

5-1-1984

## Some Problems with Judicial Review of Administrative Inconsistency

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### Recommended Citation

H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984) 8:2 DLJ 435.

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In a 1982 law review article Professor David Mullan proposes that we adopt the identification of inconsistency as a basis for judicial review of administrative action.<sup>1</sup> On its surface such a proposal may not seem revolutionary. The concept of precedent and rule-oriented decision-making is fundamental to common notions of justice. Arbitrariness in official action offends the rule of law. Hence to resist such a proposal may not seem at the outset a very popular task, especially if the alternative is to tolerate inconsistent administrative action.

But it is not the popularity or the unpopularity of the undertaking which is troubling, so much as its ambiguity. Mullan's work draws upon the "relatively precise principle" that like cases should be treated alike. For my part, I find this precision elusive. The role of consistency in the process of judicial decision-making is controversial.<sup>2</sup> When considered in the administrative law setting the difficulties of overseeing inconsistency within an exceptional, deferential model of judicial review are manifold.

The irony of Professor Mullan's proposal is that it emerges in the context of a work devoted to resisting attempts to extend intra-jurisdictional review, specifically through the development of a doctrine of substantive fairness. Says Mullan of substantive fairness, such review would be "dangerous and unnecessary"<sup>3</sup> because it would involve an "open-ended standard"<sup>4</sup> providing an opportunity for judges to "second-guess"<sup>5</sup> statutory authorities.

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1. "Natural Justice and Fairness — Substantive as well as procedural Standards for the Review of Administrative Decision-Making" (1982), 27 McGill L.J. 250.

2. See e.g., K. Llewellyn, *The Common Law Tradition* (Boston, Toronto: Little, Brown & Co., 1960); B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale Press, 1931); J. Stone, *Legal Systems and Lawyers' Reasonings* (Stanford: Stanford University Press, 1964); R. Wasserstrom, *The Judicial Decision* (Stanford: Stanford University Press, 1961); A.T. Denning, *From Precedent to Precedent* (Oxford: Clarendon Press, 1959).

3. *Supra*, note 1, at 280.

4. *Id.*, at 274.

5. *Id.*, at 275.

Two of the reasons put forward for rejecting such a development are that it would contradict the legislative preference for administrative mechanisms and that it would negate the advantage of the comparative expertise of the statutory decision-maker. Inconsistency, by contrast, is said to be a "relatively precise principle"<sup>6</sup> which "is not likely to present a threat to the autonomy of administrative agencies."<sup>7</sup> It is my view that the concept of treating like cases alike is not at all precise as a criterion of judicial review and that it is every bit as open-ended as the substantive unfairness which Mullan rejects.

It must be stated that Professor Mullan acknowledges the need for some qualification on the reach of his proposed principle of review. He recognizes the need for flexibility in policy development and the danger of perpetuation of erroneous decisions. In the end the target is admittedly an ambiguous one; but it is perhaps this ambiguity more than the prospect of anyone taking seriously a proposal of rigid consistency which prompts a response. My position simply stated is this: we do not presently have in Canada a separate ground of judicial review for inconsistency nor do we need one, however qualified. All of our existing bases of review adhere to a jurisdictional model, complete with the deference implicit in such a concept. There is no such deference implied by the broad language of inconsistency and any effort to articulate a qualified version would be a futile attempt to navigate the slippery slope between jurisdictional review and plenary revision, with the inevitable result being tantamount to appellate review.

To reject inconsistency as an independent ground of review is not however to condone administrative treatment which is apparently inconsistent. While maintaining a jurisdictional model of review we may still supervise the most blatant inconsistencies by treating them as evidence of abuse of discretion or bias.<sup>8</sup> Professor Mullan even suggests that review for inconsistency may be nothing more than a particular case of reviewing abuse of discretion.<sup>9</sup> But this latter

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6. *Id.*, at 287.

7. *Id.*, at 286.

8. This view is shared by Professor Mullan in a previous article in which he rejects inconsistency as a separate ground of review, saying that this "is the kind of judicial review we do not want." "Recent Developments in Nova Scotian Administrative Law" (1978), 4 Dal. L.J. 467, at 538.

9. *Supra*, note 1, at 296.

concept has always had a jurisdictional format,<sup>10</sup> and it is considerably more modest in its theoretical underpinnings than is the notion that judges should ensure that like cases be treated alike. The proper response to administrative action which is ostensibly inconsistent but which falls short of traditional jurisdictional grounds of review is not judicial oversight, but the exertion of pressure in the political dynamic, of which the administrative decision-maker forms a vital element.

Professor Mullan also supports his proposal by reference to American judicial review. It is said that a requirement of consistency as developed in American cases is "an implied limitation on the exercise of statutory discretions generally."<sup>11</sup> This paper will show that the American principle is not nearly so general in scope and that it may only be a particular manifestation of a requirement of reasoned decision-making. It will be argued that two cases relied upon by Mullan which purport to found a consistency requirement on constitutional grounds are wrong. Moreover, even assuming the American jurisprudence to be as sophisticated and far-reaching as Mullan states it, there remains a danger in selectively borrowing from their experience. It is important to undertake comparative judicial review in a comprehensive light. In this case it will be seen that American developments diverge significantly from those in Canada and that we must be very cautious when relying upon their precedents.

Ultimately I concur in the general tenor of Professor Mullan's article which is to favour a cautious and restrained model of judicial review and to reject a principle of substantive fairness. I also concur in his view that "there is still obviously much room for thought and refinement of language."<sup>12</sup> What follows, I hope, will contribute to that process.

### *I. The Problem of "Consistency"*

The initial and indeed the central problem in this analysis is to determine what is meant by consistency. The Mullan proposal is

10. See Mullan, *Administrative Law* (2d ed. Agincourt: Carswell, 1979), at 3-165 where he says that abuse of discretion is "a further aspect of jurisdiction or vires." Also *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140 (*per* Rand J.) and 158 (*per* Martland J.); *Smith and Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95 at 100 (*per* Rand J.).

11. *Supra*, note 1, at 282.

12. *Id.*, at 298.

said to be "based on the reasonably precise principle underlying much of our legal thinking that like cases be treated alike."<sup>13</sup> It would be worthwhile at this point to consider just how precise is this principle and how much of our legal thinking it underlies. The durability of the concept cannot be gainsaid. It has descended in virtually literal form from the work of Aristotle. Chaim Perelman writes: "from Plato and Aristotle, through St. Thomas Aquinas, down to the jurists, moralists and philosophers of our own day runs a thread of universal agreement on this point."<sup>14</sup>

But Perelman was not impressed by the durability of the concept so much as by its flexibility or, one might say, malleability. He wrote of the importance of "an indeterminate element, a variable whose various specific applications will produce the most contrasting formulas of justice."<sup>15</sup> To Perelman and those of the Belgian school, legal argument was not a matter of formal logic but of rhetoric: "[A legal argument] is not correct and compelling or incorrect and valueless, but is relevant or irrelevant, strong or weak, in accordance with the reasons that justify its use under the circumstances."<sup>16</sup>

Julius Stone was even more skeptical than Perelman in his rejection of consistency as a governing principle in legal argument. He wrote that the effect of simplifying justice into equality is "to conceal, truncate, foreclose or disguise by fictional or ambiguous formula the range of values involved in justice-controversies."<sup>17</sup> Professor Weston, in a recent article in the *Harvard Law Review*, concludes that the concept of equality is entirely circular:

So there it is: equality is entirely circular: It tells us to treat like people alike; but when we ask who 'like people' are, we are told 'people who should be treated alike'.<sup>18</sup>

13. *Id.*, at 286.

14. *The Idea of Justice and the Problem of Argument*, trans. J. Petrie (London: Routledge and Kegan Paul, 1963), at 12.

15. *Id.*

16. "Logique formelle, logique juridique" (1960), 11-12 *Logique et Analyse* 226, at 228.

17. "Justice Not Equality" in E. Kamenka and A. Tay eds., *Justice* (New York: St. Martin's Press, 1980), at 114-15.

18. "The Empty Idea of Equality" (1982), 95 *Harv. Law Rev.* 537, at 547. Cf., K. Greenawalt, "How Empty is the Idea of Equality?" (1983), 83 *Col. L. Rev.* 1167; and K. Karst, "Why Equality Matters" (1983), 17 *Ga. L. Rev.* 245. See the response by Weston in "To Lure the Tarantula from its Hole: A Response" (1983), 83 *Col. L. Rev.* 1186.

Notwithstanding its admitted ambiguity the concept of treating like cases alike retains a superficial appeal as a prescription for justice. It is a cliché of the judicial process. It recurs with varying emphases in the writings of legal theorists.<sup>19</sup> It has recently been suggested that the two rules of natural justice derive from this "formal maxim."<sup>20</sup>

The conclusion of writers like Jerome Frank and Stone that the judicial device of precedent is not scientific can hardly be disputed. But it is not then necessary to conclude that it is an entirely empty or tautological concept. In concluding that the precedential system, once found to be unscientific, is irrational, Richard Wasserstrom says realist thinkers fall into the trap of the "irrationalistic fallacy."<sup>21</sup> The concept cannot be entirely empty. Arguments about consistent treatment and reasoned applications of rules are, after all, the stock-in-trade of the legal profession.

Some very helpful work has been done on this problem by Gidon Gottlieb who, like Wasserstrom, rejected the irrationalistic fallacy.<sup>22</sup> Gottlieb considered rule-based argument to be a new form of logic, not scientific, but, as he called it, "a working logic."<sup>23</sup> It was, said Gottlieb, "field-dependent." Central to this form of reasoning were necessary connections between rules and other elements of the separate logical texture which "are necessarily involved in the *application* of such rules."<sup>24</sup> According to this approach, the soundness or rationality of a particular decision can be tested by two principal measures, consistency of treatment and conformity with operative purposes and policies. So at this point one is left to wonder whether Gottlieb's refutation of the irrationalistic fallacy of the realists doesn't ultimately confirm it. The attempt to break out of the circularity of treating like cases alike may itself conclude in a tautology. But there are two elements in his

19. E.g., H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), at 155-6; J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971), at 237; R. Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1978), at 113. It should be noted however that none of these writers asserts the Aristotelian concept as a prescription for justice. Rawls immediately qualifies by saying: "to be sure, this notion does not take us very far." Hart says: "it is by itself incomplete, and until supplemented, cannot afford any determinate guide to conduct."

20. R.A. MacDonald, "Judicial Review and Procedural Fairness in Administrative Law: I" (1980), 25 McGill L.J. 520, at 542.

21. Wasserstrom, *supra*, note 2, at 23.

22. *The Logic of Choice* (London: George Allen and Unwin Ltd., 1968), at 23-4.

