WHITMORE AND THE AMERICANS: SOME AMERICAN INFLUENCES ON THE DEVELOPMENT OF AUSTRALIAN ADMINISTRATIVE LAW

THE HON JUSTICE STEPHEN GAGELER*

I INTRODUCTION

Harry Whitmore has been said to have been the 'founding father' of Australian administrative law.[1] That accolade is appropriate not less for his pioneering scholarship in the field of Australian administrative law in the 1960s and 1970s than for his role as a member of the Kerr Committee[2] and of the Bland Committee [3] in establishing the architecture of the statutory system of Commonwealth administrative law put in place by the enactment in rapid succession of the *Administrative Appeals Tribunal Act 1975* (Cth), the *Federal Court of Australia Act 1976* (Cth), the *Ombudsman Act 1976* (Cth), and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

The statutory system of administrative law which Whitmore was instrumental in establishing proved so successful in practice that it appeared in the 1980s and for much of the 1990s to have rendered moot some of the more profound theoretical issues with which Whitmore was forced to grapple in his earlier legal scholarship. Those theoretical issues began to re-emerge only towards the end of the 1990s, as newly appearing gaps in the coverage of the statutory system at the Commonwealth level led to focus being redirected to the scope and operation of the express constitutionally entrenched supervisory jurisdiction of the High Court.[4] The theoretical issues intensified in the first decade of this century, to be even further intensified by the recognition in 2010 of the implied constitutional entrenchment of the supervisory jurisdiction of state Supreme Courts.[5]

---

* Justice of the High Court of Australia. A shortened version of this article was presented as the ninth annual Whitmore Lecture, sponsored by the Council of Australasian Tribunals, on Tuesday 19 May 2015. My thanks to John Basten and Mark Aronson for their comments, and to Heather Anderson, Sarah Zeleznikow and Roshan Chaile for their assistance.

1 John McMillan and Dennis Pearce, 'Vale Emeritus Professor Harold Whitmore' (ANU College of Law, 2008).

2 Commonwealth, *Report of the Commonwealth Administrative Review Committee*, Parl Paper No 144 (1971).

3 Commonwealth, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973).

4 *Constitution* s 75(v).

5 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ('*Kirk*').

The theoretical issues to which I refer are those thrown up by the existence of, and relationship between, two ancient dichotomous distinctions: the distinction, on the one hand, between 'fact' and 'law'; and the distinction, on the other hand, between 'jurisdiction' and 'want' or 'excess' of jurisdiction, either of which is said to amount to 'jurisdictional error'. They are distinctions which, as a matter of history, were being invoked in the practice of the English Court of King's Bench by the 18th century. It was the supervisory jurisdiction of the Court of King's Bench which came to be inherited by the state Supreme Courts when they were established as colonial Supreme Courts in the Australian colonies in the 19th century. The means by which that supervisory jurisdiction was exercised at common law came to be reflected in part in the specific constitutional references to writs of 'prohibition' and of 'Mandamus', which were used to define the original supervisory jurisdiction conferred on the High Court when it was established as the 'Federal Supreme Court' at the beginning of the 20th century.[6]

The distinctions between 'fact' and 'law', and between 'jurisdiction' and 'want' or 'excess' of jurisdiction, are distinctions which have grown out of the common law judicial process, and which are incapable of being expounded or developed in a manner that is entirely divorced from some underlying conception of the nature and scope of judicial power. Like judicial power itself, they have defied comprehensive definition. They have become fundamental, yet remain perplexingly elusive.

The theoretical difficulty inherent in each of the distinctions is only compounded by the overlap between them. That compounding of difficulty can be illustrated by attempting to catalogue or systematise the circumstances in which a 'question of fact' which arises in the course of administrative decision-making might be said to be 'jurisdictional'. The compounding of difficulty can further be illustrated by attempting to contemplate circumstances in which a 'question of law' which arises in the course of administrative decision-making might be said to be 'non-jurisdictional'.

My modest aim in this article is to point out the assistance to be gained in addressing these longstanding, yet still current, theoretical issues by revisiting some of the early Australian scholarship of Whitmore and from some consideration of the scholarship of the two dominant American administrative law academics of Whitmore's generation: Kenneth Culp Davis and Louis L Jaffe.

II DAVIS AND JAFFE

Davis was, in the early 1960s through to the mid-1970s, a Professor of Law at the University of Chicago.[7] He published a book in 1951 entitled *Administrative Law*, which was the first 'systematic exposition' of that topic in

6 *Australian Constitution* ss 71, 75(v); *Judiciary Act 1903* (Cth) s 33.

7 'In Memoriam: Kenneth Culp Davis' (2003) 29(1) *Administrative and Regulatory Law News* 2, 2.

the United States.[8] The contents of that book were expanded into a four volume *Administrative Law Treatise* which was published in 1958 and updated frequently over the next three decades.

Jaffe was throughout much of the same period a Professor of Law at Harvard University.[9] He published a series of influential articles in the 1950s and early 1960s. The contents of those articles were later consolidated and revised in the form of a book entitled *Judicial Control of Administrative Action*,[10] which he published in 1965.

