Doctrinal Antithesis in Anglo-American Administrative Law

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English administrative law guards judicial supremacy over all matters of statutory interpretation, while instructing judges to refrain from scrutinizing administrators' factual findings. By contrast, American federal courts are obliged to respect agencies' statutory-interpretive autonomy, but take a rigorous "hard look" at substantial agency factual determinations. This Article argues that the antithetical approaches to judicial review of administrative action adopted by the apex courts of the United Kingdom and the United States can be adequately explained by the polarization of these two polities along a spectrum of effective vetogates.

I. INTRODUCTION

Positive political theory (PPT) has made important contributions to the empirical and, increasingly, the normative study of administrative law in the United States.[1] Recently, Elizabeth Magill and Daniel Ortiz predicted that PPT theories must fail when applied to the

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[1] Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale 1997); Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 Chi Kent L R 953 (1997); Daniel B. Rodriguez, *Administrative Law*, in K.E. Whittington, et al, eds, *The Oxford Handbook of Law and Politics* 340 (Oxford 2008); Daniel A. Farber and Anne Joseph O'Connell, *Introduction: A Brief Trajectory of Public Choice and Public Law*, in D.A. Farber and A.J. O'Connell, eds, *Research Handbook on Public Choice and Public Law* 1 (Elgar 2010).

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United Kingdom,[2] where judicial review "has real bite"[3] and "is much more than a rubber stamp."[4] In their reading of PPT, judicial review in an administrative law context becomes politically consequential only in presidential systems like the United States, where presidential-congressional gridlock opens up room for agency malfeasance, hence also opportunities for judicial intervention; whereas in parliamentary systems like the United Kingdom, the close alignment of Government and Parliament squeezes out opportunities for agencies to act unfaithfully to their political principals, and with it any room for judicial review.[5] This intuition is powerful in a constitutional law context: the US Supreme Court does regularly invalidate acts of Congress,[6] whereas the Appellate Committee of the House of Lords (the Law Lords) has consistently upheld the doctrine of parliamentary sovereignty.[7]

[2] There is no overarching "UK legal system." The process of union has resulted in the United Kingdom being constituted by three separate jurisdictions: England and Wales (conventionally abbreviated as "England" in the context of law), Northern Ireland, and Scotland. Each jurisdiction has a separate judiciary. Particularly, Scotland is a mixed civil law–common law jurisdiction. See, for instance, Andrew Le Sueur and Evelyn Ellis, *Constitutional Fundamentals*, in David Feldman, ed, *Oxford Principles of English Law: English Public Law* 12 (Oxford 2009).

[3] M. Elizabeth Magill and Daniel Ortiz, *Comparative Positive Political Theory*, in S. Rose-Ackerman and P. Lindseth, eds, *Comparative Administrative Law* 134–35 (Elgar 2010).

[4] Id at 142.

[5] Id at 137.

[6] Susan Rose-Ackerman and Peter L. Lindseth, *Comparative Administrative Law: An Introduction*, in Rose-Ackerman and Lindseth, eds, *Comparative Administrative Law* at 439 (cited in note 3).

[7] The Appellate Committee of the House of Lords (and its successor, the Supreme Court of the United Kingdom) exercised appellate jurisdiction over civil and criminal cases from England and Wales and Northern Ireland, and civil cases from Scotland. This Article is only interested in the Appellate Committee or the UK Supreme Court acting in its capacity as the final court of appeal of England and Wales, rather than Northern Ireland and Scotland. Before the Human Rights Act was enacted in 1998, there were only a few cases in which it could be said that the Law Lords had exercised some form of judicial review of primary legislation. In *R v Secretary of State for Transport, ex parte Factortame Limited*, [1991] AC 603 and *R v Secretary of State for Employment, ex parte Equal Opportunities Commission*, [1995] 1 AC 1, the Law Lords had asserted the power to "disapply" acts of Parliament that breach European Union directives. However, this case, as with similar ones, merely reiterated the supremacy of European Union law over relevant aspects of UK domestic law, rather than applied domestic constitutional principles to gauge the merits of primary legislation. Furthermore, this decision has not triggered in England and Wales any wave of judicial review of legislation on European Union law grounds. See Brice Dickson, *Judicial Activism in the House of Lords 1995–2007*, in Brice Dickson, ed, *Judicial Activism in Common Law Supreme Courts* 363 (Oxford 2007).

Contrary to the Magill-Ortiz account, however, the accepted view among PPT scholars is that the primary judicial function in administrative law is to undertake routine oversight tasks such as monitoring lower-level government agents, rather than to rule on fundamental political values, as typifies constitutional controversies.[8] The PPT of administrative law is concerned with how agency costs are controlled, manipulated, and reduced. There is no reason to assume that bureaucrats in parliamentary systems shirk less than their counterparts in presidential ones. Notwithstanding their common historical origins, English and American administrative law traditions part company in ways too important to be overlooked. Most notably, the United Kingdom and the United States have adopted exactly opposite doctrines of judicial review respecting questions of law versus questions of fact.[9] In general, English administrative law jealously guards the supremacy of courts in all matters of statutory interpretation, while obligating them to refrain from scrutinizing administrators' factual findings, whereas its American counterpart instructs the federal courts to respect agencies' statutory-interpretive autonomy, on the one hand, and take a rigorously "hard look" at substantial agency factual and policy determinations on the other.[10] Particularly, the US approach—requiring courts to defer on legal matters that are supposed to be within their own expertise, while intervening in more administrative matters—seems counterintuitive. Justice Stephen Breyer, while still a circuit judge, called it "an important anomaly."[11] For Richard Epstein, it was "[t]he great tragedy of modern administrative law."[12]

[8] See Nuno Garoupa and Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation versus Legal Tradition* 3(2) J Legal Analysis 431 (2011); William Bishop, *A Theory of Administrative Law*, 19 J Legal Stud 489 (1990).

[9] Notice that, as analytical categories, questions of law and questions of fact are not mutually exclusive: "errors of law grow downward into roots of fact, and matters of fact reach upward without a break, into mattes of law." John Dickinson, *Administrative Justice and the Supremacy of Law* 55 (Harvard 1927). See also Robert C. Dolehide, *A Comparative "Hard Look" at* Chevron*: What the United Kingdom and Australia Reveal about American Administrative Law*, 99 Tex L R 1281 (2010).

[10] Peter Cane, *An Introduction to Administrative Law* 112 (Oxford 3d ed 1996); Paul Craig, *Judicial Review of Questions of Law: A Comparative Perspective*, in Rose-Ackerman and Lindseth, eds, *Comparative Administrative Law* at 449 (cited in note 3); Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* 154 (Harvard 2011); Eric C. Ip, *Taking a 'Hard Look' at 'Irrationality': Substantive Review of Administrative Discretion in the US and UK Supreme Courts*, 34 Oxford J Legal Stud 481 (2014).

[11] Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin L Rev* 397 (1986).

[12] Epstein, *Design for Liberty* at 154 (cited in note 10).

This Article undertakes the heretofore untried task of explaining this doctrinal antithesis in the administrative common law[13] of the UK judicial House of Lords[14] and the US Supreme Court.[15] Section II constructs out of the relevant PPT literature an explanatory framework, the centerpiece of which is the concept of "vetogates." These are institutions competent to veto legislative or policy proposals in circumstances that may force a reversion to the status quo.[16] Bear in mind that this framework is primarily positive, and focuses exclusively on questions of common law doctrinal design. Consequently, it is unconcerned with the normative justifiability of individual administrative law principles, and makes no empirical pretense that the courts of England and America have in practice adhered unswervingly to their stark differences in doctrine.[17]

Section III evidences that English and American administrative law once had much in common, both historically and doctrinally. Section IV shows how the polarization of these two polities along a spectrum measuring the number of effective vetogates within the law-making process is key to explaining why doctrinal antithesis overtook English and American administrative law, their historical similarities notwithstanding.[18] The scarcity of effective vetogates in

[13] Gillian E. Metzger, *Embracing Administrative Common Law*, 80 Geo Wash L R 1295 (2012). This Article is not concerned with constitutional judicial review on the basis of codified constitutional instruments such as the Constitution of the United States and the Human Rights Act 1998.

[14] Positive political theory or rational choice theory is underdeveloped in the study of British government and laws. See Keith Dowding, *Rational Choice and British Politics*, in A. Gamble, et al, eds, *Oxford Handbook of British Politics* 75 (Oxford 2009).

[15] In addition, this Article is not concerned with how the administrative law decisions of the Law Lords and the US Supreme Court were implemented. A number of PPT-informed empirical studies have been dedicated to this question in the American context. See, for instance, Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U Chi L Rev 823 (2006); Thomas J. Miles and Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U Chi L Rev 761 (2008).

[16] Stephan Haggard, *The Politics of Corporate and Financial Restructuring: A Comparison of Korea, Thailand, and Indonesia*, in Stijn Claessens, et al, eds, *Resolution of Financial Distress: An International Perspective on the Design of Bankruptcy Laws* 262, n1 (World Bank 2001).

[17] For instance, in the United Kingdom, as a practical matter, the English courts do not always substitute judgment on questions of law or spell out the precise meaning of all statutory conditions in enabling acts; sometimes they assigned the labels "law" and "fact" to different questions depending on whether they want to intervene or not. Craig, *Judicial Review of Questions of Law* at 453 (cited in note 10).

