Chapter 1 : Table of contents for A common law theory of judicial review

A Common Law Theory of Judicial Review: The Living Tree Published: November 05, W.J. Waluchow, A Common Law Theory of Judicial Review: The Living Tree, Cambridge University Press, , pp., $ (hbk), ISBN

In lieu of an abstract, here is a brief excerpt of the content: Cambridge University Press, , p. For many Canadian jurists, the coming into force of the Charter of Rights and Freedoms in was something of a tragedy; for others it was the arrival of the New Jerusalem. Of course, the Charter was only part of a larger package of constitutional reform brought about by the Canada Act, U. Moreover, however much jurists like to think that the Constitution Act, of which the Charter comprised the first 33 sections was a legal event of great momentâ€”involving, notably, "patriation" of the power to amend the larger part of the Canadian constitutionâ€”others understood the process of constitutional reform quite differently. For them, the central objective pursued by Mr. Trudeau was political and sociological: Over the quarter-century since the signing ceremony on Parliament Hill in April , the juristic interpretation has come to dominate scholarly assessments of the Charter, even though for most Canadians the political dimension seems more present. Hart, whose legal theory permeates this monograph, locates himself among those who focus on the Charter as a legal instrument. He sets himself a difficult, but centrally important, task: How to explain and justify constitutional review of legislation. Although the book is entitled A Common Law Theory of Judicial Review, most lawyers would find the title curious, given its contents. To begin, the book has very little to say about "judicial review" as the subject is traditionally understood in the Anglo-Canadian world. Almost no attention is paid to judicial review of administrative action, for more than years the lifeblood of common law constitutionalism. Certiorari, mandamus, quo warranto and habeas corpus were judicial remedies of high moment. Through them, the Court of Kings Bench developed the basic contours of what we now know as the Rule of Law. It exercised a supervisory authority over inferior tribunals and statutory decision-makers, constraining them to act within their delegated jurisdiction, imposing minimal norms of procedure through devices like the "rules of natural justice", checking the exercise of discretionary power, limiting abuses of regulation-making authority, and implementing various implied principles of the common law constitution [End Page] such as "no expropriation without compensation. Finally, even on the terrain of Charter review, the focus of the monograph is on constitutional review of legislation, by far the lesser remit of the courts, rather than on constitutional review of state action by public officials acting under constitutionally valid authority. Admittedly, a review is not the place to critique the book an author did not write. Still, it is worth noting the disjuncture between title and content, if only to show that the manner in which the author, and the vast majority of those theorists he cites, frames his subject is decidedly presentist. While the focus is predominantly Canadian, comparisons are made with jurisprudence under the American Bill of Rights and with the British experience, where fundamental rights have not been constitutionalised. The author begins by presenting the standard criticism of You are not currently authenticated. View freely available titles:

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Review of the hardback: 'This book will probably come to form part of the canon of constitutional law literature, not only because it provides a sound justification for the existence of judicial review, but also because it gives a compelling orientation as to how it should be exercised.'.

This means that the formatting here may have errors. This text version has had its formatting removed so pay attention to its contents alone rather than its presentation. The version you download will have its original formatting intact and so will be much prettier to look at. Foundations of Judicial Review. What is the constitutional basis of Judicial Review? In these lectures, we will address three main sets of issues. The nature of the question. When we inquire about the constitutional foundations of judicial review, what exactly are we asking about? What gives the courts constitutional authority to strike down executive action? The relevance of the question. Does is matter what the constitutional basis of judicial review isand, if so, why? It relates to fundamental Qs such as parliamentary sovereignty. Basis of JR might influence the content of the rules applied by courts. Relationship between basis of JR and the effectiveness of ouster clauses? The answers to the question. What, then, are the constitutional foundations of judicial review? The principle is an attempt at justifying Judicial Review of executive acts and decisions. Note the following points about the ultra vires model: Wade and ForsythKey question for court: The key question is whether the administrative act or decision under challenge within or outside the authority conferred upon the agency by parliament through the medium of the relevant statute. But how is the court to answer this question? Where the empowering act lays down limits expressly, this just involves construing statutory language and applying it to the facts. The court need only determine whether the land is part of a park and decide accordingly. But where an act confers discretionary power on a decision maker, the question is not so simple. However principles of good administration require that there can be no malpractice of this kind. The court will intervene and determine the decision to be ultra vires if it was taken unreasonably, in bad faith, or on no proper evidence - that is the developed grounds of judicial review. This can only be achieved through the art of statutory construction. It is presumed that parliament did not intend that such abuses could take place, so certain safeguards against abuse are implied within the act. As with substance - whether discretion has been exercised UV - so with procedure, too. It is assumed that parliament when conferring power intends that it be used fairly and in line with due consideration of the rights and interests of those that may be adversely affected. This means judges read all statutes as having implied terms relating to, for example, procedural fairness. Parliament effectively legislates against a background of pre-made judicial principles pertaining to fairness - and in creating these principles, judges take parliaments agreement for granted. Although, as we will see, the ultra vires model has been heavily criticisedto such an extent that it does not, in its unreconstructed form, enjoy any serious support amongst commentatorsit does have certain attractive features. Leaving to one side the separate topic of judicial review of non-legal powers exercised by non statutory bodies, I see no reason to depart from the orthodox view that ultra vires is "the central principle of administrative law" as Wade and Forsyth The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully. He anchors what courts do in underlying legislation: Secondly, in some but, as we will see, not all circumstances, the ultra vires doctrine seems accurately to capture what is going on, in terms of courts reviewing executive action for compliance with standards which are laid down, or otherwise apparent from, the legislationand that seeking to explain what the courts are doing in any other way would be unconvincing. There are clearly many instances of the courts following the ultra vires doctrine - or at least doing what the doctrine would tell them to do, if they were following it. Consider, for instance, the following cases: The question was whether the claimant in the case was a child. The supreme court said that it was within their jurisdiction to decide on whether C was a child. This is a clear example of a court deciding on the legality of administrative action with reference to a statute - they are following,

