THE UNDERPINNINGS OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: COMMON LAW OR CONSTITUTION?

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INTRODUCTION

There was published in the University of Chicago Law Review some years ago a debate between Professor Dworkin and Judge Posner in the course of which Judge Posner drew a distinction between "top down" and "bottom up" reasoning. He accused Professor Dworkin of being a "top downer" and professed himself to be an unashamed "bottom upper".[1]

Let me explain the distinction. In "top down" reasoning the judge or legal analyst adopts a theory about an area of law. The theory is then used to organise and explain the cases; to marginalise some and to canonise others. In "bottom up" reasoning the judge or legal analyst starts with the mass of cases or the legislative text and moves only so far as necessary to resolve the case at hand. According to Judge Posner "[t]he top downer and the bottom upper do not meet".[2]

The distinction is useful although the dichotomy is not complete. The "bottom upper" would be lost in the wilderness of the single instance without some organising theory. The organising theory of the "top downer", on the other hand, cannot move too far from the decided cases or the legislative text. To do so might make an interesting exercise in political, sociological or economic analysis. But it would have neither utility nor legitimacy as a tool of legal analysis.

REASONING IN ADMINISTRATIVE LAW

The history of administrative law in this country, as in the United States and the United Kingdom, has been largely and, until of late, a crudely bottom up affair. In the legal taxonomy of the late nineteenth century, the field of private rights and obligations was divided between contract and tort. Each was unshackled from the old forms of action. Each was assigned its own organising theory or theories. In the field of public rights and obligations, there was no division. The field was held by constitutional law. There was no place for administrative law, the very thought of which was treated with suspicion and derision. Indeed, Dicey went so far as to say that

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1 "Legal reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) *U Chicago L R* 433.

2 Ibid.

"[i]n England, and in the countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown".[3] The truth was that administrative law was not so much unknown as ignored. A contemporaneous American commentator argued with some justification that "the general failure in England and the United States to recognise an administrative law is really due, not to the non-existence in these countries of the law but rather to the well-known failure of... law writers to classify the law".[4] As Maitland noted, an examination of any volume of the reports of the Queen's Bench Division at the beginning of the twentieth century showed that about half of the cases reported were concerned with rules of administrative law.[5] Yet there was no organising theory: just a mass of case law. The old prerogative writs—the public law equivalents of the forms of action and the means by which the courts at Westminster traditionally controlled inferior courts—not only escaped procedural reform but were pressed ill-fittingly into the service of the judicial review of the burgeoning area of purely administrative discretion. The result was a thicket of procedural technicalities which stifled the development of coherent doctrine. Such general rules as were able to emerge were of uncertain status and derived largely from the forms of judicial decision-making analogised to what was termed "quasi-judicial" decision-making.

So it remained for a substantial part of the twentieth century. Despite considerable developments administrative law remained for the most part conceptually hidebound. There were notable judicial milestones but there was no administrative law equivalent of *Donoghue v Stevenson*. There was no organising theory.

This conceptual retardation existed in Australia despite the possibilities inherent in the conferral of original and inalienable jurisdiction on the High Court under s 75(v) of the Constitution in all matters in which a writ of mandamus or prohibition was sought against an officer of the Commonwealth. In practice the availability of the writs to correct error in the exercise of administrative decision-making was severely restricted by two considerations. One was continuing uncertainty as to the nature of the jurisdictional errors to which the writs could be directed. The other was the procedural difficulty of needing to commence proceedings in the original jurisdiction of the High Court, and to do so by making a preliminary application for an order nisi.

The enactment of the Administrative Decisions (Judicial Review) Act 1977 (Cth) provided the impetus for new conceptual developments in Australia. There was for the first time a simplified procedure for obtaining judicial review of administrative action. There was also a clear enumeration of the grounds upon which judicial review might be granted. Separately, and in plain English, there was an enumeration of the relief that could be given.

This was followed soon afterwards by the enactment in 1983 of s 39B of the Judiciary Act 1903 (Cth) conferring jurisdiction on the Federal Court in terms substantially mirroring those of s 75(v) of the Constitution. Shorn of the constitutional overtones, conferred on a new court and without procedural technicalities, s 39B was

3 A V Dicey, *Law of the Constitution* (1885) at 180.

4 F J Goodnow, *Administrative Law* (1893) at 6-7 quoted in K Davis, *Administrative Law Treatise* (3rd ed 1994) Vol 1 at 7-8.