[18] Matthew D. McCubbins, *Legislative Process and the Mirroring Principle*, in C. Menard and M.M. Shriley, eds, *Handbook of New Institutional Economics* 132 (Springer 2005).

the United Kingdom enabled Parliament to delegate scant statutory interpretative authority to the administrative state and to conserve more oversight powers in the House of Commons majority whose leaders constitute the Government. This has not only persuaded but also compelled the Law Lords to devise doctrines that disregard statutory interpretations of administrators while giving a wide margin of deference to the majority's primacy in overseeing administrative findings of fact. By contrast, the multiplicity of vetogates in America drove Congress to delegate considerable statutory interpretative powers to the agencies, and also weakened the oversight capacity of congressional majorities. Both of these outcomes spurred the Supreme Court to encode respect for agency statutory interpretations but not agency evidentiary findings into its administrative jurisprudence. Section V offers some concluding remarks.

II. VETOGATES AND ADMINISTRATIVE LAW

A. Overview

Positive political theory consists of the analysis of political institutions, decision making, and behavior from a microeconomic standpoint, using its methodological and theoretical assumptions, namely, that policy outcomes result from the choices of self-interested, rational, utility-maximizing political players who, like market players, interact interdependently under incomplete information.[19] The principal contributions of PPT to the field of law and economics include, but are not limited to, measuring and predicting the supply and demand of legislation throughout the law-making process, and understanding the strategic interaction between courts and political actors.[20] PPT scholars have concentrated increasingly on investigating the forces shaping the content of judicial doctrines.[21] On this view, final appellate adjudication not only decides the outcome of the case at bar but also articulates doctrines destined to regulate similar cases across the entire legal system. This gives an apex court incentive to act strategically when fashioning judicial doctrines so as to facilitate

[19] See Dennis Mueller, *Public Choice III* (Cambridge 2003); Matthew D. McCubbins, et al, *The Political Economy of Law*, in A.M. Polinsky and S. Shavell, eds, *Handbook of Law and Economics* 2 1662 (Elsevier 2007).

[20] Daniel A. Farber and Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 Geo L J 457 (1992).

[21] See Tonja Jacobi and Emerson H. Tiller, *Legal Doctrine and Political Control*, 23(2) *Journal of Law, Economics, and Organization* 326 (2007); Rachel K. Hinkle, et al, *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4(2) J Legal Analysis 407 (2012).

decisional efficiency or further its preferred policy outcomes. In this process the court typically has to trade off vagueness for specificity and narrowness for breadth, subject to the reactions of other actors and the constraints of the constitutional system, professionalism, and desires for popular legitimacy.[22]

PPT analysts ordinarily operate at two levels, strategic design (rules of the game) and strategic action (play of the game).[23] Strategic design analysis tries to explain how institutions are constructed to conduce to policy outcomes consistent with the preferences of the designer; whereas strategic action analysis, taking the institutional rules as given, predicts players' behavior. Consider this analytical structure as applied to administrative law and the governance of legislative delegation to agencies.[24] Design analysis inquires how legislatures act rationally and strategically when enacting regulatory and enabling statutes.[25] These statutes set in motion, at the next, action stage, a complex process of strategic administrative production of regulatory public policy through collection and analysis of information relevant to the determination of the applicability of legislative instructions to concrete circumstances.[26] The two levels of PPT analysis, strategic design and strategic action, parallel the two orders of questions in administrative law—questions of law and questions of fact.

B. Strategic Design and Questions of Law

In practice, legislatures rarely monopolize the strategic design of regulatory governance. Because of their own resource scarcities, they can, do, and must "outsource" or delegate the function of filling in incomplete statutory terms and resolving their ambiguities—a kind of limited de facto law making—to administrative agencies and

[22] Scott Baker and Pauline T. Kim, *A Dynamic Model of Doctrinal Choice*, 4(2) J Legal Analysis 329 (2012).

[23] Emerson H. Tiller, *Resource-based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150(5) U Penn L R 1455-6 (2002); see Oliver E. Williamson, *Why Law, Economics, and Organization?*, in F. Parisi and C.K. Rowley, eds, *The Origins of Law and Economics: Essays by the Founding Fathers* 495 (Elgar 2007).

[24] Daniel L. Soulber and David Besanko, *Delegation, Commitment, and the Regulatory Mandate*, 8 J L Econ & Org 126 (1992).

[25] Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 *Pub Choice* 151 (1984); McCubbins, et al, *The Political Economy of Law* at 1725 (cited in note 19).

[26] Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 Wash U L Q 44 (1994).

courts.[27] The theory of "vetogates" in the PPT literature is particularly helpful in explaining this phenomenon. This theory holds that laws and important policies cannot be legitimately changed unless alternatives exist that all vetogates prefer to the status quo.[28] Some vetogates exist within the legislature, for example, the separation of lower from upper houses, and these tend to increase the internal transaction costs to legislators of agreeing on legislation. Others lie outside the legislature, for example, a veto-wielding head of state, heightening the external transaction costs of legislating. As the total number of *effective*[29] vetogates increases, it becomes harder for the interests represented by the various vetogates to converge on detailed agreements that satisfy everyone's preferences; consequently, statutes become both more ambiguous and more difficult to enact or repeal.[30] Overall, the polity becomes more stable but less decisive.[31]

Indeterminate terms in regulatory statutes, left unresolved, leave policies uncertain, incurring social costs. A highly likely outcome is massive coordination problems among agencies, individuals, and groups, rooted in conflicts over the law's "meaning," which can even lead to violent extralegal conflict that benefits no one. Legislatures encumbered by multiple effective vetogates will have little choice but to delegate a considerable amount of elaboration and interpretation of statutes to those responsible for administering them, namely, agencies, as these are placed beyond the constraints of legislative process vetogates. Even if agencies do not perfectly align with the policy preferences of legislatures, their joint interest in successful policy outcomes may override their differences.[32]

[27] Frank B. Cross, *The Theory and Practice of Statutory Interpretation* 4 (Stanford 2009).

[28] William B. Heller and Mathew D. McCubbins, *Political Institutions and Economic Development: The Case of Electric Utility Regulation in Argentina and Chile*, in Stephen Haggard and Mathew D. McCubbins, eds, *Presidents, Parliaments, and Policy* 230 (Cambridge 2001).

[29] The effectiveness of vetogates is emphasized because it is possible for one vetogate to be "absorbed" by another. For instance, if the same legislative majority controls both the lower and upper houses (each being a vetogate) of a bicameral legislature, then the two vetogates will effectively become one—being absorbed by that majority. See George Tsebelis, *Veto Players: How Political Institutions Work* 26 (Princeton 2002).

[30] William N. Eskridge, *Vetogates and American Public Law*, J L Econ & Org *2 (forthcoming 2012).

[31] Gary W. Cox and Mathew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes*, in Haggard and McCubbins, eds, *Presidents, Parliaments, and Policy* at 27 (cited in note 28).

[32] Cross, *The Theory and Practice of Statutory Interpretation* at 9 (cited in note 27).

Delegation to agencies entails that some of their authority to elaborate and interpret statutes inevitably spills over to the courts, which also enjoy powers of statutory interpretation.[33] From the legislature's standpoint, however, agencies often make better candidates for this role: typically, they are more familiar with the legislative process and its heterogeneous outputs;[34] tend to possess more specialized technical expertise;[35] and have better access to information illumining the nexus between policy choices and actual regulatory outcomes and priorities.[36] By contrast, courts are normally politically insulated and lack ideological coherence, outcome-orientation,[37] or familiarity with the peculiar backgrounds of particular statutes.[38] Judges are generalists limited by cumbersome legal procedures such as the doctrine of stare decisis or jurisprudence constante, and suffer from informational disadvantages and shortages of staff and of investigatory resources.[39] The proliferation of unresolved policy and regulatory questions relevant to the day-to-day implementation of primary legislation lessens the importance of the courts in articulating authoritative interpretations of administrative law, as compared to agencies.

C. Strategic Action

Enabling statutes almost always condition their enablement of administrative action upon certain factual circumstances that legitimize the exercise of (thus implicitly constituting a constraint on) administrative discretion: an agency can act only if specified facts exist or if its acts will trigger specific changes to such facts.[40] Now analogize a legislature to a board of directors wielding broad oversight over "managers" (that is, the political executive), but unable

[33] Id at 4.

[34] Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* 210 (Cambridge 2006).

[35] Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U Chi L R 1142 (2001).

[36] Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in Farber and O'Connell, eds, *Research Handbook on Public Choice and Public Law* at 287–89 (cited in note 2).

[37] See Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 Harv L R 528 (2006).

[38] See Vermeule, *Judging under Uncertainty* at 213 (cited in note 34).

[39] Richard Posner, *Economic Analysis of Law* 853 (Aspen 8th ed 2011).

[40] See Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 Wm & Mary L Rev 685 (1986).

to scrutinize—because of limited human capacity[41] to "micromanage"[42] policy outcomes—the daily fact-finding activities of subordinate employees (administrative agencies). Given the problems of time inconsistency and "coalitional drift,"[43] the governing majority may not favor every statute enacted by its opponents, yet sufficient reasons exist to persuade it to prefer in the aggregate agencies' general respect for any such statute. William Landes and Richard Posner observe that such respect, which contributes to statutory longevity, enables incumbent majorities to make credible policy commitments that give them bargaining power with organized interests who seek specific legislation in exchange for political support.[44]

Agencies, however, have an incentive to depart from their legal mandates. They have better information than the legislature about the effects of their acts on outcomes.[45] Sometimes agencies are merely bypassing rigid statutory dictates in order to adapt to changing realities—after all, creative bureaucrats are as essential to the smooth working of the polity as creative middle and upper managers are to firms.[46] In other cases, agency departure from statutory schemes stems from outright shirking or ideological differences with the legislature, and may lead to politically undesirable, even devastating, effects on public policy.[47] Agencies that disregard statutory mandates are often acting on inaccurate understandings of fact as well;[48] for instance, their fact-finding methods may be heavily biased, or they may disregard of relevant evidence in the course of formulating policy-implementing administrative programs.

