

## Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide

HANNA WILBERG

### I Introduction

Whether there should be deference on questions of relevance and purpose is an oddly neglected aspect of the broader question to which this part of the book is devoted. This essay explores this question in relation to three jurisdictions: the United Kingdom, New Zealand and Canada.<sup>1</sup>

The broader question concerns deference on questions of law: whether reviewing courts should be prepared to defer to primary decision-makers' interpretation of the relevant statute in appropriate contexts.<sup>2</sup> Deference to primary decision-makers' statutory interpretation means that reviewing courts will uphold some interpretations without asking whether they are, in the courts' view, the best interpretations. They will do this so long as the interpretations are within what the courts consider to be the range of reasonably available interpretations,<sup>3</sup> or so long as the reasons given are capable of justifying the interpretations.<sup>4</sup> Such deference has traditionally been applied in a very strong form to primary decision-makers' factual determinations and exercises of discretion, but not to statutory interpretation.

The aspect to be explored in this essay concerns the grounds of irrelevant considerations, failure to take account of mandatory considerations, and improper purposes — what I will call for brevity's sake the relevance and purpose grounds. The question is whether courts should ever accord deference to primary decision-makers' views on what is relevant or what are permissible purposes for exercising a statutory power. This aspect has to date received surprisingly little attention. The most notable recent exception is Timothy Endicott's *Administrative Law* book, which

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<sup>1</sup> I chose the first two of these because they are familiar to me and similar to each other; the third for an instructive contrast.

<sup>2</sup> On this, see H Wilberg and M Elliott, 'Deference on Questions of Law: A Survey of Taggart's Contribution and Themes in the Wider Literature' (ch 8 in this volume); and M Taggart, 'The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective' in P Rishworth (ed), *The Struggle for Simplicity in the Law: Essays in Honour of Lord Cooke of Thorndon* (1997) 189.

<sup>3</sup> See *Dunsmuir v New Brunswick* [2008] SCC 9, [2008] 1 SCR 190, [47].

<sup>4</sup> D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) 279, 303–04; adopted in *Baker v Canada* (1999) 174 DLR (4th) 193 (SCC), [65]. The statement in *Dunsmuir* (n 3), [47] combines both versions.

considers deference on these grounds in some detail.<sup>5</sup> It was his discussion that drew my attention to this topic.

In this essay, I approach this ultimately normative question via questions about taxonomy: in the scheme of grounds for judicial review, how should these grounds be classified, and what follows from that classification in terms of the availability of deference? There is a great deal of uncertainty on this taxonomical issue in the case law and commentary.

Parts II and III of this essay concern the orthodox UK and New Zealand approach to questions of law, and part IV the alternative deferential approach favoured by some commentators and adopted by the Canadian courts. While I am attracted by the latter approach, in this essay I do not discuss the relative merits of these two approaches. Rather, I ask in relation to each how the relevance and purpose grounds fit into that approach.

## II The Orthodox UK and NZ Approach

### A The orthodox approach to standards of review generally

The orthodox approach in the UK and New Zealand is to reject any deference on questions of statutory interpretation. These are questions of law and thus questions for the courts: courts intervene to correct any interpretation which, in their view, is not the best interpretation.<sup>6</sup> In contrast, questions of fact and the exercise of discretion are merits questions which are entrusted to primary decision-makers.<sup>7</sup>

In theory, the two types of merits questions were long considered not reviewable as such at all. Review was available only where decisions on them were so unreasonable as to compel the inference that there must have been an error of law.<sup>8</sup> That fiction has largely been abandoned in favour of accepting *Wednesbury* unreasonableness or irrationality as a ground in its own right, alongside illegality,<sup>9</sup> and it is generally accepted that irrationality involves some judicial evaluation of the substantive merits of a decision-maker's exercise of a discretion (or of a finding of fact).<sup>10</sup> In other words, while all reviewable errors render a decision *ultra vires* in the broad sense, unreasonableness or irrationality is not a species of error of law in the narrower sense of the illegality ground of review. However, the old insistence that substantive merits

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<sup>5</sup> T Endicott, *Administrative Law*, 2nd edn (Oxford, Oxford University Press, 2009) 272–73 and 276–27. For further exceptions, see nn 101–102 and accompanying text.

<sup>6</sup> *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); *R v Hull University Visitor ex p Page* [1993] AC 682 (HL). Adherence to this approach remains firm in New Zealand. In the UK, many see signs of potential erosion in *Jones v First Tier Tribunal* [2013] UKSC 19, [2013] 2 AC 48, [45]–[46]. For the different version of this approach adhered to in Australia, see P Cane 'Judicial Control of Administrative Interpretation in Australia and the United States' (ch 9 in this volume) and M Aronson 'Should We Have a Variable Error of Law Standard?' (ch 10 in this volume).

<sup>7</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA)

<sup>8</sup> *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

<sup>9</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL) (CCSU), 410–11.

<sup>10</sup> See eg A Lester and J Jowell, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *Public Law* 368, 369–70; P Craig, 'The Nature of Reasonableness Review' [2013] *Current Legal Problems* 1, 2, 4–5. D Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford, Clarendon Press, 1990), 263 still considered this a 'striking statement'.

were never for the courts was for long still partly salvaged by emphasising that intervention on the irrationality ground was exceptional.<sup>11</sup>

This approach can be described in terms of standards of review and degrees of deference: the illegality ground concerning questions of law involves review on a ‘correctness’ standard involving no deference at all, while the irrationality ground concerning questions of fact and exercises of discretion involves review on a highly deferential ‘rationality’ standard.<sup>12</sup> It is worth noting, however, that the language of standards of review and deference is essentially foreign to the traditional way of thinking described above, in which all questions were quite simply either questions for the court or unreviewable.

More recently, the concept of variable standards of review and varying degrees of deference has been developed, but only as a further qualification to the otherwise highly deferential rationality standard for reviewing exercises of discretion and fact-finding.<sup>13</sup> Deference has also been much debated in the context of the Human Rights Act 1998 (UK) and the New Zealand Bill of Rights Act 1990, especially in relation to the proportionality test.<sup>14</sup> But aside from that, there is virtually never any explicit variation in the standard of review on questions of law.<sup>15</sup>

In relation to the classification into questions of law, fact or discretion on which the orthodox approach relies, a point of clarification may be helpful. Often it sounds as though these classifications refer to the nature of the impugned decision as a whole. However, that makes no sense: decisions are not normally pure exercises of discretion or findings of fact or interpretations of law — they are a composite.<sup>16</sup> What these classifications really refer to, therefore, is something more particular. This can be put in two different ways: the classifications refer to the *aspect* of the decision that is challenged by a particular ground, and correspondingly to the *basis* for the court’s intervention on that ground. The ‘discretion’ classification is more often put in the first way: it means that a ground challenges the discretionary aspect of a decision. The ‘law’ classification is more often put the second way: it means that courts invoking this ground intervene on the basis of statutory interpretation.

The justification for the orthodox approach is not often elaborated in detail, but may be stated as involving three main reasons. First, ensuring public decision-makers’ compliance with the law is necessary for upholding the rule of law. Secondly, interpreting and applying the law is part of judges’ essential constitutional role. Third and finally, respect for Parliament’s will requires ensuring that those who are granted power by statute exercise it in accordance with that statute.<sup>17</sup>

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<sup>11</sup> *CCSU* (n 9), 410.

<sup>12</sup> See, eg, M Taggart, ‘Proportionality, Deference, *Wednesbury*’ [2008] *New Zealand Law Review* 423, 430, 451.

<sup>13</sup> *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA); *Wolf v Minister of Immigration* [2004] NZAR 414 (HC). See Taggart, ‘Proportionality’ (n 12).

<sup>14</sup> See H Wade and C Forsyth, *Administrative Law*, 11th edn (Oxford, OUP, 2014) 308–15.

<sup>15</sup> For discussion of avenues for covert deference, see Wilberg and Elliott (n 2); Aronson (n 6).

<sup>16</sup> See, eg, Galligan (n 10), 9.

<sup>17</sup> See *Bulk Gas* (n 6), 133; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) 174 (Lord Reid), 208 (Lord Wilberforce); *Page* (n 6) 701–02. For recent explicit statements of the rule of law rationale, see also *R (Unison) v Monitor* [2009] EWHC 3221 (Admin), [2010] PTSR 1827, [60] (Cranston J); *Wool Board Disestablishment Company Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011]

## B Conflicting sources on the place of the relevance and purpose grounds

The place of the relevance and purpose grounds within this orthodox scheme of grounds and standards of review is rarely addressed explicitly. The *standard* of review on these grounds is almost universally assumed to be correctness. Usually that is tacitly assumed by commentators and tacitly applied by courts, but it has also been confirmed by the courts on the few occasions where they have addressed the question explicitly.<sup>18</sup>

When it comes to *taxonomy*, however, there are two apparently conflicting strands in the case law and commentary. On the one hand, the use of the correctness standard implies that these grounds must involve questions of law. Consistently with that, in the few cases where courts have addressed this question they have classified these grounds as illegality grounds,<sup>19</sup> that is as involving questions of law.<sup>20</sup> *De Smith's Judicial Review* also expressly adopts this classification,<sup>21</sup> while other commentators have noted its use in the cases while reserving their position on it.<sup>22</sup>

On this first approach, the ground of failing to take account of mandatory relevant considerations starkly illustrates the orthodox law/discretion divide. Whether a consideration is mandatory is a question of law which courts will determine on a correctness standard. However, the weight to be assigned to a mandatory consideration is a matter for the decision-maker, and courts will intervene only if the weight assigned is *Wednesbury* unreasonable.<sup>23</sup>

On the other hand, however, many commentators classify the relevance and purpose grounds as concerning abuse of discretion.<sup>24</sup> Often, they draw attention in this context to the fact that the *Wednesbury* decision included these grounds in its broader 'comprehensive'<sup>25</sup> or 'umbrella'<sup>26</sup> sense of unreasonableness.<sup>27</sup> Craig acknowledges

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2 NZLR 442, [116]–[118] (Hammond J; a dissenting opinion, but the majority did not disagree with this point).

<sup>18</sup> See, eg, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL), 1030; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 764.

<sup>19</sup> *R v Secretary of State for the Environment ex p Hammersmith and Fulham LBC* [1991] 1 AC 521 (HL) 597 expressly rejects a proposed classification as irrationality.

