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DICEY'S SHADOW†

Jurisdiction or reasonableness

The 1979 decision of the Supreme Court in *Canadian Union of Public Employees [CUPE], Local 963* v. *New Brunswick Liquor Corporation*[1] was thought by many to have got rid of the idea that the courts had any large role to play, via an idea of jurisdictional control, in the review of the decisions of administrative agencies. CUPE seemed to establish as the sole basis for judicial review a test that would require judicial intervention only in cases of 'patent unreasonableness.'

John Evans has argued that the decision was the culmination of three sources of pressure.[2] First, the courts had reappraised both their role and that of agencies. The composition and structure of administrative agencies, 'together with the wide range of procedural tools' available to the agencies, had persuaded the courts that 'these bodies had indeed been given the primary statutory responsibility for implementing and elaborating the legislative mandate within their area of regulation.' And this was despite the fact that the agencies would then exercise the power to determine law that courts had previously assumed to be their special expertise.

Second, the courts recognized the conceptual impossibility of constructing 'logically coherent doctrine for distinguishing those questions conclusively committed to the agency from those which the courts could decide for themselves.' That is, they abandoned the facade of the old law of jurisdictional control, which allowed them to review as they saw fit.[3]

Third, and most important in Evans's view, judges recognized that the interpretation of the statutory language involved could not, as was previously believed, come up with uniquely correct meanings of legislation. As a result, when a provision of an agency's constitutive legislation did not admit of only one correct meaning, interpretation was increasing-

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1 [1979] 2 SCR 227

2 'Developments in Administrative Law: The 1984–85 Term' (1986) 8 *Supreme Ct LR* 1, 26–9

3 Ibid.

ly regarded as a matter for the exercise of the agency's informed discretion, rather than a matter of the courts' finding the 'correct' answer supplied by the common law. In short, the courts adopted an attitude of deference to the agency's interpretation.[4]

Thus, as the two authors of a recent essay on Canadian administrative law tell us, it was 'increasingly, though somewhat cautiously, assumed that the days of strict jurisdictional review had given way to an approach based on reasonableness and to one more sensitive to the needs and goals of the administrative state.'[5] But, as the authors, Rod Macdonald and Alison Young, suggest, this assumption is now rather shaky, mainly because of the reasoning of Beetz J in two subsequent decisions, *Syndicat des Employés de production du Québec et de L'Acadie* v. *Canada Labour Relations Board*[6] and *Syndicat national des Employés de la Commission scolaire régionale de L'Outaouais (CSN)* v. *Union des Employés de service, local 289 (FTQ)* (referred to hereinafter as *Bibeault*).[7]

Both cases were cast as jurisdictional issues. In *Acadie*, the first issue was whether the Canadian Labour Relations Board had exceeded its jurisdiction in finding that a collective ban on overtime constituted an unlawful strike within the meaning of the Canada Labour Code.[8] Second, the court considered whether the board had exceeded its jurisdiction in ordering the parties to submit to an arbitrator the question whether overtime was voluntary in terms of the collective agreement. *Bibeault* dealt with the issue whether a decision by a labour commissioner was within jurisdiction when he determined that there had been a transfer of rights and obligations under section 45 of the Labour Code;[9] that is, whether there had been an 'alienation or operation by another in whole or in part of an undertaking other than by judicial sale.'

In *Acadie*, Beetz J concluded that the order to go to arbitration was not within jurisdiction and he came to the same conclusion about the labour commissioner's decision in *Bibeault*. His reasoning, though difficult to follow at times, is clearly to the effect that courts are entitled to apply a standard of correctness in respect of certain fundamental jurisdictional issues; and whether or not they are so entitled is to be determined by looking to legislative intent.

In *National Corn Growers Association* v. *Canada (Canadian Import Tribunal)*[10] the majority of the Supreme Court avoided the question of the status of *Acadie* and *Bibeault*. In a separate judgment, Wilson J said that this was not an appeal in which it was appropriate to discuss 'the strengths and weaknesses of *Acadie* and the approach taken in *Bibeault*.' However, as Macdonald and Young suggest, the drift of her reasoning is that both *Acadie* and *Bibeault* are wrong. In particular, she expressed her concern that the court should be sensitive to the suggestion that it might be 'wavering in its commitment to *CUPE*' and thus to reasonableness as the appropriate standard of review.[11]

It seems then that one of the central questions for Canadian administrative law over the next few years will be whether the focus on reasonableness required by *CUPE* will be restored or whether the idea of jurisdictional control will continue to surface. In order for that question to get the attention it deserves, it will be necessary to inquire into the pull for judges of a jurisdictional inquiry either in tandem with, or even in place of, an inquiry into reasonableness.