Thomas Schwartz and Matthew McCubbins have typologized the various means available to legislatures to exact agency obedience

[41] Yadira Gonzalez de Lara, et al, *The Administrative Foundations of Self-enforcing Constitution*s, 98 Am Econ Rev 105 (2008).

[42] David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* 27 (Cambridge 1999).

[43] Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J L Econ & Org 111 (1992).

[44] William Landes and Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J L & Econ 875 (1975).

[45] Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in Rose-Ackerman and Lindseth, eds, *Comparative Administrative Law* at 117 (cited in note 3).

[46] Weingast, *The Congressional-Bureaucratic System* at 156 (cited in note 25).

[47] See Murray J. Horn, *The Political Economy of Public Administration: Institutional Choice in the Public Sector* (Cambridge 1995).

[48] Richard J. Pierce, et al, *Administrative Law and Process* 121 (Foundation 4th ed 2004).

to valid laws,[49] subject to the number of effective vetogates. Legislatures may resort to their prerogatives of dismissal of staffs or of nullification of administrative decisions. Less drastically, they may lessen their informational disadvantage through "police patrols," as by committees seeking evidence of bureaucratic malfeasance, or by public hearings, press releases, letters of threat, and so forth, making life unpleasant for administrative officials;[50] or through "fire alarm" procedures whereby recipients of administrative services bring bureaucratic defiance to the attention of legislators, reducing the transaction costs of oversight.[51] In addition a legislature may use administrative procedures to rebalance asymmetries of information,[52] or "stack the deck" during agency proceedings in favor of the interests which were paramount in the enactment of enabling statutes.[53] But administrative procedures will not matter unless they are enforced. "Fire-extinguishers" avail here, Legislatures outsourcing oversight to administrative services recipients by granting them standing to sue malfeasant agencies in court.[54]

The correction of administrative failure tends to be easier in polities where fewer vetogates prevent legislatures from acting decisively to undo agency decisions. If legislatures can by themselves hold agencies to effective account, this will naturally lessen demand for fire-extinguisher litigation to impose liability on agencies.[55] Courts may continue to protect individual rights, but will not review the merits of administrative action.[56] By contrast, a multiplicity of vetogates raises the costs to legislatures of recalling delegation and exerting oversight.[57] This will likely raise demand for fire extinguishers unfettered by vetogates, to perform some of the legis-

[49] Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am J Pol Sc 165 (1984). See also Arthur Lucia and Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J L Econ & Org 96 (1994).

[50] Stephenson, *Statutory Interpretation by Agencies* at 295 (cited in note 36).

[51] See Sean M. Theriault, *Party Polarization in Congress* (Cambridge 2008).

[52] Matthew D. McCubbins, et al, *Administrative Procedures as Instruments of Political Control* 3J, L Econ & Org 273 (1987).

[53] Matthew D. McCubbins, et al, *The Political Origins of the Administrative Procedure Act*, 15 J L Econ & Org 186 (1999).

[54] John D. Huber and Charles R. Shipan, *Politics, Delegation, and Bureaucracy*, in B.R. Weingast and D.A. Wittman, eds, *The Oxford Handbook of Political Economy* 269 (Oxford 2006).

[55] See Peter Cane, *Administrative Law* 411 (Oxford 4th ed 2004).

[56] Mashaw, *Greed, Chaos, and Governance* at 198 (cited in note 1).

[57] Jacob Gersen and Adrian Vermeule, *Delegating to Enemies*, 112 Col L R 2199 (2012).

lature's oversight tasks.[58] In this vacuum of ex post political control, the need for courts to function as suppliers of additional oversight naturally increases. The apex court thus faces stronger pressures and incentives to devise more aggressive doctrines that serve as ex ante constraints and ex post controls to agencies when applied by the lower courts. Such doctrinal constraints, however, are more likely than not to focus on questions of fact, rather than questions of law. Recall that a polity with multiple effective vetogates is bound to witness the skyrocketing of statutory ambiguities. As a relative matter, specialized, well-equipped, and outcome-oriented agencies are more suitable candidates than generalist courts for the task of resolving almost endless system-wide statutory ambiguities for long-term purposes, without causing the law-making system to grind to a halt. As a rule, courts are not entitled to preemptively promulgate sweeping and binding interpretations that clarify far-reaching statutory policy questions, like their agency counterparts. An apex court, residing in a multiple vetogates polity, intent on reducing the legislature's agency costs on the one hand, and conserving the authority and resources of the lower courts on the other, has little realistic choice other than to devise doctrines that are aggressive but confined to the review of comparatively inconsequential agency factual and evidentiary findings on a case by case basis.

The following theses may be derived from the preceding analysis:

1. Ceteris paribus, the greater the number of effective vetogates, the less likely an apex court will devise aggressive doctrines of judicial review of administrative statutory interpretation; and vice versa.
2. Ceteris paribus, the greater the number of effective vetogates, the more likely an apex court will devise aggressive doctrines of judicial review of administrative findings of fact; and vice versa.

III. A HISTORICAL OVERVIEW OF MODERN ANGLO-AMERICAN ADMINISTRATIVE COMMON LAW

Judicial review of administrative action in the United Kingdom and the United States has had much in common. Administrative law of both countries originated in the common law courts of early modern England, which in the seventeenth century began to reform

[58] Kenneth A. Shepsle, *Analyzing Politics: Rationality, Behavior, and Institutions* 431–32 (Norton 2d ed 2010).

their writs of certiorari, mandamus, and prohibition with a view to controlling official acts.[59] Until the twentieth century, English and American courts also shared similar approaches to questions of law and fact.[60] In England it was considered axiomatic that on questions of fact the administrative authority "is the master in its own house."[61] The province of the courts is rather to determine questions of law.[62] Similarly, federal courts in the United States once gave little or no deference to statutory interpretation by agencies.[63] The Supreme Court's insistence that courts, not agencies, were entitled to discern the meaning of the law won congressional endorsement in the Administrative Procedure Act of 1946 (APA),[64] which codified over half a century of federal case law.[65] The APA authorizes judicial review on questions of law and, to a much lesser extent, questions of fact.[66] On questions of law §706 mandates that courts "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action"; by contrast, respecting questions of fact, §706(2)(A) requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The "arbitrary and capricious" standard came from the Supreme Court's

[59] See Stephen G. Breyer, et al, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 15–16 (Wolters Kluwer 7th ed 2011).

[60] H.W.R. Wade and Christopher F. Forsyth, *Administrative Law* 8 (Oxford 10th ed 2009).

[61] Id at 229.

[62] In *Secretary of State for Education and Science v Tameside MBC*, Lord Wilberforce opined: "If a judgment requires, before it can be made, the existence of some facts, then although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge." *Secretary of State for Education and Science v Tameside MBC*, [1977] AC 1014, 1037.

[63] Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Col L Rev 1120 (1987); Richard L. Pierce, *Reconciling* Chevron *and Stare Decisis*, 85 Geo L J 2225 (1997).

[64] Cass R. Sunstein, *Law and Administration after* Chevron, 90 Col L Rev 2080 (1990).

[65] McCubbins, et al, *Administrative Procedures as Instruments of Political Control* at 255 (cited in note 52).

[66] William N. Eskridge, *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L R 1461 (2008).

pre-APA, originally lenient, due process rulings,[67] in which agencies were not required to support their rulemaking with evidence, records, or statement of reasons.[68]

Similarly, throughout the twentieth century, judicial review of administrative action in both countries expanded roughly within the same time frame, though in different ways. Britain's involvement in the two World Wars ushered in a period of exceptionally strong executive government, corresponding to a period of judicial deference when the English courts followed Parliament in endorsing and supporting the Government's authority and power to tackle national emergencies.[69] Judicial review was at that time "little more than perfunctory."[70] This changed, however, in the 1960s, when administrative common law underwent a "revolution"[71] which "transformed [it] exponentially,"[72] unleashing a period of "unparalleled judicial creativity" during which "the range of bodies subject to judicial review [were] much widened."[73] This did not happen overnight, but the "innovative" jurisprudence of the Law Lords "set the tone for all that was to follow."[74] All the same, their prevailing approach was "a cautious one"[75] that followed the orthodox rules of statutory interpretation and showed a "general executive-mindedness";[76] for instance, avoiding intrusive or probing reviews (let alone nullifications) of delegated legislation.[77]

[67] Kevin Stack, *The Statutory Fiction of Judicial Review of Administrative Action in the United States*, in C.F. Forsyth, et al, eds, *Effective Judicial Review: A Cornerstone of Good Governance* 321 (Oxford 2010).

[68] Richard J. Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand L R 301 (1988).

[69] Carol Harlow and Richard Rawlings, *Law and Administration* 96 (Cambridge 3d ed 2009).

[70] Stanley A. de Smith, *Judicial Review of Administrative Action* 28 (Stevens 3d ed 1973).

[71] David Williams, *Law and Administrative Discretion*, 2 Ind J Global Legal Stud 192 (1994).

[72] Michael Supperstone and Lynne Knapman, *Administrative Court Practice* 1 (Oxford 2008).