<sup>20</sup> See, eg, *Padfield* (n 18), 1030.

<sup>21</sup> H Woolf and others, *De Smith's Judicial Review*, 7th edn (London, Sweet & Maxwell, 2013), ch 5, and see also [11-019].

<sup>22</sup> P Craig, *Administrative Law*, 7th edn (London, Sweet & Maxwell, 2012), [19-001(i)]; Craig, 'Reasonableness' (n 10), 5; DR Knight, 'Mapping the Rainbow of Review: Recognising Variable Intensity' [2010] *New Zealand Law Review* 393, 417.

<sup>23</sup> *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA), 552; *Tesco* (n 18), 764.

<sup>24</sup> Wade and Forsyth (n 14), ch 11; Craig (n 22), ch 19; M Elliott, *Beatson, Matthews and Elliott's Administrative Law: Text and Materials*, 4th edn (Oxford, Oxford University Press, 2011), ch 8; P Cane, *Administrative Law*, 5th edn (Oxford, Clarendon Press, 2011), ch 6.5.

<sup>25</sup> *Wednesbury* (n 7), 229.

<sup>26</sup> Craig (n 22), [19-002]; Craig, 'Reasonableness' (n 10), 5.

<sup>27</sup> Also Wade and Forsyth (n 14), 292–93; Endicott (n 5), 45. C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge, Cambridge University Press, 2009), 43–44, question whether these were indeed intended to be two separate principles. Their preferred view seems to be that the relevance and purpose grounds represent the entirety of the unreasonableness ground, which would

that these grounds are more commonly classified as illegality,<sup>28</sup> but has reservations about this. He has pointed out that the line between these grounds and irrationality is an uncertain and malleable one.<sup>29</sup>

It is usually not clear on what basis and for what reason commentators adopt the ‘discretion’ classification. In particular, they do not mention the standard of review in this context, and do not say that the classification entails a deferential standard of review.<sup>30</sup> Some of them are unlikely to support such an argument.

### III Evaluating the Conflicting Classifications

This part of the essay evaluates the conflicting classifications of the relevance and purpose grounds as falling on either side of the law/discretion divide. Throughout this part, I proceed on the assumption that we should maintain the orthodox approach of arranging grounds and standards of review according to the law/discretion divide: illegality grounds attract a correctness standard, while irrationality grounds attract a rationality standard.<sup>31</sup> The sole question in this part is how the relevance and purpose grounds should be classified within this orthodox scheme.

Section A outlines the basic argument for the ‘law’ classification. Sections B and C examine two possible objections to the ‘law’ classification that may underlie the ‘discretion’ classification. Although this alternative classification, and the deferential standard of review that it would entail on the orthodox approach, has some intuitive appeal, my conclusion in relation to both objections is that they must fail. While both objections draw attention to significant features of the relevance and purpose grounds, they are not valid objections to the ‘law’ classification for the purposes of assigning a standard of review within the orthodox approach. By way of a postscript in section E, however, I suggest a different method for addressing valid concerns about correctness review on these grounds.

#### A The argument in favour of the courts’ ‘law’ classification

If the alternative classification of the relevance and purpose grounds as falling on the discretion side of the divide was a valid classification for the purposes of assigning grounds and standards of review within the orthodox scheme, that would mean that they fall within the broader umbrella of the irrationality ground, rather than that of the illegality ground. That in turn would mean that they involve judicial evaluation of the merits, as noted earlier.<sup>32</sup>

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then not involve any element of merits review. *De Smith’s Judicial Review* (n 21), [11-019] also notes the broad usage in the case, but says that today we would classify the wider group of grounds as illegality.

<sup>28</sup> See n 22.

<sup>29</sup> P Craig, ‘Political Constitutionalism and the Judicial Role: A Reply’ (2011) 9 *International Journal of Constitutional Law* 112, 124–27; see also P Hogg, ‘The Supreme Court of Canada and Administrative Law, 1949–1971’ (1973) 11 *Osgoode Hall Law Journal* 187, 206–07.

<sup>30</sup> Except the sources in n 29.

<sup>31</sup> For discussion of an alternative approach, see part IV.

<sup>32</sup> See above, n 9.

Very arguably, however, judicial evaluation of the merits is in fact not the basis on which the courts use these grounds. This is the basic argument for classifying these grounds as involving questions of law, as the courts have done. While questions concerning the merits may well arise in the context of deciding what the statute provides (a point to which I will return),<sup>33</sup> courts intervene not on the basis that their view of the merits is better, but on the basis that it is their responsibility to determine what the statute requires or permits.<sup>34</sup> Courts determine the propriety of purposes and the relevance of considerations by a process of statutory interpretation.<sup>35</sup>

Relevance and purpose questions can, of course, be merits questions: what factors *should* be considered and what purposes pursued, in the sense that they are the most appropriate in the circumstances, is at the very heart of deciding what is a good decision. But they become questions of law when and to the extent that the statute expressly or impliedly regulates what considerations or purposes *may or must* be considered or pursued: contravention of such statutory direction is illegal. The argument for the ‘law’ classification of the relevance and purpose grounds is that when courts intervene on these grounds, they do so on this latter, statutory basis, entailing illegality.

The same line between merits and legality can indeed be seen in relation to other grounds that are clearly illegality grounds. For example, whether a school principal *should* expel or merely suspend a student for a breach of school rules is a merits question, just like the question what are the most appropriate factors to consider and purposes to pursue. But if the relevant statute confers only limited powers on the principal, then whether the principal *may* expel as well as suspend is a question of law: if the principal is empowered only to suspend, then a decision to expel is illegal. In exactly the same way, questions of relevance and purpose are questions of law where the question is what may or must be considered by virtue of the statute.

A qualification to the statutory basis of these grounds may perhaps be found in cases where common law principles rather than statutory directions are invoked. For instance, public power must be exercised for public purposes — pursuit of private interests (private gain, favour or ill will) is always improper.<sup>36</sup> Whether this is a qualification at all is open to debate — some may prefer to see such general constraints as implicit in all grants of statutory power, and in that sense having a statutory basis. For present purposes, the short point is that even if such principles are

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<sup>33</sup> See section C of this part III.

<sup>34</sup> Correspondingly, if we ask what *aspect* of the *decision* is challenged (as per text following n 16), the answer is that it is the decision-maker’s interpretation of the statute as permitting consideration or pursuit of the impugned considerations or purposes — albeit often the decision-maker will not have turned her mind to this, but will have merely tacitly assumed that her reasons were consistent with the statute.

<sup>35</sup> See *Padfield* (n 18), 1030; P Cane and L McDonald, *Principles of Administrative Law: Legal Regulation of Governance*, 2nd edn (Oxford, Oxford University Press, 2012), 139–40; Taggart, ‘Proportionality’ (n 12), 427; D Dyzenhaus, M Hunt and M Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1 *Oxford University Commonwealth Law Journal* 5, 26; J McLean, P Rishworth and M Taggart, ‘The Impact of the New Zealand Bill of Rights on Administrative Law’ in *The New Zealand Bill of Rights Act 1990* (Auckland, Legal Research Foundation, 1992) 62, 68.

<sup>36</sup> *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, [53].

found in the common law rather than statute, invoking them still involves questions of law.

## **B First objection: these grounds structure the exercise of discretion**

By way of objection to the courts' classification of the relevance and purpose grounds as falling on the 'law' side of the divide and hence coming under the broader umbrella of the illegality ground, it may be said that these grounds structure the exercise of discretion, and thus intrude into the discretionary aspect of a decision in a way that other illegality grounds do not. This may be what some of the commentators have in mind in adopting their alternative classification of these grounds as involving abuse of discretion. In this section I argue that this is a valid point about the nature of these grounds, but that it does not provide a convincing reason for the more deferential review that would be entailed by a 'discretion' classification on the orthodox approach.

### *i A valid point about the impact on discretion*

KC Davis' framework for control of discretion is helpful in articulating the distinction I am suggesting here, although his account did not focus on judicial review. Illegality grounds can be classified as either *confining* discretion by determining the scope of a power; or *structuring* the exercise of discretion by requiring or prohibiting certain reasons.<sup>37</sup> The relevance and purpose grounds fall into the latter category — they structure discretion by providing standards to guide its exercise.<sup>38</sup>

These grounds thus go beyond merely policing the legal boundaries of the power: they concern not the legal scope of the power, but the exercise of discretion within that scope. Even if the decision-maker has power to do what she did, in the sense of power to achieve the outcome she achieved (such as expelling a student, to return to my earlier example), her reasons will still be scrutinised. Her decision may still be unlawful if her reasons were defective in terms of the considerations taken into account or the purposes pursued. (Indeed, by this route these grounds have the potential for precluding some of the outcomes that otherwise would have been within the scope of a power.<sup>39</sup>) Some commentators have therefore suggested that these grounds impact more than other illegality grounds on the exercise of discretion entrusted to the decision-maker.<sup>40</sup>

### *ii What about the improper purposes ground?*

But is this point valid for the improper purposes ground as well as the relevance grounds? Does purpose not go to the scope of the power rather than to the exercise of discretion within that scope, at least in some cases? There is a degree of uncertainty and even confusion about the nature of the improper purposes ground. Let me show that at least some versions of the ground do involve structuring the exercise of discretion by prohibiting some reasons, rather than confining the scope of the power.

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<sup>37</sup> KC Davis, *Discretionary Justice: A Preliminary inquiry* (Urbana, Ill, University of Illinois Press, 1977); helpfully summarized by Cane (n 24), 171.

<sup>38</sup> Cane and McDonald (n 35), 138; also Cane (n 24), 172.

<sup>39</sup> Elliott (n 24) 235, 238; Endicott (n 5), 272, 275–76 (where the point may be slightly overstated).

<sup>40</sup> Endicott (n 5), 267, 272, 275–76; Elliott (n 24), 235.

First, we must be careful to note that not every reliance on purposive interpretation amounts to invoking the improper purposes ground. Purposive interpretation can also be used to interpret provisions defining the scope of the power, and indeed can also be used to defend rather than challenge a decision.