23. *Id.*, at 169.

24. *Id.*, emphasis that of Gottlieb.

work which show a tentative way out. The first is his recognition of the field-dependent nature of legal reasoning, the importance of rules *as applied*. The second is his conclusion that rule-guided choices and decisions “ideally must rest upon *deference* to preferred balancings between rival purposes and policies.”<sup>25</sup>

This notion of deference to preferred balancings is crucial to understanding legal reasoning and especially to dealing with a proposal that judges review inconsistent administrative decisions. To illustrate, if I appear before an administrator to persuade him that “consistency” compels a particular outcome in a case, I must present my argument as follows:

- (i) There is a precedent or a series of precedents which have been decided according to an asserted rule;
- (ii) The rule was and continues to be sound on its political merits;
- (iii) The actual case is similar to the claimed precedents in the relevant respects and hence should be treated alike.

Whether the administrator is being asked to depart from an existing “rule” on the ground that it was or is politically inappropriate or to perform what lawyers may consider the more mundane task of distinguishing the claimed precedent, there is an indispensable element of choice. This element is just as potent at the stage of marshalling facts to compare the cases as it is when deciding upon the appropriate rule. At each stage the official will decide according to his perception of the circumstances and of prevailing political exigencies. The question will never be: “What does consistency as an objective principle compel us to do?” Rather it is: “What is the most rational choice to make in the circumstances?” And, confronted with a challenge to the validity of an administrator’s decision through an application to a reviewing judge, the ultimate question is: “*Who* should decide?”

In the end the question will be, as Gottlieb concluded, one of deference. Legal argument is potentially endless. And it cannot be terminated by hand-waving references to “consistency”. It can only be terminated by a decision from the appropriate authority. Consistency is one argument to put before the decision-maker, to be weighed in good faith. But ultimately we must acknowledge, as did Perelman, that “strong arguments and good reasons are the strong

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25. *Id.*, at 172.

arguments and reasons *for the one who is to be convinced.*"<sup>26</sup> The administrative, like the judicial, process is about making decisions. Disappointed parties and even more objective observers can argue about whether two cases have been treated consistently. But only the designated decision-maker, fully informed and acting for proper and impartial purposes, can *know* whether a decision is or is not consistent with the cited precedent.

So we conclude that consistency, like reasonableness, is something about which we can have intuitive feelings and make analogical arguments but still disagree. As Perelman concluded we can argue about it rhetorically but not scientifically. And, as found by Gottlieb, it comes down to a recognition that this type of decision-making process is a "working logic." It is a matter of applying rules, or principles, to facts. The essence of the matter is not to determine in some scientific fashion whether a decision is consistent with a claimed precedent but to determine *who should decide*.

## II. *The Problem with Judicial Review*

Normally we believe that we have a restricted model of judicial review in Canada which defers to the expertise of the designated official decision-maker. Indeed the endorsement of such a model is the major premise of the Mullan article. However, Professor Mullan says that review for inconsistency is based upon a "reasonably precise principle" which "is not likely to present a threat to the autonomy of administrative agencies."<sup>27</sup> It is not clear whether this amounts to a claim that a consistency requirement can be enforced without consideration of the merits of the agency's decision and is hence merely procedural or whether it interprets consistency review as falling into some half-way house between procedural and substantive review. In either case the inference is that such judicial oversight would stop short of an incursion into the autonomy of agencies. Professor Mullan is not alone in making this qualification. Richard Stewart suggests that such requirements are not directly addressed to the substance of agency policy, only to ensuring "that

26. "Law Philosophy and Argumentation" in *Justice, Law and Argument* (Dordrecht, Boston, London: Reidel, 1980), at 160. Emphasis added.

27. *Supra*, note 1, at 286.

the agency's action is *rationally related* to some permissible societal goal."<sup>28</sup>

It is difficult to believe that review for inconsistency can be carried on without interfering with the autonomous decision-making of the agency. This is especially true if the remanded decision is challenged a second time around. A reference to the application of the principle in the American case of *Greyhound Corporation v. ICC*<sup>29</sup> will demonstrate how non-deferential such review can be. Under the *Interstate Commerce Act*, the ICC is empowered to treat holding companies as carriers for purposes of the accounting, reporting and security regulations of the *Act* if the holding company acquires "control" of a carrier. In 1963 Greyhound Corporation transferred its carrier operations to a subsidiary, Greyhound Lines, but remained subject to the securities jurisdiction of the ICC since the bus line continued to be its principal source of income (80%). Beginning in 1963 the parent company diversified its holdings so that carrier operations came to represent 20% and 40% of gross and net income respectively. In 1972 the company petitioned the ICC to be released from the securities jurisdiction. Previous to this time the test which was consistently applied was whether the carrier accounted for more than half of the parent company's gross income. The ICC denied the petition, citing two justifications: Greyhound controlled a major part of the busing industry, and the principal sources of Greyhound Corporation's *net* income were transportation related operations.

The company then challenged the ICC refusal claiming that the decision in their case was inconsistent with the policy applied to other carriers. The Circuit Court of Appeals concluded that the ICC was duty bound to justify its standards and to explain the co-existence of conflicting decisions. The order was remanded to the Commission for elaboration of the factors justifying either a new policy or a special application in the case of Greyhound. In affirming its order the ICC cited four factors: the importance of the carrier to the parent company, Greyhound's past record of corporate

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28. "The Reformation of American Administrative Law" (1975), 88 Harv. L. Rev. 1667, at 1680. When the comments of Professor Stewart are read in context the intellectual ambivalence surrounding this discussion is plainly evident. A requirement of consistency is said to not be "directly" addressed to substance. Then it is said that it may "impact" on the substance. Finally it is referred to as an additional *procedural* ground.

29. 551 F.2d 414 (D.C. Cir. 1977).

abuses, competing demands by other subsidiaries for the resources of the parent company, and the state of the industry in general. In the course of reaffirming its position the Commission accepted comments from Greyhound, other carriers, and the Commission's Bureau of Investigation and Enforcement. Greyhound again sought judicial review on the basis of the inconsistency of the ICC's interpretation of its securities jurisdiction. This time the D.C. Court of Appeals considered each of the four factors enumerated by the Commission and dismissed the first as contradicting the ICC's position, the last two as "broad generalizations" and the point regarding past abuses as, absent additional facts, "unreasonable."<sup>30</sup> In the result the Court set aside the order entirely, remarking that in eight years since the initial order the Commission had had ample time to explain its deviation from prior decision, and concluded that there was "no useful purpose to be served in allowing the Commission another shot at the target."<sup>31</sup> In the face of such a critical review of the basis of the ICC's decision and of the Court's failure to show any modicum of deference to the agency decision, it is difficult to defend inconsistency review as being something less than *de novo* consideration of the merits.

A second case illustrating the extent of such review is *Office of Communication of the United Church of Christ v. Federal Communications Commission*.<sup>32</sup> The FCC is obliged to promulgate Equal Employment Opportunity regulations but may do so within its mandate to ensure that broadcasters serve all segments of the community. In 1969 it adopted rules requiring stations with five or more full-time employees to file reports respecting employment of minorities. In 1976, after accepting comments from interested parties, the threshold was raised by the FCC to stations with more than ten employees. The stated reasons for the policy were: inadequate Commission resources to process the reports; equal opportunity programs were unenforceable against small stations because they had no formal personnel procedures; the burden imposed on small stations was unjustified; and the great majority of industry employees would be covered in any event. The Second

30. 668 F.2d 1354 at 1361 (D.C. Cir. 1981). Only Judge Skelly Wright sat on both cases. The other members of the court were different in each instance.

31. *Id.*, at 1364.

32. 560 F.2d 529 (2d Cir. 1977). It is interesting to note that this case applies the principles developed in the context of inconsistent adjudications to a rulemaking proceeding.

Circuit Court declined to accept the point regarding the agency's resources because that same argument had been made in dissent at the time of the 1969 rules but rejected by the majority of the FCC. The Court observed that no evidence of strained agency resources was presented by the FCC. In response to the point regarding the informality of smaller stations, the Court could not see that this factor had changed since 1969 and, furthermore, was of the view that even in the case of small stations, such requirements were "wholly reasonable".<sup>33</sup> The third point regarding the burden on small stations was found to be unsupported by evidence and the fourth point, that 85% of the industry's workforce remained subject to the requirements, was responded to by some selective statistical citations from the record. The decision by the Commission was therefore quashed because the FCC had "failed to articulate a reasoned explanation for its action."<sup>34</sup>

What these cases illustrate is the lack of any objective limitations on the exercise of judicial oversight of what the court considers to be inconsistent decisions.<sup>35</sup> Notwithstanding reminders that courts should be sensitive to the need for flexibility in administrative policy development, such considerations can be reduced to pious platitudes where a reviewing court is resolved on another substantive outcome than the one chosen by the agency. So long as the agency is only required to acknowledge its departure from an established rule, the requirement of consistent treatment might be said to be formal or procedural. But when the next step is taken to require not only an explanation but one which the court accepts as rational there can no longer be any pretence that the review is not substantive. It is precisely that.

Not only does such review ignore any question of judicial deference, it actually involves a presumption against the agency. The agency effectively bears a burden of persuasion when it desires to modify its policy. In addition it is confronted with the prospect that a reviewing court may read its reasons selectively or, as occurred in the *Office of Communications* case, go back into the record to refer selectively to the evidence. Should it still be contended that this amounts to less than substantive review because

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33. *Id.*, at 534.

34. *Id.*, at 535.

35. See also *Sunbeam Television Corp. v. FCC*, 243 F.2d 26 (D.C. Cir. 1957) where the Circuit Court of Appeals simply substituted its views for that of the agency on the proper application of, not departure from, the FCC's precedents.

the court doesn't actually substitute its view for that of the agency, it might be responded that, so far from insulating the agency from the court, this feature provides yet another device which expands the role of the court. The agency's decision must stand the test of rationality. The court is not similarly constrained; it need only find that the departure of the agency is irrational. If the court were obliged to explain why the status quo is more reasonable than the change, it would at least be subjected to whatever objective limitations are imposed by rationality itself. Under a regime where it need only set aside or remand to the agency, the court has the luxury of falling back on an implicit argument in favour of no change, and so it can hardly be said that such a basis of review does not encroach upon the autonomy of official decision-makers.