therefore, the kind of process that the ultra vires principle says JR is all about. Lloyd v McMahon [] AC Lord Keith decided that oral hearings were not necessary before statutory auditors issued ceterficates of a penal nature to councillors by reference to the lack of an explicit provision for it within the statute - noting that explicit provisions had been found in other similar statutes. The case demonstrates a clear link between what the court decides and what the statute says - applying the thinking of the ultra vires principle. It was held that in doing so, the minister was acting unlawfully - the statute imposed a duty to have regard to the welfare of the child or young person - requiring ongoing review of the tariff period - not setting once and for all. He was acting ultra vires. This is not, however, to suggest that all instances of judicial review can readily be related to the terms of the relevant legislation. This point is developed below. Thirdly, viewed from the perspective of judicial politics, the ultra vires model is highly convenient: The implementation of parliamentary intention simply protects judges against charges of activism or judicial supremacism. Baxter, Administrative Law Cape Town at Judges by employing the theory are cloaking judicial review under parliamentary sovereignty. Fourthlyand, according to some accounts, most significantlythe ultra vires model provides a way indeed, the way in which judicial review may be reconciled with parliamentary sovereignty. This point is related to the third, but whereas the third point is concerned with the implications of judicial review from the perspective of judicial politics, the fourth argument is concerned with the implications of judicial review from the standpoint of fundamental issues of constitutional architecture. Because the fourth argument has proven to be pivotal in the debate about the foundations of judicial review, we need to consider it in some detail. This says that JR is only legitimate because courts are implementing the sovereign will of parliament. Ultra vires is therefore the only way of reconciling JR with sovereignty. The analytical difficulty is this: Likewise if Parliament grants a power to a Minister, that Minister either acts within those powers or outside those powers. There is no grey area between authorisation and the denial of power In purported exercise of this power, the Minister grants permission for the construction of: This is not authorised by parliament because of an implied term requiring procedural fairness. Parliament could not have intended that the power be possible to exercise unfairly. According to the ultra vires doctrine, both decisions will be unlawful. But we need to think about the following questions: Why will each decision be unlawful according to the ultra vires doctrine? Why does Forsyth contend that the courts will only be justified in striking down the decisions if they are ultra vires? The criticisms take two main forms, which reflect the two principal claims of ultra vires theorists concerning, respectively, the explanatory power and the constitutional necessity of the ultra vires model. In the elaboration of [principles of judicial review] the courts have imposed and enforced judicially created standards of public behaviour Neither deductive logic nor the canons of ordinary language They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins. We do not need that fig-leaf anymore Critics say that clearly something more is going on - Judges may be clever, but not enough to infer the entire law of JR from, very often, parliamentary silence. There are cases that clearly turn on parliamentary intention - Croydon, Venables. Can we really get from the statute to the individual grounds of review? The wider significance is that: Development of judicial review over time Craig This is a body of law that has grown up in a very short period of time. Admin is a very recent creation. Furthermore the content of the law is ever changing and not static - a. New grounds emerge; and b. If the UV view is to be believed, this has happened because parliament intended it that way. But how can judges just divine this parliamentary intention? Critics say that these are actually changes that judges have authored - as judges were authors of the grounds of review in the first place. Ouster clauses Anisminic v Foreign Compensation Commission [] 2 AC Craig Held, review of wrong determinations was not prohibited by the ouster clause - they were not determinations. How can you say that the court were only giving effect to the will of parliament by seemingly very clearly undermining it. How can the UV doctrine account for this? There is no statute to interpret. At the very least, this criticism suggests that UV is an incomplete explanation. Perhaps though this demonstrates that it is flawed, and should be rejected entirely. But must the review of the exercise of statutory and non-statutory powers rest on the same foundation? Related Administrative Law Samples:

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A Common Law Theory of Judicial Review The Living Tree In this study, W. J. Waluchow argues that debates between defenders and critics of constitutional bills of rights presuppose that constitutions are more or less.