The next point to note is that there is a type of purpose-based illegality where the statutory purpose is not served at all by the decision, and as a result the decision is outside the scope of the power. For example, in *Seaton*, a compulsory acquisition notice was quashed because it was not for the purpose of a ‘Government work’ at all.<sup>41</sup> But that is not the only kind of improper purposes complaint. Indeed, the New Zealand Supreme Court in *Seaton* rejected the label ‘improper purposes’ for this type of illegality.<sup>42</sup> There is, however, an overlap between this type of illegality and a ‘true’ improper purposes case: where a purpose pursued by the decision-maker has frustrated the statutory purpose,<sup>43</sup> it is true to say *both* that the purpose pursued was improper *and* that the decision-maker had no power at all to make the decision because the statutory purpose was not served.

The main point, finally, is that there are many other reasons for challenging a purpose pursued by a decision-maker as improper. The challenged purpose may prejudice or compromise pursuit of the statutory purpose without necessarily frustrating it; or it may be specifically prohibited by the statute; or it may be impliedly excluded in some other way, such as by an exhaustive statement of purposes which does not include the challenged purpose.<sup>44</sup>

All of these latter ‘true’ versions of improper purposes challenges do involve structuring rather than confining the discretion. The classification of the relevance and purpose grounds as not concerning the legal scope of the power but rather controlling the exercise of discretion within that scope is therefore valid for improper purposes as well as relevance grounds.

### *iii What are the implications for the standard of review?*

The remaining question concerns the implications of this classification: does it mean that these grounds fall on the ‘discretion’ side of the law/discretion divide for the purposes of the standard of review, and should therefore attract only deferential review? There are at least four reasons to doubt this. The first and basic reason is that even if these grounds intrude further into the exercise of discretion, it may still be true that the *basis* for the courts’ intervention is statutory interpretation,<sup>45</sup> which entails correctness review.

Secondly, the three reasons for this orthodox correctness standard on questions of statutory interpretation<sup>46</sup> apply equally to statutory directions concerning relevance

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<sup>41</sup> *Seaton v Minister for Land Information* [2013] NZSC 42, [2013] 3 NZLR 157; discussed in H Wilberg, ‘Administrative Law’ [2013] *New Zealand Law Review* 715, 719–25.

<sup>42</sup> *Seaton* (n 41), [38]. This may have been partly due to particular wording of the statutory test: the power was available for “any land required for a Government work”.

<sup>43</sup> This was one of the ways in which the House of Lords described the defect in *Padfield* (n 18), 1033.

<sup>44</sup> *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA), [42]–[45].

<sup>45</sup> Or to put it the other way round (as per text following n 16), it may still be true that the challenged *aspect* of the *decision* is the decision-maker’s (express or tacit) interpretation of the statute as permitting the challenged reasoning.

<sup>46</sup> Text accompanying n 17.



and purpose. First, upholding the rule of law requires enforcement of such directions just as much as it requires enforcement of statutory limits to the scope of powers. Secondly, in both cases this is part of the constitutional responsibility of courts to interpret and apply the law. Thirdly, respect for Parliament's will requires enforcement of both types of statutory provision.

The third reason for doubt is this. If the argument for deference on relevance and purpose relies on the notion that, barring irrationality, decision-makers should be free to reach decisions for legally impermissible reasons so long as the outcome is within the legal scope of their power, this may be seen as a partial throwback to the narrow jurisdictional doctrine<sup>47</sup> that was abandoned in *Anisminic*.<sup>48</sup> Even those who favour a move to deference on questions of law do not propose a return to that particular 'blunt ... instrument'.<sup>49</sup>

Finally, it is debatable whether the relevance and purpose grounds really do intrude further into the exercise of discretion. The precise opposite argument could also be made. These grounds are also often described as reasoning *process* grounds. It is then sometimes said that they do not intrude into the substance of the discretion in the same way as limits on the scope of the power: they merely control the process leading to a decision, rather than the substantive outcomes.<sup>50</sup> I have reservations about the validity of this opposite argument as well, as I will explain.<sup>51</sup> What it demonstrates, however, is that the relative intrusiveness of grounds which structure rather than confine discretion is very much open to debate.

In light of these four reasons for doubt, the best conclusion may well be that this distinction between structuring discretion and confining its scope has no significance for the standard of review. In terms of the law/discretion divide, as seen earlier,<sup>52</sup> both the reasons and the outcome of a decision can be assessed in terms of their merits; yet both of them can be regulated by statutory limits and requirements, and in both cases questions about such statutory limits and requirements are questions of law.

### **C Second objection: there is discretion in statutory interpretation**

A further objection to classifying the relevance and purpose grounds as illegality grounds concerning questions of law is that there is always an element of discretion in statutory interpretation generally, and that this is especially so in determining relevance and purpose. While this is true, I argue in this section that it does not entail a 'discretion' classification of these grounds for the purposes of assigning standards of review within the orthodox approach.

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<sup>47</sup> See *Anisminic* (n 17), 182–83 (Lord Morris, dissenting). It would only be a partial throwback because under the old jurisdictional doctrine, errors within jurisdiction (ie within the scope of the power) were not reviewable at all (unless they appeared on the face of the record), not even on a deferential standard.

<sup>48</sup> *Ibid*, 210 (Lord Wilberforce).

<sup>49</sup> Taggart, 'Scope of Review' (n 2), 213.

<sup>50</sup> See further Part IV C i.

<sup>51</sup> *Ibid*.

<sup>52</sup> Part III A.

That statutory interpretation involves an element of discretion, policy or judgement cannot, I think, be denied. It is partly due to the indeterminacy of language. It is also due to the requirement of contextual and purposive interpretation, which may have an impact even on relatively clear language, and to the fact that the relevant purpose is often open to debate.<sup>53</sup>

Craig and many other commentators have made this point specifically in relation to the relevance and purpose grounds: ‘what are relevant considerations or proper purposes will often not be self-evident’,<sup>54</sup> and determination of such questions often entails ‘judicial value judgment and use of substantive principles’.<sup>55</sup> ‘Moreover, the boundary line between this form of intervention and more direct substitution of opinion by the judiciary may well become blurred.’<sup>56</sup>

Among the often-cited cases that illustrate these points particularly clearly is the 1920s case of *Roberts v Hopwood*.<sup>57</sup> The House of Lords there applied the values of its class and time by holding that a local authority’s statutory power to pay salaries and wages ‘as it sees fit’ could be exercised only so as to pay a fair wage for the work done. ‘Socialistic philanthropy’ (paying an increase above the rate of inflation) and a ‘feminist ambition to secure equality of the sexes’ (paying men and women at the same rate) were irrelevant considerations. Even the landmark *Padfield* decision,<sup>58</sup> not usually thought of as controversial, can be seen to reflect some contestable value judgements about the competing interests engaged by a milk marketing scheme.<sup>59</sup>

This room for discretion or judgement in applying the relevance and purpose grounds gives rise to an objection to the ‘illegality’ classification of these grounds within the orthodox approach. That objection may take one of three forms. I will take these in turn, to show why each of them must be rejected.

*i Doubts about the law/discretion divide? Introducing two types of discretion*

In the first version of the objection, some of the commentators who point out the room for discretion in statutory interpretation go on to deny that there is any clear line between law and discretion at all, and to argue that we should not allocate standards of review based on such a blurry or even illusory line.<sup>60</sup>

However, this proposal involves abandoning the orthodox approach to standards of review, rather than merely challenging the courts’ classification of the relevance and purpose grounds within that approach. In this part of the essay, as already noted, I am examining the best classification of these grounds on the assumption that the orthodox approach is right in maintaining a line between law and discretion, and insisting that

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<sup>53</sup> See Cane (n 24), 64; Galligan (n 16), 9–11, also 20–21 and 23–24.

<sup>54</sup> Craig (n 22), 19-002.

<sup>55</sup> *Ibid.*, [19-001iii]. See also Craig ‘Political Constitutionalism’ (n 29), 124–27; Cane and McDonald (n 35), 141; Elliott (n 24), 238–39; Hogg, ‘Supreme Court’ (n 29), 207; Galligan (n 10), 295.

<sup>56</sup> Craig (n 22), 19-002.

<sup>57</sup> *Roberts v Hopwood* [1925] AC 579 (HL).

<sup>58</sup> *Padfield* (n 18).

<sup>59</sup> See Endicott (n 5), 46 and 272–73; also J Beatson, ‘The Scope of Judicial Review for Error of Law’ (1984) 4 *Oxford Journal of Legal Studies* 22, 27–28; R Austin, ‘Judicial Review of Subjective Discretion – At the Rubicon; Whither Now?’ (1975) 28 *Current Legal Problems* 150, 167–72. It is worth reading the dissenting opinion of Lord Morris for the competing perspective.

<sup>60</sup> See sources in n 87 and also n 78, and text at nn 140–141.

courts should apply a correctness standard on one side of the line and a rationality standard on the other side. The alternative approach advocated by these commentators is examined below, in part IV of this essay.

But this objection does raise the question how the orthodox approach with its reliance on the distinction between law and discretion can be maintained once it is recognised, as it must be, that there is scope for discretion or judgement within statutory interpretation. Does that not render the line-drawing impossible, and thus the orthodox approach incoherent?

The answer, I suggest, lies in drawing a line between two different types of discretion or judgement exercised in two different contexts. On one side of the line is the sort of discretion that forms part of determining what a statute provides, expressly or by implication. On the other side is discretion in the sense of evaluation of the merits of a decision. I will call the former type of discretion ‘interpretive judgement.’ A valid interpretive judgement requires the interpreter to identify an adequate foundation in the text or context of the statute for considering that judgement to represent the statutory policy or purpose.<sup>61</sup> That is what distinguishes it from other types of discretion. While discretion always implies responsibility to decide for valid reasons that correspond to the type of authority,<sup>62</sup> in the case of interpretive judgement those valid reasons are of this particularly limited and specialised kind. Drawing the line between the two types of discretion or judgement will often be difficult and contentious, but I do think it is a conceptually valid line.

For instance, it would have been difficult for the House of Lords in *Roberts v Hopwood* to find a statutory foundation for the social value judgements that it imposed in that case.<sup>63</sup> In contrast, in *Roncarelli v Duplessis* there was a statutory foundation for the Supreme Court of Canada’s intervention (as well as a foundation in more general public law principles). The liquor licencing statute in issue did not say that a licensee’s habit of standing bail for Jehovah’s witnesses arrested for pamphleteering was irrelevant: it was silent on the criteria for the liquor licencing power. But this consideration was logically irrelevant to the statutory subject-matter of liquor licencing, and thus impliedly impermissible as a matter of statutory interpretation.<sup>64</sup>

If it is accepted that this line can be drawn, then the orthodox approach remains available. Even in the face of recognition that statutory interpretation involves judgement or discretion, the orthodox approach can maintain its line between statutory interpretation and discretion, and can persist in allocating standards of review based on that line.

