rather, they should defer to an administrative decision, provided that the decision is not 'arbitrary, capricious, or manifestly contrary to the statute'.²⁶ When Stevens J assessed the EPA's reasons for adopting the plant-wide definition of 'stationary source', which was to give States more flexibility while attempting to balance federal environmental standards with the desire to promote economic growth,²⁷ he concluded that it was not unreasonable and therefore upheld the decision.

The main distinction between the doctrine of jurisdictional error set out in *Anisminic* and the doctrine of judicial deference outlined in *CUPE* and *Chevron* is the way in which administrative law is conceived. Instead of defining administrative law by reference to jurisdictional limits, Dickson and Stevens JJ both emphasise the constitutional legitimacy of administrative institutions and decisions. Among other things, they highlight the democratic pedigree of administrative institutions and the fact that the legislature had given administrative officials the authority to interpret the law regarding a controversial legal question. In addition, they both point out that administrative officials have experience and expertise regarding the implementation of legislative policies which warrants a degree of judicial respect. Thus, both *CUPE* and *Chevron* provide a more elaborate account of the

²⁵ *ibid* at 843.

²⁶ *ibid* at 844–45.

²⁷ Thomas Merrill, 'The Story of *Chevron USA Inc v Natural Resources Defense Council, Inc*: Sometimes Great Cases Are Made Not Born' in William Eskridge, Philip Frickey and Elizabeth Garrett (eds), *Statutory Interpretation Stories* (New York, Foundation Press, 2011) 165, 175.

reasons which legitimate administrative legal authority than Lord Reid's judgment in *Anisminic*, which focuses merely upon parameters derived from a positivistic understanding of legislative intent.

Furthermore, because both *CUPE* and *Chevron* avoid the confusion associated with conflicting notions of jurisdictional parameters, the doctrine of judicial deference seems more coherent—at least at a theoretical level. Instead of simultaneously asserting 'narrow' and 'broad' jurisdictional parameters based upon conflicting conceptions of law, the doctrine of judicial deference asks judges to consider whether an administrative decision is reasonable in light of the circumstances. Thus, the conflicting notions of administrative jurisdiction are replaced by a unified standard of legality.

However, history shows that judicial deference in Canadian and American administrative law has been anything but straightforward. In Canada, much confusion stems from the fact that the Supreme Court has never made a decisive break from the language of jurisdictional error.²⁸ However, even if the doctrine of judicial deference were not corrupted in this way, the complex analytical framework which has emerged in Canada would still raise serious questions about its integrity.²⁹ Thus, one prominent academic observed as early as 1996 that '*CUPE* has run into the sand, and a reformulation is needed urgently',³⁰ a plea recently echoed by various members of the Canadian Supreme Court.³¹

Similar concerns about the doctrine of judicial deference have been expressed in the United States. Even though *Chevron* is easily the most cited decision in American administrative law, it seems to have raised more questions than it has resolved. For example, even though the concept of jurisdiction is noticeably absent from American common law, a similar confusion arises because *Chevron* deference is contingent upon whether Congress 'has directly spoken to the precise question at issue'.³² Thus, there has been significant controversy over what constitutes a sufficiently 'clear' expression

²⁸ See, eg David Mullan, 'The Re-emergence of Jurisdictional Error' (1985) 14 *Administrative Law Reports* 326; David Mullan, 'The Supreme Court of Canada and Jurisdictional Error: Compromising *New Brunswick Liquor*' (1987) 1 *Canadian Journal of Administrative Law & Practice* 71; David Mullan, 'A Blast from the Past: A Surreptitious Resurgence of *Metropolitan Life*?' (1992) 5 *Administrative Law Reports* (2d) 117; David Mullan, 'Recent Developments in Administrative Law: The Apparent Triumph of Deference!' (1999) 12 *Canadian Journal of Administrative Law & Practice* 192.

²⁹ See, eg David Mullan, 'Deference from *Baker* to *Suresh* and Beyond: Interpreting the Conflicting Signals' in David Dyzenhaus (ed), *The Unity of Public Law* (Oxford, Hart Publishing, 2004) 21.

³⁰ Michael Taggart, 'Outside Canadian Administrative Law' (1996) 46 *University of Toronto Law Journal* 649, 652.