Professor Mullan admits a need for courts to be sensitive to "various legitimate reasons for acting inconsistently and changing policies."<sup>36</sup> He says that "frequent change" should be tolerated where the agency has a broad policy mandate. In effect, what is proposed is a requirement of consistency unless inconsistency is justified in the view of the court. This is hardly the type of neutral principle appropriate to the exceptional nature of judicial review. Superior courts do not sit in appeal from administrative decision-makers, they review excesses. By enabling courts to effectively second-guess the tribunal on whether it should deviate from precedent, the consequence, as has been seen, is an independent review of the rationality of the agency decision. The factors which the court will consider when reviewing the decision are the same as those considered by the agency.<sup>37</sup> Judicial review should be premised upon neutral principles which are capable of being understood and acted upon by the agencies themselves. Review for inconsistency, so far from being neutral or disengaged, invites full judicial reconsideration of the administrative decision.

To undertake such an open-ended review would be for the courts to effectively undermine the choice of the legislature in selecting specialized tribunals to perform administrative functions. Administrators are given a political mandate to operate within a specified jurisdiction and comprehended by that mandate is a legislative preference for expeditious, relatively inexpensive and expert decisions. To transform judicial review from supervision of

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36. *Supra*, note 1, at 286.

37. See Mullan, *supra*, note 8, at 537-38.

illegality into review for rationality would be to negate these advantages and to foster vexatious litigation. It would add substantially to the cost of the process and, by permitting delay, would chill activity in the regulated sector. Moreover there is the question of whether the courts are capable of assessing the rationality of agency choices to deviate from past practice. Supervisory courts have significant limitations of procedure which might prevent them from considering subtleties which could legitimately motivate the agency. Neither do courts have the benefit of the agency's specialized experience. Finally, to admit such a broad principle of review could impose such a strain on the limited resources of superior courts as to jeopardize both the integrity and the administrative functioning of the courts themselves.

### *III. The Problem of Precedent in Administrative Law*

Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration."<sup>38</sup>

Consistency of treatment implies that some kind of policy choice has been made, that the decision-maker will deliberate the case at hand in the broader context of policy development and implementation rather than disposing of the matter as an *ad hoc* isolated determination. These are the advantages of consistency which have prompted American writers such as Professor Davis<sup>39</sup> and American courts<sup>40</sup> to express a preference for rule-making over

38. H.N. Janisch, "Policy Making in Regulation" (1979), 17 Osgoode Hall L.J. 46, at 96.

39. K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1968); D.L. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy" (1965), 78 Harv. L. Rev. 921; J. Skelly Wright, "Beyond Discretionary Justice" Book Review (1972), 81 Yale L.J. 575; K. Kahn, "The NLRB and Higher Education: The Failure of Policymaking through Adjudication" (1973), 21 U.C.L.A. L. Rev. 63; Note "The Federal Regulatory Agencies: A Need for Rules of Decision" (1964), 50 Va. L. Rev. 652.

40. *SEC v. Chenery Corp.*, 332 U.S. 194 at 202 (1947); *Standard Rate and Data Service v. United States Postal Service*, 584 F.2d 473 at 482 (D.C. Cir. 1978).

adjudication as a regulatory tool. A similar comprehensive approach to policy development has been urged for Canadian regulators.<sup>41</sup>

But an inflexible concept of consistent treatment following the model of *stare decisis* would in principle be antithetical to the need for individuated treatment which is the essence of administrative law. As Professor Mullan pointed out in a 1978 article, the common law of judicial review, through the development of a doctrine that administrators should not fetter their discretion, has attempted "to safeguard administrative tribunals from court-like tendencies with respect to precedents."<sup>42</sup> The tension between the need for individual consideration and the danger of unprincipled decision-making is an eternal problem of administrative law, and a problem which Canadian and English courts have not handled in a very satisfactory fashion. There is a line of jurisprudence which has resisted attempts by administrators to develop general rules if the consequence would be something less than a full exercise of discretion. The adoption of a requirement of consistent decision-making cannot be proceeded with before some attempt is made to reconcile such a proposal with the principle that bodies vested with discretionary powers must not fetter themselves.<sup>43</sup>

The normal point of commencement for reviewing the issue of fettering discretion is the judgment of Bankes L.J. in *The King v. Port of London Authority. Ex p. Kynoch, Ltd.*:

There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case . . . [I]f the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.<sup>44</sup>

41. Janisch, *supra*, note 38.

42. *Supra*, note 8, at 537.

43. See: H.W.R. Wade, *Administrative Law* 5th ed. (Oxford: Clarendon Press, 1982), at 330-31.

It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time.

44. [1919] 1 K.B. 176 at 184 (C.A.).

On its face the *dictum* of Bankes L.J. appears to amount only to a requirement that the tribunal or official vested with a discretionary power consider all cases individually.<sup>45</sup> However, it is readily apparent that there is no "wide distinction" as suggested by Bankes L.J. and that in reality there exists a considerable tension between a requirement of individual treatment and the development of general policies.<sup>46</sup>

A good illustration of the narrow scope of what Molot calls the channel between the Scylla of individuated adjudication and the Charybdis of formal rule-making<sup>47</sup> can be found in the decision of the Ontario Court of Appeal in *Re Hopedale Developments Ltd. and Town of Oakville*.<sup>48</sup> In that case the Ontario Municipal Board had power under the *Planning Act* to direct a municipality to amend a by-law where the municipality refused to do so.<sup>49</sup> In a series of previous decisions the Board had announced that it "should decline" to interfere unless it was shown that the by-law was clearly not for the common good, that it created undue hardship, that some private right was unduly interfered with or denied, or that the municipality had acted arbitrarily or otherwise improperly. McGillivray J.A. concluded that the Board, by laying down such principles, had reduced the scope of the inquiry and, had it disposed of the case simply by applying those principles without considering the individual merits of the application, would have been in error as having "fettered its discretion."<sup>50</sup> Notwithstanding the opposition of the Court to such fettering of discretion, McGillivray J.A. also referred to a commentary in *de Smith* to the effect that it is

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45. In *British Oxygen Co. Ltd. v. Minister of Technology*, [1971] A.C. 610 at 625, Lord Reid commented on the excerpt from *Kynoch*: "But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' (to adapt from Bankes L.J. on p. 183). ...What the authority must not do is to refuse to listen at all." See also *Stringer v. Minister of Housing*, [1971] 1 All E.R. 65 at 80, *per* Cooke J.

46. See: H.L. Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion (1972), 18 McGill L.J. 310; D.J. Galligan, "The Nature and Function of Policies Within Discretionary Power", [1976] Public Law 332.

47. Molot, *id.*, at 330.

48. [1965] O.R. 259 (C.A.).

49. R.S.O. 1960, c. 296, s. 30 (19).

50. [1965] O.R. 259 at 265 (C.A.).

“obviously desirable” to openly state general principles by which a tribunal intends to be guided in the exercise of its discretion.<sup>51</sup>

It is not immediately evident that the two positions can be reconciled. The bottom line is that it is desirable to have open general policies but the tribunal falls into error when it dismisses the application on the basis of its policy. In the end the most likely construction to be put on *Hopedale* is that a tribunal falls into error when it automatically or slavishly applies a declared policy without considering whether the application in question might raise unique considerations.<sup>52</sup> Such an approach can also be found in a decision of the British Columbia Court of Appeal in a case where the Superintendent of Motor Vehicles suspended a driver's license automatically upon conviction for impaired driving. The policy was admitted to be a “blanket” approach to all persons so convicted. The B.C. Court quashed the suspension on the ground that the Superintendent had failed to exercise his discretion by not addressing the issue of the fitness of the particular driver.<sup>53</sup> The Nova Scotia Court of Appeal has recently quashed a decision of the provincial Rent Review Commission where that decision was based on internal guidelines. While the claimed breach of natural justice was the non-disclosure of the guidelines to affected landlords, Mr. Justice MacDonald made the passing observation that: “Non-regulation guidelines become objectionable, however, if they have the effect of predetermining the matters in issue. To some extent the guidelines appear to have had that effect in this case.”<sup>54</sup>

While these cases admit the competence of tribunals and administrative officials to develop policy guidelines they clearly

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51. See: *deSmith's Judicial Review of Administrative Action*, ed. J.M. Evans, 4th ed. (London: Stevens and Sons, 1980), at 313.

52. See Mullan, *Administrative Law*, *supra*, note 10, at 3-166: “[D]iscretion should be exercised in relation to each individual matter coming before the decision-maker and should not be automatically determined or even fettered by reason of a rigid policy laid down in advance. Of course, the laying down of general guidelines and principles for future action by a statutory decision-maker is not objectionable so long as it still considers the merits of each individual matter for decision in the light of those guidelines and principles and is prepared to admit of exceptions to the general policy in appropriate cases.”

53. *Lloyd v. Superintendent of Motor Vehicles*, [1971] 3 W.W.R. 619 at 626-7 (B.C.C.A.).

54. *Dale Corporation v. The Rent Review Commission and the Tenants of the Welsford* (1983), 58 N.S.R. (2d) 138. See a case comment by A. Wayne MacKay, “*The Dale Corporation v. Rent Review Commission: ‘Secrecy Rebuked’*” (1983), 1 Admin. L.R.

eschew rigidity and prohibit a narrowing of discretion.<sup>55</sup> The question which this raises for the present discussion is whether it is realistic to call upon courts to recognize a principle of judicial review requiring consistency when those same courts are prepared to quash administrative decisions which adhere automatically to predetermined policies. Such a proposal has the double handicap of fettering the discretion of tribunals and of being itself inconsistent. Either one value, consistency, or the other, full exercise of discretion, must yield. For the present, English and Canadian courts apparently exalt the latter.<sup>56</sup> At the very least a proposed endorsement of judicially enforced consistency must come to terms with this line of jurisprudence. It presents a threshold impediment to the introduction of such a principle.

Even if it is assumed that the common law can be rationalized so that the principle against fettering discretion applies only where the decision-maker refuses to consider an individual case and bases that refusal on a pre-existing policy, the problem of precedent in administrative law will not be resolved. After all, behind the common law principle there is a concern for the process. Underlying this concern is a recognition that official decision-makers are often given mandates which require a flexible and dynamic treatment of a particular subject matter. Their nature is to make choices which are sensitive to the dictates of social policy, and in this way their process necessarily deviates from the rule-conscious model of the ordinary courts. The concept of precedent is of greatest value in the case of the ordinary courts, but even there the strictures of *stare decisis* have been moderated.<sup>57</sup> Between adjudications in the ordinary courts and administrative

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55. See *Hopedale*, *supra*, note 48, at 265: "To lay them down as principles by which the Board would be guided may therefore be both reasonable and wise but to say that the appellant *must* comply with them before the Board will allow the application is clearly wrong and the Board, if it so fettered its jurisdiction; would be in error." Emphasis that of McGillivray J.A. See also *Capital Cities Communications, Inc. v. CRTC* (1977), 81 D.L.R. (3d) 609, at 629 (S.C.C.).