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<sup>61</sup> While this may sound like a positivist approach to statutory interpretation, the approach proposed here is agnostic on theories of statutory interpretation. Those theories essentially determine what counts as relevant context, and the relationship between text and context. All I am saying here is that once the guidance from the text and any relevant context runs out, any further judgement is no longer interpretive judgement.

<sup>62</sup> Endicott (n 5), 234; Galligan, (n 10) 6–8, and see also 30 and 140; contrast F Bennion, ‘Judgment and Discretion Revisited: Pedantry or Substance?’ [2005] *Public Law* 707, 709–10, 715.

<sup>63</sup> See n 57 and accompanying text.

<sup>64</sup> *Roncarelli v Duplessis* [1959] SCR 121 (SCC), 140. For this method of interpretation, see also Galligan (n 10), 308–13.

*ii All relevance and purpose challenges concern exercises of discretion?*

Even if it is accepted that challenges involving statutory interpretation can fall on the ‘law’ side of the law/discretion divide despite the room for judgement, a second version of the objection still needs to be considered. It may still be argued that the relevance and purpose grounds as a group must fall on the ‘discretion’ side because, as we saw, they provide particularly large scope for judgement.

However, there are two answers to this objection. First, that larger scope for judgement in fact only applies to some relevance and purpose challenges — generally those, like *Roberts v Hopwood*, where criteria of relevance or purpose are expressed in broad or vague terms;<sup>65</sup> and those, like *Roncarelli* or *Padfield*, where courts are asked to imply criteria of relevance or purpose.<sup>66</sup> There are other cases where a challenge invokes a narrow and specific criterion of relevance or purpose that is expressly provided in the statute. While in such a case there is still some room for judgement in deciding the meaning of that criterion, that is no different from any other illegality grounds. On the orthodox approach, such a question would clearly be a question of law: the judgement involved can only be what I have called interpretive judgement.

Secondly, if my analysis under the previous heading is accepted, then even the types of challenge that involve greater scope for judgement because criteria are broad, vague or have to be implied will often fall on the ‘law’ side. Even in such a case, a court’s answer to a relevance or purpose question may have its foundation in the statutory text or context — as I suggested was the case in *Roncarelli v Duplessis*.

In conclusion, on the orthodox approach all relevance and purpose challenges that have a statutory foundation fall on the ‘law’ side of the line.

*iii Relevance and purpose grounds may fall on either side of the line?*

The analysis so far suggests that relevance and purpose challenges can fall on either side of the line, depending on whether or not the particular relevance or purpose argument has its foundation in the statutory text or context. That leads to the third and final version of the objection to the ‘law’ classification: while some challenges on these grounds involve questions of law, others do not and hence should not attract a correctness standard.

This objection does involve a valid point: there are indeed cases where the statutory guidance on relevance and purpose runs out.<sup>67</sup> Such challenges cannot fall on the ‘law’ side of the line and should not attract a correctness standard.

Once again, however, there are two answers to this. First, where the statutory direction runs out, usually that means that there is no basis for judicial intervention on relevance and purpose grounds at all. The consideration that has been challenged as

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<sup>65</sup> That is the type of provision which Endicott (n 5), 237 says confers a ‘resultant discretion’.

<sup>66</sup> M Aronson and M Groves, *Judicial Review of Administrative Action*, 5th edn (Pymont, NSW, Thomson Reuters, 2013), [5.40].

<sup>67</sup> Put more precisely, while the guidance may never run out (thank you to Trevor Allan for raising this), there comes a point where any statutory guidance is so equivocal that it no longer provides a legitimate basis for reviewing judges to substitute their judgement for that of the primary decision-maker.

irrelevant or mandatory is neither of these things: it falls into the intermediate category of permissible but optional considerations.<sup>68</sup> The statute has left the choice to the decision-maker.

But that is not a complete answer. It is conceivable that there may still be some non-statutory<sup>69</sup> basis for judicial intervention on the ground that the challenged consideration was irrelevant or the purpose improper — perhaps because it is illogical in the context of the decision-maker’s overall reasoning. In such cases, the type of discretion involved is no longer interpretive judgement but judicial evaluation of the merits. A ‘law’ classification of such a relevance and purpose challenge is thus inappropriate, and on the orthodox approach such challenges should only attract deferential rationality review.

To this possibility there is, however, the second answer: such (fairly exceptional) cases indeed fall on the discretion side and should attract only rationality review — but they simply do not involve the same ground of review as the usual statute-based relevance and purpose challenges. If we are to adhere to the orthodox approach of arranging grounds and corresponding standards of review according to the law/discretion divide, then we cannot accommodate grounds that straddle this divide. On the orthodox approach, a ground that has no statutory foundation and attracts deferential rationality review is for that very reason a type of irrationality ground that falls on the discretion side of the divide.

#### **D Conclusion on classification within orthodox approach**

In this part I have evaluated the conflicting classifications of the relevance and purpose grounds. On the one hand, it seems fairly clear that these grounds do not involve evaluation of the merits in the sense that the irrationality ground does: they involve statutory interpretation. On the other hand, there are at least two senses in which they do involve or concern discretion. However, neither of these two points leads to the conclusion that these grounds fall on the discretion side of the law/discretion divide, which would entail deferential rationality review on the orthodox approach. First, the fact that these grounds structure rather than confine discretion is of doubtful significance for the standard of review. Secondly, it is true that statutory interpretation to determine relevance and purpose questions involves an element of discretion. However, this type of discretion (which I have called interpretive judgment) is distinguishable from discretion in the sense of evaluation of the merits. To the extent that relevance and purpose arguments are occasionally made without statutory foundation, such arguments are best classified as part of the irrationality ground.

#### **E A postscript on judicial restraint within correctness review**

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<sup>68</sup> *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA), 183; *In re Findlay* [1985] 1 AC 318 (HL), 333; *Corner House* (n 36), [40].

<sup>69</sup> And more broadly non-legal: ie also not invoking general legal principles concerning permissible purposes for using public powers as discussed at n 36.

Given that the relevance and purpose grounds fall on the law side of the divide and thus must attract correctness review on the orthodox approach, there remains a valid concern about the scope for judicial discretion. There is a risk that judges will inadvertently cross the line from interpretive judgement into evaluation of the merits, while continuing to apply correctness review. That would amount to usurping the discretion confided by Parliament to the primary decision-maker. This concern may account for the lingering sense that a correctness standard may not be appropriate for these grounds — but in fact the concern applies to all exercises of statutory interpretation, not just to the relevance and purpose grounds.

How to address that concern (other than by moving to the alternative approach discussed in the next part) is a question beyond the scope of this essay, but let me provide a very brief sketch of a solution. I suggest the risk can be minimised if judges err on the side of restraint when asked to read down broadly expressed purposes or criteria, or to imply further restrictive purposes or criteria. Whenever the statutory basis is doubtful, judges would do well to avoid reading in such restrictions on statutory powers. They would do well to accept, for instance, that some broad statements of purpose are meant to leave further choices to the decision-maker,<sup>70</sup> and to classify any further restrictive criteria urged on them as permissible but optional considerations.<sup>71</sup> Failure to observe this sort of restraint is, I suggest, what makes cases such as *Roberts v Hopwood* controversial.

#### **IV The Alternative, Deferential Approach**

This part considers an alternative, deferential approach to questions of law and statutory interpretation, focusing on the version that has been proposed by some commentators and adopted in Canada. Section A outlines this approach and the reasons for it. Section B returns to the central question in this essay: it considers the place of the relevance and purpose grounds within this alternative approach, and whether deference is available in relation to them. It starts by outlining why I would expect an affirmative answer to the latter question, and then surveys the unsettled position in the commentary and the Canadian case law. Section C finally explores and evaluates some possible reasons for this unsettled position.

##### **A The alternative approach to standards of review generally**

The orthodox approach to questions of law generally has been questioned by several commentators,<sup>72</sup> and abandoned by the courts in Canada and the United States,<sup>73</sup> in

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<sup>70</sup> See *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42, [53]–[54] for an instance of this approach.

<sup>71</sup> See n 68 for the cases recognising this category. For proposals that it be used as a means of restraint, see Elliott (n 24), 235, 239; Aronson and Groves (n 66), [5.30]; Endicott (n 5), 274, 276; A Irvine, ‘Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review’ [1996] *Public Law* 59, 67.

<sup>72</sup> P Craig, ‘Jurisdiction, Judicial Control, and Agency Autonomy’ in I Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (1995) 173; Craig (n 22), ch 16; Taggart, ‘Scope of Review’ (n 2); P Daly, *A Theory of Deference in Administrative Law: Basis, Application, and Scope* (Cambridge, CUP, 2012); Endicott (n 5), 308–28; Knight, ‘Mapping’ (n 22).

favour of an alternative, deferential approach where courts in appropriate contexts defer to administrative interpretations of statutes by applying some form of reasonableness standard. That means upholding interpretations without asking whether they are in the courts' view the best interpretations, so long as the interpretations are within what the courts consider to be the range of reasonably available interpretations, or so long as the reasons given are capable of justifying the interpretations.<sup>74</sup>

In Canada, the jurisdiction on which I focus in this part, until recently this approach took a highly contextual form. Whether and to what extent deference is appropriate in the particular context was determined by applying a range of contextual factors related to the nature of the question; the expertise, specialisation or other qualifications of the decision-maker in relation to that question; and indications of Parliament's intent in conferring the power, such as privative clauses.<sup>75</sup> While Canada's commitment to such contextualism is currently slightly less clear, following the attempt at simplification in *Dunsmuir*<sup>76</sup>, a similarly contextual approach has also been favoured by several of the commentators.<sup>77</sup>

Behind this alternative, deferential approach lies a different understanding of questions of law,<sup>78</sup> which ties in with a more general dissenting tradition of scepticism about the need for and benefits of oversight by the ordinary courts in administrative law.<sup>79</sup> Contrary to assumptions underpinning the orthodox approach (which its critics often associate with Dicey), there is no bright line separating questions of law from questions of fact nor from matters of discretion, policy or judgement. Questions of law do not necessarily have uniquely right answers which courts are always best qualified to give. The policy animating a regulatory scheme and its practical context

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<sup>73</sup> *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation* (1979) 2 SCR 227 (CUPE); *Dunsmuir* (n 3); *Chevron USA Inc v NRDC* (1984) 467 US 837; *United States v Mead Corp* (2001) 533 US 218.