Davis and Jaffe were between them the pioneers of American administrative law scholarship and the undisputed leaders within that field. There was considerable rivalry between them. To appreciate their scholarship, something needs to be said both of the era of American administrative law in which they wrote and of the intellectual milieu into which they fitted.

The era of American administrative law in which Davis and Jaffe wrote was one which had seen, since the New Deal of the 1930s, a considerable increase in the number of federal regulatory agencies in the United States and a considerable expansion in the scope of their activities. The constitutional door had been opened to the era by a momentous decision of the Supreme Court in 1932.[11] The Supreme Court had in that decision accepted that adjudication by federal administrative agencies – even of disputes about statutory rights between private citizens – was compatible with the maintenance of the 'essential attributes of ... judicial power' in the judiciary,[12] as required by Article III of the *United States Constitution*, provided at least that there existed recourse to an Article III court for the conclusive determination of a question of law arising in the administrative adjudication, and provided at least that there also existed recourse to an Article III court for the conclusive determination of questions of fact and law in cases involving 'jurisdictional facts'. In the Court's terms, a 'jurisdictional fact' was a fact, the existence of which was a 'condition precedent to the operation of [a] statutory scheme', and which had a constitutional element 'because the power of the Congress to enact the [relevant] legislation turn[ed] upon the existence of th[o]se conditions'.[13] The era had then seen the systematisation of federal administrative law and practice with the enactment by Congress in 1946 of a legislative code expressed to govern both 'rule-making' (essentially policy or regulation formation) and 'adjudication' (or decision-making) by federal administrative agencies, as well as to confer a right of judicial review on a person

8 Ronald M Levin, 'The Administrative Law Legacy of Kenneth Culp Davis' (2005) 42 *San Diego Law Review* 315, 317.

9 Daniel B Rodriguez, 'Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory' (1997) 72 *Chicago-Kent Law Review* 1159, 1162; Robert C Clark, 'In Memoriam: Louis L Jaffe' (1997) 110 *Harvard Law Review* 1203, 1203.

10 Louis L Jaffe, *Judicial Control of Administrative Action* (Little, Brown and Company, abridged student edition, 1965).

11 *Crowell v Benson*, 285 US 22 (1932). See also Richard H Fallon Jr et al, *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation Press, 6th ed, 2009), 329–39.

12 *Crowell v Benson*, 285 US 22, 51 (Hughes CJ) (1932).

13 Ibid 54–5 (Hughes CJ).

'adversely affected or aggrieved by [any agency] action'.[14] The exercise of that statutory right of judicial review triggered a requirement on the part of the reviewing court, subject to limited exceptions, to 'decide all relevant questions of law' and to 'hold unlawful and set aside agency action ... found to be', amongst other things, 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law', 'in excess of statutory jurisdiction', 'without observance of procedure required by law' or 'unsupported by substantial evidence'.[15]

The dominant school of jurisprudence in the United States during the era in which Davis and Jaffe wrote was the (post-legal realist) legal process school. Its emphasis was on the development of legal principle, in a manner responsive to social change, through a process of reasoned elaboration undertaken by courts, co-operatively with other arms of government, with a view both to institutional competence and expertise, and to democratic legitimacy.[16] Davis and Jaffe were both of that school. Neither had much time for the analytical jurisprudence, developing into positivism, then prevalent in England. Had they taken part in the famous debate played out in the pages of the *Harvard Law Review* between the Englishman H L A Hart and the American Lon Fuller (about how in principle to interpret a legal rule forbidding the taking of vehicles into a public park),[17] Davis and Jaffe would both have been firmly on the side of Fuller. Both would have favoured the interpretation which most reasonably fulfilled the inferred social purpose of protecting safety and amenity.[18] Each recognised himself as a pragmatist.[19]

But Davis and Jaffe sat at different points in the legal process spectrum. Davis was much more of a pragmatist, much more of a realist. Davis strove for clarity, simplicity, consistency, fairness and substantial justice in the practical operation of contemporary public administration. Judicial review was just one of several means to that end. He was forgiving of purely theoretical inconsistency in judicial decision-making in pursuit of that end, and was impatient with legal technicality. He wrote plainly and systematically about the whole process of agency rule-making and adjudication, focusing on judicial review only in two of the four volumes of his treatise. Jaffe, in contrast, concentrated throughout his career almost exclusively on judicial review, writing profoundly (and at times quite obscurely) about the complex interplay of relationships between administrative agencies and the courts. He strove to identify deep themes, rooted in legal history, which were available to be moulded or adapted to contemporary circumstances. Compared with Davis, Jaffe was more analytical, more historical,

---

14 *Administrative Procedure Act*, Pub L No 79-404, § 10(2)(a), 60 Stat 237, 243 (1946).

15 *Administrative Procedure Act*, Pub L No 79-404, § 10(2)(e), 60 Stat 237, 243–4 (1946).

16 William N Eskridge Jr and Philip P Frickey, 'The Making of *The Legal Process*' (1994) 107 *Harvard Law Review* 2031, 2032.

