Power-Conferring Principles and Authority

Joanne Murray

Faculty of Law, McGill University, Montreal

April 2023

A thesis submitted to McGill University in partial fulfillment of the requirements

of the degree of Doctorate of Civil Laws

Table of Contents

Thesis Abstract

It is often assumed that judicial review's principal aim is to control or constrain exercises of discretionary powers. This thesis aims to challenge that assumption. I argue that the doctrines of judicial review, particularly reasonableness in public law and loyalty in trusts law, are jurisgenerative in nature – they produce legal authority rather than constrain parliamentary authorizations or trust deeds. I do so principally by arguing that reasonableness and loyalty are the ultimate power-conferring principles, or *grundnorms,* of administrative and trusts law that make possible other-regarding power. Judicial review's nature and legitimacy thus rest less upon its regulative character and more upon its jurisgenerative character – on its ability to create the conditions of legal validity. Understanding judicial review as jurisgenerative helps us answer the question posed by judicial review skeptics: why should unelected judges be able to impose common law constraints upon the actions of public decision-makers duly authorized by Parliament? It does so by demonstrating that the authority, as opposed to authorization, of public decision-makers, stems from following the norms that produce, as opposed to constrain, an administrative power. This importantly changes the relationship between Parliament, the executive, and the courts from one of "competing supremacies" to one of an institutional collaboration that constitutes the administrative state.

Résumé

Il est souvent présumé que l'objectif principal du contrôle juridictionnel est de contrôler ou de limiter l'exercice des pouvoirs discrétionnaires. Cette thèse vise à remettre en question cette hypothèse. Je soutiens que les doctrines du contrôle judiciaire, en particulier les doctrines de la décision raisonnable en droit public et la loyauté en droit des fiducies, sont de nature jurisgénérative – elles produisent une autorité juridique plutôt que de contraindre les autorisations parlementaires ou les actes de fiducie. Je le fais principalement en soutenant que la décision raisonnable et la loyauté sont les principes ultimes qui accordent du pouvoir, ou les *grundnorms*, du droit administratif et du droit des fiducies rendant possible le pouvoir sur autrui. La nature et la légitimité du contrôle judiciaire reposent donc moins sur son caractère régulateur que sur son caractère jurisgénérateur – sur sa capacité à créer les conditions de la validité juridique. Comprendre le contrôle judiciaire en tant que générateur de jurisprudence nous aide à répondre à la question posée par les sceptiques du contrôle judiciaire : pourquoi des juges non élus devraient-ils être en mesure d'imposer des contraintes de *common law* aux actions des décideurs publics dûment autorisés par le Parlement ? En effet, cette approche démontre que l'autorité, par opposition à l'autorisation des décideurs publics, découle du respect des normes qui produisent, plutôt que de contraindre, un pouvoir administratif. Cela modifie de façon importante la relation entre le Parlement, l'exécutif et les tribunaux, qui passe d'une "suprématie concurrente" à une collaboration institutionnelle qui constitue l'État administratif.

List of Abbreviations

- CJ – Chief Justice
- CUPE – Canadian Union of Public Employees
- EU – European Union
- ECA – European Communities Act 1972
- FCC – Foreign Compensation Commission 1950 (UK)
- FCO – Foreign Compensation Order 1950 (UK)
- FOIA - Freedom of Information Act 2000 (UK)
- J. – Justice
- J.A. – Justice of Appeal
- NBLC – New Brunswick Liquor Corporation
- SCC – Supreme Court of Canada
- SJTA – Supervisory Jurisdiction over Trusts Administration
- SSHD – Secretary of State for the Home Department (UK)
- TEU – Treaty on European Union
- UK – United Kingdom of Great Britain and Northern Ireland
- USA – United States of America

Acknowledgments

It has been no easy feat to write this thesis. Its breadth and challenging topic begot many false starts and redrafts. I think back to when I started this thesis, and how young I was, and I now see the privilege that it was to mature as a scholar and a person throughout this DCL. Such a privilege was of course only possible thanks to the support and love of many people.

First to my supervisor, Prof. Evan Fox-Decent, thank you so much for being my mentor. I remember when I first moved to Montreal, not knowing a soul, I was anxious and scared about the journey I was about to embark upon. You told me that for the first few weeks, my biggest worries should be learning what brand of Canadian toothpaste I like and learning the best places to dance in Montreal. That compassionate energy was the rock that kept me going in what otherwise would have been an overwhelming process. Thank you for always making yourself available to chat, at a moment's notice, and for providing consistent and last-minute feedback on numerous drafts. It was this supportive environment that enabled me to become confident in the more controversial aspects of my thesis. Your passion for administrative law imbued me with the energy to complete this thesis and carve my own voice in the field. Thank you so very much.

Second, I would like to thank my Supervisory Committee, Prof. Lionel Smith and Prof. Richard Janda for your challenging comments in our yearly tracking meetings. Richard, thank you for unearthing this thesis topic's assumptions; your words have been particularly challenging, and I am grateful that they enabled this thesis' message to become more subtle. Lionel, thank you for all our conversations about the nature of the supervisory jurisdiction and for all your emails directing me to important literature. I also would like to thank my past committee members, Prof. Hoi Kong and Prof. Mark Walters. Your contribution in past tracking meetings, emails, and discussions made this thesis what it is today.

This research was funded by a Vanier Canada Graduate Scholarship through the Social Sciences and Humanities Research Council, the McGill Faculty of Law, McGill University and Prof. Evan Fox-Decent's Social Sciences and Humanities Research Council Fund. I am grateful for the generous financial support provided by these persons and institutions. I presented ideas that are part of this dissertation at many a conference, including The Public Law Conference 2018 and 2022, the Modern Studies in the Law of Trusts and Wealth Management Conference 2021, and

McGill University's Graduate Law Conference 2020. The feedback and comments I received at these spaces were invaluable to the development of the thesis.

I would also like to thank McGill University, Faculty of Law's Graduate Office. From "Festive Receptions" on the fourth floor, to helping in all tasks administrative – the work of Bianca, Lina, Silvana, and Dalia has made the DCL process smooth and enjoyable. Thank you to the former Associate Deans Richard Gold and Andrea Bjorklund for your discretion, kindness and leadership in moments of crisis. A special thank you to the current Associate Dean, Darren Rosenblum, who came through for me to ensure this thesis got finished.

Thank you to Mariève Isabel at Graphos – the support of those writing "pomodoros" shone a light in dark times. Thank you also to the wellness advisors that facilitate the PhD Support Group. Without this space, I never would have developed the resilience and courage to fight to the end. This thesis was created and written in many a place. I am grateful to the offerings of space by McGill University – from the Faculty of Law to Thomson House, my second home. Thank you also to Stereo, the floor upon which I came up with the entire concept of this thesis. Thank you also to Thesez-Vous, where a large bulk of this thesis was written.

Thank you to my colleagues Bradley Por, Adrien Habermacher, Upasana Dasgupta, Atagun Kejanlioglu, Vishakha Wijenayake, Lucie Robathan, Emre Amasyali and Charlotte Gaudreau whose conversations about work, and beyond, made me feel respected as a scholar and loved as a friend. Thank you to my cherished friends Sal Snow, Brendan Cooke, Neeth Kunnath, Katie Elder, Lucia Racine, Alexandra Abelidis, and many more. Through the tears and fears this thesis brought, you stayed the truest of friends and always helped keep things in perspective. A special thank you to Brendan and Charlotte for translating my abstract into French.

To my family – my parents Helen and Chris, and my siblings Laura, Molly and Aprril, there are no words to describe the extent of my gratitude. When I left home all those years ago, no one expected me to stay for as long as I did. Our family whatsapp has been the centre of my universe in this all-consuming race to finish and I am so fortunate to have had your support throughout. Thank you to my cat, Bingley, for sitting on my keyboard whilst I tried to work. Finally, to my fiancée Tof, I know that it cannot be easy to love a person who is in love with a thesis. Your support and the home we built have been the stability I needed during the turbulent process that is a PhD. Words fail me – thank you.

Chapter One

1. Introduction

1.1. Prologue

It is often assumed that the principal aim of judicial review is to control or constrain the exercise of discretionary powers. Such an assumption brings the legitimacy of judicial review into question as it is unclear why unelected judges can impose duties, such as the duty of reasonableness or the duty of fairness, upon democratically authorized bodies. On this understanding, courts and Parliament compete for supremacy. This competition is heightened in cases where judges impose common law duties, despite the fact Parliament purports to confer absolute power to an administrative decision-maker. In fiduciary law, a similar assumption is sometimes made. Scholars are concerned to justify why the Courts of Equity are entitled to impose the onerous duty of loyalty – the duty to act on behalf of another – onto bilateral voluntary agreements that did not include such a requirement. This thesis aims to challenge the assumption that judicial review is constituted by constraints on administrative action and trustee action. Instead, I argue that the doctrines of judicial review, particularly reasonableness in public law and loyalty in trusts law, are jurisgenerative in nature – they produce legal authority that itself expresses the constitution of both administrative action and trustee action. I do so principally by arguing that reasonableness and loyalty are the ultimate power-conferring principles, or *grundnorms,* of administrative and trusts law that make possible administrative and trustee power.