5 F W Maitland, *Constitutional History of England* (1908) at 505-506.

available to be picked up where the Administrative Decisions (Judicial Review) Act, by reason of its jurisdictional limitations, left off.

Natural justice—bottom up or top down?

The Administrative Decisions (Judicial Review) Act was by no means an invitation to theorise: quite the opposite. The Act was readily susceptible of being interpreted as a self-executing codification of the grounds of judicial review applicable to all Commonwealth administrative action falling within its purview. If it had been so interpreted, subject to problems arising from its jurisdictional limitations, there would have been little need for further conceptualisation. There would have been a need only to expound and apply the specific grounds enumerated in its text. However, in *Kioa v West*[6] the High Court rejected such an approach to its interpretation. The Court held that the effect of s 5(1)(a) of the Act (dealing with natural justice) was not to impose an obligation to observe the rules of natural justice in relation to every decision to which the Act applies but simply to provide for a remedy where an obligation to observe the rules of natural justice was otherwise imposed and was breached. The primary object of the Act was to effect procedural reform. The obligation to observe the rules of natural justice, if it existed, was to be found outside the Act. But where?

Two views emerged. To Sir Anthony Mason, the source was the common law. He said:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[7]

He went on to declare that:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[8]

As applied to the operation of Commonwealth statutes this common law duty was presumably seen by his Honour as being imposed indirectly through the application of s 80 of the Judiciary Act 1903 (Cth).

To Sir Gerard Brennan, the source of the duty to observe the rules of natural justice was not the common law but the statute conferring the relevant decision-making power. He said:

> At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power. That is clear enough when the condition is expressed; it is seen more dimly when the condition is implied, for then the condition is attributed by judicial construction of the statute. In either case, the

6 (1985) 159 CLR 550.
7 Ibid at 582.
8 Ibid at 584.

> statute determines whether the exercise of the power is conditioned on the observance of the principles of natural justice.[9]

These are diametrically opposed views. To Sir Anthony Mason, in this context the bottom upper, the rules of natural justice as derived from the common law are inherently flexible. They are dependent for their existence on the fact that some right, interest or legitimate expectation is being or may be affected by an exercise of power. They are then moulded to fit a particular statutory scheme. To Sir Gerard Brennan, in this context the top downer, the rules of natural justice derive from the proper construction of a statute irrespective of the circumstances.

The top downer and the bottom upper do meet in the majority of cases. The different processes of reasoning arrived at precisely the same result in *Kioa v West*. Where they were later shown to part company in relation to natural justice was on the role of legitimate expectations. To Sir Anthony Mason—and to a majority of the High Court—a legitimate expectation giving rise to a particular requirement to observe the rules of natural justice could be generated by some external act such as the publication of a policy or the entering into of a treaty. To Sir Gerard Brennan that is a theoretical impossibility.

The difference of views manifest in *Kioa v West* was revealed in subsequent cases to have a broader foundation. In *Minister for Aboriginal Affairs v Peko-Wallsend*[10] Sir Anthony Mason expounded the now classic analysis of s 5(2)(b) of the ADJR Act (dealing with failure to take account of relevant considerations) and the related grounds in s 5(2)(a) (taking account of irrelevant consideration) and s 5(2)(g) (*Wednesbury* unreasonableness). The structure of Sir Anthony's analysis is significant for present purposes. After introducing the ground in s 5(2)(b) as "substantially declaratory of the common law", he went on to set out a series of propositions derived from decided cases in Australia and the United Kingdom. The propositions conclude with a reference to the scope of "*Wednesbury* unreasonableness". It is said that both "principle and authority" show that a court can in some circumstances set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or given excessive weight to a relevant factor of no great importance, but that those circumstances are closely confined. In this context, an analogy is drawn between the judicial review of administrative action and appellate review of a judicial discretion.

This form of analysis represents the very best of bottom up reasoning. It is anchored in the common law. It adheres closely to the decided cases and to the statutory text. It extracts from the decided cases so much as is necessary to give precise content to the relevant ground of review. It results in a collection of discrete but related principles.