17 H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

18 Fuller, above n 17, 662–3.

19 See, eg, Louis L Jaffe, 'Book Review: S A de Smith, *Judicial Review of Administrative Action*' (1961) 74 *Harvard Law Review* 636, 638–9 n 6.

more subtle, and more theoretical. The 792 pages of his *Judicial Control of Administrative Action* have been fairly described by Judge Richard Posner as the *summa theologica* of the era.[20]

The difference between Davis and Jaffe is perhaps epitomised by their respective reactions to the first attempts by English academics to provide a comprehensive treatment of judicial review of administrative decision-making, in the form of S A de Smith's *Judicial Review of Administrative Action*, published in 1959, and of H W R Wade's *Administrative Law,* published in 1961. Both Davis and Jaffe were critical, less of de Smith and of Wade than of the seemingly moribund English legal system those authors attempted to describe. But Davis was scathing. When he came in 1962 to review Wade's *Administrative Law*, Davis made clear that he thought Wade's almost exclusive focus on judicial review was far too narrow a treatment of the subject matter. But that was not the only problem. Davis was especially provoked by a statement by Wade that the common law writs of certiorari, prohibition and mandamus were working 'well', and was even more provoked by Wade's statement that a judge undertaking judicial review of administrative action 'ought, in theory, to act like a calculating machine, which will deliver the right solution if fed with the right data'.[21] Davis was moved to say that '[t]he literature of English administrative law needs to move from bombast to realism'.[22] In so doing, he reiterated a suggestion he had made two years earlier when reviewing de Smith's book, that 'either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again'.[23] Davis also observed with evident despair that Wade's belief that a judge ought act like a calculating machine was so mistaken as to the 'fundamentals of the judicial process' that it undermined confidence in Wade's 'overall judgment'.[24] It fell to Jaffe, in what was simultaneously a rebuke to Davis and a hands-across-the-sea attempt to appease Wade, to point out that, in likening a judge to a calculating machine, Wade had actually intended to employ that subtle and distinctly English form of humour known as irony: meaning himself to emphasise the absurdity of mechanical jurisprudence, Wade had likened a judge to a calculating machine as a 'way of stating the opposite'.[25]

20 Chief Judge Richard A Posner, 'The Rise and Fall of Administrative Law' (1997) 72 *Chicago-Kent Law Review* 953, 955 n 1.

21 H W R Wade, *Administrative Law* (Clarendon Press, 1961) 81, 173.

22 Kenneth Culp Davis, 'English Administrative Law – An American View' [1962] *Public Law* 139, 139.

23 Ibid 149. See also Kenneth Culp Davis, 'The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence' (1961) 61 *Columbia Law Review* 201, 204.

24 Davis, 'English Administrative Law – An American View', above n 22, 157.

25 Louis L Jaffe, 'English Administrative Law – A Reply to Professor Davis' [1962] *Public Law* 407, 415.

III WHITMORE

Whitmore, after completing his undergraduate studies in law at the University of Sydney in 1958, went on to obtain a Masters degree at Yale University before returning to Australia to commence an academic career in 1961. At Yale, Whitmore was undoubtedly exposed to the scholarship of Davis and Jaffe. The content and style of his academic writing shows that he was very much influenced by Davis' straightforward approach and system-wide perspective.

Whitmore's first substantial article, entitled 'Australian Administrative Law – A Study in Inertia',[26] published in 1963, drew attention to the codified administrative and judicial review procedures in the United States as well as to some recent reforms in administrative practices in the United Kingdom and in New Zealand, all of which he said underlined the 'apathy and apparent self satisfaction' which then existed in Australia.[27]

Whitmore's next substantial article, published in 1967, was perhaps his only real foray into administrative law theory. The article, colourfully entitled 'O! That Way Madness Lies: Judicial Review for Error of Law',[28] adopted a distinctly sceptical tone. The article acknowledged, in deference to Jaffe, that it was 'arguable that the critics [had] over-emphasized the uncertainties of judicial review for jurisdictional error, and the lack of logic inherent in [that] concept'.[29] Employing ultra-realist terminology made famous by Julius Stone, however, the article went on to predict that, whether or not jurisdictional error was a 'meaningless category', the importance of jurisdictional error would decline as it came to be 'supplanted to some degree by the even more flexible and uncertain concept of review for error of law'.[30] Presaging the statutory reforms in which Whitmore was soon to play a major role, the article concluded by suggesting that 'draconic action to unravel the sorry mess [was] needed as a matter of urgency', and that the 'complexities and uncertainties' could not be 'tolerated indefinitely'.[31]

The previous year had seen the publication of a new edition of a book entitled *Principles of Australian Administrative Law*,[32] in which Whitmore substantially revised and expanded on the previous edition of a work that Wolfgang Friedmann and David Benjafield had published in 1962, just as Whitmore's