56. See *Merchandise Transport Ltd. v. British Transport Commission*, [1962] 2 Q.B. 173, at 193, *per* Devlin L.J.: "[A] tribunal must not pursue consistency at the expense of the merits of individual cases. If the discretion is to be narrowed, that must be done by statute; the tribunal has no power to give its decisions the force of statute." For the American position on fettering discretion, see note 138 *infra*.

57. See the opinion of Dickson J. for the majority of the Supreme Court in *Minister of Indian Affairs and Northern Development v. Ranville* (1982), 44 N.R. 616. For general discussion, see J.D. Murphy and R. Rueter, *Stare Decisis in Commonwealth Appellate Courts* (Toronto: Butterworth's, 1981).

action generally, there exists the critical distinction that administrators, even those most closely resembling a court model, are expressly charged with a policy-making function. Lon Fuller recognized this generic difference by declining to extend his internal morality of law to all administrative decisions. This he said would be to extend it "beyond its proper domain."<sup>58</sup> Fuller believed that to attempt the tasks of economic allocation within such formal limits would be "certain to result in inefficiency, hypocrisy, moral confusion and frustration."<sup>59</sup> Even Aristotle, the source of much inspiration for advocates of equality, recognized that flexibility was to be preferred in the application of law where general principles were incapable of comprehending the details.<sup>60</sup> This is not to deny the value of consistency in such cases. Instead it is meant to underline the risks of treating the arid legal reasoning of appellate judges as the only model for testing consistency. This point was recognized early in the development of modern administrative tribunals by Dean Roscoe Pound who expressed a fear that administrative decision-makers would fall into the same precedential trap as did nineteenth century equity judges:

No one can deny that there are dangers involved in committing the application of legal standards to administrative bodies. One danger is that they will do what courts have done before them: crystallize particular applications to particular cases into rules and thus deny the standard. More than one court attempted this in the law of negligence and American courts of equity in the nineteenth century did much toward turning experience in the exercise of the chancellor's foot into hard and fast rules of jurisdiction.<sup>61</sup>

Furthermore, there may be administrative tasks which appear to resist a model of consistent treatment. If one talks of a general principle of consistency then it could extend to such cases as a

58. *The Morality of Law* (New Haven, Yale University Press, 1964), at 170.

59. *Id.*, at 173.

60. Politics, Book III, Chap. 16. 1287b. (Jowett trans.) "But some things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation. Nor does anyone deny that the decision of such matters must be left to man. . ." For an interpretation of Aristotle in the modern administrative context, see J. Frank, *If Men Were Angels* (New York: Harper, 1942) where Frank concludes that Aristotle was not hostile to what today we call administrative discretion, (at 193-209, esp. 203).

61. "The Administrative Application of Legal Standards" (1919), 44 A.B.A. Rep. 445, at 463-64.

decision by a customs officer to open a piece of luggage or by a police officer to question witnesses. These latter functions are hardly susceptible to a requirement of consistency as, especially in the case of the customs official, random action may be the essence of the task. Similarly with prosecutors, selective prosecution may be necessary in light of scarce resources, discrete perceptions of community interest, or the presence of mitigating circumstances.<sup>62</sup>

Assuming that the range of administrative functions could be set out on a spectrum depicting them in order of the respective value which should be accorded stability and predictability, the model which would come closest to the ordinary courts is that of the independent regulatory agency with open precedents. This will be seen in the American jurisprudence to be the area where courts have developed what is sometimes called a consistency requirement. However, even in this regime consistency must be approached with considerable caution. H. N. Janisch has argued that the CRTC should articulate policy through the use of open precedents.<sup>63</sup> However, he cautions that respect for precedent should not lead to consistency for its own sake. In a recent comment on a CRTC decision he criticizes the Commission for following a consistent policy and concludes that by doing so it has "painted itself into at least three policy corners."<sup>64</sup> When the leading scholar of a rare Canadian tribunal which resembles the American independent regulatory agency criticizes the Commission for being consistent, notwithstanding his earlier eschewing of *ad hoc* decision-making, it becomes apparent that the choice is not between consistency and arbitrariness; it is between rational policy implementation with such stability as the regime in question permits and an inflexible straitjacket which pursues consistency for its own sake.

But the problem is not with the concept of consistency itself. So long as a decision-maker considers the same factors in each case and does so in good faith, the result will be consistent. The problem is with popular, and especially lawyers', perceptions of what considerations are relevant. The random action of a customs officer is not inconsistent; random selection accords everyone an equal

62. See: C.W. Thomas and W.A. Finch, "Prosecutorial Decision Making" (1976), 13 Am. Crim. L. Rev. 507.

63. *Supra*, note 38.

64. "The CRTC and Consistency: A Comment on the TCTS Decision" (1981), C.R.R. 5-183, at 5-193.

chance of being chosen. The same can be said of selective prosecutions so long as criteria are objective and there is no personal animus toward the accused. While a lottery might be an objectionable mode of adjudication to those accustomed to a court model, it may well be the most expeditious and least expensive option open to an administrative decision-maker. It might also be the most consistent.

#### *IV. The American Law and the Problem of Comparative Judicial Review*

The inspiration for Professor Mullan's call for inconsistency review is an American line of cases which are said to represent a "fairly sophisticated jurisprudence."<sup>65</sup> Notwithstanding this admiring characterization Mullan gives a three-point summary of the American cases which suggests that he either places considerable emphasis on the qualifier "fairly" or that he judges their sophistication in terms of their capacity to raise questions as to the reach of such a principle of judicial review.

It will be seen that these cases belong to two separate streams, a major one amounting to a judicially imposed requirement that agencies depart from a developed precedent only where a rational explanation is provided, and a minor one based on the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution. It is my view that the former development is limited to a handful of mainline court-substitute agencies and that the latter, consisting of two District Court judgments, is wrong.

The first line of cases<sup>66</sup> has elements of imposing a precedential model upon agencies but invariably the language of consistency is tempered by a more modest requirement that the agency explain any departures from its norms. Witness the following *Per Curiam* excerpt from the D.C. Circuit Court of Appeals: "This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."<sup>67</sup> The

65. *Supra*, note 1, at 284.

66. These cases are reviewed in K.C. Davis, *Administrative Law Treatise* (2d ed. San Diego: K.C. Davis Pub., 1979), v. 2 §§ 8.9-8.12 and 1982 Supplement § 1707. See also Davis, *Administrative Law in the Seventies* (Rochester: Lawyers' Coop., 1976), § 17.07; and L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown & Co., 1965), at 586-9.

67. *Greyhound Corp. v. Interstate Commerce Commission*, 551 F. 2d 414 at 416 (D.C. Cir. 1977). See also *Atchison, Topeka and Santa Fe Railroad Co. v. Wichita Board of Trade*, 412 U.S. 800 at 808 (1973).

requirement of consistency is normally linked to an observation that reviewing courts are not imposing a concept of *stare decisis* and that agencies are free to develop policies in accordance with changed circumstances or revised interpretations of relevant policy requirements. In *American Trucking Association v. Atchison, Topeka and Santa Fe Railway Co.* Fortas J., giving the opinion of the Court, dealt with needed flexibility which he said was an essential part of the agencies' regulatory function:

Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.<sup>68</sup>

The most likely construction of this line of jurisprudence is that it admonishes agencies not to depart from established rules *sub silentio*. Of course the principle is extended when the court undertakes a review of the agency's proffered reasons after a remand.<sup>69</sup> However, such instances are exceptional and the typical application involves a single remand where no explanation has been given for an apparently inconsistent decision. In any event this type of review does not extend very far across the administrative spectrum. Professor Davis says that, depending on how you count, it applies to anywhere from one per cent to ten per cent of administrative decisions.<sup>70</sup> A review of the cases where the issue of inconsistency arises reveals that the mainstream is constituted by a

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68. 387 U.S. 397, at 415 (1967). See a 1980 decision of the Fourth Circuit Court of Appeals where the Court holds that the NLRB has a duty to alter policies to respond to new circumstances. *J.P. Stevens Co. v. NLRB*, 623 F.2d 322, at 329. In *FCC v. National Citizens' Committee for Broadcasting*, 436 U.S. 775 (1978) the Court noted the FCC's needed "ability to experiment" and commented: "One of the most significant advantages of the circumstances in a flexible manner" (at 811).

69. See discussion at notes 29-35, *supra*.

70. *Administrative Law Treatise*, *supra*, note 66, v. 2, § 8.9, at 199. In this context Professor Davis refers to the requirements of the *Administrative Procedure Act*, 5 U.S.C. § 557(c), which stipulates that certain decisions follow a model of formal adjudication, including the preparation of a record:

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.

handful of mainline, independent federal agencies which have adopted an adjudicative model of policy-making. They each give reasoned opinions which are publicly accessible and which are cited as precedents in subsequent adjudications.<sup>71</sup> In fact, virtually all of this jurisprudence involves the FCC,<sup>72</sup> ICC,<sup>73</sup> NLRB,<sup>74</sup> FERC,<sup>75</sup> and the FPC.<sup>76</sup> It is rare that the principle has been invoked against administrative decisions which do not fall into the court-like policy-making-through-adjudication model.

The limitations of such a requirement can be seen in *Sirbo Holdings v. Commissioner of Internal Revenue*<sup>77</sup> where a taxpayer argued that he ought to be accorded the same treatment of a purported capital gain as another similarly situated taxpayer. The Commissioner simply admitted that the claimed precedent was in error. Said Chief Judge Friendly:

While even-handed treatment should be the Commission's goal . . . perfection in the administration of such vast respon-

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However, this is not by any means a requirement which applies to all administrative decisions, only to those "required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. § 553 (c) and § 554(a)). The infrequency of such a statutory stipulation underlies the comment by Professor Davis that the practice of reasoned decision-making is so rare. Moreover it should be noted that informal administrative action is not subject to any procedural requirements under the *APA* and such action is subject only to the lowest standard of judicial review, for "arbitrary and capricious" action (§ 706(2)(A)). And even this review is excepted where "agency action is committed to agency discretion by law." (§ 701(a)(2)).

71. Davis, *id.*, at 196.

72. Federal Communications Commission: e.g. *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975).

73. Interstate Commerce Commission. See: *Frozen Food Express v. United States*, 535 F.2d 877 (5th Cir. 1976); *Neidart Motor Service v. United States*, 583 F.2d 954 (7th Cir. 1978); *Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976).

74. National Labour Relations Board. See *U.A.W. v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972); *NLRB v. International Union of Operating Engineers, Local 925*, 460 F.2d 589 (5th Cir. 1972); *NLRB v. Silver Bay Local Union*, 498 F.2d (9th Cir. 1974).