General principles[edit] Judicial review can be understood in the context of two distinctâ€”but parallelâ€”legal systems, civil law and common law , and also by two distinct theories of democracy regarding the manner in which government should be organized with respect to the principles and doctrines of legislative supremacy and the separation of powers. First, two distinct legal systems, civil law and common law , have different views about judicial review. Common-law judges are seen as sources of law, capable of creating new legal principles, and also capable of rejecting legal principles that are no longer valid. In the civil-law tradition, judges are seen as those who apply the law, with no power to create or destroy legal principles. In contrast to legislative supremacy, the idea of separation of powers was first introduced by Montesquieu ; [1] it was later institutionalized in the United States by the Supreme Court ruling in Marbury v. Madison under the court of John Marshall. Separation of powers is based on the idea that no branch of government should be able to exert power over any other branch without due process of law ; each branch of government should have a check on the powers of the other branches of government, thus creating a regulative balance among all branches of government. The key to this idea is checks and balances. In the United States, judicial review is considered a key check on the powers of the other two branches of government by the judiciary. Differences in organizing "democratic" societies led to different views regarding judicial review, with societies based on common law and those stressing a separation of powers being the most likely to utilize judicial review. Nevertheless, many countries whose legal systems are based on the idea of legislative supremacy have learned the possible dangers and limitations of entrusting power exclusively to the legislative branch of government. Many countries with civil-law systems have adopted a form of judicial review to stem the tyranny of the majority. Another reason why judicial review should be understood in the context of both the development of two distinct legal systems civil law and common law and two theories of democracy legislative supremacy and separation of powers is that some countries with common-law systems do not have judicial review of primary legislation. Though a common-law system is present in the United Kingdom, the country still has a strong attachment to the idea of legislative supremacy; consequently, judges in the United Kingdom do not have the power to strike down primary legislation. Administrative acts[edit] Most modern legal systems allow the courts to review administrative acts individual decisions of a public body, such as a decision to grant a subsidy or to withdraw a residence permit. In most systems, this also includes review of secondary legislation legally enforceable rules of general applicability adopted by administrative bodies. Some countries notably France and Germany have implemented a system of administrative courts which are charged with resolving disputes between members of the public and the administration. In other countries including the United States and United Kingdom , judicial review is carried out by regular civil courts although it may be delegated to specialized panels within these courts such as the Administrative Court within the High Court of England and Wales. The United States employs a mixed system in which some administrative decisions are reviewed by the United States district courts which are the general trial courts , some are reviewed directly by the United States courts of appeals and others are reviewed by specialized tribunals such as the United States Court of Appeals for Veterans Claims which, despite its name, is not technically part of the federal judicial branch. It is quite common that before a request for judicial review of an administrative act is filed with a court, certain preliminary conditions such as a complaint to the authority itself must be fulfilled. In most countries, the courts apply special procedures in administrative cases. Primary legislation[edit] There are three broad approaches to judicial review of the constitutionality of primary legislation â€”that is, laws passed directly by an elected legislature. No review by any courts[edit] Some countries do not permit a review of the validity of primary legislation. In the United Kingdom, statutes cannot be set aside under the doctrine of parliamentary sovereignty. Another example is the Netherlands, where the constitution expressly forbids the courts to rule on the question of constitutionality of primary legislation. In American legal language, "judicial review" refers

primarily to the adjudication of constitutionality of statutes, especially by the Supreme Court of the United States. This is commonly held to have been established in the case of Marbury v. Madison , which was argued before the Supreme Court in A similar system was also adopted in Australia. Constitutional Court of the Czech Republic In , Czechoslovakia adopted a system of judicial review by a specialized court, the Constitutional Court as written by Hans Kelsen , a leading jurist of the time. This system was later adopted by Austria and became known as the Austrian System , also under the primary authorship of Hans Kelsen, being emulated by a number of other countries. In these systems, other courts are not competent to question the constitutionality of primary legislation; they often may, however, initiate the process of review by the Constitutional Court. In specific jurisdictions[edit].

Chapter 4 : A Common Law Theory of Judicial Review: The Living Tree by W. J. Waluchow

The argument is based on a hypothetical model of a randomized system of judicial review, and proceeds to show that between the actual practices of judicial review in the US, and the hypothetical.