³¹ *Toronto (City) v Canadian Union of Public Employees, Local 79* [2003] 3 SCR 77, 113–48 (LeBel J); *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

³² *Chevron* (n 18 above) 842.

of Congressional intent.³³ Additional confusion has been caused by uncertainty over the scope of the *Chevron* doctrine—whether it applies to all administrative interpretations of law, or whether it is limited to some smaller subset of administrative action.³⁴ These and other concerns have prompted one prominent American scholar to argue that ‘as a legal doctrine, [*Chevron*] has proven to be a complete and total failure, and thus the Supreme Court should overrule it at the first possible opportunity’.³⁵

III. THE ARGUMENT IN BRIEF

In this book, I will examine how jurists in the United Kingdom, the United States of America, and Canada have conceptualised administrative law. In addition to highlighting important doctrinal differences and similarities concerning judicial review of administrative decisions, the comparative analysis also serves as a prelude to a theoretical account of the legitimacy of administrative law and the related issue of judicial deference towards administrative decisions.

While this comparative analysis might be enriched by examining how other legal cultures—including civilian jurisdictions—consider administrative law, I will focus my attention on the common law perspective. The doctrine of jurisdictional error in the United Kingdom serves as a baseline for my analysis, because it outlines the traditional common law approach to administrative law. This approach also crops up periodically in American and Canadian public law doctrine, and it continues to be a central feature in other Commonwealth countries. However, the law pertaining to judicial review of administrative decisions in the United States and Canada has since broken away from jurisdictional error in favour of a doctrine of judicial deference towards administrative decisions. In order to better understand the historical basis for this doctrinal schism, its normative underpinnings, and its practical consequences, I will juxtapose the intellectual history of jurisdictional error with that of judicial deference in the United States and Canada, which emerged in the wake of the *Lochner* era and the rise of the modern administrative state in North America.

³³ Antonin Scalia, ‘Judicial Deference to Administrative Interpretations of Law’ (1989) 38 *Duke Law Journal* 511, 520–21; Note, ‘“How Clear is Clear” in *Chevron*’s Step One?’ (2005) 118 *Harvard Law Review* 1687; Matthew Stephenson and Adrian Vermeule, ‘*Chevron* Has Only One Step’ (2009) 95 *Virginia Law Review* 597; Kenneth Bamberger and Peter Strauss, ‘*Chevron*’s Two Steps’ (2009) 95 *Virginia Law Review* 611.

³⁴ *United States v Mead Corp* 533 US 218 (2001); Cass Sunstein, ‘*Chevron* Step Zero’ (2006) 92 *Virginia Law Review* 187.

³⁵ Jack Beerman, ‘End the *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled’ (2009–10) 42 *Connecticut Law Review* 779, 782.

In Chapter two, I investigate why the traditional constitutional theory fails to provide an adequate account of administrative law in a constitutional democracy. I will argue that this blind spot has been inherited from AV Dicey's constitutional theory. Dicey famously argued that there was no such thing as administrative law in the United Kingdom, and claimed that his conclusion followed logically from the constitutional principles of parliamentary sovereignty and the rule of law. However, I will argue that Dicey's theory is unfounded as a matter of historical fact, contestable as a matter of principle, and rests on an incoherent theoretical foundation. From an historical perspective, the United Kingdom had an established system of administrative law long before Dicey published his constitutional treatise, so it is a mistake to accept the validity of his historical assertions regarding administrative law. I will argue that instead of treating Dicey's claim as axiomatic, it is better understood as a controversial ideological argument—one which is hostile to the political aims of the modern administrative state. When this rhetorical veneer is stripped away, we can see that Diceyan constitutional theory is both incoherent and dialectical because it involves an attempt to marry Jeremy Bentham's legal positivism (which emphasises the sovereignty of Parliament) with Blackstone's natural law theory (which emphasises the supremacy of judges over legal interpretation) within the same constitutional theory. Once the underpinnings of Dicey's theory have been exposed, we can begin to develop a more forthright theory about the legitimacy of administrative law.

In Chapter three, I examine the legacy of Diceyan constitutional theory through case-law analysis regarding the doctrine of jurisdictional error and, more recently, proportionality review in the United Kingdom. I will argue that judicial reasoning in these cases reflects the deeply rooted problems with Diceyan constitutional theory set out in Chapter two. The primary problem in this respect is that the practice of judicial review is fundamentally incoherent, whether it is conceived in terms of jurisdictional error or proportionality. More specifically, this overview reveals two conflicting lines of authority: one line of cases holds that administrative officials are entitled to wield an unrestrained form of political discretion that can be shielded from judicial review by legislative fiat; the other line of cases holds that judges always retain the licence to quash administrative decisions which do not comply with their own substantive interpretations of the law. In light of the incoherence of jurisdictional error and proportionality review, a debate has now emerged within the United Kingdom regarding the merits of judicial deference as an organising doctrine. I argue that in order to fully assess this proposal, one should consider the American and Canadian experience with this doctrinal framework.