The structure of Sir Anthony Mason's analysis can be contrasted with that of Sir Gerard Brennan in his exposition of the role of judicial review in *Attorney-General v Quin*.[11] While acknowledging that the doctrine of *ultra vires* alone is too restrictive to define the scope of the judicial review of administrative action, his Honour nevertheless referred to it as:

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9 Ibid at 609.
10 (1986) 162 CLR 24 at 39-42.
11 (1990) 170 CLR 1.

> both a powerful constitutional justification for judicial control and a useful organizing principle for the creation of a coherent subject from what has sometimes appeared to be a "wilderness of single instances."[12]

Sir Gerard went on to say that:

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government.[13]

His Honour referred to the statement of Sir Harry Gibbs in *Victoria v Commonwealth and Hayden*[14] to the effect that the duty of the courts extends to pronouncing on the validity of executive action when challenged on the ground that it exceeds constitutional power and added that "the duty [also] extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law."[15]

Sir Gerard Brennan continued:

> The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137 at p 177 [5 US 87 at p 111]: "It is, emphatically, the province and duty of the judicial department to say what the law is." The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[16]

This is top down reasoning at the highest level. From the constitutional conception of the nature of judicial power, there is derived a single principle which then informs both the scope and content of judicial review. That single principle is the duty of the court to declare and enforce the law. The relevant law for the purposes of judicial review is that which marks out the limits of a repository's power and which governs its exercise. Having explained the province and function of judicial review in these terms, his Honour went on in *Attorney-General v Quin* to explain the particular doctrine of "*Wednesbury* unreasonableness" as being based on "an implied intention of the legislature that a power be exercised reasonably".[17]

The influence of *Marbury v Madison*

The last three sentences of the passage from the judgment of Sir Gerard Brennan in *Attorney-General v Quin* were quoted with approval by four members of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*.[18] The last four sentences, including the reference to the words of Marshall CJ in *Marbury v Madison*,

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12 Ibid at 35 quoting J Beatson, "The Scope of Judicial Review for Error of Law" (1984) 4 *Oxford Journal of Legal Studies* 22.
13 Ibid.
14 (1975) 134 CLR 338.
15 (1990) 170 CLR 1 at 35.
16 Ibid at 35-36.
17 Ibid at 36.
18 (1996) 185 CLR 259 at 272.

were picked up and applied by Gummow and Hayne JJ in *Abebe v Commonwealth*.[19] Substantially the whole of the passage was quoted with approval by Gummow J in *Minister for Immigration and Ethnic Affairs v Eshetu*.[20]

The joint judgment of Gummow and Hayne JJ in *Abebe v Commonwealth* contains a separate passage which develops the same theme. Their Honours said:

> The Constitution, as Dixon J put it in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193, is an instrument framed on the assumption of the rule of law. In the conduct of government under the Constitution, this means at least that, while there is no error of law simply in making a wrong finding of fact...(a) "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is", the terms used by Marshall CJ in *Marbury v Madison*, 5 US 87 at 111 (1803) and (b) to adopt remarks of Isaacs J in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*, (1923) 32 CLR 518 at 541-2 every person "is entitled to his personal liberty except so far as that is abridged by a due administration of the law".[21]

These remarks appear at the commencement of a judgment dealing with discrete constitutional issues as well as with administrative law issues but they can be read without ambiguity as being introductory to both. The reference to the constitutional assumption of the rule of law and the derivation from that assumption of notions concerning both the role of the judiciary and the liberty of the individual is reminiscent of the observation of Deane J in *Re Tracey; Ex parte Ryan*[22] that the independence of the judiciary guaranteed by Chapter III provides the Constitution's "only general guarantee of due process".

Marbury v Madison and *Australian Communist Party v Commonwealth* are classic expositions of the nature of judicial review in constitutional law. *Marbury v Madison* established in the United States the fundamental principle that it is for the courts to determine whether legislative or executive action falls within the limits set by the Constitution. As Fullagar J pointed out in *Australian Communist Party v Commonwealth*,[23] "in our system the principle in *Marbury v Madison* is accepted as axiomatic, modified in various ways (but never excluded) by the respect which the judicial organ must accord to the opinions of the legislative and executive organs". *Australian Community Party v Commonwealth* was a particular application of that principle. The High Court there held that the constitutional validity of legislative or executive action could not be made to turn upon the opinion of the Parliament or an executive officer that the action was within power. Rather, it was for the courts and the courts alone to determine the limits of constitutional power. *Victoria v The Commonwealth and Hayden*, to which Sir Gerard Brennan also made reference in *Attorney-General v Quin*, concerned the availability of judicial review of Commonwealth executive action alleged to fall beyond the scope of the executive power conferred by s 61 of the Constitution. The judgment of Sir Harry Gibbs, which favoured the availability of such review, again relied expressly on the principle in *Marbury v Madison*.