Dicey and the rule of law

Wilson J's judgment in *Corn Growers* gives us a characteristically rich basis for asking the question. She divided her reasoning into two sections, 'What *CUPE* sought to leave behind' and 'What *CUPE* sought to achieve.' In the latter section, she quoted with evident approval Evans's analysis of the pressures that made a decision like *CUPE* inevitable. Wilson J's clearly expressed sense is that it is high time for the Court to leave behind the Diceyan idea of the rule of law, an idea that she said had been 'remarkably influential' on the early history of Anglo-Canadian administrative law.[12]

Dicey had argued for three elements of the rule of law. First, it was of the essence of the rule of law that the 'regular law' is supreme – individuals should not be subject to arbitrary power; second, the state's officials are subject to the jurisdiction of the 'ordinary' courts in the same way as any individual; and third, the Constitution is the result of the 'ordinary,' that is, 'regular,' 'private' law of the land, so that the courts should determine the position of executive officials – the legality of their actions – by the principles of private law.[13]

4 Ibid.
5 Alison Harvison Young and Roderick A. MacDonald 'Canadian Administrative Law on the Threshold of the 1990s' (1991) 16 *Queen's LJ* 31, 36.
6 [1984] 2 SCR 412
7 [1988] 2 SCR 1048
8 RSC 1970, c. L-1
9 RSQ, c. C-27
10 (1991) 74 DLR (4th) 449
11 Macdonald and Young, supra note 5, 41; *Corn Growers* supra note 10, 463–4
12 Ibid. 453
13 See A.V. Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed.) (London: MacMillan 1987) (first published 1885).

In Wilson J's view, it is the first two of these elements that create the pull on judges to a jurisdictional test that makes agency determinations subject to the same process of review that is appropriate for the decisions of lower courts. Following Paul Craig's recent work on Dicey, she notes that these two elements highlight what Craig considers the 'less well-known face of sovereignty, that of parliamentary monopoly.'[14]

The better-known face, as Craig puts it, is 'parliamentary omnicompetence' – the ability of Parliament to legislate as it pleases on any subject. This omnicompetence was justified by the supposed fact of the public accountability of legislators to those who held the suffrage. And it followed from this fact that any governmental or executive action had to answer to the same standard of legitimacy. A doctrine of parliamentary monopoly thus seems entailed in the doctrine of omnicompetence. The problem is how to make government and executive officials subject to Parliament in the face of the growing complexity of administration.

The natural solution seems the courts. They provide the institutional guarantee that the boundaries of legitimate official action – the boundaries set by Parliament – are policed. And they do so by reference to the idea of legislative intent. Parliament must have intended that officials do no more than the task assigned to them, within the boundaries set for them.

However, as Craig notes in a passage emphasized by Wilson J: '[T]he idea that there is an interest in securing the efficacious discharge of regulatory legislation was no part of [Dicey's] model, except in so far as it was viewed as a natural correlative of the proper maintenance of external judicial supervision delimiting the boundaries of the legislative will.'[15] And, one should add, the model implodes when the legislation in question seems designed by Parliament to escape external judicial supervision, especially when an agency seems charged by a privative clause with establishing the substance of the policy that it is designed to implement.

Craig's essay on Dicey is now the first chapter of his grandly conceived and executed work, *Public Law and Democracy in the United Kingdom and the United States of America*. His project is to see what light is shed on public law in both jurisdictions by a comparison of a legal system in which the doctrine of parliamentary omnicompetence is still entrenched with a system where constitutional judicial review is taken for granted. His thesis

14 Craig 'Dicey: Unitary, Self-Correcting Democracy and Public Law' (1990) 106 *Law QR* 105, 113

15 Ibid. 118–9; *Corn Growers* supra note 10, 454–5

is that political theory, constitutional law and theory, and administrative law and theory, represent more or less abstract levels of looking at the same problems so that each is implicated in an inquiry into any one.

The book will thus be of special interest to Canadian public lawyers because it might seem, at least since the patriation of the Constitution, that Canadian public law is now in the shadow of American constitutionalism as well as of Dicey. In this review essay, I will ask what Craig has to offer to take us out of both those shadows.