<sup>74</sup> See nn 3–4. The choice between these two options is uncertain and unsettled in Canadian law, as are the details of the second option.

<sup>75</sup> These 'pragmatic and functional' factors were developed in *UES, Local 298 v Bibeault* [1988] 2 SCR 1048; *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

<sup>76</sup> *Dunsmuir* (n 3). The simplified 'standard of review analysis' substituted by this decision (ibid, [63]) partly sidelines the contextual factors in favour of a more categorical approach (ibid, [51]–[61]; but cf [55] and [64]), and abandons the choice between two distinct reasonableness standards in favour of one (ibid, [45]). While the Supreme Court insists on the paradoxical position that the single reasonableness standard is not variable yet still 'governed by the context' (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654, [47]), the Federal Court of Appeal has forged an approach in which contextual factors determine the breadth of the range of reasonable decisions: see, eg, *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha* 2014 FCA 56. For a full account of the Canadian journey, see P Daly, 'The Struggle for Deference in Canada' (ch 12 in this volume).

<sup>77</sup> Eg Taggart, 'Scope of Review' (n 2); Knight, 'Mapping' (n 22).

<sup>78</sup> See *CUPE* (n 73), 235–37, 242; *National Corn Growers Association v Canada (Import Tribunal)* [1990] 2 SCR 1324, 1332–43 (Wilson J); *Baker* (n 4), [54]–[55]. And see Taggart, 'Scope of Review' (n 2), esp 196, 198, 202–05, 212–13; Craig (n 22), ch 16; Daly, *A Theory of Deference* (n 72), esp chs 3 and 6; Endicott (n 5), ch 9; S Wildeman, 'Pas de Deux: Deference and Non-Deference in Action' in CM Flood and L Sossin (eds), *Administrative Law in Context* (Toronto, Edmond Montgomery Publications, 2013) 323, 329–30; Beatson (n 59); Galligan (n 10), 14–20; P Hogg, 'Judicial Review: How Much Do We Need?' (1974) 20 *McGill Law Journal* 157, 161–62; Hogg, 'Supreme Court' (n 29), 188–89.

<sup>79</sup> See Wilberg and Elliott (n 2); MD Walters, 'Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law' (ch 15 in this volume).

are relevant to determining the best interpretation of a statutory provision within that scheme. Administrative decision-makers are thus sometimes better placed to interpret their empowering statute than reviewing courts, in terms of relative expertise, experience, or other qualifications in relation to the subject-matter. The legislature, moreover, may sometimes be seen to have allocated interpretive authority to the administrative decision-maker rather than to reviewing courts.

## **B The puzzling uncertainty about the relevance and purpose grounds**

My question here is not whether this alternative deferential approach should be adopted or maintained — though I should declare that I do find the approach attractive. Rather, my question concerns the implications for the relevance and purpose grounds: assuming this alternative deferential approach is adopted and accepted, should the possibility of deference extend to the relevance and purpose grounds? This section starts by outlining the answer I would expect, and then surveys the position in the commentary and case law, which is puzzlingly different and uncertain.

### *i The expected answer*

I would have assumed that when the possibility of deference is extended from the control of discretion and fact-finding to questions of law, as it is on the alternative approach, it would obviously be available for the relevance and purpose grounds as well. Four reasons may be noted.

First, the alternative approach rejects fixed standards of review based on the type of question: the availability and extent of deference for all questions rather depends on a range of contextual factors that include but are not limited to the type of question. There seems no reason why the same should not apply to the relevance and purpose grounds. Secondly, the resulting central innovation of the alternative approach is that questions of statutory interpretation can attract deference. I have concluded that these grounds involve statutory interpretation,<sup>80</sup> so this innovation should apply to them. Thirdly, if my conclusion on the type of question involved is doubted, the alternative is to consider these grounds to involve discretion, to a greater or lesser degree. On that basis, deference would be even more obviously appropriate: discretion has always attracted deference, on both the orthodox and the alternative approach. Finally, the reasons for the alternative approach<sup>81</sup> seem to be at least equally applicable to the relevance and purpose grounds: in particular, given that there is at least as much scope for policy and judgement on these grounds as on other issues of statutory interpretation,<sup>82</sup> administrative expertise and experience are at least as relevant on these grounds.

### *ii The silence of the leading commentators*

When we turn to the commentators who have argued for the alternative deferential approach, we find only limited positive support for my expected answer that the availability of deference extends to the relevance and purpose grounds.

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<sup>80</sup> Part III C.

<sup>81</sup> See section A of this part IV.

<sup>82</sup> See part III C.



Craig and Taggart, the leading critics of correctness review on questions of law in the UK and New Zealand respectively, simply do not touch on the relevance and purpose grounds in this context. Their arguments for the alternative approach tend to focus on issues as to the meaning of express words rather than issues as to what criteria might be implied; and on provisions defining the scope of a power rather than on provisions specifying what considerations or purposes are permissible or mandatory.<sup>83</sup> The one exception in Taggart's essay on deference on questions of law is one cryptic footnote, which notes that relevance grounds are usually classified as involving control of discretion, and questions the orthodox sharp divide between law and fact; but does not address what this means in terms of standard of review.<sup>84</sup> Where Craig and Taggart do discuss the relevance and purpose grounds elsewhere in their work, they tend not to focus on the question of deference in that context.

As for the classification of the relevance and purpose grounds, most of the commentators who have argued for an alternative deferential approach to questions of law tend to see these grounds as involving abuse of discretion<sup>85</sup> (as do most Canadian commentators both before and since the introduction of the alternative deferential approach there);<sup>86</sup> but all of them also cast doubt on the law/discretion divide.<sup>87</sup> According to Craig, indeed, the line between these grounds and irrationality is uncertain and manipulable — an observation that appears to concern both classification and the standard of review on these grounds.<sup>88</sup> Taggart, on the other hand, notes the Canadian courts' then frequent classification of these grounds as jurisdictional, but does so without indicating his own position.<sup>89</sup>

Two commentators who do support my expected answer at least to some extent are Endicott and Knight. Endicott in particular clearly proposes deference in applying the relevance and purpose grounds. Even he does not discuss these grounds in his discussion of deference on error of law, except very briefly in passing near the end.<sup>90</sup> In his chapter on substantive fairness, however, he presents the relevance and purpose grounds as being among the most interventionist,<sup>91</sup> and expressly argues for deference to be available in applying them.<sup>92</sup> A reasonableness standard should be used for them

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<sup>83</sup> Taggart, 'Scope of Review' (n 2); Craig (n 22), ch 16.

<sup>84</sup> Taggart (n 2), 201, fn 69.

<sup>85</sup> Craig (n 22), ch 19; Endicott (n 5), ch 8; also Beatson (n 59), 26–27.

<sup>86</sup> See, eg, Hogg, 'How Much Do We Need?' (n 78), 170–72; Hogg, 'Supreme Court' (n 29), 206; D Mullan, 'Deference from *Baker* to *Suresh* and Beyond – Interpreting Conflicting Signals' in D Dyzenhaus (ed), *The Unity of Public Law* (Oxford, Hart Publishing, 2004) 21; G Cartier, 'Administrative Discretion: Between Exercising Power and Conducting Dialogue' in CM Flood and L Sossin (eds), *Administrative Law in Context* (Toronto, Edmond Montgomery Publications Ltd, 2013) 381, 391, 399.

<sup>87</sup> Taggart, 'Scope of Review' (n 2), 198, 203–04, 205, fn 69; Daly, *A Theory of Deference* (n 72), 255–57; Endicott (n 5), 347–49; Hogg, 'How Much Do We Need?' (n 78), 161–62; Hogg, 'Supreme Court' (n 29) 188–89.

<sup>88</sup> Craig, 'Political Constitutionalism' (n 29), 124–27.

<sup>89</sup> M Taggart, 'Globalization, "Local" Foreign Policy, and Administrative Law' in G Huscroft and M Taggart (eds), *Inside and Outside Canadian Administrative Law* (Toronto, University of Toronto Press, 2006) 259, 272.

<sup>90</sup> Endicott (n 5), 347 in ch 9.

<sup>91</sup> *Ibid.*, 267, 272 in ch 8.

<sup>92</sup> *Ibid.* 273, 276–277, 349.

unless relevance and purpose criteria are ‘specifically’ provided by statute.<sup>93</sup> This reads broadly similar to the American approach to deference.<sup>94</sup>

Knight’s work on variable intensity may at first sight appear to concern substantive review only in its narrow sense concerning merits questions. However, he discusses variable intensity and deference according to context as an approach that applies across all grounds of review — and hence as including deference on questions of law.<sup>95</sup> In that context, his survey of overt and covert forms of deference in the New Zealand case law includes discussion of the forms of restraint that are occasionally used in applying the relevance and purpose grounds.<sup>96</sup>

Daly is a further recent exception to the silence on my question. He has indeed acknowledged that deference on statutory interpretation should logically extend to the relevance and purpose grounds.<sup>97</sup> However, he calls instead for the traditional nominate grounds to be abandoned altogether: they should not be used as anything more than ‘indicia’ of unreasonableness.<sup>98</sup> That is partly because he rejects the law/discretion line on which the distinctions between these grounds are founded.<sup>99</sup> In addition, he is concerned that because of their association with correctness review, the use of traditional grounds such as the relevance and purpose grounds is liable to undermine judicial commitment to deference.<sup>100</sup>

Earlier commentators, writing around the time when the British courts were abandoning the jurisdictional approach and before the Canadian courts introduced the alternative deferential approach, apparently were more likely to include discussion of these grounds and a call for deference in relation to them. Hogg, for instance, noted the room for judgement and disagreement in statutory interpretation as to relevance or purpose, and concluded that courts should be ready to defer to decision-maker’s answers to these questions in appropriate cases.<sup>101</sup> Beatson noted a tendency under the old jurisdictional approach of justifying jurisdictional review on the relevance and purpose grounds on the basis that they only concerned process. He considered this to represent an undue widening of the scope of review<sup>102</sup> — which must mean that he rejected correctness review on these grounds.