This thesis examines administrative law and trusts law together. I take the view that administrative law and trusts law bear a strong family resemblance because they both involve the exercise of other-regarding or representative powers. By 'other-regarding' or 'representative power,' I mean the power to act on behalf of a group of identified beneficiaries or on behalf of a public purpose. The family resemblance between the two areas of law is evident when we analyze the doctrines that regulate trustee discretion and administrative discretion. Both trustees and administrators must, for instance, not act for improper purposes,[1] must consider relevant

[1] *Vatcher v Paull*, [1915] AC 372 at 378 [*Vatcher*] (trustees cannot act for improper purposes); *Pitt v Holt and Futter v Futter*, 2013 UKSC 26, [2013] 2 AC 108 [*Pitt v Holt (SC)*] (trustees cannot consider irrelevant

considerations and not consider irrelevant one's, must not delegate or fetter their discretion,[2] and must act reasonably[3] and fairly.[4] I argue that these doctrines drawn from both trust law and administrative law can be interpreted as "aspects"[5] of a single duty called the "duty of loyalty", the quintessential and central duty that defines what it means to hold power on behalf of another. The duty of loyalty is broadly a requirement that, when exercising her discretionary powers, the fiduciary is bound to act in the best interests of the beneficiary or an impersonal purpose.[6] Consequently, to know if the fiduciary did indeed act in the best interests of the beneficiary or for an impersonal purpose, we need to understand the fiduciary's motives – we need to know why a fiduciary acted to understand if the discretion was correctly exercised.[7]

Following the work of Prof. Evan Fox-Decent, I contend that the duty of reasonableness and the duty of fairness, the principal duties of administrative law, are the public law versions of the duty of loyalty.[8] Fox-Decent explains that the reason the duty of loyalty is converted into the duty of reasonableness and the duty of fairness is because the public administrator is not acting with single-minded loyalty towards one beneficiary, but is acting on behalf of multiple classes of beneficiaries.[9] As such, her loyalty is transformed into a requirement to be even-handed as between classes of beneficiaries (the duty of fairness) and into a requirement to reasonably consider the interests of each beneficiary (the duty of reasonableness).[10] Reasonableness also involves demonstrating a concern for the vulnerability of each beneficiary,[11] and involves explaining how the beneficiary's interests were solicitously considered in the administrator's reasons for her

considerations); *Padfield v Minister of Agriculture*, [1968] AC 997 [*Padfield*] (public decision-makers cannot act for improper purposes or for irrelevant considerations).

[2] *Turner v Corney*, (1841) 6 Beav 516 617 (trustees cannot delegate discretion); *Re Gibson's Settlement Trusts*, [1981] Ch 179 (fettering trustee discretion); *Delta Air Lines Inc v Lukács*, [2018] 1 SCR 6 (public decision-makers cannot fetter discretion); *Roncarelli v Duplessis*, [1959] SCR 121; [1959] 16 DLR (2d) 689 [*Roncarelli cited to DLR*] (public decision-makers cannot delegate discretion).

[3] *Roncarelli cited to DLR*, *supra* note 2 (duty of reasonableness in public law); *Gailey v Gordon*, [2002] 2 NZLR 192 (duty of reasonableness in trusts law).

[4] *Re Haasz*, (1959) 21 DLR (2d) 12, [1959] OWN 395 at 19 (trustees must be impartial); *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 (duty of fairness in public law).

[5] Lionel Smith, "Aspects of Loyalty" (July 27, 2017) online: SSRN: <ssrn.com/abstract=3009894> (date accessed 14 September 2022)

[6] P D Finn, *Fiduciary Obligations* (Sydney: Law Book Co., 1977) at para 15.

[7] *Lehtimäki and others v Cooper*, 2020 UKSC 33 at paras 187-189 [*Lehtimäki*]; Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) 130 LQR 608.

[8] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford; New York: Oxford University Press, 2011) at 34–37.

[9] *Ibid* at 34.

[10] *Ibid* at 35.

[11] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 135 [*Vavilov*].

decision.[12] On that latter requirement, of a "reasoned explanation,"[13] we can see a clear link between fiduciary law's concerns for the motives for which fiduciaries act and a concern for the reasons for which public administrator's act when making their decisions. A fiduciary interpretation of public law doctrine therefore explains why the current law, located in the landmark decision *Canada (Minister of Immigration and Citizenship) v Vavilov,*[14] requires that public decision-makers provide a reasoned explanation for their decisions.

Fiduciary government literature has blossomed over the past fifteen years and this thesis draws on and extends the findings of this literature.[15] However, this thesis does not primarily aim to justify a fiduciary interpretation of public powers. Instead, I start with the assumption that public authorities do not hold powers for their own benefit but hold their powers "on behalf of the public or a section of the public."[16] The primary goal of this thesis is instead to argue that loyalty is the central *grundnorm* or power-conferring principle that constitutes the trustee's and administrator's other-regarding authority.

To begin that argument, this thesis adopts a specific understanding of legal power and the norms that constitute and govern its exercise. The first point to note is that a legal power is different from a factual power. Unlike a factual power, where causation produces the effects we see in the world upon its exercise, legal powers require power-conferring principles to "intrinsically"[17] generate and produce legal effects that may be invisible to the naked eye. To take Raz's example

---

[12] *Ibid* at para 79.
[13] *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 31 [*Mason*].
[14] *Vavilov*, *supra* note 11.
[15] This is just a selection of the literature: Evan J Criddle et al, *Fiduciary Government* (Cambridge, United Kingdom: CUP, 2018); Fox-Decent, *supra* note 8; Evan Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford, New York: Oxford University Press, 2016); Ethan J Leib, David L Ponet & Michael Serota, "A Fiduciary Theory of Judging" (2013) 101:3 California Law Review 699–753; David Ponet & Ethan Leib, "Fiduciary Law's Lessons for Deliberative Democracy" (2011) 91 BU L Rev 1249; Lorne Sossin, "Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law" (2003) 66 Saskatchewan L Rev 129–82; P D Finn, "The Forgotten 'Trust': The People and the State" in Malcolm Cope, ed, *Equity: issues and trends : the importance and pervasiveness of equitable doctrines and principles in modern private, commercial, and public law* (Sydney: Federation Press, 1995); Evan J Criddle, "Fiduciary Foundations of Administrative Law" (2006) 54:1 UCLA law review 117; Steven Cleveland, "Politicians as Fiduciaries: Public Law and Private Law When Altering the Date of an Election." 77:4 Washington and Lee Law Review 1463; Theodore Rave, "Politicians as Fiduciaries" 126 Harv L Rev 671; John Barratt, "Public Trusts" (2006) 69:4 Mod L Rev 514–542; Matthew Conaglen, "Public-Private Intersection : Comparing Fiduciary Conflict Doctrine and Bias" (2008) PL 58; Raymond Davern, "Impeaching the Exercise of Trustees' Distributive Discretions: 'Wrong Grounds' and Procedural Unfairness" in David Hayton, ed, *Extending the Boundaries of Trusts and Similar Ring-fenced Funds* (New York: Kluwer Law International, 2002).
[16] *Equitable Life Assurance v Hyman*, 2002 1 AC 408 at para 18, [2000] 2 All ER 331, CA.
[17] Christopher Essert, "Legal Powers in Private Law" (2015) 21:3–4 Legal Theory 136 at 145.

of a legal power, the sale of a house may factually *cause* a host of consequences to occur, such as a change in residential tax liabilities, but to sign the relevant deed of transfer is what *results* in the normative effect of an actual sale.[18] A valid sale is thus intrinsically produced by following the relevant norms prescribed by law that make such effects possible, in this case, the signing of a deed. I call these relevant norms power-conferring principles, as opposed to power-conferring rules, because they do not confer the power of sale *per se*, but make the *exercise* of an authorized power of sale possible and valid in law. Given that the legal result, in this instance, the sale, is intrinsically brought about by following the relevant power-conferring principles, this means that it is not possible to hold a legal power without accompanying power-conferring principles. Power-conferring principles thus i) explain to the power-holder how to exercise the power, ii) validly and intrinsically bring about normative changes in the world, and iii) provide for the authority of the power-holder's action. These power-conferring principles also ensure that acts done within the relevant mandate enjoy legal validity. Crucially, power-conferring principles are internal to a power's very form, and thus cannot be removed without creating a merely factual as opposed to legal power.

As suggested above, in the administrative and trusts law context, the central duties are the duty of reasonableness and the duty of loyalty. These duties govern the way in which the decision-maker is bound to exercise her discretionary power such that to stand aloof to them guts the action of its authority and validity. It is my contention that we can therefore alternatively interpret loyalty and reasonableness as power-conferring principles that produce the legal effect of the power-holder having the authority to act or represent the beneficiary and legal subject. Thus, in the private law context, the authority to represent the beneficiary's interests is intrinsically produced by following the relevant power-conferring principle that makes such authority possible, in this case, by acting on behalf of the beneficiary. In other words, the power-conferring principle of loyalty informs the fiduciary that if she wishes to exercise her power validly, she must exercise her power on behalf of the beneficiary. In the public law context, a valid representation of the legal subject is intrinsically produced by the administrator where she acts in a reasonable and fair manner in the exercise of her powers.