Leflar, Honest Judicial Opinions, 74 Nw. Close The answer is: Close The more vexing question is one of definition. Close as Shapiro calls it, and what if it exists does it require? In his formal answer, Shapiro, who champions the importance of candor, defines judicial candor largely as the avoidance of deliberate falsehoods: It calls for searching forthrightness in analyzing hard legal questions. Close As a first approximation, we might say that Shapiro defends a narrow conception of judicial candor as avoidance of prevarication, defined as knowing utterance of propositions that one believes to be false or misleading, but that he occasionally assumes a broader meaning. Madison 8 8 5 U. She truly believes let us assume that Marbury controls. From another perspective, however, the opinion is opaque. Close We might even suspect that she has willfully refused to do so. Perhaps she thought the legal arguments in the case so nearly in equipoise that she was entitled to choose both an outcome and a rationale from among a set of legally plausible alternatives and that, in her mind, Marbury controls only because she opted to say so in her opinion. What should we conclude about whether the judge has satisfied her obligation of candor under these imagined circumstances? If that example seems farfetched, consider partly analogous cases that arise routinely in the Supreme Court. Because the Justices have no strict obligation to follow precedent, they frequently need to make methodological choices. Kozel, Settled Versus Right: Barnett, Trumping Precedent with Original Meaning: Not as Radical as It Sounds, 22 Const. Close And their choices in particular cases can leave lawyers and lower court judges scratching their heads about how one or more of the Justices selected the premises upon which they rested their conclusions. Lee, Stare Decisis in Historical Perspective: Close Are the Justices candid if they fail to explain why some cases are controlled by plain language and original historical meanings and others by precedent? Close And one need not impute deviousness or willful misrepresentation to explain why a Justice might think that the issues in one case required a different approach from those in another. Nihilism and Legal Theory, 94 Yale L. Such false appeals to neutrality are, nonetheless, illegitimate. For a defense of judicial nonintrospection, but not of dissembling, see Altman, supra note 1, at Close Here we can ask: Have Justices who refuse to disclose such motivations, when they have them, satisfied their obligations of judicial candor? I was once disposed to say that they had not. But reflection has led me to a more nuanced view. To think clearly about judicial candor, we need a distinction that leading contributors to the literature have failed to recognize so farâ€”a distinction between the obligation of judicial candor and the ideal of judicial candor. Nonetheless, in the absence of either a willful effort to deceive or the utter unintelligibility of proffered legal reasoning, the kinds of opinions just imagined normally do not breach an obligation of candor. In the view that this Essay advances and defends, we should regard judicial candor as existing along a spectrum. Along that spectrum, one crucial marker defines minimal obligations. A judge or Justice who fails to satisfy those requirements commits a serious, culpable breach of norms of acceptable judicial conduct. But the minimal obligations mark a point at some distance from the ideal, which the Justices can approach more or less closely. Close More ordinary judges can satisfy their obligations of candor without approaching the standard that those eminent jurists set. Its second and more ambitious innovation is to introduce a conceptual apparatus for appraising judicial candor in a range of contexts. Among the central challenges for a theory of judicial candor is to arbitrate among disparate linguistic and conceptual intuitions. If I say that judicial candor means or requires one thing, and someone else says that it is or demands something else, it is not clear what we are arguing about or how, even in principle, we could resolve our differences. Plainly, however, the parties to the debate believe that something is at stake. So do a number of judges with whom I have discussed judicial candor. Close Others may think that there is a morally correct or optimal way to understand or interpret judicial candor, partly independent of any rhetorical advantages that it might confer. Close my strategy in this Essay will be to assume that debates about judicial candor have an irreducible normative element but that they begin with, and must remain sensitive to, anchoring patterns of linguistic usage and linguistic intuition. Proceeding

accordingly, I propound a framework for meaningful debate about what judicial candor is or requires. Although others might formulate the relevant questions slightly differently, analysis of any shared concept must begin with patterns of linguistic usage. A Defence of Conceptual Analysis Close And when differences about actual or proper usage emerge, there is no hope of rational arbitration among contending claims without asking what reasons we might have to prefer one sense or usage to anotherâ€”my second question. Otherwise debate would be pointless. Close analysis of leading positions in the debate then reveals the crucial salience of the third and fourth questions. The fifth question is one that any comprehensive theory of judicial candor almost self-evidently needs to answer once it is raised. By the end, this Essay will have defended the conclusion that I stated at the outset: We should think of judicial candor as defining both an obligation and an ideal. Failures fully to achieve the ideal are common, breaches of judicial obligation rarer. We should ask our judges and Justices to do better, but with an awareness of why they may be unlikely ever to realize the ideal of judicial candor fully. In discussing judicial candor, we should begin by considering how peopleâ€”in this case, mostly lawyers, law professors, and law studentsâ€”ordinarily use the term. In doing so, we should expect considerable, but not total, convergence. It is not a technical legal term. It neither appears in the Constitution or statutory judicial codes 24 24 See Idleman, supra note 1, at ; cf. Close Nor is it a term of common parlance. In order to apply the concept of judicial candor, we need to know something about judges, the judicial role, and the American legal system. For discussion of the contrast between French and U. A Comparative Law Approach, 72 Wash. Close Debates about judicial candor draw their meaning from within that framework. The central aims of this Part are more descriptive and analytical than normative. My main aspirations here are to describe the currently leading conceptions of judicial candor, to clarify the terms on which argument has proceeded in the past, and to identify potentially generative foundations for future normative argument. Close â€”in varied settings. When we do so, we characteristically have a specific subject in mind. We are typically concerned about openness and sincerity in disclosing information concerning particular matters, not in revealing facts or opinions about everything. These reference points from extralegal linguistic usage mark several ways in which the concept of judicial candor is distinct from candor in other roles or nonjudicial contexts. To begin with, nearly everyone who talks or writes about judicial candor assumes it to be a virtue. Aristotle, Nicomachean Ethics bk. Times July 14, , http: Close The criticisms did not reflect judicial candor, in the sense in which Professor Shapiro and others use the term, but candor of a different kind, or in a different role, that was unfitting for a Justice to exhibit. Nancy Gertner, 64 N. Judicial candorâ€”in the sense in which most legal commentators use the termâ€”involves candor with respect to issues that judges need to analyze in order to resolve the cases in which those issues arise and in which they have or assume an obligation to give reasons for their decisions. The last qualification, involving obligations of reason-giving, merits highlighting. Close The Supreme Court affirms repeatedly that lower federal courts have no duty to write opinions in all cases. Close Indeed, the Court itself almost never explains its decisions to grant or deny certiorari. Close In cases decided by written opinions, individual Justices occasionally note that they concur only in the judgment, or even record dissents, without further indication of their reasoning. Close We can postpone the question of whether ideals or obligations of judicial candor apply more broadly than is widely assumedâ€”for example, to cases that judges now resolve without any written opinions at all. Subjective and Objective Conceptions When we begin to speak of the standards that define judicial candor in the provision of reasons for reaching conclusions, we encounter divisions in the scholarly literature. According to subjective conceptions, in order to know what candor requires a judge to do, we need to know or refer to what she individually and subjectively thinks, feels, or believes. Examples would be conceptions that require judges not to misstate their beliefs or, more affirmatively, insist they disclose thoughts that they would otherwise prefer to conceal. Close For example, an objective conception might require a judge to ask and answer those legal and factual questions that any reasonably honest and searching analysis would divulge. Having done so, we can then consider the possibility of theories of judicial candor that include both subjective and objective elements. Subjective Conceptions of Judicial Candor. Close Subjective conceptions of judicial candor vary from the less to the more demanding. Professor Shapiro exemplifies the former, more minimalist approach. Close Nor, Shapiro adds, should a judge fail to disclose something if she knows that her omission would create a false