### *iii Mixed record in the Canadian cases*

Canadian courts, of course, cannot simply maintain silence on this question: they have had to fix standards of review for all types of challenge, including those on relevance and purpose grounds. An important qualification is that explicit reliance on specific grounds of review is rare in recent Canadian case law (a point to which I will return).<sup>103</sup> However, among the arguments advanced in support of challenges,

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<sup>93</sup> Ibid 273.

<sup>94</sup> *Chevron* (n 73).

<sup>95</sup> Knight, ‘Mapping’ (n 22).

<sup>96</sup> Ibid, 417.

<sup>97</sup> Daly, ‘Struggle for Deference’ (n 76), part IV.

<sup>98</sup> Daly, *A Theory of Deference* (n 72), 262.

<sup>99</sup> Ibid, 256–57.

<sup>100</sup> Ibid, 260–61; also Daly, ‘Struggle for Deference’ (n 76), part IV.

<sup>101</sup> Hogg, ‘How Much Do We Need?’ (n 78), 171–72; Hogg, ‘Supreme Court’ (n 29), 206–07. See also Galligan (n 10), 294–95, raising the same questions albeit without committing to an answer.

<sup>102</sup> Beatson (n 59), 28–29.

<sup>103</sup> See section C ii of this part IV.

arguments concerning relevance and purpose continue to feature. Uncertainty about the standard of review in relation to such arguments arises from a very mixed record:<sup>104</sup> the possibility of deference here took a long time to be introduced at all, and has still not settled in securely.

For some 20 years after deference on questions of law was first introduced,<sup>105</sup> a correctness standard continued to be applied to relevance and purpose arguments.<sup>106</sup> Views on classification were also uncertain and contradictory, as in the UK and New Zealand. The correctness standard was consistent with the commonly adopted view that these grounds were jurisdictional.<sup>107</sup> However, the apparently conflicting classification of these grounds as concerning control of discretion also featured frequently — as it continues to do.<sup>108</sup> L’Heureux-Dubé J, dissenting in *Shell v Vancouver*, criticised courts for applying ‘vague doctrinal terms’ such as relevance and purpose, in order to assess reasonableness under a ‘cloak’ of ‘vires’, allowing them to ‘substitute their views’.<sup>109</sup>

The Supreme Court finally extended its variable standards of review approach to apply also to relevance and purpose arguments only in *Baker* in 1999.<sup>110</sup> The treatment of the issue there was rather obscure, however, because the Court took the step of extending the alternative deferential approach to these arguments as part of a broader move to extend the approach to review of ‘decisions classified as discretionary’ generally. In that category the Court included review on grounds of both relevance and purpose and orthodox *Wednesbury* unreasonableness.<sup>111</sup> Accordingly, the extension of the variable standards approach had the potential to result both in greater deference on relevance and purpose arguments<sup>112</sup> and in reduced deference in the field previously covered by the ground of *Wednesbury* unreasonableness.<sup>113</sup>

Moreover, the focus in *Baker* is on this latter aspect: the Court’s brief reasons for the extension of the variable standards approach are very much focused on justifying the reduction in deference from the old *Wednesbury* unreasonableness ground.<sup>114</sup> The fact

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<sup>104</sup> D Mullan, ‘Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action - the Top Fifteen!’ (2013) 42 *Advocates’ Quarterly* 1, 42 says there is a ‘perennial issue’ about the relationship of the nominate grounds, such as relevance and purpose, with the standards of review.

<sup>105</sup> In *CUPE* (n 73).

<sup>106</sup> G Van Harten, G Heckman and DJ Mullan, *Administrative Law: Cases, Text and Materials*, 6th edn (Toronto, Edmond Montgomery, 2010) 956–57. For a notable example, see *Shell Canada Products Ltd v Vancouver (City)* [1994] 1 SCR 231 (SCC).

<sup>107</sup> As noted in Taggart, ‘Globalization’ (n 89), 272; Mullan, ‘Deference from *Baker* to *Suresh*’ (n 86), 24.

<sup>108</sup> *Baker* (n 4), [53]. For commentary adopting this view, see n 86.

<sup>109</sup> *Shell v Vancouver* (n 106), 244, 258. However, her focus is on arguing for deference to municipalities; that deference usually applies to statutory interpretation is mentioned only once: *ibid* 246–47.

<sup>110</sup> *Baker* (n 4).

<sup>111</sup> *Ibid*, [53].

<sup>112</sup> That is expressly contemplated *ibid*, [65].

<sup>113</sup> Mullan, ‘Deference from *Baker* to *Suresh*’ (n 86) discusses these as ‘two polarities’ and seeks to reconcile what he sees as an apparent contradiction.

<sup>114</sup> *Baker* (n 4), [53]–[54].

that there is a potential *increase* in deference on relevance and purpose arguments is stated only by way of assuaging concerns about that reduction in deference.<sup>115</sup>

Indeed, it is not at all clear that the move to deference on relevance and purpose arguments was even put into action in *Baker* at all. Despite purporting to apply a reasonableness standard, when it comes to identifying a mandatory relevant consideration — the interests of an illegal immigrant’s children must be considered in deciding whether to grant a ‘humanitarian and compassionate’ exemption from deportation — the Court proceeds on the basis of its own reading of the statute in context.<sup>116</sup> This looks more like correctness review: the Court does not say that it would have been unreasonable for the official not to have considered the children’s interests relevant. In contrast, the opposite move to lesser deference in the field previously covered by *Wednesbury* unreasonableness is very clearly applied: the Court reviews the weight accorded to the mandatory consideration on a much more intensive standard than the *Wednesbury* unreasonableness standard that was traditionally used for questions of weight.<sup>117</sup>

Subsequent case law and commentary interpreting *Baker* has tended to continue this focus on the possible reduction in deference from the traditional *Wednesbury* standard, rather than on the introduction of deference on relevance and purpose.<sup>118</sup> When commentators do advert to the issue concerning relevance and purpose arguments, they always note the Court’s express statement that deference is now available in disposing of these arguments.<sup>119</sup> But they also tend to present this as novel and even radical, and to wonder whether courts will follow it.<sup>120</sup>

More than 15 years after *Baker*, this idea of extending deference to relevance and purpose arguments has still not settled in at all securely. The recent decision of the Federal Court of Appeal in *Forest Ethics* does clearly and expressly affirm that deference is available in relation to relevance arguments.<sup>121</sup> However, it is not difficult to find Supreme Court decisions post-*Baker* that tacitly appear to apply a correctness standard to these arguments, despite having concluded that a reasonableness standard is appropriate for review of the impugned decision.<sup>122</sup> In *Chamberlain*, for instance, a school board’s decision not to approve a book depicting same-sex families was struck down for failure to consider relevant considerations and taking account of irrelevant ones. Although a reasonableness standard is selected as appropriate for this case, the relevance issues are discussed almost uniformly in terms

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<sup>115</sup> Ibid, [55].

<sup>116</sup> *Baker* (n 4), [67]–[74].

<sup>117</sup> Ibid, [75]. For the traditional position, see *NZ Fishing Industry Association* (n 23), 552; *Tesco* (n 18), 764.

<sup>118</sup> Eg *Suresh v Canada* 2002 SCC 1, [2002] 1 SCR 3; Mullan, ‘Deference from *Baker* to *Suresh*’ (n 86). See also, more generally, Daly, *A Theory of Deference* (n 72), 255–58; M Taggart, ‘The Impact of Apartheid on Commonwealth Administrative Law’ [2006] *Acta Juridica* 158, 203, but cf 204.

<sup>119</sup> Van Harten, Heckman and Mullan (n 106), 957; Mullan, ‘Unresolved Issues’ (n 104), 43–44; Cartier, ‘Administrative Discretion’ (n 91), 399–400. See also *Kane v Canada (Attorney-General)* 2011 FCA 19, 328 DLR (4th) 193, [102] (Stratas JA dissenting).

<sup>120</sup> Mullan, ‘Deference from *Baker* to *Suresh*’ (n 86), 23–27; Taggart, ‘Impact of Apartheid’ (n 118), 204; Wildeman, ‘Deference’ (n 78), 348–49.

<sup>121</sup> *Forest Ethics Advocacy Association v National Energy Board* 2014 FCA 245, [65]–[69].

<sup>122</sup> As noted in Mullan, ‘Unresolved Issues’ (n 104), 48–50 and 77–78. Also Cartier, ‘Administrative Discretion’ (n 86), 400; Daly, ‘Struggle for Deference’ (n 76).

implying a correctness standard.<sup>123</sup> The word ‘unreasonable’ tends to feature throughout as no more than a conclusory label: if the board has erred in law, then its decision must be declared unreasonable.<sup>124</sup>

Similarly, several cases have repeated a formulation of the deferential standard of review according to which reasonable decisions will stand so long as the decision-maker has ‘appl[ied] the correct legal test’ — and going by the application of that formulation, the ‘legal test’ that has to be ‘correct’ appears to include questions of relevance and purpose.<sup>125</sup> Several commentators have made similar criticisms of the *Retired Judges* case.<sup>126</sup> In *Chieu*, indeed, the Court expressly assigned a correctness standard to a relevance issue, on the basis that this was a legal and therefore jurisdictional issue.<sup>127</sup>

### C Exploring and evaluating some reasons for the unsettled position

In this final section, I explore and evaluate some possible reasons why there is such limited support for the expected position in the Canadian case law and in the commentary favouring the alternative approach.

As we have seen, the mixed record in the case law appears to be at least partly related to confusion. One potential source of confusion lies in the contradictory classifications of the relevance and purpose grounds. Another lies in Canada’s retention of the concept of jurisdictional error.<sup>128</sup> Most recently this has been controversially confirmed as one of the exceptional categories of case attracting correctness review.<sup>129</sup> For many years before that, it functioned as no more than a conclusory label for cases attracting correctness review based on the contextual factors, but use of the jurisdictional terminology always presented the risk of slipping back into correctness review *because* a matter was classified as jurisdictional.<sup>130</sup> As we have seen, that was particularly the case for relevance and purpose arguments.

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<sup>123</sup> *Chamberlain v Surrey School District No 36* 2002 SCC 86, [2002] 4 SCR 710, [58]–[61]; but compare [57]. It will be recalled that *Baker* (n 4) itself is open to similar criticism: text at n 116.