[18] Joseph Raz, *Practical Reason and Norms* (Oxford, UK: Oxford University Press, 1999) at 102.

Given there is an intrinsic relationship between acting on behalf of the beneficiary or legal subject, and the valid exercise of authority, this means that we need to know *why* a decision was taken to know if the trustee or administrator validly exercised her powers. In other words, since part of the duty of loyalty is the requirement to act with pure motives, the provision of reasons (showing those pure motives) by the trustee or administrator becomes a prerequisite for the valid exercise of authority. We see this is indeed the case doctrinally. As suggested above, in administrative law, the courts have reiterated that the core of public authority rests upon a "process of public justification."[19] Similarly in fiduciary law the primary question to determining loyalty is one of motives – of whether the fiduciary genuinely believed she was acting in the best interests of the beneficiaries.[20]

When we interpret the doctrines of judicial review and trusts law as power-conferring principles, this explains why judges are entitled to impose reasonableness and loyalty as requirements that govern the exercise of administrative and trustee powers. This is because to remove these power-conferring principles by statute or trust deed makes it impossible for the trustee or public official to act in an other-regarding fashion and makes it impossible for her to bring about valid normative changes in the position of the beneficiary. It also risks damaging the power's legality, instead leaving the fiduciary or administrator with merely a factual power to rule by might as opposed to through law. Thus, the fact that power-conferring principles are necessary, internal components to a *legal* power explains why judges will review on grounds of reasonableness and loyalty, even if the trust deed or statute purports to confer an absolute power to administrators and fiduciaries. In choosing to review decisions on grounds of reasonableness or loyalty, judges are therefore effectively presupposing the power-conferring principles necessary for the administrator to produce other-regarding legal authority. This implies that judicial review is not a practice that primarily seeks to constrain or control exercises of public power, but one that confers the conditions necessary for public actors to exercise public authority. Thus, while Parliament distributes power to administrative actors, the doctrines developed and applied by the common law also confer power in the sense that they make the exercise of a power possible and

[19] *Vavilov*, *supra* note 11 at para 79.
[20] *Lehtimäki*, *supra* note 7 at paras 187–189.

valid in law. Judicial review is therefore a far more jurisgenerative practice than has hitherto been appreciated.

Understanding judicial review as jurisgenerative helps us answer the common question posed by judicial review skeptics: why should unelected judges be entitled to impose constraints upon the actions of decision-makers duly authorized by Parliament? The jurisgenerative approach answers this challenge by demonstrating that the authority, as opposed to authorization, of public decision-makers stems from following the laws that produce, as opposed to constrain, administrative power. This importantly changes the relationship between Parliament, the executive and the courts from one of "competing supremacies"[21] to one of an institutional collaboration that co-constitutes the administrative state.

1.2. Two Research Questions

This dissertation aims to answer two interconnected questions:

A) What is the basis of administrative authority?
B) Why is judicial review legitimate?

The reason these questions are interconnected is because judicial intervention often relies upon an administrative actor failing to exercise proper authority. Thus, one's understanding of the basis or nature of that authority will inform one's account of whether particular instances of judicial review are legitimate. Likewise, if we seek to understand why judges are entitled to impose common law norms on the actions of administrative agents, we also will need to explain the nature and basis of administrative authority.

At first glance, perhaps these research questions appear simple to answer. To take the first question, surely an administrative actor's authority is found in its authorizing mandate – its "home statute"[22] – which imprints the administrative actor with legal and democratic authority. This view was recently affirmed in the landmark decision *Canada (Minister of Immigration and Citizenship) v Vavilov*[23] where the Supreme Court of Canada (SCC) argued that the "central rationale" for

[21] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge; New York: Cambridge University Press, 2006).
[22] *Vavilov*, *supra* note 11 at para 25.
[23] *Vavilov*, *supra* note 11.

deferring to administrative decisions "has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute."[24] Here, the court suggests that administrative actors hold the authority to administer statutory schemes because Parliament delegated them the power to do so. However, later in the judgment the court suggests that merely pointing to a statutory authorization is not sufficient to demonstrate that an exercise of public authority is legitimate.[25] Instead, the law requires that most administrative actors provide a "reasoned explanation"[26] as to why she, for example, chose a particular interpretation of a statutory term. These reasoned explanations, the SCC found in *Vavilov,* must be coherent, intelligible and internally coherent in light of the relevant legal and factual constraints that bear upon the decision.[27] These relevant legal constraints include the governing statutory scheme,[28] past practices,[29] and responding to the submissions provided by parties,[30] particularly where parties provided an alternative interpretation of a statutory term.[31] As such, it cannot be the case that the basis of administrative authority is rooted purely in statutory delegation because it is also rooted in the *reasons* for which the decision-maker acts in particular cases.[32] *Vavilov's* conflicting account of administrative authority serves as a reminder that understanding the nature and basis of administrative authority is not obvious or straightforward. The conflicting accounts also suggest, in my view, that there may be an important distinction between authorizing an administrative body to act via a process of delegation, and the reasonable exercise of authority.

The question regarding the legitimacy of judicial review is perhaps more difficult still to answer. The debate concerning the legitimacy and foundations of judicial review arose from a path-breaking article published by Dawn Oliver[33] which argued that the traditional *ultra vires*

[24] *Ibid* at para 24.
[25] *Entertainment Software Association v Society of Composers*, 2020 Federal Court of Appeal, Stratas JA ("An administrative decision-maker that pays mere lip service to text, context and purpose rather than conducting a genuine analysis may well have its legislative interpretation quashed" at para 42) ; See also Roderick A Macdonald, "The Acoustics of Accountability—Towards Well-Tempered Tribunals"" in András Sajó, ed, *Judicial Integrity* (Boston: Brill | Nijhoff, 2004) 141 at 148.
[26] *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 53, Stratas JA [*Portnov*].
[27] *Vavilov, supra* note 11 at paras 85 and 99.
[28] *Ibid* at paras 108–110.
[29] *Ibid* at paras 129–132.
[30] *Ibid* at paras 127–128.
[31] *RL c Ministère du Travail, de l'Emploi et de la Solidarité sociale,* 2021 QCCS 3784 at para 76 [*Ministère du Travail*].
[32] *Vavilov, supra* note 11 at para 14.
[33] Dawn Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review?" (1987) PL 543.

model of judicial review was flawed. The traditional *ultra vires* theory claims that judicial review is legitimate because there are implied terms within statutes that allow courts to review the decisions made by administrative bodies.[34] Oliver's main criticism was that this view could not account for the judicial review of non-statutory powers,[35] such as prerogative powers, as these controls cannot be said to relate to the intention of Parliament. She thus took a common law constitutionalist approach, arguing that there are general principles of good administration embedded within the common law that regulate the use of powers.

This debate continued until the turn of the decade when the conversation stagnated.[36] However, the search for the foundations of judicial review remains animated by crucial questions that go to the heart of our constitutional order: why is it that an unelected body is entitled to review the decisions of administrators who have been delegated that power by Parliament, a democratically accountable body?[37] What is the legitimate scope and extension of judicial review of administrative action, if any? As McGarry notes, these questions are fundamental to understanding the relationships between the courts, Parliament, the executive, and the individuals subject to coercive public authority.[38]

1.3. Current Answers and Their Flaws

In this section, I analyze the problems with the literature's answers to the research questions posed in the previous section. Given that the research questions are interconnected, I consider both questions together from the perspective of comparing the two leading theories on judicial review – the *ultra vires* theory and the common law constitutionalist theory.

As summarised above, the *ultra vires* theory of judicial review rests the authority of administrative actors and the legitimacy of judicial review on Parliamentary authorization.[39] It is called the *ultra vires* theory because Parliament delegates a limited statutory scope, called a jurisdiction or *vires,* to administrators, and this jurisdictional boundary is controlled and policed

[34] See William Wade & Christopher Forsyth, *Administrative Law*, 10th ed (Oxford: Oxford University Press, 2009).
[35] Oliver, "Ultra Vires", *supra* note 33 at 546; See also Dawn Oliver, "Review of (Non-Statutory) Discretions" in Christopher Forsyth, ed, *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000).
[36] John McGarry, *Intention, Supremacy and the Theories of Judicial Review* (Oxford, UK: Routledge, 2017) at 1.
[37] Brian Dickson, "The Public Responsibilities of Lawyers" (1983) 13 Man LJ 175 at 185.
[38] McGarry, *Intention, supra* note 36 at 2.
[39] Wade & Forsyth, *Administrative Law* 10th ed., *supra* note 34 at 30–35.

by the court to protect the rule of law.[40] Judicial intervention is therefore warranted when a decision-maker acts *ultra vires* her jurisdiction, meaning she acted beyond her authorizing mandate. However, the decision-maker will be deemed *ultra vires* not merely where she flouts the exact statutory wording of her jurisdiction, but where she acts unreasonably, or unfairly, and other such like doctrines. These doctrines, developed and applied by the common law, are not terms located in the statute directly. As such, *ultra vires* theorists argue that these terms, developed by the common law, are implicitly intended by Parliament.[41] For instance, if a decision-maker has been delegated the power to revoke boxing licenses, but she does so without providing an oral hearing to the person whose license she is revoking, her decision may be found by the court to be unfair.[42] This procedural fairness requirement is not explicitly in the statute, but judges, it is said, are entitled to review on such grounds because Parliament does not intend for decisions to be taken unfairly.[43] The doctrines of judicial review are thus implicit terms within the statute that further limit the jurisdiction or *vires* held by the decision-maker.[44] Thus, in essence, traditional *ultra vires* theorists argue that judicial review is legitimate because there is an implied term within statutes that enable judges to review the decisions of administrators to check if they act within their assigned jurisdiction.[45] In other words, judges are entitled to review administrative decisions and develop and apply the doctrines of judicial review because implicitly, Parliament has enabled them to do so.