understanding. This last aspect seems critical: Close At the very least, the critics are right that such a standard would require a great deal. For an especially distinguished contribution with endnotes citing to prior contributions, see Michael J. Close If the Justices had felt obliged to tell all, they likely would have required nine opinions, not one, with many of those opinions being very lengthy. Perhaps no one could reasonably be asked to tell everything that matters in some degree to the resolution of a complex issue. But there is no need to prejudge whether we should embrace a conception of judicial candor that imposes sweeping demands for forthright disclosure. For now, it suffices to recognize that some would define judicial candor in such terms. Objective Conceptions of Judicial Candor. Close But no prominent commentators appear actually to endorse this view. Close A definition of candor in these terms would stray too far from ordinary linguistic practice.

Chapter 5 : A THEORY OF JUDICIAL CANDOR - Columbia Law Review

A Common Law Theory of Judicial Review has 3 ratings and 0 reviews. In this study, W. J. Waluchow argues that debates between defenders and critics of co.

Constitutional position[edit] The English constitutional theory, as expounded by A. Dicey , does not recognise a separate system of administrative courts that would review the decisions of public bodies as in France, Germany and many other European countries. Instead, it is considered that the government should be subject to the jurisdiction of ordinary Common Law courts. At the same time, the doctrine of Parliamentary sovereignty does not allow for the judicial review of primary legislation primarily Acts of Parliament. This limits judicial review in English law to the decisions of officials and public bodies, and secondary delegated legislation, against which ordinary common law remedies, and special " prerogative orders ", are available in certain circumstances. The constitutional theory of judicial review has long been dominated by the doctrine of ultra vires , under which a decision of a public authority can only be set aside if it exceeds the powers granted to it by Parliament. The role of the courts was seen as enforcing the "will of Parliament" in accordance with the doctrine of Parliamentary sovereignty. However, the doctrine has been widely interpreted to include errors of law [1] and of fact and the courts have also declared the decisions taken under the Royal Prerogative to be amenable to judicial review. Procedural requirements[edit] Under the Civil Procedure Rules a claim application for judicial review will only be admissible if permission leave for judicial review is obtained from the High Court , which has supervisory jurisdiction over public authorities and tribunals. Permission may be refused if one of the following conditions is not satisfied: The application must be made promptly and in any event within three months from the date when the grievance arose. The applicant must have sufficient interest in a matter to which the application relates. The application must be concerned with a public law matter, i. However, the Court will not necessarily refuse permission if one of the above conditions is in doubt. It may, in its discretion, examine all the circumstances of the case and see if the substantive grounds for judicial review are serious enough. The purpose of the letter is to identify the issues in dispute and to avoid litigation where possible. The protocol specifies a template for the letter. It is usual to allow 14 days for a response. Styling of the claimant[edit] Unlike other civil proceedings in English courts, in judicial review court papers the claimant is styled as The Queen on the application of Claimant X or King when reigning. Technically a judicial review is brought by the Crown, on the application of the claimant, to ensure that powers are being properly exercised. In R v Panel for Takeovers and Mergers Ex p Datafin [] 1 QB , the Court of Appeal held that a privately established panel was amenable to judicial review because it in fact operated as an integral part of a governmental framework for regulating Mergers and Takeover, while those affected had no choice but to submit to its jurisdiction. Ouster clauses[edit] Sometimes the legislator may want to exclude the powers of the court to review administrative decision, making them final, binding and not appealable R Cowl v Plymouth City Council. However, the courts have consistently held that none but the clearest words can exclude judicial review. The courts however do uphold time limits on applications for judicial review. They could not originate their action under the general civil law procedure, because that would be avoiding the procedural safeguards afforded to public authorities by the judicial review procedure, such as the requirement of sufficient interest, timely submission and permission for judicial review. However, a defendant may still raise public law issues as a defence in civil proceedings. So for example, a tenant of the public authority could allege illegality of its decision to raise the rents when the authority sued him for failing to pay under the tenancy contracts. He was not required to commence a separate judicial review process Wandsworth London Borough Council v Winder If an issue is a mix of private law rights, such as the right to get paid under a contract, and public law issues of the competence of the public authority to take the impugned decision, the courts are also inclined to allow the claimant to proceed using ordinary civil procedure, at least where it can be demonstrated that the public interest of protecting authorities against frivolous or late claims has not been breached Roy v Kensington and Chelsea and Westminster Family Practitioner Committee , Trustees of the Dennis Rye Pension Fund v Sheffield City Council Grounds for review[edit] In Council of Civil Service