[73] Christopher F. Forsyth and Linda Whittle, *Judicial Creativity and Judicial Legitimacy in Administrative Law*, 8 Canterbury L Rev 453 (2002).

[74] Michael J. Beloff, *The End of the Twentieth Century: The House of Lords 1982–2000*, in Louis Blom-Cooper, et al, eds, *The Judicial House of Lords, 1876–2009* 231 (Oxford 2009).

[75] Dickson, *Judicial Activism in the House of Lords 1995–2007* at 367 (cited in note 7).

[76] Helen Fenwick, et al, *The Human Rights Act in Contemporary Context*, in H. Fenwick, et al, eds, *Judicial Reasoning under the UK Human Rights Act* 1 (Cambridge 2007).

[77] See, for instance, *Hoffman, La Roche and Co v Secretary of State for Trade*, [1975] AC 295.

In America, President Franklin D. Roosevelt's court-packing plan threatened the Supreme Court credibly enough to induce it to adopt a generally deferential stance to the legality of New Deal administrative programs. The availability of judicial review was consequently curtailed by the Court's conspicuous deference to administrative agencies.[78] In the twenty years after the enactment of the APA, the federal courts acquiesced in the growth of the post–New Deal administrative state,[79] by allowing the nondelegation doctrine to fall into obscurity.[80] Yet administrative common law has made a remarkable comeback since the late 1960s, when the courts began to impose more stringent legal and procedural requirements on agency decision making.[81] Today, the most important administrative law principles created or recognized by the US Supreme Court are not derived from the APA;[82] it is hard to argue, as we shall see, that the APA authorizes blockbuster doctrines such as hard look review.[83] However, compared to the Law Lords, the Supreme Court has generally respected congressional preclusions of judicial review,[84] except in constitutional cases.[85]

Judicial review of administrative action in both the United Kingdom and the United States appears to have sprung up in tandem with the growth of the administrative state. In the words of former Justice Sandra Day O'Connor, the mushrooming of the administrative state in the two countries has "meant that more and more of the goods and services on which people depend are made available through administrative proceedings of one type or another."[86] The functions of the British state began to ramify after the Second World War, and, notwithstanding the deregulatory agenda of the Thatcher premiership in the 1980s, have continued to do so through the end of the twentieth century. Myriad agencies and nondepartmental public bodies have been created to pursue a gamut of public policy ends, vesting sweeping powers in administrators to implement countless

[78] Breyer, et al, *Administrative Law and Regulatory Policy* at 21 (cited in note 59).

[79] Id at 23.

[80] Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L J 79 (2009).

[81] Breyer, et al, *Administrative Law and Regulatory Policy* at 28 (cited in note 59).

[82] Stack, *The Statutory Fiction of Judicial Review of Administrative Action in the United States* at 317 (cited in note 67).

[83] Metzger, *Embracing Administrative Common Law* at 1301 (cited in note 13).

[84] See, for instance, *Block v Community Nutrition Inst*, 467 US 340 (1984).

[85] See, for instance, *Johnson v Robison*, 415 US 361 (1974).

[86] Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 Wm & Mary L Rev 643 (1986).

public (and even privatization) programs[87] that impact the everyday lives of citizens.[88] Resort to discretionary power has concurrently "exploded,"[89] and discontent with administrative procedures accumulated.[90] The proliferation of administrative authorities has triggered responses from Parliament, such as the "police-patrol" select committees set up in 1979 to superintend the work of the major civil service departments. Parliament and the courts have increasingly teamed up to control administrative powers.[91]

In the United States, the twentieth century had seen Congress creating cabinet departments, cabinet-level agencies, independent regulatory commissions, federal corporations, independent bodies within cabinet departments, and so forth, to carry out the laws it enacts.[92] An "activist" era in regulatory policy had emerged by the late 1960s or early 1970s,[93] as agencies expanded their range of action to include industrywide rate regulation, while administrative adjudication and rulemaking became increasingly the norm.[94] Notably, independent agencies outside the structure of the President's Cabinet multiplied.[95] Agencies resorted to informal notice-and-comment rulemaking with greater frequency, aggravating concerns that they might give inadequate consideration to the interests of all stakeholders.[96] Many believed they were no longer acting "in the public interest," due to "capture" by the very industries they were supposed to regulate.[97] Some courts, especially the DC Circuit, were deeply distrustful of the growth of regulation, and responded by developing the hard look doctrine, which demanded reasoned explanations and adequate

[87] See Horn, *The Political Economy of Public Administration* (cited in note 47).

[88] Matthew Flinders, *Mechanisms of Judicial Accountability in British Central Government*, 54 *Parliamentary Affairs* 54 (2001); Paul Craig, *Political Constitutionalism and the Judicial Role: A Response*, 9 Intl J Const L 112 (2011).

[89] Mark Elliott, *Beatson, Matthews, and Elliott's Administrative Law: Text and Materials* 113 (Oxford 4th ed 2011).

[90] Wade and Forsyth, *Administrative Law* at 13 (cited in note 60).

[91] Cane, *Administrative Law* at 410 (cited in note 55).

[92] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 83 Col L Rev 583–84 (1984).

[93] Mashaw, *Greed, Chaos, and Governance* at 21 (cited in note 1).

[94] Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 Chi Kent L Rev 1092 (1997).

[95] Martin Shapiro, *A Comparison of US and European Independent Agencies*, in Rose-Ackerman and Lindseth, eds, *Comparative Administrative Law* at 304 (cited in note 3).

[96] Bob Allen, *Rationalizing Hard Look Review after the Fact*, 122 Harv L Rev 1912 (2009).

[97] Maxwell L. Stearns and Todd J. Zywicki, *Public Choice Concepts and Applications in Law* 377 (Thomson Reuters 2009); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 Wash L Rev 438 (2009).

evidence from agencies under scrutiny.[98] Congress also proceeded to enact clearer guidelines for agencies to follow, ring-fencing them with detailed procedural requirements and deadlines.[99]

The Law Lords' expansion of the "width" of the applicability of administrative law together with their maintenance of, at best, a "shallow" judicial penetration cohere with the proposition that they were much more receptive to review of questions of law than of fact, whereas the Supreme Court's "narrow" and "deep" doctrines evidence the opposite. The problem for the next section, then, is to explain why the Law Lords have rested content with orthodoxy, while the Supreme Court's rulings maintain but a "tenuous connection" to the APA.[100]

IV. EXPLAINING DOCTRINAL ANTITHESIS

A. Vetogates and Judicial Review of Questions of Law in the United Kingdom

The United Kingdom is the paradigm low-*n* vetogates polity;[101] indeed, among liberal democracies, the Westminster model has the fewest vetogates and is capable of the most decisive action. Such a system, combining a parliamentary system with plurality voting and strong party discipline, tends to yield to the winning party disproportionate governing majorities in Parliament, ones, moreover, unconstrained by federalism, a codified constitution, supermajority voting rules, or judicial review of legislation.[102] In British constitutional theory, parliamentary sovereignty is an organic rule the importance of which could hardly be overstated. Leaving the complexities of membership of the European Union aside, there are formally only three vetogates in the United Kingdom: the House of Commons, the House of Lords, and the Monarch, but only one of them is *effective*, namely, the Commons. The Commons is "now virtually unchecked," the Lords having long ago lost their power to veto leg-

[98] Matthew J. Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 Geo L J 2599 (2002).

[99] Breyer, et al, *Administrative Law and Regulatory Policy* at 24 (cited in note 59).

[100] See Stack, *The Statutory Fiction of Judicial Review of Administrative Action in the United States* at 318 (cited in note 67).

[101] Iain McLean, *What's Wrong with the British Constitution?*, 89 (Oxford 2010).

[102] Francis Fukuyama, *Do Defective Institutions Explain the Development Gap between the United States and Latin America?*, in F. Fukuyama, ed, *Falling Behind: Explaining the Development Gap between Latin America and the United States* 194 (Oxford 2008).

islation, following the Parliamentary Acts of 1911 and 1949, while the Monarch's prerogatives have atrophied throughout the twentieth century.[103] Thus, the lower chamber has, in essence, retained the only effective veto in the polity.[104] Yet even this veto is a weak one, as the Commons majority governs through an inner circle known as "the Government," which has consolidated its political ascendancy over all other members of the Commons to such an extent that its will is tantamount to the will of Parliament for practical purposes.[105]

The Government, chaired by the Leader of the Party which holds most seats in the Commons who doubles as the Prime Minister, dominates agenda setting in Parliament.[106] While ordinary "backbench" members of Parliament (MPs) may submit bills, the Government "frontbench" originates nearly all legislative proposals that succeed. In each annual session of Parliament the Government adopts a program of legislation to give effect to policies collectively agreed ex ante, often corresponding to the governing party's election manifesto.[107] The Commons' vetogate is so weak that, in urgent cases, an ordinary public bill can be passed in a few days or even hours.[108] This is so even for constitutional reforms: on June 12, 2003, the Prime Minister's office announced in the midst of a Cabinet reshuffle that a "Supreme Court" would replace the Appellate Committee of the House of Lords as the United Kingdom's final court of appeal. No consultations were held, not even with the Law Lords. In merely three years, the United Kingdom had reformed an integral part of its entrenched constitutional structure, without any of the contentious

[103] Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 Oxford J Legal Stud 421 (2012).

[104] Gary W. Cox, *The Efficient Secret* 3 (Cambridge 1987).