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19 (1999) 162 ALR 1 at 54.
20 (1999) 162 ALR 577 at 607.
21 Ibid at 38.
22 (1989) 166 CLR 518 at 580.
23 (1951) 83 CLR 1 at 262-263.

The adoption of the principle in *Marbury v Madison* into administrative law means that the judicial review of legislative action and the judicial review of administrative action are ultimately attributed to a common source. That source, although it can legitimately be labelled "the rule of law", is more precisely identified as the constitutional separation of judicial power from legislative and executive power. Within a constitutional system which establishes and secures such a separation of powers, it is the province and duty of the judicial power to declare and enforce the law that constrains and limits the powers of the other branches of government.

The common source brings with it a common limitation. The function of declaring and enforcing the law is not only exclusively the function of the judicial power. It is the sole function of the judicial power. The positive proposition stated by Marshall CJ in *Marbury v Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is" was explained in the same case to have a negative corollary. The negative corollary was stated by Marshall CJ in the following terms:

> The province of the Court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.[24]

The effect of the analysis of Sir Gerard Brennan in *Attorney General v Quin* is that precisely the same positive proposition and precisely the same negative corollary fall to be applied in an administrative law context. They are used to explain the function of judicial review and to distinguish judicial review from review on the merits. In the language of Sir Gerard Brennan, the positive proposition is that it is the duty of the courts to enforce "the law which determines the limits and governs the exercise" of administrative action. The negative corollary is that the courts are concerned with legality alone: "[t]he merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

The principle in *Marbury v Madison* has given rise to voluminous debate in the academic literature in the United States in the last 50 years. The debate arises out of the realist revelation that the declaration of the law cannot be explained simply in terms of the exposition of a single or inevitable legal truth. Once the declaratory theory of law is exploded in recognition of the reality of judicial choice, the elegant simplicity of *Marbury v Madison* falls away. The question becomes one of determining by what principles (if any) such a choice is to be made. How is the judge to discern the legal limits of the powers constitutionally conferred on other branches of government and how is the judicial discernment of those limits to be distinguished from the determination of questions "in their nature political"? The particular debate between Professor Dworkin and Judge Posner, to which I referred at the beginning of this article, was an aspect of that broader debate. Those Judge Posner describes as the top downers have looked for some high level guiding principle. The bottom uppers have simply done their best with the precedents or text with which they have been presented.

The identification of the principle in *Marbury v Madison* as the source of the judicial review of administrative action is doubtless less controversial. This is because the reality of judicial choice is less problematic in administrative law than it is in

24 5 US 137 at 170 (1803).

constitutional law. Subject to overriding constitutional constraints on the scope of legislative power, the legal limits of an administrator's power are ultimately set or capable of being set by the legislature. If the judicial declaration of those limits does not meet with the legislature's favour, the limits can always be changed. The recent history of migration legislation in Australia shows how that is so.

Interestingly, *Marbury v Madison* appears not generally to have been identified in the United States as the origin of the judicial review of administrative action.[25] This is hardly surprising given that the actual result in that case was to deny the constitutional validity of a law conferring jurisdiction on the Supreme Court to order mandamus against an executive officer; and given that the principles governing the judicial review of administrative action have developed in the United States only after the legal realist revolution and largely as a result of the enactment in 1946 of the Administrative Procedure Act. What is said to have "laid the foundation for the modern presumption of judicial review"[26] is the later and more tentatively expressed observation of Marshall CJ in *United States v Nourse*[27] that "it would excite some surprise" if an administrative officer might decide a question of right between the government and an individual leaving the individual with no remedy. Nevertheless, while the Supreme Court of the United States has not finally ruled on the question, there is considerable support for the view expressed by Brandeis J that "[t]he supremacy of the law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether [an administrative] proceeding in which facts were adjudicated was conducted regularly".[28]