"Modified" *ultra vires* theorists argue that there is not an intention by Parliament to mandate judicial review *per se*, but more generally we can discern an intention that "Parliament legislates for a European liberal democracy."[46] The courts may therefore assume, through an "interpretive methodology,"[47] that without clear language to the contrary, "it was Parliament's

[40] *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 [*West Fraser Mills*] Côté J ("respect for legislative intent — a cornerstone of judicial review — requires that courts accurately police the boundaries of delegated power" at para 59).
[41] John McGarry, "Intention, Supremacy and Judicial Review" (2013) 1:2 The Theory and Practice of Legislation 255 at 259.
[42] *McInnes v Onslow Fane and another*, [1978] 3 All ER 211.
[43] Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55:01 CLJ 122 at 127.
[44] *R v Hull University Visitor, ex parte Page*, [1993] AC 682, HL at 701, Lord Browne-Wilkinson [*Page*].
[45] Wade & Forsyth, *Administrative Law* 10th ed., *supra* note 34 at 31.
[46] *R v Secretary of State for the Home Department, ex parte Pierson*, [1998] AC 539 at 587 [*Pierson*].
[47] Mark Elliott, "Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" in Forsyth, *Judicial Review*, *supra* note 35 at 103

intention to legislate in conformity with the rule of law principle."[48] Consequently, judges can intervene when decision-makers act contrary to the rule of law, meaning, they acted beyond their authorizing mandate. Both the traditional and modified versions of *ultra vires* are attractive because they harmonize the role of the judiciary with parliamentary sovereignty, ensuring judges, who have no democratic accountability to the public, could not be seen to contravene the will of Parliament.[49] The theory is also simple in that it allows the courts role to be neatly defined as the whistle blower of the legal boundaries created by Parliament, and fits neatly within a strict separation of powers model of state. In this separation of powers model, Parliament creates legislation, the executive administers government policy, and courts are the apex institution ultimately responsible for legal interpretation.

By contrast, "common law constitutionalism" argues that the legitimacy of the supervisory jurisdiction, and the common law doctrines that control government power, do not need to rest on Parliamentary intent. Instead, the supervisory jurisdiction is merely an inherent power held by the courts for centuries, and the doctrines of judicial review find their source in common law precedent. Within this common law precedent, there are fundamental norms, principles, values or rights that regulate and enlighten statutory interpretation.[50] These principles and values develop incrementally, such that they represent accepted ideals of "human flourishing"[51] or the "common good"[52] within the community, and judges are therefore justified in relying on them.[53] These principles act as "constraints on arbitrary power"[54] in order to "protect individuals from arbitrary action by the state."[55] The legitimacy of review thus rests on ensuring the government acts according to the principle of legality and restricting the removal of individual rights.[56] Some common law constitutionalists, like modified *ultra vires* theorists, argue that these principles and the doctrines of judicial review act as interpretive presumptions that can be derogated from by

[48] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001) at 110.
[49] Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115:6 Yale LJ 1346.
[50] Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55:3 McGill LJ 511 at 513.
[51] T R S Allan, *Constitutional Justice : A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003) at 91.
[52] *Ibid*.
[53] Fox-Decent, "Democratizing", *supra* note 50 at 513.
[54] Allan, *Constitutional Justice*, *supra* note 51 at 32.
[55] *Ibid* at 2.
[56] Se-Shauna Wheatle, "Common Law Constitutionalism Through Methodology" (2019) 65:2 McGill LJ 341 at 350.

statute,[57] so long as the intention of Parliament is "crystal clear."[58] Others, such as David Dyzenhaus take the argument to a more radical conclusion and contend that the principles of legality, primarily reasonableness and fairness, are inherent to the very concept of law.[59] As such, the more Parliament chooses to enact statutes that derogate from the rule of law, the more the concept of rule by law is also at stake.[60] Common law constitutionalism is attractive because it contends that the doctrines of judicial review are common law creations, rather than implied statutory terms. It also explains why those principles cannot be removed by statute, more easily justifying cases where judges review for fairness or reasonableness despite an explicit statutory disposition removing the right to judicial review.[61]

Scholars have taken a wide range of approaches to criticizing these justifications, which broadly can be grouped into four categories: the problem of competing supremacies, indeterminacy, the insufficient explanation of administrative authority, and assuming the court's role is to constrain parliamentary authorizations and the actions of administrators. The strength of these critiques shows the necessity for an alternative theory.

1.3.1. Competing Supremacies

The first issue with *ultra vires* and common law constitutionalism is that both presuppose a formal separation of powers model of state based on "competing supremacies."[62] This is perhaps a natural consequence of the Constitution resting upon Albert Venn Dicey's competing constitutional pillars – the rule of law[63] and parliamentary sovereignty.[64] As such, the rule of law and parliamentary sovereignty end up in tension with one another. *Ultra vires* theorists implicitly argue that parliamentary sovereignty comes prior to the rule of law (for it is Parliament who sets the boundaries that the rule of law requires be policed) and common law constitutionalists

[57] David Dyzenhaus, "Formalism's Hollow Victory" (2002) 4 NZ L Rev 525 at 538, discussing; Paul Craig, "Formal and Substantive Conceptions of the Rule of Law" (1997) PL 467.
[58] *R (Jackson) v Attorney General*, [2006] 1 AC 26 at para 159.
[59] Dyzenhaus, "Formalism", *supra* note 57; Dyzenhaus, *supra* note 21.
[60] Dyzenhaus, *Constitution of Law*, *supra* note 21 at 6.
[61] For example, cases involving ouster clauses, such as *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 [*Anisminic*]; *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227 [*CUPE*]. These cases are discussed in Chapter Four, section 4.2.
[62] Dyzenhaus, *Constitution of Law*, *supra* note 21 at 7, citing; Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth & Peter Leyland, eds, *Public Law in a Multi-Layered Constitution* (Bloomsbury Publishing, 2003) 311.
[63] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: LibertyClassics, 1982) at 434.
[64] *Ibid* at 3–4.

implicitly argue the rule of law is "logically prior" to parliamentary sovereignty (because Parliament is subject to some "higher law" that limits what it can or cannot do).[65] As Dyzenhaus points out, however, this Diceyan theory assumes each "pillar" has a distinct role in constitutional ordering – Parliament, as the sovereign, holds a "monopoly" on making law, and judges, as the caretakers of the rule of law, have a "monopoly" on interpreting law.[66] However, separating law-making from legal interpretation, and assigning Parliament and the courts respectively those roles, necessarily prevents the administration from obtaining any distinctive authority in its own right.[67] The administration does not have any authority in its own right because it is merely a shadow of Parliament's democratic mandate, and it does not have any authority to determine questions of law because that is the purview of courts.

Parliament and the courts' "competing supremacies" can be reconciled, however, if we view the judge's role as ensuring every action carried out by government is supported by the proper legal authority from Parliament.[68] In other words, the judge is on "safe ground' where she merely intervenes to safeguard parliamentary sovereignty.[69] She thereby also secures the bare rule of law principle that all administrative actors should have a jurisdiction under which they act.[70] The only real distinction between the *ultra vires* and common law constitutionalist approaches is *how* the administrator's jurisdiction should be interpreted by the courts, – via a originalist, literal interpretation of an intention of Parliament (*ultra vires*) or inclusive of legal principles that constrain the interpretative process conducted by the courts (common law constitutionalism). Either way, authority on both accounts thus remains primarily a question of jurisdiction. *Ultra vires* sees administrative authority as exhausted by plain statutory language, whereas common law constitutionalism sees administrative authority as exhausted by the statute interpreted alongside common law principles. Accordingly, both theories consider a decision 'arbitrary' either because the decision-maker acted beyond a jurisdictional boundary (however that boundary is interpreted) or because the statute itself is problematic in some way (e.g. it confers an unfettered authority to

[65]Sir John Laws, "Law and Democracy" (1995) PL 72 at 85.
[66] Dyzenhaus, "Formalism", *supra* note 57 at 526.
[67] Matthew Lewans, *Administrative Law and Judicial Deference* (2016) at 14; Harry W Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall LJ 1 at 7.
[68] Dyzenhaus, *Constitution of Law*, *supra* note 21 at 54–60; See also T R S Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford, UK: Oxford University Press, 2013) at 218.
[69] Wade & Forsyth, *Administrative Law* 10th ed., *supra* note 34 at 31.
[70] *Entick v Carrington*, (1765) 19 St Tr 1030.

the decision-maker). Authority is not necessarily put in jeopardy because the administrator insufficiently justified her decision to the legal subject.