The 'regular,' the 'private,' and democracy

We have seen that Wilson J accounts for the pull to jurisdictional control in terms of the first two elements of Dicey's idea of the rule of law: that the 'regular law' is supreme – individuals should not be subject to arbitrary power; and that the state's officials are subject to the jurisdiction of the 'ordinary' courts in the same way as any individual. These two elements are not, however, sufficient to account for what Craig says is the 'philosophy implicit within this ... model ... – an implicit dislike or distrust of the regulative state.' According to Craig, this philosophy sought external control of administration through the courts 'as the main vehicle for the vindication of private autonomy.'[16]

It is thus the third element of Dicey's idea of the rule of law that would seem to explain the judicial dislike of the regulative state. The equation of the common law, which protects the individual private sphere of autonomy, with the regular law to which officials are subject is in the service of a philosophy that wants to privilege the private ordering of the market over the intrusive, welfarist state.

It is important to see this point because it explains why the 'efficacious discharge of regulatory legislation' is no part of Dicey's model. Judges will not see it as their role to facilitate the discharge of regulatory legislation when, with Dicey, they think that such legislation is in any case suspect. And if it is the third of the elements of Dicey's conception of the rule of law that is fundamental, then an attempt to move out of Dicey's shadow brings both public lawyers and judges into the full glare of current political theory on two related issues.

The first issue is the one just sketched – the public/private distinction when it is made by those who want to privilege private over public order. It is not, that is, the distinction itself that is necessarily in issue, but the

16 Craig, supra note 14, 118–9; Wilson J quotes the passage from which this sentence is taken in *Corn Growers* supra note 10, 455.

privileging of the private over the public. Moreover, it is only if that privileging is inevitably part of the common law that judges whose first allegiance is to the common law have to be suspicious of the regulatory state.

The second issue is democracy. To use the public / private distinction in the service of privileging the private is a way of setting fairly clear constitutional limits to what an elected legislature can do. But even if this privileging is questionable, it does not follow that the public / private distinction should play no role in setting constitutional limits. If there are good reasons for protecting those individual rights that are needed to give individuals control over their lives, to secure their autonomy, then one has to answer the question of what, if anything, should be the limits on democracy. One has to rethink the role of the courts, but the public / private distinction, while no longer in the service of privileging the private, is still of fundamental importance.

Dicey of course evaded such an inquiry by merely assuming the identity of the common law with values privileging the private. He thus also had to assume that legislation would not generally endanger this privileging. The second assumption is the more notorious since even those who share the first assumption (a good example is Lord Hewart) have to cope with the fact of a progressively well-entrenched welfare state. As Craig carefully shows, Dicey held to the second assumption because of his deeply held normative views about political order. Dicey thought that democracy is both 'unitary' and 'self-correcting.' It is unitary in that authority flows from the electorate to the legislators, who articulate the electoral mandate and control its implementation. It is self-correcting because legislators who are tempted to stray from the popular mandate do so at risk of being dumped at the next election.

The tensions in the model are obvious. Dicey's claims on behalf of the rule of law rely on legislators in fact remaining accountable to an electoral mandate and on the executive in fact remaining under the control of Parliament. And the development of the system of party politics with which we are now familiar has virtually destroyed the basis for such reliance. In addition, Dicey's confidence in the common law as the repository of constitutional rights was based on a history of judicial control of the executive in the absence of an authorizing statute. But that confidence, as Dicey himself recognized, is shattered when the executive is expressly given power by statute to make inroads on the private order 'guaranteed' by the common law.

Craig regards this point as specially significant just because he characterizes the process as involving a distribution of public power, including legislative power, to bodies outside of Parliament. It then seems to follow that however such bodies should be made accountable, they

cannot be made accountable via the courts' reliance on the idea of parliamentary monopoly.

So although Craig does not say this in as many words, it is clear that the problems for Dicey's model can arise from three distinct sources. Private order can be disturbed by an executive out of control of Parliament, by legislators out of control of the electorate, or by legislators who are in fact following a mandate to disturb private order and seeing to it that the executive implements that mandate.

In regard to the last of these sources, Craig neglects an important part of Dicey's argument, which is that the real guarantee of freedom lies ultimately in the allegedly liberty-loving, that is, liberal, character of the British public; something Dicey took to be manifested in custom, including the practice of the common law. And it is surely the change in that character that has brought about many of the major tensions in public law in Britain. The change has two aspects.

First, the public was extended in scope through the extension of the suffrage. Second, that same public did give to a series of progressive governments the mandate to create the welfare state. And it is the judiciary's propensity to take seriously their role as guardians of private order, thereby protecting a minority of property holders from executive attempts to effect popular raids on the private, that continues to fuel the distrust of the judiciary endemic in democratic theory.