75. Federal Energy Regulatory Commission. See: *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578 (D.C. Cir. 1979).

76. Federal Power Commission. See *District of Massachusetts v. FPC*, 517 F.2d 761 (1st Cir., 1975). FERC has taken over the functions of the former FAC, *Department of Energy Organization Act*, P.L. 95-91, August 4, 1977, title IV. § 402; 42 U.S.C. § 7172 (1980 Supp.).

77. 509 F.2d. 1220.

sibilities cannot be expected . . . The making of an error in one case, if error it was, gives other taxpayers no right to its perpetuation.<sup>78</sup>

The decision of the Second Circuit Court not to require consistency of the Commissioner of Internal Revenue accords with the refusal of courts to require consistent enforcement policy on the part of other officials or prosecutors.<sup>79</sup> Neither have American courts been prepared to review administratively imposed sanctions on the basis of harsh or inconsistent application. In a case where a Circuit Court questioned a decision for unevenness in the application of sanctions, the Supreme Court overruled the lower court, saying that the setting aside of the official's sanction was "an impermissible judicial intrusion into the administrative domain."<sup>80</sup>

It is clear that the American cases do not amount to a general acceptance of a rule against administrative inconsistency. Instead they might be said to be limited to a recognition of a need to police incongruous decisions of agencies which choose to make policy by adjudication and which have developed a precedential mode of declaring their policies. The underlying rationale of these cases is a concern for the reliance interest of affected parties and thus applies only where an agency opts for rule-making through adjudication. This explains the application of the principle to a handful of cases

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78. *Id.*, at 1222. Compare *IBM Corp. v. U.S.* 343 F.2d 914 (Ct. Claims, 1965). This case involved a claim by IBM that a competitor Remington had, by virtue of a ruling of the Commissioner of Internal Revenue, not been subjected to a 10 per cent excise tax on business machines from 1952 to 1958, at which time the Commissioner revoked his earlier ruling. IBM had not received such a ruling and claimed to have paid \$13 million dollars in excise tax over the period for which Remington was not similarly taxed. The majority of the Court of Claims held in favour of IBM, concluding that "curbing tax collection in the interest of equality" was required by a provision of the Internal Revenue Code respecting retroactivity of regulations (at 919). Such a limitation was said to be implicit in the mandate given by Congress and a failure to consider comparative effects on a question of statutory interpretation the decision is a dubious one. If it is understood to rely on a general principle of equality of treatment it is even more revolutionary. See the dissenting opinion of Chief Judge Cowne and the cases cited therein. See also Davis who said the decision is "unsound", *Administrative Law of the Seventies*, *supra*, note 66 § 17.07-3. at 412. The Supreme Court denied *certiorari* in the *IBM* case, 382 U.S. 1028 (1966).

79. *Moog Industries v. Federal Trade Commission*, 355 U.S. 411 (1958); *U.S. v. Batchelder*, 442 U.S. 114 (1979). See J. Vorenberg, "Decent Restraint of Prosecutorial Power" (1981), 94 *Harvard L. Rev.* 1521, esp. cases cited at n.71.

80. *Butz v. Glover Livestock Commission*, 411 U.S. 182, at 188-9 (1973). "The fashioning of an appropriate and reasonable remedy is for the Secretary, not the Court".

and the refusal to apply it to "precedents" not intended to have a normative character.

There exists a second line of cases, small in number but potentially much more far-reaching in their impact, where the equal protection guarantee of the Fourteenth Amendment of the U.S. Constitution has been said to require consistent treatment, even in making administrative decisions where precedents are not intended to be norm-creating. The first such case and the most easily explained is *Yick Wo v. Hopkins*,<sup>81</sup> where a conviction under a municipal ordinance requiring a license to operate a laundry in a wooden building was set aside by the Supreme Court when it was shown that licenses were denied to all two hundred Chinese applicants but were granted to all but one of eighty non-Chinese. The court found that the conclusion "could not be resisted" that the ordinance was being applied in an invidiously discriminatory fashion, i.e., on the basis of hostility to the race and nationality of the appellant. In the opinion of the Court:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>82</sup>

The case has not subsequently been applied as a prohibition against all unequal treatment, only "unjust and illegal discrimination." In response to alleged prosecutorial abuses it has been interpreted as applying only to *invidious* discrimination.<sup>83</sup>

But there are instances in American case law where lower courts have reviewed administrators' decisions on the basis of non-invidious discrimination. In *Del Mundo v. Rosenberg*<sup>84</sup> the District Director of the Immigration and Naturalization Service denied an application for a stay of deportation. The District Court remanded the matter to the Director because it was shown that a similarly

81. 118 U.S. 356 (1886).

82. *Id.*, at 373-4, *per* Matthews J. for the Court.

83. See cases cited in Vorenberg, *supra*, note 79, at n. 71. See also L. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), at 1025-26. In *United States v. Nixon*, 418 U.S. 683 at 693 (1974) the Supreme Court said: [T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case". See Davis, *Administrative Law Treatise*, *supra*, note 66, v.2, 9:1-9:22.

84. 341 F. Supp. 345 (C.D. Calif. 1972).

situated applicant had been granted a stay. There was between the two cases, according to Hawk District J., an "obvious identity" which was "immediately apparent."<sup>85</sup> Such a denial of equal protection of the laws was considered to be "arbitrary, capricious and unreasonable"<sup>86</sup> and an abuse of discretion by the Director.

A second case where the equal protection clause was invoked is *Muhammad Ali v. Division of State Athletic Commission, New York*<sup>87</sup> where the Commission suspended the plaintiff's boxing license because of his refusal to submit to induction into the armed forces. Ali produced evidence of 244 other cases where the Commission had not suspended licenses notwithstanding conviction of these license-holders for sometimes serious crimes, often involving physical violence. The District Court Judge enjoined the Commission from denying the licence. Ali, according to Mansfield District J., had not been accorded "the even-handed administration of the law which the Fourteenth Amendment requires."<sup>88</sup> He concluded that the decision of the Commission "should and constitutionally must have some rational basis."<sup>89</sup>

These cases do not however represent a general application of the equal protection clause. They suffer from a misapprehension of the function of the clause in believing that it is a general mandate to review unreasonable or arbitrary acts. If that were so all official acts in America, including sanctions, prosecutorial decisions and administration of the revenue laws, would be subject to review if treatment were shown to be uneven. We have already seen that the Supreme Court declines to interfere with either sanctions or prosecutions. What *Ali* and *Del Mundo* fail to perceive is that the equal protection clause is aimed not at perfect consistency but at the elimination of official discrimination. The precise point considered in *Muhammad Ali* is contradicted by a passage from the judgment of Chief Justice Stone, for the Court, in *Snowden v. Hughes*:

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection

85. *Id.*, at 348.

86. *Id.*

87. 316 F. Supp. 1246 (S.D.N.Y. 1970).

88. *Id.*, at 1250. Citing *Yick Wo v. Hopkins* as authority.

89. In *Ali*, Mansfield Dist. J. said the decision of the Commission "should and constitutionally must have some rational basis", *Id.*

unless there is shown to be present in it an element of intentional or purposeful discrimination.<sup>90</sup>

A question of arbitrary action cannot simply on the basis of inequality be transformed into a constitutional issue and thereby subjected to judicial review: "It is not without more denial of equal protection of the laws."<sup>91</sup>

Thus, if we set aside *Ali* and *Del Mundo*, we are left with a single line of American cases involving federal agencies which, through adjudication, develop policies which rise to normative status. The constitutional principle is limited to the rare instance where uneven application of the law violates constitutional guarantees against invidious discrimination: i.e., irrational discrimination based on a characteristic typical of membership in a class. That in summary is what the "fairly sophisticated" American jurisprudence amounts to. It does not exemplify any generally applicable judicial requirement of consistency, equality or fairness. It is a tentative effort to supervise a limited number of court-like official decision-makers.

Quite apart from the question of whether the American cases do in fact represent the principle stated, there remains a more fundamental problem. Selective reliance upon isolated elements of administrative supervision from other jurisdictions is a dangerous undertaking. Judicial review of administrative action is politically

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90. 321 U.S. 1 at 8 (1943). That "discrimination", as it is used by Chief Justice Stone, refers to some characteristic of the plaintiff and not merely to unequal treatment *per se* is emphasized by the dissenting judgment of Douglas J. who differed from the majority only in his preference for giving the plaintiff an opportunity to show discrimination:

If the action of the Illinois Board in effect were the same as an Illinois law that Snowden could not run for office, it would run afoul of the equal protection clause whether that discrimination were based on the fact Snowden was a Negro, Catholic, Presbyterian, Free Mason, or had *some other characteristic or belief* which the authorities did not like. Snowden should be allowed the opportunity to make that showing no matter how thin his chances of success may seem. (at 19).

91. *Id.*, at 8. See also: *Williamson v. Lee Optical*, 348 U.S. 483 (1955): "The prohibition of the Equal Protection clause goes no further than the invidious discrimination" (at 489); *Baker v. Carr*, 369 U.S. 186 (1961): "It is not inequality alone that calls for a holding of unconstitutionality; only if that inequality is based on an impermissible standard may this Court condemn it." (at 335) *per* Harlan J. dissenting; *City of New Orleans v. Dukes*, 427 U.S. 297 (1975): "[I]n the local economics sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." (at 303-4). *Per Curiam* Opinion); *Beck v. Washington*, 369 U.S. 541 at 554 (1961). Also: N. Dorsen, *Frontiers of Civil Liberties* (New York: Pantheon), at 291-92.

sensitive. It is the product of a political, socio-economic and constitutional dynamic. The resulting equilibrium is a sensitive one. In the end the balance between judicial overseeing and administrative autonomy may simply be a matter of emphasis or attitude. In any event principles of judicial review cannot be glibly and selectively borrowed from one milieu and successfully applied in another unless the comparative process is complete.

A comparison of several significant elements of the Canadian and American models of judicial review will sound a note of caution against selective borrowing of American principles involving more extensive review. There are significant disparities between the two systems, with the Canadian model being clearly more deferential to administrative decision-makers. The disparate emphases of the two systems can be illustrated by reference to three black-letter themes as well as by an overview of scholarly attitudes.