For example, in the Canadian case about the constitutionality of the Greenhouse Gas Pollution Pricing Act,[71] (which will be enforced in provinces deemed to have an insufficient regime for curbing greenhouse gas emissions),[72] the statute delegated broad regulation and amendment powers to the Governor General. Côté J. saw the primary issue as being that the statutory purpose was too broad, and she argued the provision was thus an unconstitutional "Henry VIII" clause because it shielded the regulations from judicial and legislative oversight.[73] Her argument implicitly draws upon the rule of law idea that statutes ought to be clear, congruent and stable, but Côté J.'s defence of the rule of law ultimately rests on a formalist ideology. She essentially presupposes that the only relevant question to determining a decision-maker's authority is whether or not the *statute* failed to properly control the exercise of the power. Consequently, she was not interested in assessing the *reasons* given by the Governor General, unlike other judges on the bench, because for her the question of authority had to be formally addressed by the statute.

As suggested, a common law constitutionalist response to broad statutes is to claim that common law principles or fundamental rights place limits on the scope of the power. This view of the rule of law presupposes that principles and rights shrink the jurisdictional boundary, as it were, of the decision-maker. But this view squeezes out any need for deference to be given to the administrative decision-maker's reasons because such questions are not necessary to determining authority – only the statute, interpreted by the court alongside certain principles or rights, is relevant to determining authority. This has been fatal to the development of deference in English law. For instance, the UK Supreme Court in *Privacy International*, taking arguably a common law constitutionalist approach, found that the rule of law would be jeopardised if tribunal "local law" developed because it is "ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power."[74] This view precludes any deference to administrative decision-

[71] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Carbon Pricing*].
[72] Environment is a provincial issue, so the question was whether a federal pricing regime was covered by the power to legislate for peace, order and good government in the *Constitution Act* 1867 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s 91
[73] *Carbon Pricing*, *supra* note 71 at paras 274–278.
[74] *R (on the application of Privacy International) v Investigatory Powers Tribunal and others*, 2019 UKSC 22 at para 131 [*Privacy Intl*].

makers, and reviews all administrative decisions on a standard of correctness. The problem with correctness review, however, is that the courts impose from the top-down their own interpretation of the statute (even if that is inclusive of common law principles) and the reasons the decision-maker had for making a specific determination of law become irrelevant. The 'rule of law' that is being protected on a standard of correctness is merely an amalgam of legislative authorization checked by the courts. The 'rule of law', on this view, does not necessarily require administrators to justify their actions to legal subjects.

Correctness review inevitably runs up against the charge of judicial supremacism. For example, in the "black spider memos" case,[75] *R (Evans) v. Attorney General*, the UK Attorney General vetoed the Upper Tribunal's decision to release politically charged communications sent between Prince Charles and members of government to a journalist from *The Guardian*.[76] The Attorney General had been conferred this power to veto decisions of the Upper Tribunal by s 53(2) Freedom of Information Act 2000 (FOIA) if he had "reasonable grounds" to believe there was not a failure to release information.[77] However, Lord Neuberger found that the Attorney General could not use a veto to override the decision of the Upper Tribunal in this case because it would "cut across two constitutional principles which are also fundamental components of the rule of law."[78] The first was that judicial decisions "cannot be ignored by anyone"[79] while the second was that executive action is "reviewable by the court at the suit of an interested citizen."[80] To ensure that s 53(2) FOIA was not totally stripped of meaning, Lord Neuberger argued that a veto would only be reasonable if the Tribunal's decision had been "demonstrably flawed in fact or in law."[81] The decision was widely criticized by academics, and one holds sympathy for Lord Wilson's concerns that Lord Neuberger's judgment, "did not … interpret section 53 FOIA. [He] re-wrote it."[82] The result is, arguably, a top-down assertion of authority, albeit from judges as opposed to Parliament.[83]

---

[75] *R (Evans) v Attorney General*, [2015] UKSC 21 [*Evans*].
[76]The memos were eventually printed, "Read the Prince Charles Black Spider Memos," *The Guardian* (13 May 2015) online: <www.guardian.co.uk> [perma.cc/7TTJ-KXJP]
[77] *Freedom of Information Act 2000* (UK), s 53 (2)
[78] *Evans*, *supra* note 75 at para 52, Lord Neuberger (majority).
[79] *Ibid* at para 58.
[80] *Ibid* at para 52.
[81] *Ibid* at para 71. (Given that the Attorney General only had 20 days to issue a veto after the Upper Tribunal's determination, it would be a rare occurrence that the Attorney General could use his veto.).
[82] *Ibid* at para 168, Lord Wilson (minority).
[83] David Dyzenhaus, "The Rule of (Administrative) Law in International Law" (2005) 68:3 Law & Contemp Probs 127.

However, the top-down imposition of statutory interpretation is where we end up if we see administrative authority as stemming from a statute that needs to be interpreted 'just right' by the courts.

In my view, the problem is with the question common law constitutionalists are interested in asking. That question is: can the common law constrain or limit parliamentary sovereignty? However, arguing that the common law constrains or limits parliamentary sovereignty rests on the assumption that Parliament is the body that needs controlling because it is the *source* of the administrative agency's authority. This line of reasoning thus still rests on the positivist assumption that administrative authority needs to have its source in Parliamentary authorization. Similarly, where common law constitutionalist John Laws argues that statutes cannot confer unfettered powers to administrative decision-makers because Parliament itself is subject to a "higher law,"[84] this likewise rests on a positivist assumption that Parliamentary authority requires, and is sufficiently covered by, some form of external authorization. Consequently, common law constitutionalism, where it takes a top-down approach, rests on the unfortunate positivist assumption that the basis of authority rests upon *authorizations* from an *external* source – either a higher constitution or Parliament itself. This thesis will argue, however, that legal authority is generated from principles *internal* to a legal power's very form, and importantly, the reasons and justifications given for the decision.

To conclude this section, a competitive model of the separation of powers assumes the legislature, judiciary and administration have specific roles in legal order. In the *ultra vires* model, the legislature is assumed to make law, the judiciary is assumed to interpret it, and the administration is assumed to merely execute policy without engaging in law and legal interpretation. Consequently, it may be better to eschew the strictness of those roles and accept, for instance, that administrators engage in legal interpretation and that judges will be required to administer in so far as they are able to review the 'merits' of decisions. It also may be better to reframe the court's role as one that works in partnership with Parliament and the administration, rather than one that competes against it. Top-down common law constitutionalism is also based on the positivist assumption that the basis of administrative authority needs to come from an

[84] Sir John Laws, "Illegality: The Problem of Jurisdiction" in Michael Supperstone & James Goudie, eds, *Judicial Review* (London: Butterworths, 1992) at 60–70.

external source, primarily a purposive interpretation of the statute and/or higher laws or principles. This squeezes out the need for deference and the need to assess the reasons for the decision because authority (and arbitrariness) stems from the statute as interpreted by the courts, not the merits of the decision. A better alternative may be to look at how authority is generated within the very form of legal power, as opposed to how it is delegated by an external body.

1.3.2. Indeterminate and Unpredictable

The second problem with the *ultra vires* theory is that it is indeterminate.[85] The theory does not offer a useful guide to the judiciary, or to administrators themselves, about the scope, intensity or application of judicial review.[86] For example, in the *Evans* case discussed in the previous section, three judges all agreed that there should be some test of "reasonableness" in reviewing the Attorney General's veto. Lord Mance states that the "reasonable grounds" criterion in section 53(2) FOIA demanded "a higher hurdle than mere rationality"[87] whereas Lord Wilson and Lord Hughes' tests were akin to strict rationality review (a less demanding standard). The *ultra vires* theory does not illuminate which intensity of "reasonableness" was the most appropriate.[88] The problem with the *ultra vires* theory is that it merely asserts the "conclusion of the legal analysis"[89] – the administrative body acted *ultra vires*. All the *ultra vires* theory adds is that this is because the decision-maker acted inconsistent with the intention of Parliament. But again, the theory offers no pointers of *when* something will be offside an intention of Parliament and thus considered *ultra vires*. Common law constitutionalism, so much as it relies upon an intention of Parliament to determine if the presumption of legality is overturned, is vulnerable to the same critique. As noted in *Evans* by Lord Hughes, Parliament had, linguistically at least, clearly communicated an intention to give the Attorney General the power to veto the Upper Tribunal.[90] Common law constitutionalism is also indeterminate insofar as it does not explain which extensions of judicial review are warranted. As Poole argues,

[85] Paul Craig, "Ultra Vires and the Foundations of Judicial Review" (1998) 57:1 CLJ 63–90 at 67.
[86] *Ibid* at 65–67.
[87] *Evans*, *supra* note 75 at para 129.
[88] Craig makes a similar argument with regards to the various tests for determining jurisdiction, Craig, "Ultra Vires", *supra* note 85 at 67.
[89] T R S Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61:1 Cambridge LJ 87 at 100.
[90] *Evans*, *supra* note 75 at para 155.