[105] Save for those rather infrequent circumstances when an alienated faction of backbenchers combined with the opposition to obstruct the Government's agenda or bring down the Government with a resolution of no confidence. In theory, minority or coalition Governments open up more effective vetogates in the UK law-making system, but these are a rarity in Westminster, and generally do survive to make lasting impact. Between 1900 and 2010 the United Kingdom experienced a total of only eleven years of minority governments and thirteen years of coalition governments, with predominating interludes of majority governments in between. It is normally relatively easy to maintain the confidence of the House of Commons majority. See Anthony King, *Ministerial Autonomy in Britain*, in M. Laver and K.A. Shepsle, eds, *Cabinet Ministers and Parliamentary Government* 208 (Cambridge 1994).

[106] McCubbins, *Legislative Process and the Mirroring Principle* at 133 (cited in note 18).

[107] Colin Turpin and Adam Tomkins, *British Government and the Constitution* 459 (Cambridge 7th ed 2011).

[108] Id at 462.

public debates, controversies or conflicts that would have befallen other liberal democracies.[109]

Under this "elective dictatorship,"[110] legislation may be enacted by the "Queen in Parliament" (agreed by the Commons and the Lords with royal assent); by the House of Commons acting on the Parliamentary Acts of 1911 and 1949 (bypassing the House of Lords but with royal assent); or by the Government (as delegated legislation). Delegated legislation nowadays can be six times as long as the Acts of Parliament promulgated in the same year (for example, 2008),[111] but this by no means evidences the formation of any new vetogate, because, given the unity of legislature and executive, the choice of primary or delegated legislation as the vehicle of policy remains firmly in the hands of the Commons majority.[112] The Legislative and Regulatory Reform Act 2006 §1, for instance, popularly pilloried as the "abolition of Parliament bill,"[113] ceded to Government ministers "potentially very broad" powers to amend or repeal legislation by orders in council if perceived "burdens" arise.[114] Delegated legislation is a "non-problem":[115] the lack of public scrutiny has led to no system-wide dissatisfaction.[116] Consistent with the theory of vetogates, UK executive agencies, though numerous, have played little role in pronouncing authoritative interpretations of law or developing core policy.[117] In practice they are "satellites" of the Government.[118]

It was in this institutional climate that England's modern administrative law developed. The Law Lords preferred the supervisory model, in which administrative authorities must try to answer all questions of law correctly; in the event of disagreement, the courts' interpretation prevails.[119] Of course, in practice authorities must make sense of the law without knowing how the Law Lords will ulti-

[109] See Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 Fordham Urban L J 387 (2007).

[110] See Lord Hailsham, *The Dilemma of Democracy* (London 1978).

[111] Wade and Forsyth, *Administrative Law* at 733 (cited in note 60).

[112] Turpin and Tomkins, *British Government and the Constitution* at 468 (cited in note 107).

[113] Id at 129.

[114] Neil Parpworth, *Constitutional and Administrative Law* 199 (Oxford 2012).

[115] Michael Asimow, *Delegated Legislation: United States and United Kingdom*, 3 Oxford J Legal Stud 267 (1983).

[116] Verkuil, *Crosscurrents in Anglo-American Administrative Law* at 692 (cited in note 40).

[117] Wade and Forsyth, *Administrative Law* at 41 (cited in note 60).

[118] Cane, *An Introduction to Administrative Law* at 272 (cited in note 10).

[119] Mark Elliott and Robert Thomas, *Public Law* 474 (Oxford 2011).

mately decide.[120] The English doctrine on questions of law requires the administrative authorities to provide a "point estimate" of the "correct" legal answer they believe will be approved by the review court, instead of operating in the wide "policy space" typically afforded them on questions of fact. In one of their earliest landmark decisions of the twentieth century, *Padfield v Ministry of Agriculture, Fisheries and Food*,[121] the Law Lords asserted the judiciary's supremacy over all questions of law, that the "construction [of the policy and objects of an Act] is always a matter of law for the court." They reaffirmed this supremacy in *Re Racal Communication Ltd*,[122] holding that it is "a matter for courts of law to resolve in fulfillment of [administrative tribunals'] constitutional role as interpreters of the written law and expounders of the common law and rules of equity," and in *Council for the Civil Service Unions v Minister for the Civil Service*.[123]

Since then, the Law Lords have consistently upheld the fundamental principle that administrative authorities can use their powers only for the purposes for which they have been expressly or impliedly conferred.[124] *R v Hull University Visitor, ex parte Page*,[125] echoing the earlier judgment of *Anisminic v Foreign Compensation Commission*,[126] set out "the fundamental principle . . . that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully." The Law Lords' characterization of all errors of law as jurisdictional—as in Lord Irvine's lead judgment in *Boddington v British Transport Police*[127]—implies a "hard-edged" review whereby the court will not hesitate to substitute its view for that of the administrator.[128]

[120] Cane, *An Introduction to Administrative Law* at 181 (cited in note 10).

[121] *Padfield v Ministry of Agriculture, Fisheries and Food,* [1968] AC 997, 1030.

[122] *Re Racal Communication Ltd* [1981] AC 374, 382–83.

[123] Whether an administrative authority has correctly understood the law regulating its decision-making power "is par excellence a justiciable question to be decided . . . by . . . the judges, by whom the judicial power of the state is exercisable." *Council for the Civil Service Unions v Minister for the Civil Service,* [1985] AC 374, 410–11.

[124] *R v Tower Hamlets LBC, ex parte Chetnik Developments Ltd,* [1988] AC 858 872; *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC,* [1991] 1 AC 521, 597.

[125] *R v Hull University Visitor, ex parte Page*, [1993] AC 682, 701–02.

[126] *Anisminic v Foreign Compensation Commission,* [1969] 2 AC 147.

[127] "[A]ny misdirection in law would render the decision . . . a nullity." *Boddington v British Transport Police*, [1999] 2 AC 143, 154.

[128] Elliott, *Beatson, Matthews, and Elliott's Administrative Law* at 49 (cited in note 89).

In reality, of course, it is not possible for courts to convincingly pinpoint in every single instance one correct answer to questions of law arising from ambiguous statutory language. Lord Mustill in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport*[129] was forced to concede that the courts may override "only if the decision maker has adopted an unreasonable definition of the term when the statutory provision under consideration is extremely vague." *South Yorkshire Transport* may appear to herald the triumph of the American approach to review of questions of law in England.[130] But there are important differences between *South Yorkshire Transport* and the rule of deference in *Chevron*. Lord Irvine comments extrajudicially that *South Yorkshire Transport* did not undo the general rule that the courts retain final authority on all matters of statutory construction, save for the most exceptional circumstances.[131] A post–*South Yorkshire Transport* review court will still pass judgment on the meaning of an ambiguous statutory term even if the administrator has real expertise over the issue.[132] Consistent with the theory, *South Yorkshire Transport* has not attained anywhere near the paradigmatic status of *Chevron*, the Law Lords basing no doctrines on it for the next two decades. In *R v British Broadcasting Corporation (Appellants), ex parte Prolife Alliance (Respondents)*[133] the majority rejected any idea of deference in matters of law due to "its overtones of servility, or perhaps gracious concession." The "point estimate" approach to any question of law, that "[t]here is a right or a wrong answer" was upheld by the nascent UK Supreme Court in *R(A) v Croydon LBC*.[134]

That the British polity has only one effective vetogate means that House of Commons majorities are able to enact and repeal laws almost at will. As Parliament, they set forth fundamental principles in acts, and as the Government, they flesh out the details of these principles in delegated legislation. Despite the growth of the administrative state, majorities have felt little need to delegate sweeping statutory interpretative power to administrative agencies insulated

[129] *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport*, [1993] 1 WLR 23, 32. The "extremely vague" term at issue was "substantial part of the United Kingdom" contained in Section 64(3) of the Fair Trading Act 1973.

[130] Elliott, *Beatson, Matthews, and Elliott's Administrative Law* at 61 (cited in note 89).

[131] Lord Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System* 157 (Oxford 2003).

[132] Craig, *Judicial Review of Questions of Law* at 452 (cited in note 10).

[133] *R v British Broadcasting Corporation (Appellants), ex parte Prolife Alliance (Respondents)*, UKHL 23, at paras 75–76 (2003).

[134] *R(A) v Croydon LBC*, UKSC 8, at para 27 (2009).

from Parliament and Government. Even when this is done, the majority has little trouble reversing a rogue decision; hence agencies of rank below the cabinet normally wield no interpretive powers of long-term consequence. Compared to the United States, resolving questions of law is of far less importance in the United Kingdom than the resolving questions of fact, discretion, and policy. In line with the theses of Section II, the capacity of Commons majorities to resolve fundamental disagreements both before and after enactment, reducing administrative authorities to mere fact finders,[135] neither pressurized nor dissuaded the Law Lords to abandon their entrenched belief that "residual" statutory ambiguities may be efficiently resolved by the courts. Consequently, there is little need to concede their monopoly of questions of law.

B. Vetogates and Judicial Review of Questions of Law in the United States

The US law-making system, characterized by bicameralism and presentment of bills to the President, enshrines the principle of checks and balances, deliberately incorporating many vetogates. According to William Eskridge, at least nine vetogates allow a bill to be struck out without need of a majority vote against it: (1) the relevant House committee, (2) the House Rules Committee, (3) House floor consideration, (4) the relevant Senate committee, (5) unanimous consent agreement, (6) Senate filibuster, (7) House-Senate conference committee, (8) conference bill consideration by House and Senate, and (9) presentment to the President.[136] Not all of these vetogates have always been "effective"; for instance, the Textbook Congress of the mid-twentieth century habitually ratified committee decisions on the floor. With the advent in the 1970s of divided government and polarized parties,[137] however, committee decisions came increasingly under scrutiny and amendment by legislators off the relevant committee.[138] The multiplicity of vetogates subjected regulatory bills to fierce debate, and the final output, shaped by compromise between parties, regions, interest groups, and manipulation by committee chairmen, often bore little resemblance to the original proposal. Congress's capacity to legislate with precision waned in

[135] Craig, *Judicial Review of Questions of Law* at 463 (cited in note 10).