26 Harry Whitmore, 'Australian Administrative Law – A Study in Inertia' (1963) 36 *Australian Law Journal* 255.
27 Ibid 259.
28 Harry Whitmore, 'O! That Way Madness Lies: Judicial Review for Error of Law' (1967) 2 *Federal Law Review* 159.
29 Ibid 159.
30 Ibid 159–60.
31 Ibid 182.
32 D G Benjafield and H Whitmore, *Principles of Australian Administrative Law* (Lawbook, 3rd ed, 1966).

academic career was beginning.[33] The influence of Davis in Whitmore's revisions can readily be seen both in the content and in the structure of the new edition. 'The administrative lawyer who confines himself to rules concerning the administration which are recognized by the courts', Whitmore wrote in the revised introduction, citing Davis' review of Wade, 'will find that he has defined himself out of the most significant part of the field'.[34] True to that practical and systemic perspective, the book was structured in such a way that a chapter on the framework of government in Australia preceded a chapter on general constitutional concepts; and that a chapter on the general topic of review of administrative action by the Parliament, the administration and the courts preceded a chapter on remedies given by courts on judicial review. The judicial review of administrative action was in that way reduced to a sub-topic of accountability for administrative action more generally. In dealing with that sub-topic of judicial review of administrative action, concluding a section on '*Ultra Vires*' before going on to similar treatment of 'Jurisdictional Error' and 'Error of Law', Whitmore characteristically said this:

> In many, if not most, of the cases where exercises of discretionary powers have been reviewed, the court has, by a process of statutory 'interpretation', converted apparently absolute discretions into discretions which are hedged about by limitations which would have startled the parliamentary draftsmen. The nature of the process by which this result is achieved is most often obscured by the terminology employed … but in each case the court has in fact given a restricted interpretation to a power which is, on the face of the statute, more or less unlimited. In each such case the court 'finds' outside the words of the statute a criterion of limitation which the court is rarely prepared to state in precise terms but which depends upon its own free judgment in the particular circumstances of the case and, in not a few instances, upon the making of tacit and undisclosed assumptions. In this way the vague 'principles' stated by the courts impose no real fetters on the court's own discretion and give to the practitioner virtually no possibility of predicting the action which a court will take in particular circumstances. At the same time this approach preserves great flexibility in the scope of judicial review.[35]

Interestingly, the new edition of *Principles of Australian Administrative Law,* as revised by Whitmore, was soon afterwards reviewed by Jaffe.[36] Jaffe evidently thought that there was far too much Davis in Whitmore. If the book had a weakness, Jaffe said, it was 'in its somewhat conventional and derivative treatment of general ideas'.[37] Its authors, Jaffe said, were 'apt to fall back on fashionable critical clichés which [had] been going the rounds' then for some

---

33 W Friedmann and D G Benjafield, *Principles of Australian Administrative Law* (Lawbook, 2nd ed, 1962). The book was a rewritten and enlarged edition of W Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, 1950), a very short book but one of the first dedicated to the subject of administrative law anywhere in the common law world. As to the trajectory of the editions, see Friedmann and Benjafield, above n 33, v; ibid v.

34 Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed), above n 32, 1.

35 Ibid 185–6.

36 Louis L Jaffe, 'Book Review: D G Benjafield and H Whitmore, *Principles of Australian Administrative Law*, 3rd ed' (1968) 6 *Sydney Law Review* 148.

37 Ibid 148.

time.[38] Especially in dealing with judicial review of discretionary administrative action, those authors showed themselves unwilling to 'seek out and formulate useful concepts'.[39] Jaffe commented that the previously quoted passage in which Whitmore had sought to sum up the nature of judicial review of discretionary powers conferred on administrators in absolute terms, and to recognise the likelihood of such broad discretions being curtailed by courts, 'startle[d]' him by its assumptions.[40] Jaffe himself 'would have supposed with our tradition of an executive bound by law – by tradition, custom, fairness, honesty, decency – that absolute discretion (however "apparent") is precisely what has not been delegated'.[41] The 'logical weakness' of Whitmore's argument, Jaffe said, was revealed by Whitmore's 'critical reference to a court "finding" limits "outside the words of the statute"'.[42] Jaffe continued:

> This, of course, derives from the naive conception of a statute as an isolated, discrete, collection of sterile words without a context of statutory purpose, and without relation to the existing corpus of the law. Fortunately our best judges whether consciously or unconsciously reject this position. They know that the legislators would indeed be 'startled' if they treated grants of discretion as 'absolute'. If each statute had to embody every relevant limitation which purpose, fairness and consistency with the general body of the law imply, the business of statute making would be impossible. For centuries the courts have been doing the necessary; when a statute is passed it is against this background, and in the expectation of such judicial control.
>
> Will such a concept of judicial review enable us to predict the outcome of each case? Of course not. But it does state the role of the judge and of the lawyers. It takes for granted that in all important judging there is a choice and if that choice is rationally made we must be content. We must accept the proposition that the judge is participating in the law making process. From this there is no escape unless we are to look to the legislature for every decision or to give the executive *carte blanche*.[43]