<sup>124</sup> *Chamberlain* (n 123), [15], [56], [71]–[72]. For an arguably similar approach, see also *Kane* (FCA) (n 119), [6], [68]–[81] and the dissenting judgment’s criticism of this, especially [124] (reversed on different grounds in *Canada (Attorney-General) v Kane* 2012 SCC 64, [2012] 3 SCR 398).

<sup>125</sup> *Lake v Canada (Minister of Justice)* 2008 SCC 23, [2008] 1 SCR 761, [41]; *Halifax (Regional Municipality) v Canada (Public Works and Government Services)* 2012 SCC 29, [2012] 2 SCR 108, [43] (also [55]).

<sup>126</sup> *CUPE v Ontario (Minister of Labour)* 2003 SCC 29, [2003] 1 SCR 539. See, eg, G Huscroft, ‘Judicial Review from *CUPE* to *CUPE*: Less is Not Always More’ in G Huscroft and M Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto, University of Toronto Press, 2006) 296; Daly, ‘Struggle for Deference’ (n 76).

<sup>127</sup> *Chieu v Minister of Citizenship and Immigration* 2002 SCC 3, [2002] 1 SCR 84, [24].

<sup>128</sup> Criticised, eg, by Taggart, ‘Scope of Review’ (n 2), 206.

<sup>129</sup> *Dunsmuir* (n 3), [59].

<sup>130</sup> For accounts of this, see MD Walters, ‘Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law’ in C Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford, Oxford University Press, 2010) 300, 306–08; A Macklin, ‘Standard of Review: Back to the Future?’ in CM Flood and L Sossin (eds), *Administrative Law in Context* (Toronto, Edmond Montgomery, 2013) 279, 294, 307; Daly, ‘Struggle for Deference’ (n 76).

But are there any other reasons for the courts' and commentators' frequent failure to accord or even contemplate deference on relevance and purpose arguments in the context of the alternative deferential approach; and are these good reasons? Let me consider two.

*i No deference needed because these grounds involve only process?*

There is one difference between the relevance and purpose grounds or arguments and some other illegality grounds that may be seen as counting in favour of a less deferential standard of review on these grounds. That is that these grounds are often said to be about 'process'. Beatson pointed out that this was often suggested as a reason for correctness review, and that it may mean one of two different things.

First, the 'process' terminology may be confused with 'procedural' in the sense of procedural fairness requirements such as the principles of natural justice, which normally attract correctness review.<sup>131</sup> While this analogy clearly represents confusion,<sup>132</sup> the point does not necessarily go without saying.

Secondly, properly understood, the 'process' label means that these grounds impose limits or requirements on the *reasoning process*, as distinct from the substantive outcome.<sup>133</sup> This is true — it is just a different way of saying that they serve to structure rather than confine discretion, as discussed in part III.<sup>134</sup> Beatson expressed various doubts but appeared to leave open the possibility that this feature might count in favour of correctness review.

But is this classification really significant for the standard of review? Does it mean that these grounds are less intrusive, and hence correctness review is appropriate? In the different context of the choice of mechanisms for giving effect to rights, treating rights as mandatory considerations provides weaker protection than reading the scope of statutory powers subject to a presumption of substantive consistency with the rights.<sup>135</sup> On the former approach, it is lawful to infringe the right, so long as it has been taken into account<sup>136</sup> (and so long as the weight accorded to it is not unreasonable<sup>137</sup>). This might be thought to indicate that reasoning process grounds are generally less intrusive than grounds that concern the substantive outcome.

However, for the purposes of assigning standards of review, it is not at all clear that reasoning process grounds such as relevance and purpose are less intrusive than other illegality grounds in a way that calls for a less deferential standard of review. To the contrary, as we saw in part III, it has also been suggested that relevance and purpose grounds encroach on the exercise of discretion to a greater extent than illegality in the form of exceeding the scope of the power.<sup>138</sup> On that basis, they might give rise to a

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<sup>131</sup> Beatson (n 59), 28–29.

<sup>132</sup> *Ibid.*, 27–29.

<sup>133</sup> This is the heading under which they are discussed in Cane and McDonald (n 35), ch 5.3.

<sup>134</sup> Part III B.

<sup>135</sup> *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420; McLean, Rishworth and Taggart (n 35); C Geiringer, 'Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law' (2004) 21 *New Zealand Universities Law Review* 66.

<sup>136</sup> McLean, Rishworth and Taggart (n 35); Geiringer (n 135).

<sup>137</sup> *NZ Fishing Industry Association* (n 23), 552; *Tesco* (n 18), 759.

<sup>138</sup> See part III B.

greater, not lesser, need for deference. As I pointed out there, both claims are open to doubt. In my view, it is best to accept that there is no significant difference between reasoning process grounds and scope of power grounds in terms of the appropriate standard of review.

*ii Does the alternative approach render the nominate grounds redundant?*  
Secondly, there is a very different possible reason for the commentators' silence on the relevance and purpose grounds and the lack of a settled position in relation to them in the case law. The reason may lie in a view that it is unnecessary and inappropriate to 'segment' a decision under challenge into different aspects that attract different grounds of challenge and different standards of review. The traditional nominate grounds of review, such as the relevance and purpose grounds, served to ensure that some types of errors were addressed on a correctness standard while other types of error were either off limits or reviewable only with extreme deference.<sup>139</sup> There is no need for this when all aspects of the decision are reviewable on the same system of variable standards of review. On this view, the topic of this essay — the categorisation of the relevance and purpose grounds or arguments and the standard of review to be applied to them — ceases to be a question.

Whether this view can be validly adopted depends, however, on the degree to which the law/discretion divide is abandoned. The alternative deferential approach always involves the view that this divide is less clear than traditionally thought and that it should not be determinative of the standard of review.<sup>140</sup> However, the traditional grounds become entirely redundant in the way I have suggested only if the divide is entirely dismissed as both illusory and irrelevant. The position on this is uncertain in both the commentary and the case law.

The commentators who favour the alternative deferential approach all question the law/discretion divide.<sup>141</sup> However, most of them probably would not go so far as to consider the line entirely illusory and irrelevant. And most do not expressly dismiss the traditional nominate grounds. The reason for their silence is thus a matter of speculation. The exceptions are Endicott and Daly. Daly argues against retention of the traditional nominate grounds, while Endicott argues against the overarching grounds of illegality and rationality. Both are concerned that analysis in terms of these grounds is liable to encourage excessive recourse to the old correctness standard.<sup>142</sup> As for the law/discretion divide, Endicott does indeed appear to dismiss this as illusory;<sup>143</sup> while Daly does not seem to go that far.<sup>144</sup>

Canadian courts abandoned the law/discretion divide as determinative of standards of review in *Baker*, as we have seen. But again, the statements in that case do not seem to go further and dismiss the divide as illusory and irrelevant.<sup>145</sup> As to whether

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<sup>139</sup> Knight, 'Mapping' (n 22), 413–15: they 'encapsulate an "off-the-shelf"' calibration of standards.

<sup>140</sup> See text following n 79.

<sup>141</sup> See nn 87–88.

<sup>142</sup> Daly, *A Theory of Deference* (n 72), 160–62; Daly, 'Struggle for Deference' (n 76), part IV; Endicott (n 5), 348–49. See also Van Harten, Heckman and Mullan (n 106), 787. This is a concern shared by Abella J: see n 149.

<sup>143</sup> Endicott (n 5), 347. This view may also possibly be implicit in passing references to deference on questions of law in Taggart, 'Proportionality': see Wilberg and Elliott (n 2).

<sup>144</sup> Daly, *A Theory of Deference* (n 72), 256–58; but cf Daly, 'Struggle for Deference' (n 76), part IV.

<sup>145</sup> *Baker* (n 4), [54]–[55].

decisions under challenge should be ‘segmented’ into different aspects attracting different grounds of challenge and different standards of review, the position in the cases is unsettled.<sup>146</sup>

On the one hand, whether the point in issue is a question of law (statutory interpretation) or one of fact, policy or discretion is not infrequently still relied on as relevant to the standard of review.<sup>147</sup> Many challenges also continue to turn on discrete issues of statutory interpretation.<sup>148</sup> Critics of ‘segmentation’ continue to find themselves in the minority.<sup>149</sup> A dictum in *Dr Q* has been cited as abandoning segmentation: the traditional grounds, ‘while still useful as familiar landmarks, no longer dictate the journey’.<sup>150</sup> However, in light of its context, this is best read as meaning only that standards of review are no longer summarily determined by invoking these grounds,<sup>151</sup> not that the grounds should no longer be used.<sup>152</sup>

On the other hand, however, we have already noted that explicit reliance on the traditional nominate grounds is rare in recent Canadian case law. There is at least a noticeable trend towards what we might call a ‘global’ approach. This eschews a focus on particular steps in the reasoning process, particularly on points of statutory interpretation, and instead assesses the decision as a whole — the reasoning process together with the substantive outcome — in one single analysis and on one single standard of review.<sup>153</sup>

For instance, in *Baker*, the Court formulated the question to be determined as ‘whether the decision in this case, and the immigration officer’s interpretation of the scope of the discretion conferred upon him, were unreasonable’.<sup>154</sup> Consistently with this, it then proceeded to consider questions of relevance and questions of weight at the same time, rather than as separate questions to be disposed of one after the other.<sup>155</sup> Similarly in *Catalyst Paper*, the reasonableness standard was simply applied to the challenged bylaw as such, rather than to any particular step in the authority’s reasoning process.<sup>156</sup> The Court noted that the attempt in older cases to maintain a

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<sup>146</sup> Pointed out in Mullan, ‘Unresolved Issues’, 64–69; also 42–51.

<sup>147</sup> Including in *Dunsmuir* (n 3), [53]. Following *Dunsmuir*’s introduction of the single reasonableness standard, this distinction is now often considered a significant part of the context in *applying* that standard: see, eg, *Alberta Teachers’ Association* (n 76), [47], [85]–[86]; *First Nations Child and Family Caring Society of Canada v Canada (Attorney-General)* 2013 FCA 75, 444 NR 120, [13]–[14] (Stratas JA).

<sup>148</sup> To name only a few of the many recent instances: *Dunsmuir* (n 3) itself; *McLean v British Columbia (Securities Commission)* 2013 SCC 67, [2013] 3 SCR 895; *Canadian National Railway Co v Canada (Attorney-General)* 2014 SCC 40.

<sup>149</sup> Abella J is the main critic on the current Supreme Court: Mullan, ‘Unresolved Issues’ (n 104), 64–69, 76–81. See, eg, her dissent on the standard of review issue in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35, [2012] 2 SCR 283, [74]–[88].