> "[W]e are not told why these particular values should outweigh (always? generally?) other, countervailing values, such as 'security' or national self-preservation. And even if they are to act as 'trumps', the concepts are elastic and malleable enough to allow for an almost infinite range of interpretive options, particularly in situations of putative crisis."[91]

The *Evans* case supports Poole's critique. Lord Neuberger's common law constitutionalist approach does not address the issue of why his two principles concerning the sanctity of judicial review were *more* important than the principle of parliamentary sovereignty.

Another point, as we will see in Chapter Four, is that judicial review on the *ultra vires* model is unpredictable. If the exercise of power is deemed to touch on a question of law or jurisdiction, then the judiciary is entitled to review wholesale. However, if a question is deemed extra-legal, such as if an administrative body is delegated a totally unfettered power, then the administration is considered "a law unto itself."[92] Hence, the problem with jurisdictional metaphors is they quite literally evoke images of a ring fence around law away from other concerns,[93] such as policy, convention or discretion. This forces a divide between the "extra-legal" and the "legal", opening up the possibility of "black holes"[94] of discretion, convention or policy that cannot be judicially reviewed. Even if one decides that this is acceptable, the *ultra vires* theory does not explain why this is justified.

Finally, another inherent inconsistency is that *ultra vires* theorists, such as Forsyth, openly acknowledge that the 'intention of Parliament' upon which the legitimacy of judicial review is based is a "fairytale",[95] but then critique judgments, such as Lord Neuberger's in *Evans,* that take a more liberal, or perhaps "fictional", approach to finding Parliament's intention as part of a statutory constructive exercise.[96] Thus, Forsyth's fictional approach to the theory of judicial review is combined with to a very literal understanding of an "intention of Parliament" in application.

---

[91] Thomas Poole, "Constitutional Exceptionalism and the Common Law" (2009) 7:2 International Journal of Constitutional Law 247 at 265.
[92] *Roncarelli cited to DLR, supra* note 2 at 715.
[93] Dyzenhaus, *Constitution of Law, supra* note 21 at 208–210.
[94] *Ibid* at 2.
[95] Forsyth, "Of Fig Leaves and Fairy Tales", *supra* note 43.
[96] See for instance Forsyth's critique of the *Evans* case, Richard Ekins and Christopher Forsyth, "Judging the Public Interest: The Rule of Law vs. The Rule of Courts," University of Cambridge Faculty of Law Research Paper No. 49/2016, online: <ssrn.com/abstract=2845448>

We would be better served by a comprehensive theory of judicial review that can determinately explain why certain common law doctrines develop. This thesis will show why reasonableness specifically is a necessary requirement for exercising administrative power. Particularly, it will show reasonableness review (which always starts by assessing the reasons offered for the decision) is the *only* standard of review that answers the relevant question of administrative authority. This is because only reasons form the core of what it means to hold authority on behalf of another or for a purpose. A power-conferring interpretation of judicial review principles, I will argue, is also able to show why some aspects of the reasonableness test, such as taking into account the submissions of the parties and the vulnerability of the parties, are necessary components to determining reasonableness. Consequently, I will show that the fiduciary power-conferring theory can offer a much more determinate theory of judicial review than *ultra vires* and common law constitutionalism.

1.3.3. The Constitution of Administrative Authority

As noted, on the one hand, *ultra vires* theorists believe that judges alone should have the authority to interpret the scope of an administrator's jurisdiction. But on the other hand, they believe that within that jurisdiction, administrative decision-makers operate as laws to themselves, and judges should therefore defer to the administrative decision and decline to review its exercise. Dyzenhaus helpfully labels this latter phenomenon "deference as submission." Deference as submission "requires of judges that they submit to the intention of the legislature, on a positivist understanding of intention."[97] By a positivist intention, Dyzenhaus means to say that there is only one "plain-fact" meaning of a statute that is for judges to find.[98] Thus, where a statute provides a government minister with an unfettered power to, for instance, grant a burial licence then a court adopting an *ultra vires* model of judicial review may submissively defer to the decision, no matter how arbitrary because "it is inappropriate for the court to treat a statutorily conferred discretion with no express limitations or fetters as being somehow implicitly limited or fettered."[99] As noted

[97] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford, UK: Hart Publishing, 1997) at 286.
[98] David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" in Dieter Grimm, Alexandra Kemmerer & Christoph Möllers, eds, *Human Dignity in Context* (Bloomsbury Publishing, 2018) 239 at 250–255.
[99] *R (Plantagenet Alliance) v Secretary of State for Justice*, [2015] 3 All ER 261 at paras 21–22.

in the previous section, this is undesirable because it leaves pockets of discretion that are unreachable by judicial review.

In my view, moving away from deference as submission means jettisoning the idea that the legislature alone specifies and constitutes administrative authority. It is my contention that administrators themselves also constitute administrative discretion. The crucial point is that the "plain fact" view of legislative intent understands discretion as something *held* statically in an authorization delegated by Parliament, rather than something *exercised* temporally by administrators themselves and found in the reasons for which administrators' act. However, authorized mandates are not in practice fossilized to their "plain-fact" meaning because they are re-constructed upon their exercise by administrators. Administrators reconstruct statutes via an interpretative process,[100] to which the agency will be "applying *its particular insight*"[101] to the statutory scheme and "holds the interpretative upper hand."[102] Take, for example, L'Heureux-Dubé J.'s noteworthy minority decision in *Attorney General v Mossop.*[103] She argued the Human Rights Tribunal's inclusion of same-sex couples in their interpretation of "family status" was reasonable because the meaning of human rights codes are not "frozen" by those who drafted them.[104] In other words, the meaning and purpose of the human rights code was "incomplete" and became "transitive" in a given interpretative exercise by the decision-maker.[105] The question is therefore how this interpretative process is governed by law.

Under common law constitutionalism, this interpretative process is governed by constitutional principles and rights that further limit the jurisdiction held by the decision-maker. However, this view still does not explain how the *exercise* of interpretative authority is *legally effective*. In Canada, to exercise authority, the administrator must do more than be within the four corners of the statute, or even act within her jurisdiction as interpreted alongside common law principles.[106]

---

[100] Dyzenhaus, "Politics of Deference", *supra* note 97 at 303; Jennifer Marie Raso, *Administrative Justice: Guiding Caseworker Discretion* (SJD Thesis, Department of Law, University of Toronto, 2018) [unpublished] at 69.
[101] *Vavilov*, *supra* note 11 at para 121; *Primeau v Canada (Attorney General)*, 2021 FC 829 at para 55.
[102] *McLean v British Columbia (Securities Commission)*, [2013] 3 SCR 895 at para 40, cited with approval in; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 40 [*Canada Post*].
[103] *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554 [*Mossop*].
[104] *Ibid* at 621–622, L'Heureux-Dubé J.
[105] David Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law : Definitional Issues in Global Administrative Law. Part I" (2009) 41:2 Acta Juridica 3 at 24.
[106] *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 at paras 71–73 [*Salmonid*].

To exercise authority, she must act *reasonably,* meaning, she must provide a reasoned explanation *to the legal subject* as to why she took a certain interpretation of a statutory term or why she exercised her power in a particular way. The exercise of a power is, on this model, a thoroughly relational concept. It is the ongoing dialogue between the legal subject and administrator that serves as the basis of authority because "reasoned decision-making is the lynchpin of institutional legitimacy."[107] In other words, the administrator's claim to validity rests upon a "discursive justification"[108] to and with the legal subject. This jurisgenerative process cannot be merely explained by statutory authorization, which is by its nature a datable event within a particular social and temporal context, issuing as it does from the intentions of particular individuals in Parliament. Instead, this jurisgenerative and discursive process is made possible by the common law requirement of reasonableness that provides for the legal effectiveness of administrative action.

Thus, moving away from deference as submission means abandoning the idea that it is the legislature alone who constitutes administrative authority and curates the design of statutory schemes. Instead, on the view that will be developed in this thesis, judges, administrators, and legal subjects also play a role in constituting and designing administrative authority. As argued above, administrative actors design their own statutory schemes because they articulate and determine the content of statutes through an interpretative process and their reasons given to legal subjects. I will also show in this thesis that legal subjects are involved in determining administrative authority insofar as the submissions they provide to administrators must be folded into the administrator's reasons for their decisions. However, the main contribution of this thesis is to argue that judges are also involved in designing the powers held by administrative state. This is because the doctrines of judicial review are, I argue, jurisgenerative power-conferring principles that create the conditions for the legitimate exercise of public authority. In other words, the common law, articulated by judges, presupposes reasonableness as the legal standard or principle that secures the validity of the interpretative process that occurs between administrative actors and legal subjects. The fact these common law power-conferring principles are jurisgenerative as well as regulative in nature suggests that the court, inasmuch as it finds and articulates these common law power-conferring principles, designs the proper constitution of public authority. Consequently, the work of courts, administrative agents, legal subjects as well as Parliament are

[107] *Vavilov*, *supra* note 11 at para 74.
[108] Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (John Wiley & Sons, 2013) at 74.

all relevant to constituting administrative authority. The idea of any "competing supremacies" between the political and judicial branches thus disappears as all branches of government, and the legal subject, are engaged in a jurisgenerative process of validity production.