Whitmore was unrepentant in repeating the passage so severely criticised by Jaffe in subsequent editions of *Principles of Australian Administrative Law*.[44] When he came to write, with Mark Aronson, a book dedicated largely to judicial review of administrative action but entitled simply *Review of Administrative Action*, published in 1978,[45] Whitmore softened his stance, but only a little. The statutory system of Commonwealth administrative law which Whitmore had played a pivotal role in instigating had by then been put in place, and courts in England and Australia had in the intervening decade shown themselves to be doing their best, even in the absence of statutory reforms, to revamp ancient common law remedies in an attempt to address the circumstances of modern

38 Ibid.
39 Ibid 149.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid 149–50.
44 D G Benjafield and H Whitmore, *Principles of Australian Administrative Law* (Lawbook, 4th ed, 1971) 175; Harry Whitmore, *Principles of Australian Administrative Law* (Lawbook, 5th ed, 1980) 151–2.
45 Harry Whitmore and Mark Aronson, *Review of Administrative Action* (Lawbook, 1978).

administration. In chapters of *Review of Administrative Action* for which he was stated in the preface to be largely responsible, Whitmore showed just a little more empathy for formal judicial technique and made just a little more effort to recognise and assist in articulating some guiding principles of general application. Jurisdictional error and ultra vires, for example, he very usefully grouped under the single heading of 'going beyond power', explaining that the two doctrines had different historical derivations but that they were analytically identical.[46] Jurisdictional error, he explained to be an 'ancient ground' for the exercise by courts of supervisory jurisdiction, which had been 'refurbished quite a deal in recent years'.[47] Error of law, he went on to explain, was becoming 'steadily more important'.[48] The grounds for the exercise by courts of supervisory jurisdiction over administrative action all 'tend to run into each other', Whitmore continued, and some writers had urged 'that all the grounds, except perhaps error of law, [were] merely aspects of *ultra vires*'.[49] His pragmatic tendencies still predominant, however, Whitmore immediately added:

> This may be correct; it is certainly not worth arguing about. And it does not affect the basic point that the courts [sic] powers are very discretionary indeed. What it all amounts to finally is that the courts will try very hard to correct what they consider to be serious mistakes; and serious mistakes which also cause injustice (in their view) will almost always be reviewed and corrected.[50]

The 'judicial creativity or "activism"' which had of late emerged in England and Australia, Whitmore suggested, would 'inevitably lead to some degree of conflict' between courts, on the one hand, and governments and politicians, on the other.[51] The courts needed to steel themselves for that conflict, according to Whitmore, recognising that they had public support for engaging in judicial review of administrative action, and retaining it 'by never again retreating to a "hands off the administration" approach'.[52]

IV FACT, LAW AND JURISDICTION

Davis and Jaffe both thought of the distinction between fact and law as essentially functional, acknowledging it to be related historically to the distinction traditionally drawn in common law adjudication between the function of the judge and the function of the jury. The jury found the facts, based on evidence adduced in the particular case. The judge determined the law, based on the judge's understanding of the applicable common law precedents and of the meaning of any applicable legislation. The adjudicated outcome, in the form of a judgment or order, was the conclusion which the common law reached by the

46 Ibid 143.
47 Ibid 37.
48 Ibid 38.
49 Ibid 38, 39.
50 Ibid.
51 Ibid 30, 39.
52 Ibid 41.

application of the law so determined to the facts so found. The adjudicated outcome was sound if the facts found by the jury were *open* on the evidence (that is to say, if the jury's findings were *reasonable*) and if the law determined by the judge was correct (that is to say, if the judge's determination was untainted by *error*).

Davis and Jaffe both recognised that the basic features of common law decision-making – the finding of facts, the determination of the law and the application of the law so determined to the facts so found in order to reach a legally operative conclusion – were intrinsic to any form of adjudication, whether undertaken by a court or by an administrator, and whether labelled as the formation of an opinion, the making of a judgment, or the exercise of a discretion. In that wider context, however, neither Davis nor Jaffe was prepared to treat the borderline between the functions of judge and jury as definitive of the functional distinction between fact and law for all purposes. One of Davis' most significant insights and enduring legacies was to draw attention to the existence, apart from the category of 'adjudicative facts' (of the kind which would be found in a particular case by a common law jury), of a category of 'legislative facts' (which may be relevant to the determination of the content or validity of delegated legislation) to which the common law rules of evidence had no application.[53]

Davis and Jaffe were both particularly interested in explaining that category of cases determined by a court on judicial review of administrative action in which a conclusion reached by an administrator that facts it had found fell within a statutory description would in practice be upheld by the court, provided that the court was satisfied that the conclusion reached by the administrator was reasonable. The leading example in the United States in Davis' and Jaffe's own era was a decision of the Supreme Court in 1943 upholding a conclusion of the National Labor Relations Board that newsboys met the statutory description of 'employees'. The cryptically expressed basis for the Supreme Court's decision was that the conclusion reached by the Board had 'warrant in the record' and 'a reasonable basis in law'.[54] Broadly equivalent examples in Australia and England during the same era, to which Whitmore pointed in his 1967 article,[55] were decisions of the High Court and of the House of Lords respectively upholding, on the basis that they were reasonable, conclusions reached by taxation authorities that particular activities of a taxpayer met a statutory description of 'mining operations'[56] or of an 'adventure or concern in the nature of trade'.[57]

---

53 Kenneth Culp Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 *Harvard Law Review* 364; Kenneth Culp Davis, *Administrative Law Treatise* (West Publishing, 1958) vol 2, 353–63. See also Stephen Gageler, 'Fact and Law' (2009) 11 *Newcastle Law Review* 1.