Unions v Minister for the Civil Service [] AC , Lord Diplock summarised the grounds for reversing an administrative decision by way of judicial review as follows: Illegality Procedural impropriety Legitimate expectation The first two grounds are known as substantive grounds of judicial review because they relate to the substance of the disputed decision. Procedural impropriety is a procedural ground because it is aimed at the decision-making procedure rather than the content of the decision itself. Those grounds are mere indications: There are no hard and fast rules for their classification, but the most common examples of cases where the courts hold administrative decisions to be unlawful are the following: The decision is made by the wrong person unlawful sub-delegation [edit] If the law empowers a particular authority, e. Where a decision is made by a properly empowered department within a local council, s. Error of law or error of fact[edit] The court will quash a decision where the authority has misunderstood a legal term or incorrectly evaluated a fact that is essential for deciding whether or not it has certain powers. So, in R v Secretary of State for the Home Department, ex parte Khawaja [] AC 74, the House of Lords held that the question whether the applicants were "illegal immigrants" was a question of fact that had to be positively proved by the Home Secretary before he could use the power to expel them. The power depended on them being "illegal immigrants" and any error in relation to that fact took the Home Secretary outside his jurisdiction to expel them. However, where a term to be evaluated by the authority so broad and vague that reasonable people may reasonably disagree about its meaning, it is generally for the authority to evaluate its meaning. For example, in R v Hillingdon Borough Council ex Parte Pulhofer [] AC , the local authority had to provide homeless persons with accommodation. The applicants were a married couple, who lived with their two children in one room and applied to the local authority for aid. The local authority refused aid because it considered that the Pulhofers were not homeless and the House of Lords upheld this decision because whether the applicants had accommodation was a question of fact for the authority to determine. The decision maker went beyond their power: They decided to charge people to use it. The court held they went beyond their power by trying to benefit commercially from something that was supposed to be for everyone. Section 1 of the Overseas Development and Co-operation Act empowered the Secretary of State for Foreign Affairs to assign funds for development aid of economically sound projects. The Secretary assigned the funds for a project to construct a power station on the Pergau River in Malaysia see Pergau Dam which was considered as uneconomic and not sound. The House of Lords held that this was not the purpose envisaged by the enabling statute and the Minister therefore exceeded his powers. Ignoring relevant considerations or taking irrelevant considerations into account[edit] This ground is closely connected to illegality as a result of powers being used for the wrong purpose. In R v Somerset County Council Ex parte Fewings the local authority decided to ban stag hunting on the grounds of it being immoral. In Padfield v Ministry of Agriculture, Fisheries and Food , the Minister refused to mount an inquiry into a certain matter because he was afraid of bad publicity. In R v Inner London Education Authority, ex parte Westminster City Council , [14] the London Education Authority used its powers to inform the public for the purpose of convincing the public of its political point of view. In all these cases, the authorities have based their decisions on considerations, which were not relevant to their decision making power and have acted unreasonably this may also be qualified as having used their powers for an improper purpose. Note that the improper purpose or the irrelevant consideration must be such as to materially influence the decision. Where the improper purpose is not of such material influence, the authority may be held to be acting within its lawful discretion. Hence in R v Broadcasting Complaints Commission, ex parte Owen [] QB , the Broadcasting authority refused to consider a complaint that a political party has been given too little broadcasting time mainly for good reasons, but also with some irrelevant considerations, which however were not of material influence on the decision. Fettering discretion[edit] An authority will be acting unreasonably where it refuses to hear applications or makes certain decisions without taking individual circumstances into account by reference to a certain policy. When an authority is given discretion, it cannot bind itself as to the way in which this discretion will be exercised either by internal policies or obligations to others. Even though an authority may establish internal guidelines, it should be prepared to make exceptions on the basis of every individual case. Unlike illegality and procedural impropriety, the courts under this head look at the merits of the decision, rather than at the procedure by which it was arrived at or the legal basis on

which it was founded. The question to ask is whether the decision "makes sense". In many circumstances listed under "illegality", the decision may also be considered irrational. Proportionality[edit] Proportionality is a requirement that a decision is proportionate to the aim that it seeks to achieve. Proportionality exists as a ground for setting aside administrative decisions in most continental legal systems and is recognised in England in cases where issues of EU law and human rights are involved. However, it is not as yet a separate ground of judicial review, although Lord Diplock has alluded to the possibility of it being recognised as such in the future. At present, lack of proportionality may be used as an argument for a decision being irrational. Statutory procedures[edit] An Act of Parliament may subject the making of a certain decision to a procedure, such as the holding of a public hearing or inquiry, [17] or a consultation with an external adviser. Courts distinguish between "mandatory" requirements and "directory" requirements. A breach of mandatory procedural requirements will lead to a decision being set aside for procedural impropriety. Breach of natural justice[edit] See also: Natural justice The rules of natural justice require that the decision maker approaches the decision making process with "fairness". What is fair in relation to a particular case may differ. Below are some examples of what the rules of natural justice require: The rule against bias[edit] Further information: Any person that makes a judicial decision - and this includes e. If such interest is present, the decision maker must be disqualified even if no actual bias can be shown, i. The minimum requirement is that the person gets the chance to present his case. If the applicant has certain legitimate expectations , for example to have his licence renewed, the rules of natural justice may also require that they are given an oral hearing and that their request may not be rejected without giving reasons. Duty to give reasons[edit] Unlike many other legal systems, English administrative law does not recognise a general duty to give reasons for a decision of a public authority. Where it is not, common law may imply such a duty and the courts do so particularly with regard to judicial and quasi-judicial decisions. Considerations of legitimate expectations: When an individual or a group has been led to think that certain steps will apply. When an individual or a group relies on a policy or guidelines which govern an area of past executive action. In a leading case on the latter point, Ms Coughlan, having been badly injured in a car accident, was promised a "home for life" by the health authority when she was transferred from the hospital to a care home. There is some authority for the proposition that the courts employ a normative legal concept of "moral desert". The following remedies are available in proceedings for judicial review:

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A Common Law Theory of Judicial Review The Living Tree. Get access. Buy the print book Check if you have access via personal or institutional login.

The Living Tree Published: November 05, W. Reviewed by Jeffrey Brand-Ballard, George Washington University I In representative democracies, you have the right to petition your lawmakers to change a law of which you disapprove. If they fail to do so, you can vote against them. In some democracies, you have an additional option. You can challenge the law in court provided you have legal standing to do so , arguing that it conflicts with fundamental law: The process by which courts adjudicate such challenges is known as "judicial review. Thousands of articles and hundreds of books have been written about judicial review by scholars in law, philosophy, and the social sciences. Three basic normative questions are: He defends judicial review as both legitimate and desirable in a democracy. He argues that courts should implement the Charter his preferred term using a common law method, rather than limiting themselves to the original meaning of the Charter or the intentions of its framers. Previous writers have drawn parallels between constitutional adjudication and common law reasoning Strauss, ; Schauer, ; Farber and Sherry, , but this appears to be the first published monograph devoted to defending a common law method of judicial review but see Stoner, ; Strauss, forthcoming. Legal philosophers know Waluchow for his articles on positivism and for his monograph, which remains the most important book-length defense of the position known as "inclusive positivism. It is well organized and clearly written, with little technical jargon. It is full of sensible, straightforward arguments. It provides a useful overview of some of the basic theoretical issues surrounding judicial review. The book could be assigned to advanced undergraduates with no background in either law or philosophy. The book also stands out from most books on judicial review in its focus on the Canadian Charter of Rights and Freedoms and its engagement with Canadian critics of judicial review, such as F. Morton, Rainer Knopff, and Michael Mandel. Waluchow also references the U. Constitution and American scholars, but his concentration on Canada is a welcome corrective to the insularity of constitutional scholarship in the USA. In this review, I shall summarize the book and express some reservations. II The book consists of six chapters, the first of which is an introduction. Anticipating the charge that judicial review is undemocratic, Waluchow explains that, in all but direct democracies, law-determining decisions are "distanced" from citizens in various ways. Constitutional limitations on government are yet another distancing mechanism, a point developed with helpful references to Locke, Hobbes, and John Austin. Waluchow recognizes, however, that constitutional limitations need not take the form of a Charter that is either written or entrenched i. Nor is separation of powers either conceptually or practically necessary. Nevertheless, separation of powers is desirable in many societies, as is an entrenched, written Charter. The chapter concludes with an overview of five theories of constitutional interpretation. The first three, which Waluchow classifies as "fixed views," are original meaning, original intent, and hypothetical intent. The remaining two theories are Dworkinian constructive interpretation and critical theory. The stage is now set for the basic questions raised in Chapter 3: Waluchow presents what he calls the "Standard Case" for Charters, supported by the "Advocates. Majorities sometimes favor legislation that oppresses minorities, but when they do so, the Advocates assure us, they are "drunk with fear" , in the grip of "temporarily ascendant" 90 but "inauthentic" preferences. Because unelected judges are insulated from political pressure, they are more likely to override these inauthentic preferences in favor of the "authentic" preferences of the majority which are, Waluchow believes, always to treat minorities fairly. His main adversary is Jeremy Waldron a; b , a liberal whom Waluchow sees as the most persuasive Critic. Charters, they claim, compromise the ideals of democratic self-government. Charters permit the dead hand of the past to rule the present. They depend upon the fiction of substantial consensus about individual rights in modern, pluralistic societies. They presuppose that there are objectively correct answers to moral questions, and that judges have better moral judgment than the rest of us. Charters are also said to presuppose an incoherent picture of human agents, according to which the same individuals who must be respected for their autonomy and responsibility also have a "predatory" nature which leads them to oppress one another in