[136] Eskridge, *Vetogates and American Public Law* at 4 (cited in note 30).

[137] Id.

[138] Matthew D. McCubbins, et al, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo L J 720 (1992).

proportion to the number of vetogates.[139] The many economic, political and social problems of the United States could hardly be resolved in the teeth of so many effective vetogates without substantial authority being delegated to agencies to fill in the unresolved details[140] and adapt general terms to new circumstances.[141] Ultimately, broad delegation to the executive, as Justice Scalia reckons, is the "hallmark" of the modern administrative state.[142]

The Supreme Court's decision in *Chevron USA Inc v Natural Resources Defense Council*[143] is a kind of "counter-*Marbury*" for the administrative state,[144] and has become the single most cited decision in American administrative law.[145] Its central doctrine of judicial deference to agency interpretations of law has been universally endorsed by Congress, courts and agencies.[146] Justice Stevens set out the famous two-part test: "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . if the statute is silent or ambiguous with respect to the specific issue," a court, according to him, "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

After more than twenty years, *Chevron* remains "the undisputed starting point" for studying the distribution of authority between federal courts and agencies.[147] William Eskridge and John Ferejohn confirm empirically that since *Chevron* statutory interpretation by agencies have prevailed about 70 percent of the time before the Supreme Court.[148] The Court has, however, sought to impose some reg-

[139] David S. Rubenstein, *Relative Checks: Towards Optimal Control of Administrative Power*, 51 Wm & Mary L Rev 2175 (2010).

[140] Charles H. Koch, *Judicial Review of Administrative Discretion*, 54 Geo Wash L Rev 479 (1986).

[141] Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw U L Rev 1239 (2002); Eskridge, *Vetogates,* Chevron*, Preemption* at 1455 (cited in note 66).

[142] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 516 (1989).

[143] *Chevron USA Inc v Natural Resources Defense Council*, 467 US 837, 842–44 (1984).

[144] Sunstein, *Law and Administration after* Chevron at 2119 (cited in note 64).

[145] Stack, *The Statutory Fiction of Judicial Review of Administrative Action in the United States* at 319 (cited in note 67).

[146] Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* 175 (Oxford 2007).

[147] Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 188 (2006).

[148] William N. Eskridge and John Ferejohn, *A Republic of Statutes: The New American Constitution* 278 (Yale 2010).

ularity on the process (but not the end result) of agency statutory construction: in *United States v Mead Corporation*[149] it held that *Chevron* deference applies only to statutes whereby "Congress delegated authority to the agency generally to make rules carrying the force of law." The year before, it had decided in *Christensen v Harris*[150] that "interpretations such as those in opinion letters. . . lack of the force of law. . . " *Mead* sought to encourage resort to notice-and-comment by agencies in their process of de facto law making, yet without erecting new vetogates.[151] Nevertheless, informal agency statutory constructions will not automatically receive de novo review even after *Mead*, as the deferential rule in *Skidmore*[152] still prevails.

The *Chevron* rule was reinforced by *National Cable & Telecommunications Association v Brand X Internet Services*,[153] where the majority went a "step further than *Chevron*"[154] to require federal judges to subordinate their own prior interpretations of federal statutes to later agency decisions. In *Mayo Foundation for Medical Education and Research v United States*[155] the Court held that "agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." And in *Talk America, Inc v Michigan Bell Telephone Co*[156] the Court ruled that deference should normally be accorded to an agency's interpretation of its regulations "even in a legal brief."

The Supreme Court's framework for reviewing questions of law in administrative cases enables the Court to maintain "a workable relationship with Congress," in the extrajudicial words of Justice Breyer.[157] It grants agencies a "policy space" to make a range of technocratic and democratic judgments, without having to make a point

[149] *United States v Mead Corporation*, 533 US 218, 226–27 (2001).

[150] *Christensen v Harris*, 529 US 576, 587 (2000).

[151] Nathan Alexander Sales and Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U Ill L Rev 1497 (2009).

[152] Courts must take account of the expertise possessed by the agency and the persuasiveness of the agency interpretation in question. *Skidmore v Swift & Co*, 323 US 134, 139–40 (1944).

[153] *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967, 982 (2005).

[154] Robin Kundis Craig, *Agencies Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 Emory L J 18 (2011).

[155] *Mayo Foundation for Medical Education and Research v United States*, 131 S Ct 704, 711 (2011).

[156] *Talk America, Inc v Michigan Bell Telephone Co*, 131 S Ct 2254, 2268 (2011).

[157] Stephen G. Breyer, *Making Our Democracy Work: A Judge's View* 115 (Vintage 2010).

estimate of statutory meaning, as in England.[158] In brief, Congress's incapacity to control statutory construction on a grand scale has been explicitly recognized in the jurisprudence of the Court,[159] which on the one hand liberates agencies to update statutes in light of cutting-edge scientific knowledge,[160] without interference from judges, who as generalists have little experience in economic, scientific, or policy affairs,[161] and on the other, liberates judges to conserve scarce time and intellectual resources without expending enormous judicial capital on the determination of what skeletal statutes really "mean" or on the invention of robust justifications of administrative interpretive choices.[162] Congress sometimes delegates far-reaching powers to agencies with but minimal statutory specifications.[163] It would always be difficult and often impossible for reviewing courts to measure the exact extent to which agency interpretations deviate from open-ended or nonexistent statutory content, estimate the agency costs this imposes on Congress, then respond accordingly.

C. Vetogates and Judicial Review of Questions of Fact in the United Kingdom

In the United Kingdom, Parliament holds the Government to account mainly through scrutiny by select committees, questions on the floor, and investigation by the Parliamentary Commissioner for Administration. A minister who loses the confidence of the Commons through personal or departmental fault may be asked to resign and return to the backbenches.[164] The complexion of parliamentary watchdog bodies reflects the Commons as a whole;[165] for example, select committees and their chairs are typically dominated by the governing majority. Thus, when one says the Government is accountable to Parliament, one is really saying that one group of MPs belonging to the parliamentary majority and holding Government

[158] Yehonatan Givati and Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretation*, 40 J Legal Stud 86 (2011).

[159] Pierce, Chevron *and Its Aftermath* at 305 (cited in note 68).

[160] Eskridge and Ferejohn, *A Republic of Statutes* at 278 (cited in note 148).

[161] Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 Admin L Rev 754 (2006).

[162] Connor N. Raso and William N. Eskridge, Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 Col L Rev 1736 (2010).

[163] Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 Mich L Rev 1135 (2010).

[164] Andrew Le Sueur, *The Nature, Powers, and Accountability of Central Government*, in Feldman, ed, *Oxford Principles of English Law* at 191–92 (cited in note 2).

[165] Adam Tomkins, *Public Law* 162 (Oxford 2003).

office is accountable to another group of MPs belonging to the same majority but not holding Government office.[166]

The Commons majority has more capacity to monitor administrative behavior than the US Congress has, mainly through MPs serving as Government ministers.[167] The fate of the Financial Services Authority (FSA) amply evidences how decisively a majority can act to right administrative errors. The FSA was set up pursuant to the Financial Services and Markets Act 2000 as a regulatory agency independent of Parliament and Government, vested with impressive (by British standards) rulemaking and adjudicative powers to promote market confidence, protect consumers, and reduce financial crime. Because it derived its operating budget entirely from the firms it regulated, it was fiscally autonomous as well.[168] In the aftermath of the financial crisis of 2008–09, however, the FSA was faulted for failure to discharge its supervisory duties to contain the damage caused by the crisis. In 2010 the newly elected Conservative-Liberal Coalition Government vowed to abolish the FSA.[169] The Financial Services Act 2012 was swiftly enacted to that end, with effect as of April 2013.

UK Prime Ministers alone wield immense powers to reallocate responsibilities between departments, create new departments, and abolish or rebrand them; for instance, after the Home Office mishandled the deportation of foreign national prisoners in 2006, Prime Minister Blair summarily stripped the office of responsibility for the Prison Service, giving it to a new Ministry of Justice.[170] Ministers often interlope in the minutiae of nationalized industry and executive agencies' daily affairs,[171] a practice finally formally recognized by the Public Bodies Act 2011, which legitimizes Government ministers through delegated legislation to abolish, combine, and reallocate powers among a gamut of administrative authorities listed in five schedules.

[166] Id at 164. In 2008, the Joint Committee on Statutory Instruments, set up in 1973, scrutinized 1486 statutory instruments, and draw the special attention of each house to fifty-nine of them, 4 percent. The committee monitors departments to determine the action taken on instruments in relation to which the committee has drawn special attention. See Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 Oxford J Legal Stud 443 (2005).

[167] Verkuil, *Crosscurrents in Anglo-American Administrative Law* at 693 (cited in note 40).

[168] Jaime Arancibia, *Judicial Review of Commercial Regulation* 76 (Oxford 2011).

[169] Tony Prosser, *Regulation and Legitimacy*, in J. Jowell & D. Oliver, eds, *The Changing Constitution* 319–20 (Oxford 7th ed 2011).