The first such divergence between Canadian and American developments is in the review of errors of law. Canadian jurisprudence has recently evinced a decidedly deferential attitude toward administrative interpretations of law. This has not always been the case as the traditional position was to review any error of law on the face of the record<sup>92</sup> unless the decision-maker was protected by a "no certiorari" privative clause.<sup>93</sup> Recent cases, following the example of the judgment of Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,<sup>94</sup> have typically deferred to administrative interpretations which are not "patently unreasonable," even in the absence of privative provisions.<sup>95</sup> There is in this development an apparent

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92. *R. v. Northumberland Compensation Appeal Tribunal Exp. Shaw*, [1952] 1 K.B. 338; *Industrial Relations Board of Alberta v. Stedelbauer Chevrolet Oldsmobile*, [1969] S.C.R. 137; *Yellow Cab Ltd. v. Alberta Industrial Relations Board*, [1980] 2 S.C.R. 761.

93. *Farrell v. Workmen's Compensation Board of British Columbia*, [1962] S.C.R. 48.

94. [1979] 2 S.C.R. 227.

95. *Alberta Union of Provincial Employees, Branch 63 v. Alberta Public Service Employee Relations Board and Board of Governors of Olds College* (1982), 37 A.R. 281 at 286 and 289 (S.C.C.); *Lafrance and Commission des Affaires Sociales v. St. Luc Hospital* (1982), 42 N.R. 434 (S.C.C.). Both *Lafrance* and *Olds College* dealt with "near" privative provisions. In Ontario since 1962 the courts have deferred to statutory arbitrations which have no express privative clause: *Re Canadian Westinghouse Co. Ltd. and Local 164 Draftsmen's Association of Ontario*, [1962] O.R. 17 (C.A.). See the development of a similar pattern in review of consensual labour arbitrations: *Volvo Canada Ltd. v. U.A.W. Local 720*, [1980]

sensitivity of the need to delineate respective fields of expertise for courts and agencies, hence the emergence of an exception to the policy of "curial deference" where general statutory considerations are at play.<sup>96</sup>

As Professor R.A. MacDonald has observed, the touchstone of error in law review is the attitude of judges.<sup>97</sup> In Canada attitudes have been for the most part deferential. In United States the case law is more equivocal. A recent Supreme Court opinion evinces a deferential approach to agency interpretations where the problem is one of an "interstitial silence" and where the interpretation is not "demonstrably irrational."<sup>98</sup> Where however the problem is not caused by legislative silence but arises simply as a matter of interpretation, such as in determining whether to treat back pay as wages it is said: "An agency may not finally decide the limits of its statutory power. That is a judicial function."<sup>99</sup> There are frequent recent examples where the Supreme Court has undertaken review of administrative interpretations without any mention of deferring to

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1 S.C.R. 178; and *Shalansky and Saskatchewan Union of Nurses v. Regina Pasqua Hospital* (1983), 47 N.R. 76 (S.C.C.).

It should be noted that there have been legislative developments in Canada which on their face run counter to this judicial policy of deference to administrative interpretations of law. For example the Ontario *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, s.2(2) provides for review for error of law to the extent not limited by the organic statute but this may not have significantly altered Common Law developments. For instance the deferential policy toward statutory arbitrators begun in *Westinghouse* has continued and has received the approbation of the Supreme Court of Canada: *Bradburn et al. v. Wentworth Arms Motel*, [1979] 1 S.C.R. 846; *MacLeod v. Egan*, [1975] 1 S.C.R. 517.

More directly contrary is the review provision of the *Federal Court Act*, S.C. 1970-71-72, c.1, s. 28(1)(b). While the point cannot be adequately considered in a footnote, the full force of this latter provision has been muted by policies of judicial deference. See e.g. *Maple Lodge Farms Ltd. v. Minister of Economic Development* (1982), 44 N.R. 354 at 359-60 (S.C.C.); *Halifax Longshoremen's Association v. Nauss et al.* (1983), 46 N.R. 324 at 333-6 (S.C.C.).

96. *Olds College, id.*, at 289; *MacLeod v. Egan, id.*, 517 at 518-19.

97. "Annual Survey of Administrative Law" (1981), 13 Ottawa L.R. 671, at 708.

98. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 at 565 (1980).

99. *Social Security Board v. Swift and Co.*, the Supreme Court said the agency interpretation constituted "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. 134 at 140 (1944). Emphasis added.

100. *Industrial Union Dept., AFL-CIO v. American Petroleum Institute et al.*, 448 U.S. 607 (1980); *Environmental Protection Agency v. National Crushed Stone Association et al.*, 449 U.S. 64 (1980); *Northern Pipeline Construction Co. v. Marathon Pipeline Co. et al.*, 102 S.Ct. 2858 (1982); *North Haven Board of Education v. Bell*; 102 S.Ct. 1912 (1982).

expert judgment.<sup>100</sup> Another variation is the case of *Gray v. Powell* which limited the scope of judicial review to ensuring that there has been "an application of the statute in a just and reasoned manner."<sup>101</sup>

Whatever emerges as the dominant view from the American case law, it seems that Congress may be about to reassert what Professor Davis calls "the extravagant version of the rule of law."<sup>102</sup> On March 24, 1982 the Senate adopted by a vote of 94-0 a *Regulatory Reform Act* including an amendment to the *Administrative Procedure Act* expanding the scope of judicial review so that a reviewing court "shall independently decide all relevant questions of law."<sup>103</sup> The statement of legislative intent which was printed in the Congressional Record along with the amendment clarifies the impact of the change:

While permitting a court to consider the agency interpretation, this amendment does not permit a court to presume that the interpretation of the agency is correct simply because it is the interpretation of the agency. The interpretation of the agency should be afforded "weight" by the reviewing court only because of its persuasiveness, not because of the source of the interpretation.<sup>104</sup>

Whatever "weight" American courts incline to place upon administrative interpretations of law under the new regime, it is

101. 314 U.S. 402 at 411 (1941).

102. *Administrative Law Treatise*, *supra*, note 66, §2:11.

103. S. 1080, 97th Cong., 2nd Sess., Congressional Record, Vol. 128, no. 31, S2717-18.

The initiative in the Second Session of the 97th Congress was not completed as the House of Representatives did not bring a counterpart to S.1080 to the floor during the lame-duck session following the 1982 Congressional elections. The House bill (H.R. 746) was said to have "a great deal of support" but was pre-empted by budget debates. (See *Congressional Record*, Vol. 128, no. 134, H8388).

104. 97th Cong., 2nd Sess., Congressional Record, No. 28. S2406, March 18, 1982. For an indication of the reactionary opinion and the theoretical ambiguity of the legislation see a comment by Senator Paul Laxalt, one of two main sponsors in the Senate: "This amendment makes abundant sense. It has long been the view of many that judicial review of regulatory action has been sadly deficient, not only in terms of its ineffectiveness, but also in terms of affording any judge who is so disposed of a way out from performing his proper duty and responsibility." (*Id.*) For commentary on the proposed amendment, see: D.R. Woodward and R.M. Levin, "In Defence of Deference: Judicial Review of Agency Action" (1979), 31 *Ad. Law Rev.* 329; O'Reilly, "Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment" (1980), 49 *U. of Cinn. Law Rev.* 739. For an earlier view on the question generally, see: L. Jaffe, "Judicial Review of Questions of Law" (1955), 69 *Harv. L. Rev.* 239.

clear that the standard deviates appreciably from the "patently unreasonable" test which prevails in Canada.

Another area where Canadian and American principles diverge is evidentiary review. Canadian courts will not review the weight, value or sufficiency of evidence.<sup>105</sup> There is even some doubt whether a reviewing court will look into the record to see if there was any evidence at all to support a factual finding.<sup>106</sup> However, the most likely view of the Canadian position is that there must be at least some evidence and that a complete absence thereof would amount to an abuse of discretion or a failure of jurisdiction.<sup>107</sup>

American law, by contrast, requires that there be substantial evidence on the record as a whole.<sup>108</sup> The Supreme Court distinguished this standard from what some courts had considered to be a requirement that there be only "some" evidence by saying that courts "must now assume more responsibility for the reasonableness and fairness"<sup>109</sup> of decisions. The evidentiary standard of the *Administrative Procedure Act* was interpreted by the Supreme Court to impose on courts a responsibility for assuring that the agency "keeps within reasonable grounds."<sup>110</sup>

A further example of the divergent approaches to judicial review can be drawn from the respective constitutional limitations on legislative delegation to agencies.<sup>111</sup> In a recent decision the Supreme Court of Canada considered a broad delegation to the Law

105. R. Reid and H. David, *Administrative Law and Practice* 2d ed. (Toronto: Butterworths, 1978), at 357.

106. D.W. Elliot, "No Evidence: A Ground for Judicial Review In Canadian Administrative Law?" (1972), 37 Sask L. Rev. 48; Reid and David, *Ibid* at 357-8, n. 97-99. Cf. H.W.R. Wade, *Administrative Law* (5th ed., Oxford: Clarendon Press, 1982), at 287, for the view that "no-evidence" means more than a total dearth of evidence; it extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting a finding.

107. Reid and David, *id.*, at 359-60. Mullan, *supra*, note 10, at 3-159. See also R.L. Towner, "No Evidence and Excess of Jurisdiction in Administrative Law", [1978] N.Z.L.J. 48.

108. *Administrative Procedure Act*, 5 U.S.C. §706(2) E (1976). This requirement applies to formal rulemakings and adjudications, not to informal proceedings.

109. *Universal Camera Corp. v. National Labour Relations Board*, 340 U.S. 474 at 490 (1951).

110. *Id.* On remand the 2d Circuit Court of Appeals reversed its earlier judgment in which it had deferred to the NLRB. *NLRB v. Universal Camera Corp.* (II), 190 F.2d 429 (2d Cir. 1951).

111. The separation of powers is not a constitutional limitation on delegation by legislatures which follow the British parliamentary model. Even the *Report of the Committee on Ministers' Powers*. cmnd. 4060 (1932), which embraced the doctrine as being *prima facie* the guiding principle for delegated legislation (at 92)

Society of British Columbia to discipline "conduct unbecoming a member of the society."<sup>112</sup> Estey J., speaking for a unanimous Court, found "nothing in law pathological"<sup>113</sup> about the agency being drawn from the sector which was to be regulated. After pointing out some advantages as well as possible conflicts arising from such self-regulation, Estey J. said:

It is for the legislature to weigh and determine all these matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province in legislation validly enacted within its sovereign sphere; as is the case here.<sup>114</sup>

A similar point was made by the Privy Council in 1938 when it rejected an argument that a provincial legislature was incapable of delegating certain powers to the Lieutenant-Governor in council. The Privy Council was of the view that any such limitation would be "subversive" of the supremacy of the legislature.<sup>115</sup>

In America the non-delegation doctrine, founded in the separation of powers and a contractarian theory of government, has been invoked to strike down legislative delegations of power. In

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ultimately had to concede: "The separation of powers is merely a rule of political wisdom, and must give way where sound reasons of public policy so require" (at 95).