the realm of ordinary politics. Finally, according to the Critics, Charters frustrate political compromise by encouraging "rights talk," in which ordinary interests are elevated to "trumps" over the common good. Waluchow acknowledges that many of these objections have some merit, but he finds them overstated. He presents several cogent responses in Chapter 4, but his main line of response, in Chapters 5 and 6, challenges two premises accepted by both Advocates and Critics. He defends judicial review as a response to our inability to know, in advance, what political morality requires. Waluchow notes, following H. Hart, that one effect of introducing secondary rules into society is that acceptance and validity can diverge. Anticipating this possibility, legislators take advantage of the open texture of language, drafting legal standards with terms such as "reasonable" and "fair" and delegating to judges the task of application. Several features of common law reasoning distinguish it from reasoning in cases regulated by statutes. Unlike statutory rules, common law rules are not canonically formulated or enacted by legislatures. Also, a court creates and applies common law rules in the process of resolving particular cases. Where an existing rule would lead to an undesirable result in the present case, the court may modify or replace the rule so as to avoid that result. He proposes "mapping common law methodology onto the understanding and development of the moral concepts, principles, and values enshrined in Charters. Rather than specifying in the Charter precisely what legislation equality permits and requires, they use "very abstract terminology" such as "equality" and "fundamental justice. The Framers of a Charter cannot predict all of the ways in which general legislation might, in the future, infringe individual rights. Waluchow argues that limited foresight justifies using abstract language and the common law method, rather than concrete language and an originalist method. Suppose the State of Iowa adopts legislation that bans political discourse via email. Waluchow knows that many important cases of judicial review do not involve new legislation or new technologies or communities temporarily "drunk" with unanticipated fears. Segregated schools and other public facilities existed in the USA when the Fourteenth Amendment was ratified. So did state statutes criminalizing abortion and sodomy. Capital punishment was in force when the Eighth Amendment was ratified. Prosecutors could use unlawfully obtained evidence at the birth of the Fourth Amendment. These laws were not new developments at all, much less developments that the men of the eighteenth and nineteenth centuries failed to foresee. We must, therefore, consider cases in which a court uses a particular Charter provision to invalidate a law that was already in effect when the provision was enacted, that was endorsed by the framers of that provision, and that has been continuously supported by most of the electorate. Nor was there great public support for the conclusion that the Constitution guaranteed a right to abortion in The same could be said about capital punishment in , sodomy in , and the use of unlawfully obtained evidence against criminal defendants in He acknowledges that most Canadians still oppose these marriages, but he insists that their opinions "flatly contradict fundamental beliefs, principles, values, and considered judgments that enjoy widespread, if not universal, currency within the community. There would be no need for the Court to overturn legislation. But Waluchow would not be satisfied with such non-binding declarations. He wants courts to mandate same-sex marriage. He may be correct that even the opponents of same-sex marriage are committed to certain moral principles of equal concern and respect. Waluchow does not explain why he imputes to the community stronger versions of these principles. His repeated insistence that failure to extend marriage to same-sex couples is "inconsistent" with such principles is surprising because common law reasoning readily accommodates unprincipled exceptions and ad hoc compromises. It proceeds analogically, without requiring deep moral justifications for the distinctions it draws. It thus seems tailor-made for those who wish to treat same-sex couples differently than opposite-sex couples without having to give a full moral justification for discriminating. Waluchow champions "bottom-up" legal reasoning, but his moral reasoning remains curiously "top-down. The problem could be solved by granting courts the authority to decide Charter cases, subject to override by simple legislative majority. In Canada, the Notwithstanding Clause actually permits a qualified form of this override, although its use is, apparently, disfavored. Supreme Court can be overturned only by constitutional amendment. Perhaps he never intended to defend American judicial review, but he might have said so explicitly, as his book then loses some interest for American readers. IV Waluchow has taken an awkward position. But he gives the community little say regarding the implications of its own constitutional morality. He makes several arguments for casting judges, rather than

legislators, as the moral expositors. V Another argument that Waluchow makes, oddly, is that legislators cannot foresee all of the ways in which legislation might infringe Charter values. Consider the decision of the Supreme Court of Connecticut that legalized same-sex marriage under the state constitution. One cannot defend this decision by claiming that the Connecticut General Assembly was unable to "foresee" the issue. The Assembly had already granted legal recognition to same-sex unions, but deliberately withheld the title of "marriage" from these unions. The representatives are not, in fact, too busy or uninformed to legalize same-sex marriage. They, and their constituents, have simply chosen not to do so. One might, of course, override their decision in the name of ideal morality, but Waluchow rejects this understanding of judicial review. He insists that overturning legislation is legitimate only if the people have misunderstood the implications of their own basic moral commitments. The common law method, which puts greater distance between entrenched text and constitutional jurisprudence, as practiced, would seem to weaken the symbolic value of the document over time. Indeed, many originalists see non-originalist courts in the USA as rejecting a public commitment to the Constitution. The originalists may be wrong, but where symbolism is the issue, appearances are everything. One might also suggest that there is symbolic value in seeing elected legislators, rather than unelected judges, make final constitutional decisions. I do not believe that he intends to persuade originalists of the merits of the common law method. It seems to me, rather, that he aims to reassure his fellow supporters of judicially mandated same-sex marriage that they are really just enforcing the constitutional values to which everyone is already committed. If he is correct, then supporters of same-sex marriage who use the courts to advance their agenda, against considerable opposition from the electorate, need not worry that they are thereby compromising democratic values, even to the slightest degree. Myself a strong supporter of same-sex marriage, I would like to believe that I can have it both ways, but I am not persuaded.

Chapter 8 : A Common Law Theory of Judicial Review: The Living Tree - W. J. Waluchow - Google Books

The critic of judicial review has to acknowledge that the rejection of judicial review creates a risk that some injustices may go uncorrected. However, judicial review poses its own set of problems, which can also be described as forms of injustice. In A Common Law Theory of Judicial Review, W.J.