This is not to say that Craig neglects these issues. His book, despite some protestations to the contrary, is about the concept of the public rather than the concept of public law. He thus makes his major contribution at the level of theoretical argument about the public / private distinction and democracy rather than at the more concrete levels of constitutional and administrative law. My point, which will be elaborated fully below, is simply that Craig might have overlooked the deepest tension of all in Dicey – Dicey's sense that ultimately it is appropriate that the scope of liberty is for the *demos* to decide.

If this is right, then the privileging of the private over the public should be for Dicey a merely contingent aspect of the law at the time and not an element of the rule of law. In other words, the tension between liberalism and democracy that Craig relentlessly tracks down in this work is not, as he sees it, a tension between two camps in political theory, the liberals versus the democrats. Rather, it is a tension within the theory of liberal democracy that one has to cope with, whether one's initial allegiance is to liberalism or to democracy. And, I will propose, the instructive lessons for political theory and public law, or, as Craig would rightly have it, for the political theories of public law, come from seeing the tension this way.

Pluralism, liberalism, and democracy

Craig shows at length how Dicey's idea of unitary democracy is further subverted by the rise of pluralism, by the recognition of the significance of the presence of groups in the electorate whose often very different understandings of what is in their interests undermines the idea of a unitary mandate to legislators. If the justification for judicial deference to legislative intent is that legislators hold a mandate from the electorate, and if the very possibility of such a mandate is in issue, then the legitimating basis for judicial deference starts to crumble. Notice that the issue here has to do with legislators' not being accountable to the electorate.

Four chapters of Craig's book are devoted to a discussion of different models of pluralism in the United States and Britain and so to this problem.[17] In the context of the United States, Craig finds that pluralism is dominated by Hobbesian conceptions of human nature, which hold that people are self-seeking maximizers of their desires. But the conceptions differ in accordance with the extent to which their proponents hold that there is no more to an expression of collective interest than the fact that different individuals have convergent desires.

Pessimistic Hobbesians will hold that there is no collective interest that can transcend conflicting individual views of the good. They are thus pessimistic in that they are resigned to the domination by stronger groups of weaker groups, since for them there is by definition no basis for curbing the stronger by reference to some interest shared with the weak. This pessimistic Hobbesianism is usually allied with a prescriptive claim about a very limited role for government. Since all that we can know about the public interest is what survives competition in the political market, the best place for the formation of interest is the largely unregulated market. Legislation is often the guise for rent-seeking activity on behalf of a powerful group that will naturally try to represent what it wants as in everyone's interest. So the less regulation the better.

Notice that this pessimistic Hobbesianism can lead to one of two judicial stances. Either judges should always defer to legislative determinations, since there is no value transcending the determination against which to measure it; or judges should scrutinize carefully any legislation in order to curb rent-seeking, especially on the part of public officials. This second stance will lead, of course, to little deference in the administrative law context to official decisions and may end up preferring clear

17 *Public Law* chapters 3, 4, 5, 6

articulation by the legislature of legislative standards and a strong non-delegation doctrine.

By contrast, Madisonian pluralism is a more optimistic Hobbesianism. Although it starts with the premise that individuals are as Hobbes describes them, it hopes to avoid domination by one group of others through a system of checks and balances. The hope of Madisonian pluralism is, as Cass Sunstein has described it, that national political representatives who are above the fray of local pressures will 'be able to disentangle themselves from local pressures and deliberate on and bring about something like an objective public good. Those representatives would have the virtue associated with classical republican citizens.'[18]

This republican vision, which Craig discusses extensively in a separate chapter,[19] carves out a special role for judges in determining whether legislation in fact reflects the public interest. One trouble with this vision is that it seems unable to decide whether the public interest is merely what emerges from the right political process or whether there are independent standards for judging substantive outcomes, even when the process is formally speaking appropriate.

On the first option, the vision assumes that once the more or less formal channnels for public participation in legislation are open, any outcome of the legislative process is in accordance with the public interest. This assumption need not, it should be noted, be limited in scope to the political process that leads to the enactment of legislation. Since, in the administrative law context, substantive decisions are made about the content of legislation by executive officials, republicans may well advocate extensive public participation in the administrative process both in the making and the implementation of policy.

However, this assumption is difficult to sustain in the light of the fact that access to participation, both before and after the enactment of legislation, can be and is largely determined by economic power and social position. Craig regards the major virtue of early pluralist theory in the United Kingdom, primarily that of Harold Laski, as calling attention to the fact that economic, social, and political power intersect and that, therefore, an exclusive focus on the exercise of state power is hardly fruitful.[20]

He does not regard it as a sufficient response to this problem to say that it is only appropriate for legislators or accountable officials to deal

18 Ibid. 58, quoting from Sunstein 'Interest Groups in American Public Law' (1985) 38 *Stan. LR* 29, 42

19 *Public Law* chapter 10

20 Ibid. chapter 5

with substantive inequalities. First, to say this is to make Dicey's false assumption that democracy is both unitary and self-correcting. Second, once one recognizes that power is in fact located in groups other than the state, there is a real issue about whether judges should not have more power than we would normally allow them. And that issue must be made to turn on their competence or potential competence, not on a false picture of the workings of democracy.