1.3.4. Constraining Administrative Authority

The final critique of the *ultra vires* theory and common law constitutionalism is that both theories assume that judicial review's legitimacy rests upon its regulative nature – upon its ability to control or constrain government action. The idea that the primary goal of judicial review is to control or *stop* administrative action is why Carol Harlow and Richard Rawlings used a "red light" metaphor to explain the work of *ultra vires* theorists.[109] Red light theory, Harlow and Rawling's argue, understands administrative law as stopping, policing, controlling, or constraining the manner in which powers are exercised in order to protect individual liberty against a muscular state.[110] Red light theory thus prioritises the role of the courts and the importance of individual rights and argues the courts should intervene to stop the administration using discretionary powers which have the capacity to be arbitrary.[111] Harlow and Rawlings cite Wade as a classic example of a red-light theorist.[112] Wade argues administrative law is "the law relating to the *control of government powers*" and "the purpose of administrative law, therefore, is to keep the powers of government within their legal bounds."[113] Importantly, Wade is also one of the main *ultra vires* theorists of judicial review.[114]

Harlow and Rawlings contrast "red light" theory with "green light" theory.[115] Green light theory focuses on how administrative law facilitates government action through the delegation of statutory schemes. Green light theorists are less court-centric in their methodology, prioritising collective rights which they see as being exercised through Parliamentary delegations of power to a flourishing administrative state.[116] This does not mean there is a carte blanche for administrative

[109] Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge, UK: Cambridge University Press, 2009) at Chapter One; A Tomkins, "In Defence of the Political Constitution" (2002) 22:1 Oxford J Leg Stud 157 at 162, n 10.
[110] Harlow & Rawlings, *supra* note 109 at 23.
[111] Martin Loughlin, "The Functionalist Style in Public Law" (2005) 55:3 UTLJ 361 at 361.
[112] Harlow & Rawlings, *supra* note 109 at 23–25.
[113] William Wade & Christopher Forsyth, *Administrative Law*, 9th ed (Oxford: Oxford University Press, 2004) at 5.
[114] William Wade, *Administrative Law*, 1st ed (Oxford: Clarendon Press, 1961) at 40–42.
[115] Harlow & Rawlings, *supra* note 109 at 31–44.
[116] Loughlin, "Functionalist Style", *supra* note 111 at 361.

actors, but green light theorists prefer to focus on parliamentary or internal mechanisms of control.[117] Rod Macondald, for example, argues an administrator must be able to do more than point to his formal discretion to demonstrate authority because he must also adhere to the internal laws of the administrative agency: "the governance endeavour is inescapably normative and is subject to the discipline of its own internal law."[118]

However, as Nicholas Lambert suggests, green light theorists still establish a dichotomy between substantive government policy on the one hand, and law as a method of oversight and control on the other.[119] The only difference is that this method of control originates internally as opposed to via judicial review.[120] Furthermore, as with red light theorists, green light theorists still see judicial review's role to be constraining administrative action. Green light theorist's aim to highlight how *Parliament* facilitates the administrative state, they do not aim to change our perception about the nature of the supervisory jurisdiction. Indeed, it is because green light theorists see judges as policing and stopping administrators that they deeply distrust the judiciary.[121]

This presumption about what courts do upon judicial review leads most theorists to assume that the pertinent question they must answer is why unelected judges are able to constrain and stop actors who hold democratic mandates. However, we already questioned whether the democratic and legal authority of government actors purely stems from their delegated mandate.[122] If validity is understood to stem from public justification, the language of 'constraint' suddenly feels odd to apply to the doctrines developed by the supervisory jurisdiction. This is because judicial review is not imposing constraints on bodies that are naturally imbued with legitimacy by virtue of their parliamentary source. Instead, administrators are imbued with legitimate authority when they exercise their power reasonably. It is the reasonableness requirement, not the parliamentary source, that generates the legal authority held by the administrator. Accordingly, the common law

[117] Harlow & Rawlings, *supra* note 109 at 38.
[118] Roderick A Macdonald, "Call-Centre Government: For the Rule of Law, Press #" (2005) 55:3 UTLJ 449 at 452.
[119] Nicholas Lambert, "Beyond Judicial Review: Governance and Public Administration" in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montreal, Canada: MQUP, 2015) at 178.
[120] Harlow & Rawlings, *supra* note 109 at 37–40.
[121] Harry W. Arthurs, "Rethinking Administrative Law", *supra* note 67 at 11, n 65; Allan Hutchinson, "Mice Under a Chair: Democracy, Courts and the Administrative State" (1990) 40 UTLJ 374 at 375–376.
[122] *Vavilov*, *supra* note 11 at para 79.

requirement that the decision-maker must act reasonably does not constrain a pre-ordained authority held by an administrator by virtue of her authorizing mandate but *generates* or *makes possible* the production of administrative authority. Consequently, it is the practice of judicial review that makes it possible, through presupposing the power-conferring principle of reasonableness, for administrative bodies to *produce* legitimate, legal authority. In other words, this requirement of reasonableness makes the actions of administrators legally effective and in that sense reasonableness, or the practice of review, facilitates the legality of public schemes by "structuring" not simply "controlling" discretion.[123]

In contrast to *ultra vires* theorists, common law constitutionalists arguably do not understand judicial review as imposing constraints. This is because they tend to believe the duties of reasonableness or fairness are inherent to the concept of law. Reasonableness and fairness are thus not impositions by judges but natural consequences of legality. Despite this, common law constitutionalists still discuss these principles primarily in terms of their regulative capabilities as opposed to their jurisgenerative capabilities,[124] perhaps because they understand these norms as *duties*. However the duty-imposing view of legality implies that the rule of law is simply a reaction *to* governmental power, undermining the view that government must *established* and limited by law. On the jurisgenerative view I advance, reasonableness both prevents arbitrary power and generates or produces legal authority.[125]

Finally, the fact that fairness and reasonableness are usually conceived of as duties that constrain how the decision-maker is to act is linked to a post-Diceyan assumption about what it is courts generally do. We assume that judges and courts primarily adjudicate and develop rights and duties and do so in an adversarial manner. Such presumptions perhaps arise out of old rules that have been jettisoned over judicial review's development. One such rule, for instance, was the need for the legal subject to demonstrate a right rather than an interest to access review, which implies

[123] David Feldman, "Judicial Review: A Way of Controlling Government?" (1988) 66 Pub Admin 21 at 30.
[124] Dyzenhaus, "Formalism", *supra* note 57 at 550; Allan, *Constitutional Justice*, *supra* note 51 at 32 and 36; Craig, "Ultra Vires", *supra* note 85 at 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 70 [*Highwood*].
[125] Some common law constitutionalists do attempt to explain how law both constitutes and regulates public authority. For example, see Mark D Walters, "The Unwritten Constitution as a Legal Concept" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford, United Kingdom: Oxford University Press, 2016) 33 at 34 (he argues that public power does not originate in authorization but authority is instead constituted in a circular fashion through interpretivist common law reasoning).

courts purely adjudicate rights and thus can only intervene where there is a right at stake.[126] Given this rule, and others like them,[127] have been jettisoned, there is no need to assume that judicial review must continue to be a purely judicial and adversarial jurisdiction that only develops rights and duties. In order to move away from a competing supremacies model of the constitution, it is necessary to break down formalist assumptions. Although the SCC in *Vavilov* has accepted that administrators should legitimately be able to engage in legal interpretation and adjudication, scholars and courts are less inclined to consider whether judges can legitimately engage in administrative action and how the practice of judicial review confers and structures the terms of public authority. This thesis aims to fill that gap.

1.4. Original Contribution and Answers to the Research Questions

1.4.1 What is the Basis of Administrative Authority?

This thesis argues that power-conferring principles produce the legal authority held by public administrators and trustees. In particular, it argues that loyalty is a power-conferring principle that produces trustee authority and reasonableness is a power-conferring principle that produces administrative authority. This dissertation's first contribution to knowledge is thus its unique interpretation of reasonableness and loyalty as the power-conferring principles or *grundnorms* of administrative and fiduciary law.

Power-conferring principles, I argue in Chapter Two, are norms internal to the very form of a legal power that generate that power's legality and hence the authority held by the power-holder. I define a legal power as a facilitative legal capacity that enables one party to effect new kinds of purposive and valuable legal interactions with others. Oftentimes this means that a legal power will create new, non-causal legal results that may not be discernable factually or causatively. For instance, a power to make a contract may cause you to supply me with 1000 widgets, but it is the power-conferring norms underlying contract that produces the result of a legally binding contract and a transfer of property in a way that causation does not capture. Thus, the primary distinction

[126] For a discussion of these old rules, see Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008) at 151–156.
[127] For instance, the court used to only intervene where a decision-maker held quasi-judicial power. Such a view rests on the assumption that judges can only adjudicate powers that determine rights and duties.

between legal powers and factual powers is that factual powers operate by causation – they *cause* consequences to occur. Legal powers, by contrast, intrinsically and non-causally bring about a *result.*[128] By intrinsic I mean that the result and the action are correlative, and each take their meaning from the other such that to do the action *is* the result.[129] Thus, in the contract example, it is doing the actions prescribed by law to create a valid contract, e.g. offer and acceptance, that actually brings about, in a normative non-causal way, the result of a legally binding contract.