54 *National Labor Relations Board v Hearst Publications Inc*, 322 US 111, 131–2 (Rutledge J) (1944).

55 Whitmore, 'O! That Way Madness Lies', above n 28, 170–1. See also Whitmore and Aronson, above n 45, 250–60.

56 *Federal Commissioner of Taxation v Broken Hill South Ltd* (1941) 65 CLR 150.

57 *Inspector of Taxes v Bairstow* [1956] AC 14.

Both Davis and Jaffe accepted that what courts were doing in such cases was conceding latitude to administrators to give content to the concepts expressed by statutory expressions within the bounds of reasonableness. Neither would have dreamt of seeking an explanation for that concession in the linguistic classification of the words used in the particular statutory expressions as 'ordinary' or 'technical' or something else.[58]

To Davis,[59] the explanation lay in the 'pragmatic' decision of courts to treat some conclusions, which he accepted were analytically conclusions of law, as though they were conclusions of fact. The labels 'fact' and 'law' were each available to be assigned by a court to a conclusion of an administrator 'on the basis of weighing the practical reasons for and against each possible allocation'.[60] Indeed, 'confusion would be considerably reduced', he suggested, if 'the words "judicial question" and "administrative question" were substituted for "question of law" and "question of fact"', 'for the new terminology would focus attention on practical needs rather than on a relatively sterile analysis of words'.[61] In a case where statutory purpose was unclear, it may be 'desirable' for a court to assign the label of 'law' to a particular question addressed, especially where the underlying problem: 'transcend[ed] the single field of the particular agency'; was 'affected substantially by constitutional considerations'; or required an analysis of legislative history outside the agency's field of specialisation.[62] Davis' underlying assumption was that labelling a conclusion one of fact resulted in its judicial review by a court applying a standard of reasonableness, while labelling a conclusion one of law resulted in its judicial review by a court applying a standard of correctness.

Jaffe took a different approach.[63] Davis' assumption that labelling a conclusion one of law resulted in its judicial review by reference to a standard of correctness was to Jaffe unwarranted. There was no reason in principle why an administrator could not be empowered by statute, within limits, to '*make law*'.[64] For a court to concede to an administrative agency a capacity to give content to a particular statutory description within the limits of reasonableness was to Jaffe nothing more or less than for the court to recognise the jurisdiction of the administrator as extending to the reasonable determination of a particular question of law. There could be non-jurisdictional questions of law (reviewable by a court by reference to a standard of reasonableness), just as there could be jurisdictional questions of fact (reviewable by a court by reference to a standard of correctness) of which questions of so-called constitutional fact were just one category. Once the potential for the existence of a non-jurisdictional question of law was recognised, said Jaffe, the analytical problem presented for judicial

58 Cf *The Australian Gaslight Co v Valuer-General* (1940) 40 SR (NSW) 126, 137–8.
59 See generally Davis, *Administrative Law Treatise*, above n 53, vol 4, 189–270.
60 Ibid 193.
61 Ibid 194.
62 Ibid 232.
63 See generally Jaffe, *Judicial Control of Administrative Action*, above n 10, 546–635.
64 Ibid 547.

review of administrative action by the fact–law distinction was very much simplified. Outside a special statutory scheme of judicial review, and save for the limited case of an error of law appearing on the face of the record, judicial review of administrative action was always concerned with providing judicial remedies not for 'mere' errors of law but rather for 'jurisdictional errors', irrespective of whether those errors might be errors of law or of fact.

The fundamental question for a court exercising traditional supervisory jurisdiction to review administrative action, according to Jaffe, was therefore whether the action was within the limits of the jurisdiction conferred on the administrator by statute. Those jurisdictional limits fell to be determined by 'a confident and responsible judiciary' engaged in the process of interpreting the statute conferring jurisdiction.[65] The principal, but not exclusive, goal of the judiciary in engaging in that process of statutory interpretation was to ascertain and to implement legislative purpose.