A more contemporary view is that of H.W.R. Wade, who comments:

Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. But this is an old-fashioned view, for in reality it is no more difficult to justify it in theory than it is possible to do without it in practice. There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading.

(*supra*, note 106, at 733). Also: M.J.C. Vile, *Constitution and the Separation of Powers* (Oxford: Clarendon Press, 1967), at 212-38.

112. *Attorney-General of Canada v. Law Society of British Columbia*, [1982] 5 W.W.R. 289. The legislation in question is the *Legal Professions Act*, R.S.B.C. 1960, c. 214, s. 48(b)(iii).

113. *Id.*, at 313.

114. *Id.*

115. *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 at 722. See Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 213-17. See also: *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Shannon v. Mainland Dairy Products Board*, [1938] A.C. 708 at 713; and John Willis "Delegatus Non Potest Delegare" (1943), 21 Can. Bar Rev. 257.

In a comprehensive article entitled "The Historic Bases of Administrative Law: Separation of Powers and Judicial Supremacy" (1958), 12 *Lut. L. Rev.* 449, R. Parker comments: "Prior to the American and French Revolutions, separation never existed as a part of any constitutional system of a national government" (at 481).

*Schechter Poultry v. United States* a system of industrial regulation through the adoption of codes of fair competition was struck down as being an unconstitutional delegation of power. The discretion vested in the President was characterized as being "virtually unfettered"<sup>116</sup> and subject to no standards. A concurring opinion of Cardozo J. termed the scheme "delegation running riot."<sup>117</sup> The non-delegation doctrine has survived in mostly dormant fashion since the *Schechter* decision but there are current signs of a revival, and not surprisingly many of those advocating its renaissance are the same commentators who are concerned about unchecked discretion.<sup>118</sup> The coincidence is not surprising because claims for structured exercises of discretion and arguments about unconstitutionally broad delegations of power are ultimately motivated by similar concerns regarding the problem of administrative discretion. The doctrine has also been raised in recent Supreme Court decisions, although not as the basis of a majority opinion.<sup>119</sup> Whatever may be the future of the non-delegation doctrine<sup>120</sup> the point remains that because of a fundamentally different perception of the relationship between the legislative and executive branches of government, American courts approach judicial review from an orientation which is radically different from that of Canadian judges.<sup>121</sup> This is an orientation which in turn pervades more

116. 255 U.S. 495 at 542 (1935). Also *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

117. *Id.*, at 553.

118. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard Press, 1980), at 131-4; Skelly Wright, *supra*, note 39, at 582-7; J. Freedman, *Crisis and Legitimacy, The Administrative Process and American Government* (Cambridge: Cambridge Univ. Press, 1978), at 78-94; T. Lowi, *The End of Liberalism* (New York: Norton, 1969), at 129-46.

119. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 at 672-76 (1980). Concurring opinion of Rehnquist J. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 at 548 (1981). Rehnquist J. dissenting (concurred in by Burger C.J.). See *National Cable Television Association v. United States*, 415 U.S. 336 (1974) where the non-delegation doctrine was said to require a narrow construction of the statute. Also the opinion of Stephens J. in *American Petroleum Institute*, *supra*.

120. See "Rethinking the Nondelegation Doctrine" (1982), 62 Bos. U.L. Rev. 257; Garvey, "Judicial Consideration of the Delegation of Legislative Power to Regulatory Agencies in the Progressive Era" (1978), 54 Ind. L.J. 45; P. Gewirtz, "The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines" (Summer, 1976), 40 Law and Contemporary Problems 46, at 52; S. Barber, *The Constitution and the Delegation of Congressional Power* (Chicago: Univ. of Chicago Press, 1975).

121. One can appreciate the diversity of the two approaches as illustrated in a passage from Martin Shapiro, an American administrative and constitutional

specific aspects of judicial review and which influences the views of scholars and politicians. Therefore the extent to which the separation of powers doctrine has infected American judicial review is an element which must be cautiously weighed when proposing the importation of an American principle of review for inconsistency into the Canadian context.

Another important area, both as a barometer of general satisfaction and as a precursor of developing trends, where Canadian and American conditions diverge is in the tenor of scholarly criticism. American scholars tend to be in almost universal agreement on the need to check discretionary power and in a faith in judicial review as a means of confining it. In the vanguard is Professor Davis whose 1969 book<sup>122</sup> was greeted by Skelly Wright as a "powerful manifesto"<sup>123</sup> which "brilliantly and systematically laid bare the soft underbelly of the American legal system."<sup>124</sup> At that time, 1971, Judge Wright was of the view that "a broad consensus is beginning to coalesce in favour of doing something about unbridled and arbitrary administrative power."<sup>125</sup> Richard B. Stewart, in a comprehensive 1975 article, commented on his own suggestion that there be a return to faith in the expertise and specialized experience of administrators by saying: "[B]ut this is the very faith of which we have become disabused."<sup>126</sup> Professor Schwartz, looking ahead to the next century, predicts a broadening of judicial review to the extent that it will become effectively appellate review. He bases his forecast upon a "growing disenchantment with the administrative process" but says the "pervasive mistrust" of government does not extend to reviewing

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scholar who had this reaction to British ministerial delegations: *Courts* (Chicago: Univ. of Chicago Press, 1981), at 123-4:

The process of both parliamentary and judicial abdication has gone so far that there are serious doubts whether the rule of law survives in England at all. And if it does, it must do so in the ideological commitments of the executive elite itself rather than in the constraining powers of the courts.

See also: B. Schwartz, *Law and the Executive in Britain* (New York: New York Univ. Press, 1949), at 30.

122. *Discretionary Justice*, *supra*, note 39.

123. Book Review, *supra*, note 39, at 577.

124. *Id.*

125. *Id.*, at 597.

126. *Supra*, note 28, at 1711.

courts.<sup>127</sup> One could refer to other American writers<sup>128</sup> but the point becomes redundant. In order to find wholehearted proponents of judicial deference and administrative discretion, it is necessary to look back to Jerome Frank<sup>129</sup> and James M. Landis,<sup>130</sup> both of whom were original participants in the New Deal.<sup>131</sup>

In Canada, by contrast, the trend has been decidedly to the opposite effect. There is no malaise comparable to that found in American writings. Harry Arthurs has recently called for judges to give "full recognition to the distinctive legal systems which have emerged" and to acknowledge "the reality of pluralism."<sup>132</sup> The

127. "Administrative Law in the Next Century" (1978), 39 Ohio S.L.J. 805, at 829.

128. Abraham D. Sofaer, "Judicial Control of Informal Discretionary Adjudication and Enforcement" (1972), 72 Col. L.R. 1293; J. Freedman "Crisis and Legitimacy in the Administrative Process" (1975), 27 Stan. L. Rev. 1041; McGowan, "Congress, Court and Control of Delegated Power" (1977), 77 Col. L. Rev. 1199. Two of the more strident denunciations of the administrative process can be found in T. Lowi, *The End of Liberalism*, *supra*, note 118, at 287 ff; and F. Hayek, *The Constitution of Liberty* (Chicago: Univ. of Chicago Press, 1960). More tolerant views can be seen in H. Friendly, *The Federal Administrative Agencies* (Cambridge: Harvard Press, 1962) (while Judge Friendly advocates the development of more definite standards, he rejects recourse to judicial review as a response (at 141 ff.)); and H. Safersstein, "Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion'" (1968), 82 Harv. L. Rev. 367.

129. *Supra*, note 60.

130. *The Administrative Process* (New Haven: Yale Press, 1938). There are two examples of contemporary American scholarship which, while not embracing the New Deal model of broad discretion and limited judicial review, contend for a move away from the delays and uncertainties which accompany "formal review." Curiously one advocate is Richard Stewart who, while not renouncing his 1975 views regarding the "problem of agency discretion" (*supra*, note 28), argues for an informal process of negotiation in search of consensus which, if successful, would be accorded a much more deferential standard of judicial review: "Regulation, Innovation, and Administrative Law: A Conceptual Framework" (1981), 69 Calif. L. Rev. 1259, at 1271, 1276-7, and 1348. A second example of concern with "the price of undue formalism" can be found in Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air* (New Haven: Yale Press, 1981), at 113-14. This model would abandon judicial grasping at "procedural straws", preferring that courts intervene "through *substantive* construction" of the statute (emphasis that of the authors) to assure a full and focused airing of plausible policy options.

131. Landis was chairman of the SEC from 1935-37. He also served on the FTC and later on the CAB. Frank was chairman of the SEC from 1939-41 and acted as general counsel to other agencies.

132. "Rethinking Administrative Law: A Slightly Dicey Business" (1979), 17 Osgoode Hall L.J. 1, at 45. See also Arthurs, "Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law" (1980), 30 U. of T. L.J. 225; and "Recognizing Administrative Law" in *Proceedings of the Administrative Law Conference* (Vancouver: U.B.C. Law Review, 1981), at 2.

Mullan article, so far from being the "powerful manifesto" of Professor Davis whose ideas it adopts, is very much a model of conservatism. The authority of the courts over the administrative process is said to be "desirably a reserve one," subject to restraint which is claimed to be justified by "*respect for legislative preference*"<sup>133</sup> and an appreciation of the respective expertise of courts and administrative tribunals. Professor Angus argued in 1974 for a narrowing of judicial review,<sup>134</sup> joining in Professor Hogg's view that "there is nothing intrinsically good about judicial review."<sup>135</sup> John Willis, writing a 1968 commentary which is highly critical of the "ideological" theme of the McRuer Report, characterized judicial review as having a "merely peripheral" role in the administrative process.<sup>136</sup> In a 1975 paper, Steve Wexler, advocating acknowledgement of "responsible personal authority" as a source of law, observed: "Discretion and institutions built on it are the norm in law and we must teach lawyers to understand them."<sup>137</sup> These views evidence more than the opinion of the individual writers; they represent a distinct view of the administra-

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133. *Supra*, note 1, at 275. Emphasis added.

134. W.H. Angus, "The Individual and the Bureaucracy: Judicial Review Do We Need It?" (1974), 20 McGill L.J. 177.

135. P.G. Hogg, "Judicial Review: How Much Do We Need?" (1974), 20 McGill L.J. 157, at 158. See also A. Abel "Appeals Against Administrative Decisions" (1962), 5 Can. Pub. Admin. 65. For an early view that "the judges of the ordinary courts know nothing of the problems of administration," see John Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional" (1935), 1 U. of T.L.J. 53, at 80.