Of course, the difficulty in adopting the second option, of having judges evaluate substantive outcomes in terms of independent standards, is in determining what those standards are. However, the main thesis of Craig's book is that some such determination is inevitable. A theory of public law that focuses exclusively on process considerations makes a choice that can be justified only by an argument that has both prescriptive and descriptive elements. It must make at the same time claims about the way the world works and the way it should work. As I have already suggested, for Craig all accounts of public law, of the role of judges in the public law order, are also political theories that attempt to justify a particular role for judges.

This difficulty for republicanism is, as Craig shows, also a problem for contemporary liberal theorists such as John Rawls and Ronald Dworkin.[21] Liberal theory has to be addressed in a book on public law and democracy just because liberals regard the task of public law as setting the appropriate limits to democracy. Put differently, liberals regard the primary task for public law as demarcating clearly the space of the private into which the state is not entitled to intrude. With Dicey, they thus regard the judiciary as appropriately employed in the preservation of the priority of private over public order. This priority is reflected in the fact that while liberals like Rawls countenance welfarist measures such as progressive taxation, these cannot be at the expense of any of a list of basic liberties.

This requirement of a 'lexical priority' of individual liberties over equality-promoting measures is itself defended by a thesis about neutrality.[22] One has to have the requirement of lexical priority, because of the deeper requirement that the state take no stand on the issue of what the good life is for individuals. But in order for the political liberties that are guaranteed by constitutional rights against the majority to be of equal worth to individuals, the de facto privileging of certain groups in private order cannot go unchallenged. Thus Craig points to the possibility of a

21 Ibid. chapters 8, 9

22 See Rawls *A Theory of Justice* (Oxford: Oxford University Press 1980).

perfectionist liberalism, one which allows the state to intrude into private order on the basis of promoting individual autonomy so as to guarantee the equal worth of liberties to all.

Republicanism of the kind proffered by Sunstein and Frank Michelman can then be seen as an attempt to develop an idea of a common good that would guide such incursions into the private. However, Craig's sympathies seem to be with liberalism against republicanism for reasons already suggested. That is, if republicanism offers us a purely procedural conception of what is in the public interest, the normative basis in individual autonomy that liberalism offers is the best substantive ground for such a procedural theory. And if republicanism seeks to go beyond liberalism, it has to date offered nothing in the way of guiding principles.

For somewhat similar reasons, Craig's sympathies seem to be with liberalism against the vision of participatory democrats such as Roberto Unger and Benjamin Barber.[23] The aim of such democrats is to increase the effective control of individuals over their own lives. They tend to be hostile to the institution of judicial review since they regard such review as diverting control by individuals over collective decision-making to a judicial élite.

Craig's major criticism here extends the main thesis of his book, namely, that theories of public law are always part of substantive political theories about democracy. For here he seems to make a claim about political theory. He regards it as incumbent on political theorists to do more than elaborate a prescriptive and descriptive account of the world. He thinks that they owe us also an account of how their theory would work; and he assumes that this involves providing us with an account of public law institutions, even if these are not organized around an independent judiciary.

In particular, he argues that the task of public law will be to protect the standards entailed in the substantive premises of democratic theory; that is, the rights of individuals to participate as equals in the process of democracy have somehow to be protected. Craig's critique of radical demcoratic theory chimes with his observation of the weakness in Laski's pluralism. This is that Laski never offered a satisfactory account of how one could consistently achieve a genuine pluralism while simultaneously providing the strong, central, state-controlled direction for the egalitarian measures that would be the basis of a genuine pluralism.

23 *Public Law* chapter 11. See Benjamin Barber *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press 1984) and Roberto Unger *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press 1987).

Although Craig fails to draw this conclusion explicitly, his survey of theories of democracy and public law shows us that Dicey's vision still retains considerable power. While Dicey's vision of the rule of law exposes a great tension in his theory between liberalism and democracy, the tension is not, it seems, one from which any of the major contenders in political theory and public law can escape.

Liberals are constantly faced by the democratic challenge that the state should be involved in providing to individuals the resources that will make possible a life of individual autonomy. Democrats will not convince us of the case to abandon judicial review in the service of traditional liberties unless they can provide us with a picture of a better system for institutional protection of liberties and rights that they themselves value. And republicans try to straddle the liberal / democratic divide without providing us with an adequate basis for doing so.