[170] Elliott and Thomas, *Public Law* at 131 (cited in note 119).

[171] Cane, *An Introduction to Administrative Law* at 272 (cited in note 10).

Unsurprisingly, the increased readiness of the Law Lords since the 1960s to review questions of law has not been paralleled by a corresponding relaxation in their approach to questions of fact;[172] continuing to disallow review of administrative decisions solely on the basis of error in findings of fact.[173] In *R v Secretary of State for the Home Department, ex parte Khawaja*[174] Lord Wilberforce ruled that questions of fact may not be reviewed save for the relatively few instances where "questions of liberty and allegations of deception" are involved. A few years later, *R v Hillingdon LBC, ex parte Puhlhofer*[175] propounded a *Chevron*-like rule—not for questions of law, but for questions of fact. *R v Tower Hamlets LBC, ex parte Begum*[176] confirmed that questions of fact "can only be challenged on judicial review if it can be shown to be *Wednesbury* unreasonable."[177] Recently, in *R(A) v Croydon LBC*,[178] Justice Baroness Hale placed a heavy evidentiary burden on challengers of administrative decisions to demonstrate unreasonableness prima facie and, thereafter, a light one on the administrative authority to rebut its alleged unreasonableness at the hearing.[179]

The Law Lords further circumscribed the scope of reasonableness review across a number of policy domains not because the old approach was too deferential, but because it was not deferential enough. The more deferentiable included inter alia the allocation of central government funds to local authorities,[180] social and economic

[172] David Blundell, *Material Error of Fact—Where Are We Now?*, 9 Jud Rev 36 (2004).

[173] *R v Criminal Injuries Compensation Board, ex parte A*, [1999] 2 AC 330, 344–45.

[174] *R v Secretary of State for the Home Department, ex parte Khawaja,* [1984] AC 74, 105.

[175] "Where the existence or non-existence of a fact" is left up to the judgment of an administrative authority, and "involves a broad spectrum ranging from the obvious to the debatable to the just conceivable", the courts should not intervene unless the authority has been "acting perversely." *R v Hillingdon LBC, ex parte Puhlhofer*, [1986] AC 484, 518.

[176] *R v Tower Hamlets LBC, ex parte Begum*, [1993] AC 509, 617–18.

[177] Such a "*Wednesbury* unreasonable" administrative decision is one "which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." *Council for the Civil Service Unions v Minister for the Civil Service*, [1985] AC at 408.

[178] *R(A) v Croydon LBC* [2009], UKSC 8, para 26.

[179] Paul Daly, *Wednesbury's Reason and Structure*, 2011 Pub L 254 (2011).

[180] *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC,* [1991] 1 AC 521.

policy,[181] immigration,[182] and national security.[183] Although the Law Lords did abandon the orthodox position that it lay within an authority's competence to err even if a factual finding is wholly unsupported by evidence,[184] they insisted that the evidence need not be substantial.[185] To qualify as "evidence" in this sense, assertions of record merely have to be "consistent with the finding" and "not logically self-contradictory."[186]

The cumulative effect of these doctrines is for English courts to accept the breadth of discretion and autonomy vested in administrative and regulatory agencies.[187] Unlike their US counterpart, the British apex court has not demanded expertise-led administrative fact finding or policymaking.[188] Indeed, the issue of an administrative agency's expertise has been assumed away as a question for Parliament, not for courts. The doctrinal trajectories of the Law Lords on judicial review of questions of fact cohere with the positive theory of vetogates. The House of Commons can resolutely correct administrative failures on its own, even those stemming from inaccurate findings of fact and evidential analysis. A Commons majority can rely on Government ministers to sanction malfeasant administrators, and can acquire supplementary information to serve its interests from a plethora of monitoring devices—from "police patrols" to "fire alarms" and "fire extinguishers." Parliamentary demand for judicial review has consequently remained slight. And the UK Parliament can, and sometimes does, reverse the effects of court judgments in ways not replicable by Congress.[189] There was little demand or room for the Law Lords to devise activist doctrines of review of questions of fact. After all, the most serious problems of the day have been resolved by Parliament sooner or later.

[181] *R v Secretary of State for the Environment, ex parte Nottinghamshire CC*, [1986] AC 240.

[182] *R v Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514.

[183] *Secretary of State for the Home Department v Rehman*, [2001] 3 WLR 877.

[184] Christopher F. Forsyth and Emma Dring, *The Final Frontier: The Emergence of Material Error of Fact as a Ground for Judicial Review*, in Forsyth, et al, eds, *Effective Judicial Review* at 249 (cited in note 67).

[185] *Runa Begum v Tower Hamlets LBC*, [2003] 2 AC 430, para 99.

[186] *Mahon v Air New Zealand Ltd*, [1984] AC 808, 821.

[187] Prosser, *Regulation and Legitimacy* at 312–33 (cited in note 169).

[188] Catherine Donnelly, *Participation and Expertise: Judicial Attitudes in Comparative Perspective*, in Rose-Ackerman and Lindseth, eds, *Comparative Administrative Law* at 357 (cited in note 3).

[189] Iain McLean, *Rational Choice in British Politics: An Analysis of Rhetoric and Manipulation from Peel to Blair* 19 (Oxford 2001).

D. Vetogates and Judicial Review of Questions of Fact in the United States

Override of agency decisions, whether through rulemaking or adjudication, is constrained by vetogates inside and outside Congress, weakening the credibility of such a threat.[190] Consider the Congressional Review Act (CRA),[191] which purports to empower Congress to override any federal agency rule by a "resolution of disapproval" without need of modifying statutory language.[192] Such a resolution, however, like ordinary legislation, must pass both houses and be presented to the President, winning a two-thirds majority of Congress in case of a veto. Inevitably, Congress cannot do much to threaten agencies that dare to defy the CRA,[193] which has been invoked successfully only once, to revoke the Clinton ergonomics rule, as of 2012.[194] Of course, Congress may sanction an agency by less formal means such as limiting budgets, targeting specific programs through earmarks and riders, using informal signals and threats, and deploying other standard techniques of legislative oversight.[195] Congress has set up "police patrols" such as oversight committees to hold hearings to nudge agencies to "behave," and created "fire alarms" under the APA of 1946, the Freedom of Information Act of 1966,[196] and the Government in the Sunshine Act of 1976[197] to empower interest groups and constituencies to find out what agencies are doing, and make this information available to Congress.[198]

Partisan polarization in Congress has proliferated effective vetogates, which has in turn aggravated congressional fragmentation. The minority might agree with an agency's erratic decision and con-

[190] Linda R. Cohen and Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S Cal L Rev 434 (1996).

[191] 5 USC §§ 801–08 (2006).

[192] Rubenstein, *Relative Checks* at 2206 (cited in note 139).

[193] Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies' Noncompliance with the Congressional Review Act*, 62 Admin L Rev 911 (2010).

[194] Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv L Rev 1832 (2012).

[195] Jeffrey S. Hill and James E. Brazier, *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, 7 J L Econ & Org 390 (1991).

[196] 5 USC § 552.

[197] 5 USC § 552b.

[198] Daniel B. Rodriguez and Barry R. Weingast, *A Positive Political Theory of the Reformation of Administrative Law*, Research Symposium: 25 Years of Law and Positive Political Theory: Past, Present and the Future, Searle Center, Northwestern Law 16 (October 7–8, 2010).

nive to circumscribe congressional oversight, while the majority, who might have reversed it, is preoccupied with pressing constituent concerns and more salient policy issues of the day.[199] The policy preferences of oversight committees may be tilted toward special interests and fail to reflect the aggregate preferences of the majority, attenuating the effect of fire alarms pulled by constituents at large.[200] Interest in a given issue is apt to die on the committee system vine before gathering adequate support, thus undermining police patrol oversight as some agencies get disproportionately missed compared to others.[201]

The most powerful political weapon is the process of appointment and dismissal,[202] as seen in the actions taken by the UK Parliament and Prime Minister against perceived agency malfeasance. Unlike their British counterparts congressional majorities can exert little control over the executive apparatus, even during periods of unified government. All administrative agencies, executive or independent, have oversight relationships with the President, who is independently elected and does not hold office subject to Congress's "confidence."[203] What is more, President and Congress are frequently at loggerheads; divided government has been the norm for at least a generation.[204] Congress pressures the President on whom to appoint to executive posts so as to nudge administrative action in certain directions,[205] but presidents too increasingly put in place mechanisms designed to achieve more control over regulatory agencies, like Nixon's Quality of Life review group, Carter's regulatory analysis executive order, and Reagan's and Clinton's comprehensive review of agencies by the Office of Management and Budget, continued by George W. Bush and Obama.[206] On one hand, congressional review of agency rules has not sufficed to counteract the President's growing influence;[207] on the other, presidential oversight may undermine the readiness of Congress to monitor agencies, especially as

[199] Croston, *Congress and the Courts Close Their Eyes* at 910 (cited in note 193).

[200] Rubenstein, *Relative Checks* at 2209 (cited in note 139).

[201] Note, *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 Harv L Rev 616 (2007).

[202] Shepsle, *Analyzing Politics* at 429 (cited in note 58).

[203] Strauss, *The Place of Agencies in Government* at 583 (cited in note 92).

[204] Eskridge and Ferejohn, *A Republic of Statutes* at 280 (cited in note 148).

[205] Jack M. Beermann, *Congressional Administration*, 43 San Diego L Rev 68 (2006).

[206] Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review* at 36 (cited in note 80).