<sup>150</sup> *Dr Q v College of Physicians and Surgeons* 2003 SCC 19, [2003] SCR 226, [24].

<sup>151</sup> See Mullan, ‘Unresolved Issues’ (n 104), 44.

<sup>152</sup> As claimed in Daly, *A Theory of Deference* (n 72), 262; Daly, ‘Struggle for Deference’ (n 76), part IV.

<sup>153</sup> Sometimes, it seems that reasonableness has reverted to being the ground as well as the standard of review.

<sup>154</sup> *Baker* (n 4), [63].

<sup>155</sup> *Ibid.*, [64]–[75].

<sup>156</sup> *Catalyst Paper Corporation v Corporation of the District of North Cowichan* 2012 SCC 2, [2012] 1 SCR 5.



clear distinction between policy and legality, and to confine review to the latter, had not prevailed.<sup>157</sup>

The Supreme Court's explanation of the reasonableness standard in *Dunsmuir* — as concerned with both the reasoning process and whether the decision falls within a range of acceptable outcomes<sup>158</sup> — may also be invoked in support of the global approach.<sup>159</sup> The reading of that passage is, however, contested. In *Newfoundland Nurses Union*, the entire passage was read as concerning the reasonableness of a decision-maker's answer to a particular question (such as a question of statutory interpretation) that arose in the course of making the impugned decision. It was the reasonableness of that particular answer that should be assessed by asking both whether that answer is reasonable and whether the decision-maker's reasons for it are capable of justifying it.<sup>160</sup> On that reading, *Dunsmuir* does not support the global approach.<sup>161</sup>

It is also worth recalling that even cases that purport to apply one uniform reasonableness standard to the challenged decision as a whole often turn out to have applied a correctness standard to questions of legality, such as relevance and purpose questions.<sup>162</sup> *Baker* is one of those cases.<sup>163</sup> To some extent, as noted, this simply reflects confusion. But it may also reflect a lingering sense that there *is* a relevant difference between legality issues and merits issues after all.

In my view, the global approach is taking variability too far. If indeed this is the approach the Supreme Court in *Baker* meant to introduce, then that was a wrong turning. Segmentation in appropriate contexts is a necessary part of the standards of review analysis. The unsettled nature of Canadian standards of review law generally may be due partly to this trend away from established categories and distinctions.<sup>164</sup>

Among the distinctions that remain significant is the distinction between statutory interpretation and evaluation of the merits. I agree with the proponents of the alternative approach that the orthodox understanding of this distinction required modification, as outlined earlier: questions of statutory interpretation do not always have one right answer which judges are best placed to provide.<sup>165</sup> The great advance of the Canadian alternative deferential approach is this insight that the divide between questions of law, fact and discretion is not as clear-cut as it may seem, and that factors other than the application of this divide are relevant to the standard of review. This

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<sup>157</sup> Ibid, [14].

<sup>158</sup> *Dunsmuir* (n 3), [47].

<sup>159</sup> See, eg, *Catalyst Paper* (n 156), [16].

<sup>160</sup> *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, [2011] 3 SCR 708, [14].

<sup>161</sup> Instead, the passage in question at least partly affirms deference 'as respect', the version of deference proposed in Dyzenhaus, 'Politics of Deference' (n 4).

<sup>162</sup> See nn 123–126 and text.

<sup>163</sup> See n 114 and text.

<sup>164</sup> On the other hand, the move in *Dunsmuir* (n 3) back to treating some categories as presumptively determinative may be criticised as going too far in the other direction: see P Daly, 'The Unfortunate Triumph of Form over Substance in Canadian Administrative Law' (2012) 50 *Osgoode Hall Law Journal* 317; though cf A Green, 'Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law' (2014) 47 *University of British Columbia Law Review* 443.

<sup>165</sup> Section A of this part IV.

divide should therefore not be determinative. However, it does not follow that the divide is illusory and irrelevant. That conclusion would be another instance of throwing out the baby with the bathwater.<sup>166</sup>

My proposal for maintaining the distinction between statutory interpretation and evaluation of the merits was set out in part III.<sup>167</sup> To summarise, while interpretation does involve discretion or judgement, there is a line between interpretive judgement and evaluation of the merits. The line depends on whether an adequate foundation can be found in the words of the statute or in the relevant context for considering a particular judgement to be part of the statute's policy or purpose. Drawing this line itself involves judgement, and reasonable people will often disagree on it. But that does not mean that it is an illusory or invalid line: in order for a particular interpreter's line to be respectable, it needs to be supported by plausible statutory interpretation reasoning.

The upshot of this view on statutory interpretation is an approach to standards of review that sits between the orthodox UK approach and the global approach that may be emerging in Canada. Segmentation must remain available: if the distinction between interpretation and evaluation is to be maintained, it can only be applied to *aspects* of the decision, not the decision as a whole. For instance, a relevance challenge raises a question of statutory interpretation, while an inadequate or excessive weight challenge raises a merits question. Both may arise in the same case, but they can only be analysed separately.

The distinction between them should continue to be a highly relevant factor in determining the standard and intensity of review.<sup>168</sup> As a result, within each individual case there should always be a gap between the standard or intensity applied by a court in scrutinising the decision-maker's interpretation of the statute, and the standard or intensity on which the court evaluates the merits of a decision. Though the gap will not be as large as on the orthodox approach, questions of statutory interpretation will always be reviewed on a *less* deferential standard, or more intensively, than merits questions arising in the same case.

For instance, there will always be a gap between the standards or intensity of review on a mandatory relevant consideration argument and on the evaluation of the weight given to that consideration within the same case. In a context where other factors call for close supervision and there are no real reasons for deference, a court will assess on a correctness standard whether the statute, properly interpreted, required the consideration to be taken into account. If so, the weight which the decision-maker in fact accorded to that consideration will then be assessed only on a reasonableness standard, but it will be fairly closely scrutinised.<sup>169</sup> On the other hand, in a context

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<sup>166</sup> That is how Taggart, 'Scope of Review' (n 2), 213 criticises the abandonment of pluralism along with its old blunt instrument, the jurisdictional doctrine, in the move to the current orthodoxy: see Wilberg and Elliott (n 2), part II.

<sup>167</sup> Part III C i.

<sup>168</sup> In the context of the Federal Court of Appeal's current approach to applying the single reasonableness standard (see n 76 and, eg, *Farwaha* (n 76); *First Nations Child and Family Caring Society* (n 147); *Forest Ethics* (n 121)), it should be one of the factors that determine the breadth of the range of reasonable answers.

<sup>169</sup> Recall that this is precisely the approach that was in fact applied in *Baker* (n 4), while purporting to apply reasonableness to the decision as a whole: text at n 114. Contrary to the Court's weighing of the

where other factors call for significant deference, the court will assess the interpretation only on a reasonableness standard: was it reasonable to read the statute as permitting the consideration to be ignored? If the consideration was in fact taken into account, the weight accorded to it will then be reviewable only on a very deferential standard.

Within this scheme, it makes sense to retain the various traditional illegality grounds: they continue to serve the useful function of identifying particular types of error in statutory interpretation. Moreover, the illegality grounds as a group usefully mark out challenges where the nature of the question is a factor favouring less deference. The Supreme Court in *Khosa* rightly held that use of nominate grounds of review does not preclude application of the Canadian standards of review analysis: the grounds can be applied in accordance with whatever is the appropriate standard of review in each case.<sup>170</sup> Even Daly, after all, accepts that the grounds can continue to serve as ‘indicia’ of unreasonableness — that means they identify reviewable types of error.<sup>171</sup>

The concern that reliance on the relevance and purpose grounds tends to compromise judges’ commitment to deference is, of course, not unfounded, given the established tradition of correctness review on these grounds.<sup>172</sup> However, there may be better ways of dealing with this risk of confusion. The global approach, far from buttressing the commitment to deference, involves its own significant risk of inadvertent correctness review on legality issues, as we saw earlier.<sup>173</sup> Where a decision as a whole is reviewed on a reasonableness standard, often that standard is actually applied only to aspects of the merits, such as the weight accorded to competing factors. Legality issues are tacitly treated as preliminary issues and reviewed on a correctness standard.<sup>174</sup> Alternatively, the temptation is to apply the conclusion of ‘unreasonableness’ to an enquiry conducted entirely in terms of correctness.<sup>175</sup>

## V Conclusion

In this essay, I have sought to help fill a gap in the case law and commentary on the standard of review on questions of law, by considering in detail how to classify the relevance and purpose grounds, and whether deference may accordingly be appropriate when using these grounds. I considered that question first on the assumption that orthodox correctness review on questions of law is otherwise to be maintained, and then in the context of the alternative deferential approach which involves deference on questions of law.

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factors for and against deference (ibid, [62]), arguably there were such strong factors in favour of more intensive review in that case (see Mullan, ‘Deference from *Baker to Suresh*’, 26) that correctness review on the relevance issue was appropriate.

<sup>170</sup> *Canada (Citizenship and Immigration) v Khosa* 2009 SCC 12, [2009] 1 SCR 339, [42]–[44], [35]–[36] and [49]–[51] and see its discussion in Daly, *A Theory of Deference* (n 72), 258–59.

<sup>171</sup> Daly, *A Theory of Deference* (n 72), 162.

<sup>172</sup> While review should always be *more* intensive on these grounds than on merits questions, *automatic* correctness review on these grounds is, of course, entirely inconsistent with the alternative approach.

<sup>173</sup> See discussion above, text to nn 123–126.

<sup>174</sup> Eg *Retired Judges Case* (n 126); *Halifax (Regional Municipality)* (n 125).

<sup>175</sup> Eg *Chamberlain* (n 123).

Perhaps my most significant conclusion is that the relevance and purpose grounds are best categorised as involving and concerning statutory interpretation; and that it is possible and remains desirable for the purposes of assigning standards of review to distinguish that type of ground from those involving evaluation of the merits.

On that basis, within the orthodox approach these grounds must continue to attract correctness review (albeit with appropriate restraint). Within the alternative deferential approach, deference should be available on the relevance and purpose grounds just as on other illegality grounds. The divide between grounds involving statutory interpretation and those involving evaluation of the merits should not be abandoned, as appears to be suggested by some commentary and case law: this divide should continue to be used as one relevant factor in determining the appropriate standard of review for each individual question arising in a case.