The presence in the Australian Constitution of s 75(v), and the traditional identification of the writs of prohibition and mandamus as being concerned with remedying jurisdictional error, undoubtedly bolsters the argument for the acceptance of the broader view of *Marbury v Madison* in Australia. Section 75(v) was inserted specifically to overcome the narrow holding in that case so as to ensure that the High Court would have original jurisdiction to issue the writs to administrative officers.[29] And, as Latham CJ pointed out in *R v Hickman; Ex parte Fox*,[30] a writ of prohibition can be issued under s 75(v) on grounds which include both want of constitutional authority to exercise a power proposed to be exercised and want of statutory authority to do so.

The identification of the principle in *Marbury v Madison* as the source of the judicial review of administrative action also provides a context for the operation of the so called "*Hickman* principle" relating to the construction and operation of privative clauses in statutes. If a privative clause were taken literally, it would amount to a fundamental challenge to the rule of law by permitting an administrator to ignore the legal limits of the administrator's authority. It would deprive the judiciary of the power to enforce those limits. But a privative clause is not taken literally. As explained

25 For a rare reference see H P Monaghan, "Marbury and the Administrative State" (1983) 83 *Columbia L R* 1.

26 *Bowen v Michigan Academy of Family Physicians* 476 US 667 at 670.

27 9 Pet 8 at 28-29 (1835).

28 *St Joseph Stockyards Co v United States* 298 US 38 at 84 (1936); B Schwartz, *Administrative Law* (3rd ed, 1991) at 482-483.

29 J Quick and R Garran, *Commentaries on the Constitution* (1901) at 788-789.

30 (1945) 70 CLR 598 at 606-607.

in *Darling Casino Ltd v New South Wales Casino Control Authority*,[31] a privative clause is interpreted not as immunising an invalid executive act from judicial review but as recasting the legislative provisions which confer the power in question so as to expand the ambit of the power. What Gaudron and Gummow JJ said in *Darling Casino*, with the approval of the other members of the Court, was that the *Hickman* principle "is a rule of construction" which reconciles "the prima facie inconsistency between two statutory provisions": one "which seems to limit the powers of the [decision-maker]" and another, "the privative clause, which seems to contemplate that the [decision] shall be free from any restriction".[32] The way in which that resolution occurs is by giving an expansive interpretation to the legislative provision which seems to limit the powers, and not by reading down the power of the court to enforce the limits set. The constitutional underpinning of this rule of construction is evident in the judgment of Sir Owen Dixon in *R v Hickman; Ex parte Fox* from which it derives. In terms entirely consistent with Sir Gerard Brennan's later invocation of *Marbury v Madison* to give emphasis to the constitutional province and duty of the judiciary to declare the legal limits of an administrator's authority, Sir Owen Dixon said:

> It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the limits of the legislative power conferred by the Constitution...It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition.[33]

However, to say that it is the constitutional duty of the courts to declare and enforce "the law which determines the limits and governs the exercise" of administrative action is not necessarily to say what law applies. It is equally consistent with the performance of that constitutional duty for the courts to declare and enforce the common law as it is for the courts to declare and enforce such limitations as may be expressed or implied in a statute. To attribute the rules of administrative law as traditionally applied by the courts to the intention of the legislature, rather than to the common law, in truth owes more to the writings of Professor Sir William Wade in the United Kingdom than it does to those of Marshall CJ in the United States. In *Waltons v Gardiner*[34] Sir Gerard Brennan expressly linked his earlier remarks in *Kioa West* and *Attorney-General (NSW) v Quin* to his agreement with the thesis of Professor Wade that it is "legislative supremacy" that provides the "justification for judicial supervision". Sir Gerard quoted with approval the observation of Sir William Wade that:

> in every case [the judge] must be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.[35]

As yet, no other Australian judge has gone so far as to adopt this approach. The endorsement of Sir Gerard Brennan's analysis in *Attorney-General v Quin* in later High Court judgments extends only to the acknowledgement of the constitutional duty and

31 (1997) 191 CLR 559.
32 Ibid at 631.
33 (1945) 70 CLR 598 at 616.
34 (1993) 177 CLR 378 at 408.
35 W Wade, *Administrative Law* (6th ed 1983) at 42.

authority of a court to declare the law. It stops short of limiting the judicial review of administrative action to the policing of legislatively imposed limits on the exercise of administrative power. As I have sought to demonstrate, there is no necessary or logical connection between the two.