The paradox of the recognition of rationality

These problems are well exemplified by returning to Wilson's criticism of Beetz J for straying from the spirit of *CUPE*. Beetz J's decisions after *CUPE* appear in a much more sympathetic light if one sees them as he saw them, as making sense of Dickson J's remark in *CUPE* about jurisdiction. There Dickson J seemed to reject the approach commonly adopted hitherto, that the question of agency jurisdiction was the 'preliminary' or 'collateral' question that the agency had to get right on the court's understanding of the correct interpetation of the agency's constitutive statute. This left the main question – application of the statute and determination of facts – to the agency.[24]

Dickson J said that 'underlying this sort of language is, however, another and, in my opinion, a preferable approach to jurisdictional problems, namely, that jurisdiction is typically to be determined at the outset of the inquiry.' He went on to say that the 'question of what is and what is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional and therefore subject to broader curial review, that which may be doubtfully so.'[25]

Since he went on to establish that the test for error of law that amounts to jurisdictional error is one of patent unreasonableness, the obvious inference, and the one Beetz J made, is that the old standard of correctness for jurisdictional error remains with the warning that the courts should be wary of deploying it too readily.

24 *CUPE* supra note 1, 233
25 Ibid.

But such a warning is useless unless it provides a principled basis for distinguishing between jurisdictional error and error of law. And as both Dickson J and Beetz J seem to acknowledge, no such test is available. Further, as Beetz J pointed out in *Acadie*, Dickson J provides us with no good reason to suppose, and it is in fact illogical to do so, that jurisdictional questions can be confined to the beginning of a judge's inquiry.[26] As Beetz J pointed out in *Bibeault*, to confine jurisdictional questions in this way would result in the determination of the importance of questions by the mere fact of the order in which they occurred.[27]

Finally, *pace* Evans, it hardly seems true to say that courts have recognized that the law is indeterminate in the sense that there are no right answers to difficult questions of statutory interpretation. Perhaps the most striking example is Dickson J's reasoning in *CUPE*. On his view, the matter to be determined fell within jurisdiction and thus the test was one of patent unreasonableness. But his conclusion seems to be that the agency determination was in fact correct.[28]

Indeed, even if it were right that the law is indeterminate in Evans's sense, this would not in itself supply a reason for judicial deference to agency determinations. Judges will still have to answer the question whether they or the agency were best suited to determine that issue. If there is no answer to that question, then courts will find themselves faced with an infinite regress.

Moreover, it is difficult if not impossible to answer that question in the abstract, that is, abstracted from the actual determination made by the agency. As Sopinka J has perceptively pointed out in *Paccar of Canada Ltd. (Canadian Kenworth Company Division)* v. *Canadian Association of Industrial, Mechanical & Allied Workers, Local 14 et al.*,[29] a court will generally be faced with the question of whether or not it should defer only if it finds itself in real disagreement with the agency determination.

Nor can these problems be wished away by the pragmatic tests outlined by commentators such as Evans and by Beetz and Wilson JJ. In fact such tests, as Wilson J's own judgment in *Paccar* illustrates, only serve to compound the problem.[30] There in dissent, she concluded on a very slim basis that the determination made by an agency though within jurisdiction was patently unreasonable.

26 *Acadie* supra note 6, 438
27 *Bibeault* supra note 7, 1090
28 *CUPE* supra note 1, especially 240–2
29 [1989] 2 SCR 983, 1018
30 Ibid. 1020–6

In my view, a pragmatic test is a response forced on the courts by their failure to find their way out of Dicey's shadow. It tells judges that they should weigh up all the relevant factors and then come to a considered decision. Since it supplies no criteria of relevance, it contains the potential for an unprincipled and thus uncontained expansion of judicial review. Ironically, Dickson J's judgment in *CUPE* makes this potential plain. By retaining the category of jurisdictional error, and by establishing a basis for review within jurisdiction, he opened up an area for review that had previously, at least in principle, been regarded as off-limits to the courts.

The reason for opening up this area is just the recognition by the courts of the legitimacy of administration. For one way of understanding the theoretical basis of doctrines like the preliminary question doctrine is that the reason for the courts to refrain from scrutiny of the main question is that that question is answered as a matter of political judgment, which is irrational at least from the point of view of law, if not from any point of view. Thus a hostile attitude to administration can lead to a hands-off approach on many issues.[31] Correspondingly, a benign or even positive attitude, one which recognizes that administration can be a good thing, leads to a hands-on approach.