Although he may have been unhappy with recent statements suggesting a disfavouring of the terminology of 'jurisdiction' in some contexts,[66] Jaffe would therefore have been comfortable with the significant development in American administrative law, post-dating his period of active scholarship, which came to treat ambiguity in the scope of the statutory conferral of power on an administrative agency as triggering a presumption that the statutory purpose was to permit the agency to adopt, and take administrative action based on, any reasonable interpretation of the power.[67] Davis, in his old age, took umbrage with it.[68]

Yet Jaffe accepted and defended the margin of choice inevitably reposed in a court seeking to ascertain and to implement legislative purpose on a case-by-case basis in the absence of such a presumption. Jaffe explained:

> It will no doubt be urged against a test in terms of purpose that it gives no predictive clue to the likely result in a new case because there is no rule for the ascertainment of purpose. That is indeed true, as it is of all statutory interpretation. The test channels the search for an answer but the answer ultimately depends on the appreciation of the particular judge. Furthermore, though the purpose test be the primary [or] basic criterion there are additional considerations which determine its application; some of these considerations are implied in the test of statutory purpose, some operate outside of it. Among them are (1) the degree to which the framing of a rule appears to depend on expertise, (2) the clarity with which a rule can be made to emerge and be given a stable form and content, (3) the importance of the rule in the statutory and administrative scheme, (4) the possible psychological advantage of judicial as compared with administrative pronouncement, and (5) the role of the court as the guardian of the integrity of the

65 Ibid 576.

66 *City of Arlington v FCC*, 133 S Ct 1863 (2013).

67 *Chevron USA Inc v National Resources Defense Council Inc*, 467 US 837 (1984). See Judge Kenneth W Starr, 'Judicial Review in the Post-*Chevron* Era' (1986) 3 *Yale Journal on Regulation* 283; Justice Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' [1989] *Duke Law Journal* 511, 516. See generally Justice Stephen Gageler, 'Deference' (2015) 22 *Australian Journal of Administrative Law* 151.

68 Kenneth Culp Davis, *Administrative Law of the Eighties: 1989 Supplement to Administrative Law Treatise* (1989) ch 29.

> legal system. Thus, there will be cases where though the rule to be laid down or the decision to be made does not clearly emerge from a study of the statute, nevertheless the court will – indeed should – take upon itself the power and responsibility for decision. ... In exercising that power the above considerations will be relevant, but not all the relevant considerations can be explicitly formulated.[69]

The process of determining jurisdictional limits, according to Jaffe, of its nature should never, even if it could ever, be reduced to a mechanistic formula. It would be quite wrong to reject the doctrine of jurisdictional error merely because the concept of jurisdiction did not admit of a priori measurement. The function of the doctrine had always been clear:

> A tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction. This is so because a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned. ... When there has been an exceptional need for control and no statutory mode of review, the English courts justified their intercession by labeling the issue jurisdictional.[70]

'In short', wrote Jaffe, 'the concept is almost entirely functional: it is used to validate review when review is felt to be necessary'.[71] Jaffe continued:

> Furthermore, we cannot altogether dispense with the jurisdictional concept. There will be situations in which the apparent or stated intention of the legislature is to limit review to certain gross errors, and in which the notion of jurisdiction, familiar as it is to judges and lawyers, will be as good as any to express the scope of review. There are other situations, too – organizational or procedural mistakes – in which the lapse is so serious that judges will want a concept which enables them to declare the order 'void'. *If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the character or the gravity of the error, it would seem that it is a concept for which we must have a word and for which use of the hallowed word is justified.*[72]

V GLIMPSES OF JAFFE IN AUSTRALIA

There have been only glimpses of Davis and of Jaffe in Australian administrative case law. The glimpses of Davis have followed no particular pattern. The glimpses of Jaffe have not been particularly more frequent, but they have appeared at defining moments.

When, in 1982, Sir Gerard Brennan referred to judicial review as 'neither more nor less than the enforcement of the rule of law over executive action', he

69 Jaffe, *Judicial Control of Administrative Action*, above n 10, 576.
70 Ibid 632.
71 Ibid 633.
72 Ibid (emphasis in original).

cited a work co-authored by Jaffe.[73] In the reference Sir Gerard cited, Jaffe and his co-author had written that Albert Venn Dicey's formulation of the 'rule of law', for all the criticisms that had been fairly levelled against it, was at least 'an attempt to formulate a general theory of the role of the judiciary in this area'.[74] Dicey's conception of the 'rule of law', said Jaffe, usefully captured 'a significant and still valid element in the Anglo-American systems which Mr Justice Brandeis called the "supremacy of the law"'.[75] Where Dicey had gone too far was 'in believing that the judges had set up discretion as the foe of the law': the historical reality was that the judges 'did recognise the sphere of administrative discretion; at the same time they insisted that discretion must function within the limits set by the purposes of the law as interpreted by them'.[76] The view which Jaffe and his co-author expressed and defended in the cited reference was 'that Anglo-American courts should accept the proposition that they have by historic warrant and general consent a valuable and indispensible role in the administrative process', as to which 'they should not be arrogant neither should they be defeatist nor irrelevantly modest' – '[t]heir task is to contain administrative activity within the bounds of delegated power: to apply to administrative action the test of "legality"'.[77] The authors continued:

> The role of the court is related to a general theory of democratic action. The large outlines of policy – and, of course, whatever details the legislature chooses to fix – are to be settled by the most representative organ. The administrative is to make the choices necessary to effectuate the policy. Two conclusions are thereby implied, the one that the administrative has a power of choice, the other that there are limits to its power. To permit interference with its power of choice would reduce the administrative to impotence. To permit persistent violation of limits would substitute the executive for the legislative, bureaucratic will for the broader based consent.[78]

That conception of the limited, yet systemically indispensible, role of judicial review of administrative action flowed through to Sir Gerard Brennan's (now canonical) exposition in 1990 of the 'duty and jurisdiction' of a reviewing court, as an aspect of the unambiguous duty of a court to 'say what the law is'.[79] This was a duty not going 'beyond the declaration and enforcing of the law which determines the limits and governs the exercise' of administrative power and not extending the supervisory jurisdiction of the court into the 'merits' of an exercise of discretionary power.[80] The expression 'merits' had come, since at least the

---

73 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70–1, citing L Jaffe and E Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345. Justice Brennan also cited Bernard Schwartz and H W R Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, 1972) ch 9.