In Chapter four, I will examine the intellectual history behind the doctrine of judicial deference by contrasting Diceyan common law constitutionalism with an alternative, protestant conception of constitutionalism

which emerged in the United States of America by the end of the nineteenth century and attracted influential adherents over the course of the *Lochner* era. By examining the work of James Thayer, Oliver Wendell Holmes Jr, Louis Brandeis, and Felix Frankfurter, I will argue that this conception of constitutionalism rests on normative premises which are democratic, pragmatic, contextual, and functional in character. Thus, instead of instructing judges to extrapolate jurisdictional parameters directly from the statutory text or common law values, the judicial role is portrayed as relatively limited because interpretive authority over the law is shared with administrative officials. So instead of enabling judges to construe the Constitution or legislation in a manner which obstructed the emergence of the administrative state, proponents of judicial restraint urged judges to accommodate legislative reform and statutory delegations of authority to administrative officials.

However, it is important to point out that proponents of judicial restraint did not advocate judicial abdication: they still asserted that judges still have a constitutional obligation to ensure that administrative decisions are fair and reasonable, and that the intensity of judicial oversight should be calibrated according to the nature of the interest affected by a governmental decision. Accordingly, governmental decisions which seriously impacted civil liberties were subjected to more onerous burdens of due process and substantive justification than decisions which impacted economic interests. Nevertheless, because this tradition of judicial restraint still co-exists alongside another constitutional perspective which allocates supremacy over law-creation to the legislature and supremacy over legal interpretation to the judiciary, the *Chevron* doctrine remains plagued by quixotic quests for legislative intent before judges will consider deferring to an administrative decision.

In Chapter five, I will examine how the intellectual movement in American legal culture at the beginning of the twentieth century had a ripple effect on the practice of judicial review in Canada. During the first half of the twentieth century, the law of judicial review in Canada was organised around the doctrine of jurisdictional error and a formal conception of the separation of powers, two doctrines which were received from the United Kingdom via decisions from the Judicial Committee of the Privy Council. However, over the course of the twentieth century, Canadian jurists began developing a doctrine of deference inspired by the American discourse on judicial restraint outlined in Chapter four. While influential judges like Ivan Rand and Bora Laskin did not rely directly on American sources or case authority, they both employed reasoning which resonates strongly with the jurisprudence of Thayer, Holmes, Brandeis, and Frankfurter. As in the United States, the Canadian doctrine of judicial deference does not entail judicial submission to administrative decisions—judges are entitled to intervene if an administrative decision is procedurally unfair or substantively unreasonable. But by the same token, it remains plagued by frequent attempts to extrapolate the

parameters of judicial review directly from the statutory text or conceptual analysis of the issue at stake, because the doctrine of judicial deference has been grafted onto a pre-existing framework informed by the doctrine of jurisdictional error and a formal conception of the separation of powers.

In the concluding chapter, I will respond to the question of administrative law by developing a theoretical account of administrative law and judicial deference organised around three interrelated issues in jurisprudence and political theory: authority, legitimacy, and legality. I will argue that administrative officials do have legitimate authority to interpret the law if they have been legally empowered by a democratically responsible branch of government to decide a question of law on behalf of the community, and their decision conveys concern and respect for the persons affected by their decision in both a procedural and substantive sense. The legitimacy of administrative law is rooted partly in the fairness of democratic decisions to authorise administrative officials to resolve interpretive disputes about the law. However, I will argue that the legitimacy of an administrative decision also depends on whether it complies with procedural and substantive standards entailed by the rule of law. More specifically, I will argue that the legitimacy of administrative law is conditioned by a principle of legality which requires administrative officials to treat individuals who are subject to their decisions as self-governing moral agents whose views regarding how the law ought to be interpreted should be taken into consideration. Furthermore, I will argue that the procedural rights associated with the rule of law have substantive bite on the content of administrative law, because administrative officials have a duty to provide decisions which respond to the arguments tendered by the parties and to justify their decision in light of more basic legal standards such as enabling legislation and constitutional values.

If my theoretical argument regarding the legitimacy of administrative law is sound, it has important implications for the practice of judicial review in a constitutional democracy. Contrary to Diceyan constitutional theory, it suggests that judges share responsibility for maintaining the rule of law with administrative officials. Therefore, the fact that a judge disagrees with an administrative interpretation of the law is not a sufficient justification for interfering with it, because that would defy the democratic basis for delegating authority to administrative officials in the first place. However, it is equally problematic for judges to defer submissively to an administrative decision simply because an administrative official was authorised by statute, because the legitimacy of administrative authority also depends on how it is exercised. The upshot of this is that judges should respect or defer to administrative decisions which are fair and reasonable, instead of substituting their interpretation of the law when it deviates from the substance of an administrative decision. In sum, my aim is to explain and justify the conjunction of administrative law and judicial deference.