Hence what I call the paradox of the recognition of rationality. For the courts to recognize rationality in the administrative process is simultaneously for them to claim a supervisory jurisdiction over what had seemed before to be the realm of irrationality – of the arbitrariness and caprice of politics.

But the potential for expansive review is an ever-present danger if, as already suggested, the courts fail to come up with criteria of rationality other than a shopping list of factors that have to be taken into account. The old criterion – that the legislature had decreed the administrative decisions to be rational – has been rejected. This is notoriously exemplified in the courts' side-stepping of privative clauses. Here one should keep in mind that in perhaps the most frequently quoted passage from *CUPE*, Dickson J seemed to outline a theory of judicial deference that says that privative clauses will be given weight by the courts when they deserve to be given weight.[32]

31 Most notably proposed by D.M. Gordon. See Kent Roach 'The Administrative Law Scholarship of D.M. Gordon' (1992) 42 *McGill LJ* 1.

32 'Section 101 [the privative clause] 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 usually 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.' *CUPE* supra note 1, 235–6

33 [1979] 1 SCR 311

The alternative criteria until recently have been the criteria developed by judges at common law – that is, the common law rights of individuals that will be presumed to be respected by legislation unless the contrary is indicated. Here I think one has to make a distinction between traditional rights such as ownership and property and rights to fairness and other peculiarly administrative law values.

One way to make this distinction is between substance and process. The traditional rights are the substantive rights protected by process values – the values that ensure that the process of decision-making about the former is fair. A powerful reason for rejecting this distinction in this context is that it indicates that the process values are in order when and only when these substantive rights are in issue. This conception of the proper place for process values was undermined by the Supreme Court's decision in *Nicholson* v. *Haldimand–Norfolk Regional Board of Commissioneers of Police*,[33] and will be further eroded as the courts use section 7 of the Charter to increase the scope of interests that deserve protection.

But another powerful reason is the one suggested by Craig, that the adoption of these process values has to be understood in terms of the substantive interests that those values serve, which are surely not limited to any list of the rights that people have hitherto been taken to enjoy at common law.

It might seem that talk of process values is far removed from the topic of jurisdictional error, since the courts in supervising the jurisdictional determinations of agencies are supervising substantive decisions as to what the law is and not the process of decision-making. But if the process / substance distinction is suspect, then there is no neat division to be drawn between procedural error and substantive error.

Further, if it has to be recognized that the idea of legislative intent is conclusory rather than the basis for judicial reasoning in this area, it also has to be recognized that the conclusion will be determined by extra-statutory considerations of the kind on which a pragmatic test focuses.

The question then remains of how to make sense of such a test. In a way, the test has always been with us since the only route for accommodating both of the models Dicey argued from, democracy and individual

rights, is by ad hoc tests whose legitimacy rested on two sources. One was the fact or alleged fact of legislative silence or ambiguity. The other was the sense that it is legitimate for the courts to decide on the basis of a rights model.

In the area of review for substantive error of law, the basis for judicial review was asserted to be simple legislative intent, justified ultimately by the idea of legislative accountability to the electorate. Since that justification has crumbled, the question has become what can be put in its place. It cannot be that judges should merely grease the wheels of administration by securing its efficacious discharge. For while the traditional democratic basis for judicial review might have crumbled, this does not mean that democracy has ceased to be the main candidate for justifying judicial review.

I suggest that judicial developments in the procedural area are in the end most likely to be helpful here. In so far as such developments pertain to securing effective participation by individuals in decisions that are likely to have a significant impact on their lives, they do express an emerging vision of democracy far richer than Dicey's unitary, self-correcting vision.

And if agency determinations of substantive law are to earn the deference of the courts, surely that should be on the basis that the determination is both fully reasoned and reasonable. That is, the determination must be a genuine attempt to take into account the different interests and values at stake, which can be ensured only by effective participation and by reasoning that is based on such participation.

Of course, that is is not all there is to it. For effective participation has to be gauged by two often competing criteria. First, there is the question of the importance of the individual interest affected by the decision. Second, there is the question of the impact of different degrees of participation on the administrative resources available to the agency. The more important the individual interest, the higher the degree of participation that will be required.[34] But the more participation that is required, the higher the costs. In the end, it will be the judicial sense of what is appropriate that has the final say. There will be an evaluation as to correctness, but it will come in the proper place.

34 This does not also entail that, as a rule of thumb, the courts should be less ready to defer. As the majority decision in *Re Consolidated-Bathurst Packaging Ltd and International Woodworkers of America, Local 2–69 et al.* [1990] 1 SCR 282 shows, if the agency has set up procedures appropriate according to its own experience to protect the interests of the parties affected by its decisions, the courts should take very seriously the agency's view of the best way to protect those interests.