[207] Jack M. Beermann, *The Turn toward Congress in Administrative Law*, 89 B U L Rev 758 (2009).

electoral campaign incentives stampede most members of Congress toward shifting blame for policy failure onto the executive.[208]

Against this backdrop of congressional incapacity to exert "more than occasional oversight of independent agencies proceedings,"[209] the Supreme Court has affirmed and developed "more daring [and] active" doctrines of judicial review of fact-finding.[210] The Court has opted for an appellate model of judicial review, focusing on the substance of agency decisions,[211] as distinct from the Law Lords' supervisory model.[212] Agency fact finding in the United States is scrutinized under a "substantial evidence" standard.[213] The hard look doctrine authorizes courts to strike down agency action not well supported by the facts.[214] In *Citizens to Preserve Overton Park, Inc v Volpe*[215] the Supreme Court ruled that while "the ultimate standard of review is a narrow one," judicial inquiry into the fact-finding process is to be a "substantial . . . searching . . . careful . . . thorough . . . probing [and] in-depth review." Subsequently, the Court held that administrative findings of fact qualify for judicial deference only if they have a "substantial basis in fact"[216] and scientific determination.[217]

In *Motor Vehicle Manufacturers Association of the United States v State Farm Mutual Automobile Insurance Co*,[218] the Supreme Court revamped the APA's "arbitrary and capricious" standard; unlike *Wednesbury* review in the United Kingdom, hard look review in the United States requires internal, interdecisional, and intertemporal consistency in the agency's reasoning processes,[219] and obligates the agency to document its reasons for its decisions; compile evi-

[208] McCubbins, et al, *The Political Economy of Law* at 1702 (cited in note 19).

[209] Carl McGowan, *A Reply to Judicialization*, 2 Duke L J 224 (1986).

[210] Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 Intl Rev Law & Econ 369 (1993).

[211] Cane, *Administrative Law* at 29 (cited in note 55).

[212] Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Col L Rev 1002 (2011).

[213] David Zaring, *Reasonable Agencies*, 96 Va L Rev 136 (2010).

[214] Stack, *The Statutory Fiction of Judicial Review of Administrative Action in the United States* at 322 (cited in note 67).

[215] *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 415–20 (1971).

[216] *Federal Power Commission v Florida Power & Light Co*, 404 US 453 (1972).

[217] *Baltimore Gas & Electric Co v Natural Resources Defense Council, Inc*, 462 US 87 (1983).

[218] According to the Court, an agency is "arbitrary and capricious" if it has, among other things, "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Manufacturers Association of the United States v State Farm Mutual Automobile Insurance Co*, 463 US 29, 43 (1983).

[219] Pierce, et al, *Administrative Law and Process* at 125 (cited in note 48).

dence supporting its reasons; consider, analyze, and reject contrary evidence; and consider, analyze, and reject alternatives to its preferred policy based on the available evidence.[220] Hard look review has remained essentially stable over the two decades since *State Farm*,[221] as witness *Massachusetts v EPA*.[222] Although Justice Scalia's opinion in *FCC v Fox Television Stations, Inc*[223] might be read as a relaxation of the *State Farm* doctrine,[224] the Court regressed to the mean in *Judulang v Holder*.[225]

The multiplicity of effective vetogates in the American polity inflicts exponential oversight transaction costs on congressional majorities; attempts by Congress to overturn Supreme Court decisions have by the same token not always been credible either.[226] The resolution of questions of law and of fact in the United States often raises complex technical issues that courts are seldom equipped to deal with. In a specifically American context, however, the emphasis on reviewing questions of *fact* avoids the need to resolve large numbers of statutory ambiguities with far-reaching, long-term significance, and avoids impairing the workability of the law-making system. Such a framework may have impelled, if not also persuaded, the federal courts to devise doctrines of review that make them into imperfect surrogates of Congress. Hard look review does risk administrative costs, inefficiencies, delays, and ossification of rulemaking,[227] but it also serves as an ex post corrective and ex ante deterrent to biased or confused agency decisions made under the pressures of particularistic interest groups.[228] It increases the likelihood that

[220] Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 Duke L J 1819–20 (2012).

[221] Miles and Sunstein, *Do Judges Make Regulatory Policy?* at 764 (cited in note 15).

[222] *Massachusetts v EPA*, 549 US 497 (2007).

[223] Agencies "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one." *FCC v Fox Television Stations, Inc*, 129 S Ct 1800, 1811 (2009).

[224] Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review* at 10 (cited in note 80).

[225] Justice Kagan, reciting the familiar *State Farm* formula, affirmed that neither "repetition" nor "consistency" is a defense that justifies "arbitrary and capricious" administrative decisions. *Judulang v Holder*, 132 S Ct 476, 483–88 (2012).

[226] Matthew D. McCubbins, et al, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75(2) Va L Rev 445 (1989).

[227] Allen, *Rationalizing Hard Look Review after the Fact* at 1929 (cited in note 96).

[228] Miles and Sunstein, *Do Judges Make Regulatory Policy?* at 809 (cited in note 15).

agencies' choices will mirror the policy preferences of the overall polity, without need of additional political oversight.[229] Congress appears to have recognized the availability of judicial review as a prerequisite for transferring rulemaking functions to independent agencies.[230]

V. DISCUSSION AND CONCLUSION

To substantiate their claim that "there appears to be more convergence between the US and the UK systems in term of reasonableness review than one would have predicted," Magill and Ortiz hold out "judicial culture" as a superior explanation for "the existence and shape of judicial review of administrative action."[231] By "judicial culture" they mean the considerations motivating judges as they develop administrative law, that is, to maintain a certain regularity and fairness in administrative decision making or to vindicate norms of professionalism. Without invoking "judicial culture," they claim, PPT analysis cannot explain convergences of judicial review in the teeth of divergence of constitutional design without losing "much of its edge" and becoming "indeterminate."[232] Although judicial culture might account for certain likenesses in UK and US administrative law (for example, the comparable concepts of "reasonableness" and "rationality" or the very readiness of courts to expand the purview of judicial review against the rise of the administrative state), it provides no satisfactory explanation of the two common law systems' antithetical approaches to questions of law and fact; for if the cultures of the English and American judiciaries are so kindred, then why, how, and when would they ever have diverged so substantially on matters so central to the common law of public administration?

Since the end of the Second World War, judicial review has expanded in proportion as Parliament and Congress have enacted more regulatory programs and delegated more discretion to administrators. In England the traditional doctrine that courts are probingly to review administrators' understandings of law yet respect their operational autonomy remains intact. In America, however,

[229] Matthew D. McCubbins and Daniel B. Rodriguez, *The Judiciary and the Role of Law*, in Weingast and Wittman, eds, *The Oxford Handbook of Political Economy* at 279 (cited in note 54).

[230] Arancibia, *Judicial Review of Commercial Regulation* at 80 (cited in note 168).

[231] Magill and Ortiz, *Comparative Positive Political Theory* at 143, 145 (cited in note 3).

[232] Id.

the *Chevron–State Farm* framework that emerged in the 1980s, as divided government and partisan polarization became consolidated into the political norm pressurizes courts to defer to agencies on matters of statutory interpretation, yet "nitpick" substantive conclusions on factual and evidential grounds.[233] This inversion of the Anglo-American administrative law of review of questions of law versus of fact is complete. This Article has broken new ground in using the conventional tools of positive political theory analysis to explain the institutional and strategic underpinnings of English administrative law, in addition to its American counterpart. It was hypothesized that the fewer the effective vetogates in a polity, the more judicial review will concentrate on questions of law and the less on questions of fact, and vice versa. It was also argued that the underlying causal mechanism that produces these results stems from legislators' aggregate preferences to control agency costs, on the one hand, and apex court judges' aggregate preferences to conserve judicial authority and resources, on the other.

Concretely put, the absence of multiple effective vetogates in the United Kingdom permitted House of Commons majorities to delegate to administrators the least possible de facto law-making authority. This has obliged the Law Lords to defer to Parliament's and the Government's primary role in oversight but not residual administrative understandings of law. By contrast, the proliferation of effective vetogates in the United States in the late twentieth century has driven Congress to delegate vast law-making powers to the administrative state, while undermining the efficacy of its oversight mechanisms. The doctrinal encoding of judicial deference to agency statutory interpretations, as heavily demanded by such a political system, helped to prevent the American law-making process from grinding to a halt, while the relative oversight vacuum left by divided government gridlock opened up avenues for aggressive judicial review of agency findings of fact.

The foregoing inquiry, however incomplete, is enough to support the proposition that the theory of vetogates, so integral to modern democratic constitutional design, has power to explain major currents in contemporary Anglo-American administrative law and how its doctrines, both activist and deferential, harden over time into seldom questioned heuristics of judicial decision making. It is undeniable that culturally embedded legal and moral principles provide judges with powerful motives and justifications for enhanced judicial intervention in administrative processes. But to attribute to a

[233] Keller, *Depoliticizing Judicial Review of Agency Rulemaking* at 452 (cited in note 97).

vaguely defined "judicial culture" precise doctrinal convergences and divergences is to introduce a tincture of self-fulfilling prophecy into social scientific inquiry. The development of antithetical administrative law doctrines in the United Kingdom and the United States was in no way predetermined by judicial culture. It is here where PPT, of which the incentive analyses have wider applicability across time and space,[234] is most productive.

[234] See Garoupa and Ginsburg, *Hybrid Judicial Career Structures: Reputation versus Legal Tradition* at 442 (cited in note 8).