74 Jaffe and Henderson, above n 73, 347.

75 Ibid.

76 Ibid 348.

77 Ibid 346.

78 Ibid.

79 *A-G (NSW) v Quin* (1990) 170 CLR 1, 35, quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

80 *A-G (NSW) v Quin* (1990) 170 CLR 1, 36.

time of the Kerr Committee,[81] consistently to be used in Australia to refer to a zone of discretion or decision-making capacity conferred on an administrator by statute. Consistently with Jaffe, Sir Gerard was unapologetic in explaining 'the modern development and expansion of the law of judicial review of administrative action' in Australia as having been 'achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[82]

When, in 2000, the High Court unanimously adopted that explanation of the nature and scope of the judicial review of administrative action in Australia, they went on to adopt as applicable within the Australian context the analysis of Henry P Monaghan in an influential article published in the *Columbia Law Review* in 1983, which expanded on the content of the traditionally recognised duty of a court to 'say what the law is'.[83] The court's 'interpretational task' in undertaking judicial review of administrative action, Monaghan had said, is no more and no less than 'to determine the boundaries of [the administrative agency's] delegated authority'.[84] Citing Jaffe, and building on Jaffe's thesis that not every question of law is a question of jurisdiction, Monaghan explained that 'there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes'; 'the judicial duty' was rather 'to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act'.[85]

Most recently, when in 2010 the High Court recognised the supervisory jurisdiction of state Supreme Courts to be impliedly entrenched by the *Australian Constitution*, all members of the High Court suggested that there was danger, against which judicial review for jurisdictional error guarded, in administrative agencies developing 'distorted positions' if left unsupervised. In adopting that terminology, they quoted Jaffe. The plurality even went on to quote Jaffe's statements that designating some questions as jurisdictional 'is almost entirely functional', being 'used to validate review when review is felt to be necessary', and that if understood not as 'a metaphysical absolute' but as simply expressing 'the gravity of the error', 'jurisdiction' refers to a concept for which there must be a word and 'for which use of the hallowed word is justified'.[86] The plurality specifically added, with copious citation of authority, that we had not in Australia taken the step of treating 'the difficulties presented by classification of some errors as jurisdictional and others as not as requiring the conclusion that *any* error

81 Commonwealth, *Report of the Commonwealth Administrative Review Committee*, above n 2, 68 [227].

82 *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6.

83 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing Henry P Monaghan, '*Marbury* and the Administrative State' (1983) 83 *Columbia Law Review* 1.

84 Monaghan, above n 83, 6.

85 Ibid 33.

86 *Kirk* (2010) 239 CLR 531, 570–1 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963. Jaffe's article was later substantially reproduced in Jaffe, *Judicial Control of Administrative Action*, above n 10, 632.

of law by a decision-maker' necessarily renders the decision beyond power.[87] The conception of a non-jurisdictional question of law is here alive and well.

VI CONCLUSION

I have recently explained elsewhere how the framers of the *Australian Constitution* studied with discernment the operation of the *United States Constitution* in the last decade of the 19th century, adopting and adapting some of its features and consciously seeking to improve on some others.[88] Their decision expressly to confer a constitutionally entrenched supervisory jurisdiction on the High Court was one of those conscious improvements.[89]

The similarities of constitutional structures, set against the background of the shared heritage of the common law and of representative democracy, make it unsurprising that American administrative law scholarship came in the second half of the 20th century to have some influence on Australian administrative law scholarship and on Australian administrative law jurisprudence. It is also unsurprising that the impact of American administrative law scholarship has been muted in Australia.

'The Australian system of government is in many respects unique', Whitmore and his co-author wrote in 1966, 'and it is desirable that we should adopt our own administrative organization and methods of control', learning from the problems encountered in the United States as from the problems encountered in other countries without ever assuming that the solutions adopted elsewhere will be the 'best solutions' for Australia.[90] Nearly 50 years on, there remains value in exploring our ongoing common problems, just as there is value in celebrating what have hitherto been our unique solutions.

87 *Kirk* (2010) 239 CLR 531, 571 [65] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

88 Stephen Gageler, 'James Bryce and the *Australian Constitution*' (2015) 43 *Federal Law Review* 177.

89 John M Williams, '"With Eyes Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23 *Federal Law Review* 149, 169; William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*' (2009) 33 *Melbourne University Law Review* 718, 779–88.

90 Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed), above n 32, 356.