It seems to me that the approach just sketched has two attractive features. First, if a court, in order to justify a decision to review, has to offer an account of why a fully reasoned agency determination fails a test of manifest or patent unreasonableness, judicial prejudice should be forced to the surface. This result will serve a process that could make judges even more accountable than they are at present.

Here I want to suggest that the most vociferous critics of judicial review, while taking Dicey as their principal target, unconsciously adopt one of his main assumptions. This is the assumption that where there is no formal electoral mandate, there is no accountability. But by dint of the obsession of legal academics with the courts, judges are subject to a scrutiny and criticism that makes them far more accountable than even the highest of public officials. As Wilson Js judgment in *Corn Growers* dramatically illustrates, they increasingly find themselves obliged to respond either implicitly or expressly in their judgments to critiques of their past decisions and to the different conceptions of the rule of law, and of the judicial role in enforcing that rule, that inform the critiques.

The second attractive feature of the approach is that it might serve to clarify the relationship between administrative law and constitutional law in a way that will preserve administrative law's distinct contribution to public law. Ever since judges showed an inclination to recognize the rationality of the administrative process, they have found themselves engaged in the difficult process of balancing conflicting values.

This balancing has not been just a matter of resolving a clash between individual rights and considerations of administrative efficiency. There is also a tension, thoroughly canvassed by Craig, between what we can think of as negative and positive rights. Roughly, negative rights are the rights that protect the individual sphere of private autonomy against incursions by the state, while positive rights are the rights to resources that individuals require in order to be autonomous, for example, education and health care. The latter are secured in part by legislation that gives individuals the right to those resources.

To critics of judicial review, administrative law seems the battleground between negative and positive rights with, as already suggested, judges acting whenever they can to secure the negative. While there is ample basis for this claim, it does not tell the whole story. It neglects the emerging vision of a new set of values that judges should act to protect. These values are secured when individuals are guaranteed the opportunity of full and effective participation in the important official decisions about how to implement 'rights in legislation.'[35]

35 See Neil MacCormick 'Rights in Legislation' in P.M.S. Hacker and J. Raz (eds) *Law,*

To reiterate, the administrative law context should remain important even when the Charter is not directly relevant. For it is in that context that judges have started to develop a vision of the individual rights required for a properly functioning participatory democracy. That is, they have not been able to succumb to the Charter-provided temptation to avoid balancing merely because very important individual interests are at stake. And it may be that it is in this emerging vision that one will find the principled approach to balancing that should inform Charter jurisprudence on section 1, so that the courts do not shuttle endlessly between the poles of the American model of absolute rights against the majority and an English model that requires total deference to some myth of prior legislative intent.

This emerging vision does not get rid of the tension between negative and positive rights for a reason already mentioned – one's assessment of what rights of participation are due has to be affected by the weight one gives to the different interests at stake. But the important feature of the vision is that it highlights the tension so that it can be properly addressed.

That tension is just the one that Dicey highlighted and then attempted unsuccessfully to dissolve. And Wilson, Evans, and Craig are surely right that we have to move out of Dicey's shadow and recognize that the idea of a prior legislative intent is altogether unhelpful in resolving the problems of public law. Legislative intent is ultimately a construction of a political theory that indicates not only the proper relationship between the courts and the legislature, but also and more fundamentally a view of the place of individual rights in a properly functioning democracy.

We should recall more than that Dicey starkly brought the tension between democracy and rights to our notice. He also argued for what Stefan Collini has recently called 'the adaptive wisdom of the common law.'[36] For Dicey a virtue of the common law is that it is a vehicle for reflecting the popular sense of what rights are worthy of protection. So with a shift to a popular sense of the importance of positive rights, he should expect that the common law would change to provide a basis for judges to adjudicate those rights.

Craig very successfully makes the case that administrative law blurs into constitutional law, which in turn blurs into political theory. He has also provided a useful map of contemporary debates in political theory. But that he himself declines to go beyond the debates is significant; he

Morality, and Society: Essays in Honour of H.L.A. Hart (Oxford: Oxford University Press 1977).

36 Stefan Collini *Public Moralists: Political Thought and Intellectual Life in Britain, 1850–1930* (Oxford: Oxford University Press 1991) 299

tells us thereby that we remain in Dicey's shadow. As judges, lawyers, and academics we will remain occupied with Dicey's problem of working out the proper place both for individual rights in democratic government and of judges in securing those rights.