I find two examples in Canadian writings which advocate substantive judicial review of administrative decisions. The first is the McRuer Report which, clearly under the inspiration of American developments, recommends extended powers for the courts to review errors of law on the face of the record (*Royal Commission Inquiry Into Civil Rights* (1968), Chapt. 19). The second, and more radical, is a recent Comment by Julius Grey arguing that "substantive fairness" is "an essential component of the new orthodoxy"; "Can Fairness Be Effective?" (1982), 27 McGill L.J. 360, at 370. See also Grey, "The Ideology of Administrative Law" (1983), 13 Man. L.J. 35.

Reference might also be made to a Comment by Noel Lyon in which he proposes an abandonment of jurisdictional concepts in favour of a general "without authority" standard. This proposal would, on questions of law, retreat from the emerging curial deference described above. "Administrative Law — Continuing Search for A General Theory of Judicial Review of Administrative Actions for Legality" (1980), 58 Can. Bar Rev. 646.

136. "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968), 18 U. of T.L.J. 351, at 352.

137. "Discretion": The Unacknowledged Side of Law" (1975), 25 U. of T.L.J. 120, at 175. See also: Wexler, "Non-Judicial Decision-Making" (1975), 13

tive process which bears little resemblance to the American actuality. That they dovetail as neatly as they do with what is clearly a prevailing philosophy of judicial deference in the Supreme Court of Canada is not coincidental. Taken together they form an unlikely backdrop for the introduction into Canadian judicial review of an American principle developed in an atmosphere which can only be said to be hostile to administrative discretion.

Thus a comparison of American and Canadian judicial review reveals an underlying divergence of philosophies regarding the respective roles of courts and agencies. Prevailing scholarly opinions are opposed. Canadian courts are clearly more deferential to the substance of agency decisions, as manifested by their restrained approach to reviewing errors of law or sufficiency of evidence, and the Canadian philosophical orientation is not infected by a constitutionally mandated separation of powers. Finally, the American jurisprudence has emerged without any resistance from concepts like our Canadian prohibition against fettering discretion.<sup>138</sup> The point of demonstrating these disparities is not to advocate insularity in the development of Canadian judicial review. There is great utility in comparative analysis. But the utility of such analysis must lie as much in what it teaches us about our own system as in what we learn about others. And its success depends upon a full inquiry into related principles and themes in both systems. Above all the trap of selective importation of principles developed in other contexts must be avoided.

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Osgoode Hall L.J. 839. For a response to Davis' *Discretionary Justice*, see H.T. Wilson, "'Discretion' In the Analysis of the Administrative Process" (1972), 10 Osgoode Hall L.J. 117.

138. The issue of the competence of agencies to narrow their discretion through self-created policy has not been much discussed in American cases. One instance where it was raised provoked this response from Judge Friendly for the Second Circuit Court of Appeals:

We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering. The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups.

435 f.2d 728, at 730. CF: *Asimakopoulos v. Immigration and Naturalization Service*, 445 F.2d 1362 (9th Cir. 1971). And see commentary of Professor Davis in his *Treatise*, *supra*, note 66, at 195-96, where Davis says *Asimakopoulos* is a rare decision.

*V. Conclusion*

The central problem in this discussion has been to determine to what extent, if any, we can call upon supervisory courts to control administrative actions which we believe to be inconsistent. Underlying that question is the difficult problem of defining "consistency". My approach to this latter problem is that you cannot define consistency, you can only argue about it. Thus the references to inconsistency in this paper have been coupled with qualifiers like "claimed", "alleged" or "ostensible". If a designated decision-maker considers a matter in good faith and considers the same factors which he would in other cases, it cannot be objectively shown that the decision is inconsistent with claimed precedents. We can attempt to persuade the decision-maker that the substantive outcome should be different but in the end we must concede that the decision is his or hers to make. In the end, this discussion, like so many problems raised by judicial review, comes down to a question of deference to preferred decision-makers. The problem of inconsistency does not admit of any middle ground. Either the courts or the administrative decision-maker must choose and prevail. For my part I believe the only viable option is to continue to defer to administrators.

The answer, therefore, to the question of how much control courts should exercise over what is asserted to be inconsistent action is "no more than is consistent with existing deferential standards of judicial review." Unless a claimed instance of uneven treatment can be dealt with as a jurisdictional problem, courts ought not to intervene. I take the basic position, which I understand to be in accord with Professor Mullan, that supervisory courts should refrain from interfering in the substance of administrative decisions. Review of inconsistency involves no such supervisory neutrality. When a court enters into a review of the proffered justification of the agency for what is an apparent inconsistency, it descends from its removed role of independent surveillance to undertake a fresh appraisal of the merits of the decision. Such an incursion subverts the very purpose of the legislature in selecting the tribunal in question and involves courts in an enterprise which can only undermine their integrity and hopelessly tax their resources.

But adherence to a traditional model of deferential judicial review need not imply that nothing at all can be done in cases where a convincing argument can be made that a decision-maker has acted

inconsistently. Short of a general review for inconsistency there may be a role for courts to address in part the problem raised by claimed unequal treatment. At least one alternative can be identified whereby it would be possible for courts to retain their neutral role yet still guarantee that officials be deliberate about departures from prior norms. Without resorting to a novel basis of judicial review such as inconsistency, the infirmity of unexplained departures from prior norms could be treated as *prima facie* evidence that the decision-maker has failed to properly consider the matter in question. Thereby courts can ensure that agencies be deliberate if they intend to persist with what is arguably an inconsistent choice. Although the language of "failure to genuinely consider the matter in question" is not instantly recognizable as a category of reviewable error, it is this concept which underlies the more familiar categories of fettering discretion, acting under dictation, unlawful sub-delegation, acting for an improper purpose, and ultimately, bias.

The quashing of a decision for an apparent failure to consider the matter need not be seen as tantamount to a requirement that the decision-maker give reasons. However, it would at least imply an obligation to indicate that all relevant circumstances have been included in the calculus. It may be that in the end a reasoned explanation will be necessary to satisfy a reviewing court of the good faith of the agency. This point regarding reasoned decisions raises a fresh issue which is related to the problem of inconsistency but which must be left for another time. A requirement of reasoned decision-making, either by statute or by common law,<sup>139</sup> raises new prospects for development of administrative norms through precedent and, consequently, for more frequent claims of inconsistent treatment. In much the same manner as a review for inconsistency it raises the problem of judicial deference if parties challenge the sufficiency of stated reasons.

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139. Reasons for decision are now required by some statutory regimes. E.g. *Administrative Procedures Act*, R.S.A. 1970, c.2, s.8; *Statutory Powers Procedure Act*, R.S.O. 1980, c.484, s.17. The traditional view is that reasons for decision are not required by common law principles: See *MacDonald v. The Queen*, [1977] 2 S.C.R. 665; *Re Stoangi and Law Society of Upper Canada* (1979), 25 O.R. (2d) 257 (Ont. Div. Ct.); Mullan, *Administrative Law*, *supra*, note 10, at 3-117. But cf. *Yarmouth Housing Ltd. v. Rent Review Commission* (1982), 54 N.S.R. (2d) 28 (S.C.A.D.); *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (S.C.A.D.). See case comment by A. Wayne MacKay, *supra*, note 54.

There is another potential avenue by which courts can effectively and appropriately review what are claimed to be inconsistent decisions. It is arguable that there is a need for supervisory courts to perform a system-coordinating function in reviewing administrative interpretations of law. Such a need can be seen in instances where coordinate decision-makers interpret legislative provisions in apparently inconsistent fashions but where neither interpretation prevails. Usual standards of judicial deference to administrative interpretations of law would insulate both views from review, unless one of them were patently unreasonable. In this case courts can serve a useful coordinating function, not based on such theoretical underpinnings as review for inconsistency but as an exception to prevailing standards of curial deference. In a sense this is the situation which faced the English Court of Appeal in *Pearlman v. Keepers and Governors of Harrow School*.<sup>140</sup> Such review can be achieved by styling a second exception to the current policy of curial deference to administrative interpretations of law, but need not go so far as the approach adopted by the Court of Appeal in *Pearlman*.

To favour a limited role for supervisory courts is not necessarily to condone inconsistent treatment or to acquiesce in it. There may be other more appropriate instruments by which to influence the agency. Where there is a consensus opposed to the decision-maker but where he acts within jurisdiction, the problem is not one of legality to be supervised by reviewing courts but one of policy to be resolved in other ways. In the end it may be a matter of incompetence on the part of the decision-maker. Or it may be that his or her view of the proper policy to follow or of the appropriate values to weigh, though reasonable, is not the best one. When an agency acts within its jurisdiction in good faith but in an arguably inconsistent manner, the appropriate response is to exert political pressure. This will normally come from affected parties and interest groups and, one hopes, from the media and academics. Such political pressure may make an impression on the agency itself or on the legislature. If it is said that affected parties, the media,

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140. [1979] 1 All E.R. 365. For a judicial expression of opinion which may amount to such a call for a system-coordinating exception to general standards of judicial deference, see the concurring judgment of Moir J.A. in *United Nurses of Alberta, Local 11, and Thomas v. Misericordia Hospital*, [1983] 6 W.W.R. 1 (Alta. C.A.).

academics and legislative overseers are too busy to effectively prevail over the vast apparatus of bureaucracy, that same argument is all the more compelling against claims that courts should undertake the task. More importantly, this political constituency will be sensitive to interests which are typically beyond the range of considerations entertained by courts. The dynamic nature of the political process is better suited to resolving such issues than is the comparatively hermetic process of a reviewing court.

In the end the answer is to strive for an administrative apparatus which will guarantee the greatest degree of rationality. The matter is above all one of institutional design and of the competence of agency personnel. If there is no apparent consistency on the front lines, supervisory courts can sit around the clock only to exacerbate the problem. For my part I take no such grim view of the administrative process. The existing relationship between reviewing courts and administrative agencies is characterized by an admirably consistent attitude of curial deference. To now adopt a radically less deferential attitude would itself be inconsistent and would be an unjustified departure from past practice.

Professor Mullan says in conclusion that the debate over the frontiers of judicial review is really about the use of words. Sometimes I wonder if we can trust ourselves to consider such a delicately balanced equilibrium as exists between judicial oversight and curial deference only in terms of words. While language is a tool of lawyers and judges it can very subtly become our master. Certain words like consistency and fairness, or phrases like "treat like cases alike," evoke peculiar rhetorical connotations which are superficially alluring but which may, if incautiously followed, prove to be the lyrics of a siren song. To now shift the sail of Canadian judicial review to accommodate a requirement of consistency would in my view mean a radical alteration of our present course in favour of one which implies a considerable risk that both the administrative process and judicial review will founder. The lure of imposing our personal understanding of administrative consistency or reasonableness through the avenue of judicial review must be resisted by lashing ourselves to the mast of curial deference and by resorting to the alternate course of non-judicial, political and logical pressure.