Taken to an extreme, the effect of Professor Wade's thesis is that the principles of administrative law are reduced to principles of statutory construction. Arguably, that is the trend in any event in Australia. The inability of a decision-maker to act arbitrarily or capriciously has often been said to be implicit in the conferral of a statutory discretion.[36] The analysis of Sir Anthony Mason in *Minister for Aboriginal Affairs v Peko-Wallsend*[37] shows that what amounts to a relevant or irrelevant consideration is determined as a matter of construction of the statute conferring the decision-making power. *Craig v South Australia*[38] suggests that it will be presumed, in the absence of the expression of a contrary legislative intention, that an administrative tribunal established by legislation will have no power to make an error of law. *Australian Heritage Commission v Mount Isa Mines Ltd*[39] illustrates that it is also a question of construction whether the existence of a fact is "jurisdictional" in the sense that it is a precondition to the exercise of a power. *Project Blue Sky Inc v Australian Broadcasting Authority*[40] shows that whether or not failure to comply with a procedural requirement spells the invalidity of a decision is similarly a matter of construction.

On the other hand, as a complete explanation of the province and function of judicial review of administrative action, Professor Wade's thesis suffers from three fundamental difficulties. One is an inability to explain the judicial review of the exercise by the executive of prerogative power.[41] Another is the inherent artificiality of attributing all of the rules of administrative law to legislative implication.[42] The third is an inability to accommodate the now dominant view that a particular factual scenario may in some circumstances give rise to a legitimate expectation requiring observance of rules of procedural fairness quite apart from the scheme of a statute.[43] In all of these respect, the common law based notion of judicial review is undoubtedly superior.

CONCLUSION

Ultimately, the resolution of the question posed in the title to this chapter may not turn on a choice between polar extremes. Recent intense debate in the United Kingdom between the supporters of Professor Wade's thesis and its detractors has produced a degree of common ground. That common ground lies in the recognition that legislation does not occur in a vacuum but is to be interpreted and applied by reference

36 For example, *The Queen v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189.
37 (1986) 162 CLR 24.
38 (1995) 184 CLR 163 at 179.
39 (1996) 185 CLR 259.
40 (1998) 194 CLR 355.
41 For example, *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374.
42 This point is well made in M Aronson and H Whitmore, *Judicial Review of Administrative Action* (1996) at 110-115.
43 For example, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

to principles and traditions of the common law.[44] Indeed, so much was accepted by Sir Gerard Brennan in *Kioa v West*[45] where, after expressing the view that curial jurisdiction to review an exercise of statutory power for want of procedural fairness depends on discerning a legislative intention that observance of procedural fairness be a condition of the valid exercise of the power, he continued:

> The statute is construed, as all statutes are construed, against a background of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that "the justice of the common law will supply the omission of the legislature": *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 at p. 194 [143 ER 414 at p. 420]. The true intention of the legislature is thus ascertained. When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention.[46]

The role of the common law in creating presumptions, or informing "rules of construction" against which the true intention of the legislature falls to be determined, is a familiar one. It has been discussed, for example, in *Bropho v Western Australia.*[47] In *Coco v The Queen*[48] there is a faint suggestion that what may be involved is a form of dialogue between the legislative and judicial branches of government in the overall interests of better administration. What four members of the High Court there said was that:

> curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.[49]

Perhaps the traditional principles of administrative law—including the principles of procedural fairness and the notion that a power ought not be exercised arbitrarily or capriciously—should now be regarded as being of the same nature as fundamental common law rights in that the Parliament ought to understand that they will be read into a statute unless specifically excluded. If so, then there is again to some extent a convergence of top down and bottom up reasoning.

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44 The debate and the emerging common ground is discussed in J Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] *PL* 448 and P Craig, "Competing Models of Judicial Review" [1999] *PL* 428.

45 (1985) 159 CLR 550.

46 Ibid at 609.

47 (1990) 171 CLR 1 at 17-18.

48 (1994) 179 CLR 427.

49 Ibid at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.