The form of a legal power thus dictates that there needs to be norms that (i) explain how to bring about legal results and (ii) intrinsically incite or produce those legal results. It is these norms that I term power-conferring principles because they are laws that qualify the application and meaning of an authorized legal power.

Power-conferring principles thus make possible new kinds of legal relationships that are not available factually without the presence of these principles. Let's consider what this means in the case of other-regarding power. The legal relation that loyalty and reasonableness, as power-conferring principles, make possible is the act of representation; it enables the power-holder to legally represent the legal or practical interests of another. Although as factually separate people we can only speak for ourselves, the doctrines of loyalty and reasonableness enables a fiduciary and administrator to legally act *on behalf of* an individual or on behalf of a purpose. As such, the representative is to "make present" another's legal personhood or a purpose in her actions as a representative.[130]

In the private fiduciary context specifically, loyalty is the central power-conferring principle that makes possible the valid exercise of fiduciary authority. This means there is an "intrinsic relation"[131] between acting loyally, meaning to further the interests of the beneficiaries, and a valid exercise of a fiduciary power. In other words, to further another's interests in the exercise of a fiduciary power intrinsically brings about a valid normative change in the position of the beneficiary. We therefore need to know if the fiduciary did indeed act in an other-regarding fashion in the exercise of her fiduciary powers to know if the exercise of the power was valid or not.

---

[128] Raz, *Practical Reason*, *supra* note 18 at 103; J E Penner, *Property Rights: A Re-Examination* (Oxford, New York: Oxford University Press, 2020) at 72.
[129] Essert, "Legal Powers", *supra* note 17 at 145.
[130] Paul B Miller, "Fiduciary Representation" in Evan J Criddle et al, eds, *Fiduciary Government* (Cambridge, United Kingdom ; Cambridge University Press, 2018) at 35.
[131] Essert, "Legal Powers", *supra* note 17 at 144.

Consequently, in the trusts law context or fiduciary law more generally, inquiring into the motives of the fiduciary becomes central to the question of whether or not the fiduciary acted validity. If we take reasonableness to be the public law version of loyalty, then there is likewise an intrinsic relation between the administrator acting with a due solicitude towards the legal subject and a valid exercise of a public power. Again, therefore, the reasons for which the decision-maker acts become central to assessing the proper exercise of authority. Thus, we see in the public law context, that a reviewing court is concerned with inquiring into the justifications put forward by the administrator and assessing their adequacy.

Loyalty and reasonableness hold an instrumental function in that, as power-conferring principles, they explain to the power-holder how she is to bring about legal effects. However, power-conferring principles also hold an important jurisgenerative quality in that legal validity itself is produced by these norms. By jurisgenerative in this context, I mean that power-conferring principles produce law's authority and do so independently of the usual channel of legal sources, in this case, outside of or distinct from parliamentary authorization or trust deed. But that does not mean to say that power-conferring principles are extra-legal. In fact, it is their jurisgenerative quality that explains how officials both make law and are subject to it.

To the extent that this thesis explains how power-conferring principles can generate legal validity, it speaks to the Kelsenian idea that law itself must be at the foundation of law. This conundrum of how law can be the foundation of law is often framed as the "Possibility Puzzle": if officials can only make law once they have been conferred a power to do so, how can officials make the laws that confer powers?[132]

Possible ways to answer the question include supposing state and sovereign are authorized by extra-legal means through either Declarations of Independence, fictional social contracts[133] or non-legal complex social facts, such as Hart's rule of recognition.[134] For instance, Martin Loughlin argues that the English and American revolutions are examples of extra-legal political power he calls "constituent power" that when exercised constitute law and constitutionalism.[135] One concern

[132] Scott Shapiro, *Legality* (Cambridge, Mass.: Harvard University Press, 2011) at Chapter 2.
[133] Fox-Decent, *Sovereignty's Promise, supra* note 8 at Prologue.
[134] Walters, "Unwritten Constitution", *supra* note 125 at 43.
[135] Martin Loughlin & Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008); Martin Loughlin, *Foundations of Public Law* (Oxford,: Oxford University Press, 2010).

with the extra-legality route is it renders law's creation outside of law itself and may incidentally entail Carl Schmitt's view that the sovereign is ultimately unbound by law and can suspend all law in a polity.[136] Furthermore, Schmitt thought that the sovereign's ability to establish the state of exception could not be constrained by law because norms are indeterminate. However, Schmitt's view is impoverished because, as Fox-Decent and Criddle note, his concept of law only involved general norms or commands.[137] Schmitt therefore ignored the role principles play in guiding exercises of discretion,[138] and more pertinently, ignored law's power-conferring function, assuming law is merely duty-imposing, and its role is to fix or constrain a presupposed political power.

For Kelsen, on the other hand, the state and law were "one and the same reality."[139] Unlike the constituent model of his peer Schmitt, Kelsen thought that law's foundation must come from within the legal system, as a non-posited presupposed basic norm that makes all other norms possible.[140] Kelsen viewed this presupposition as a logical necessity at the top of a chain of a closed system of norms, to explain how all norms within a system are authorized downward in more concrete forms.[141] Kelsen's theory is 'pure' and 'scientific' because the basic norm is not a social fact or social norm, but a *legal fact* that exists throughout all time and space.[142] To take Michael Green's example, the social act of creating the US Constitution activated a pre-existing, timeless law that authorized the Constitutional Convention's ratification of the US Constitution (and which likewise authorizes all other legal systems).[143] The basic norm is stretched over all socially recognised legal acts and in the end "justifies nothing but at the same time justifies everything"[144] because it constitutes almost any state as 'legal'. However, Kelsen's constitutionalist commitment

[136] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005) at 5; David Dyzenhaus, "The Left and the Question of Law" (2004) 17:01 Can JL & Jur 7.
[137] Evan J Criddle & Evan Fox-Decent, "Human Rights, Emergencies, and the Rule of Law" (2012) 34:1 Hum Rts Q 39 at 74.
[138] *Ibid*.
[139] Michel Troper, "The Structure of the Legal System and the Emergence of the State" in Baudouin Dupret, Julie Colemans & Max Travers, eds, *Legal Rules in Practice: In the Midst of Law's Life* (Routledge, 2020) at 46.
[140] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford University Press) at 105 and 150.
[141] Hans Kelsen, *Pure Theory of Law* (Berkley: University of California Press, 1967) at 237.
[142] Michael Green, "Marmour's Kelsen" in D A Jeremy Telman, ed, *Hans Kelsen in America - selective affinities and the mysteries of academic influence* 116 (Switzerland: Springer, 2016) 31 at 34.
[143] *Ibid*.
[144] Dyzenhaus, *Legality and Legitimacy*, *supra* note 140 at 159.

to the idea that, as Mark Walters puts it, there is a law that "regulates its own creation"[145] is useful because it prompts us to clarify what makes a power 'legal' in nature and how law can create law.

Kelsen's mistake, in my view, was that he believed authorization lay at the heart of legality. But while authorization is often a necessary condition, it does not sufficiently explain the nature of legal authority. Authorization refers to the delegative process by which an individual is conferred a power, and among other things, often explains its source, scope, purpose, and who is mandated to act under it and benefit from it.[146] However, authorization cannot be the end of the matter because no one has yet produced the legal results the power intended to facilitate. There is a temporal and conceptual gap between a mandate *held* and a mandate *exercised*, and the question is whether this gap is always permeated by law or whether law can be absent from it. The question is most salient when an authorization is so broad, like Kelsen's *grundnorm*, that *any* action taken, no matter how arbitrary or abhorrent, supposedly falls under its bracket of legality. The question is also salient when there is no authorization at all, simply a unilateral uptake of discretionary power, such as de facto fiduciary relationships or the prerogative powers of state.

However, as Chapter Two will demonstrate, we need not concede that broad authorizations are not regulated by law. The very form of a legal power is substantively limited by the purpose of a legal power as a facilitative law that creates new legal relationships and expands positive liberty. Moreover, the form of a power requires norms that (i) explain to the power-holder how she is to bring about a legal change, (ii) effect that legal change (iii) provide for its validity and produce the power-holders authority. Thus, while laws authorizing a power always comes from a higher or external source, such as a constitution, the jurisdiction created by this power is internally regulated by power-conferring principles. These constitutive principles determine how a power can be exercised, for instance, fairly and reasonably, and thereby constitute the exercise of that power as valid. The purpose and legal norms internal to a power's form fill possible gaps in legality left by authorizations because these immanent features constitute the power's nature and purpose, explain how the operation of discretion is governed by law, preclude the creation of truly unfettered powers, protect against arbitrariness by regulating the terms upon which power can be exercised, substantively limit the purposes for which power can be held and exercised, and therefore

[145] Walters, "Unwritten Constitution", *supra* note 125 at 45.
[146] See Evan Fox-Decent, "Trust and Authority" in Paul Miller & Matthew Harding, eds, *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, 2020) at 176.

constitute broad authorizations, as morally significant legal *authority.* To put the point in Kelsenian terms, social acts or exercises of political power are simultaneously rendered legal in character because of non-posited power-conferring norms that inherently regulate the creation of legal powers. Thus, even the sovereign's power to make law is subject to law because there is a jurisgenerative *grundnorm* internal to a legal power's very form (as opposed to external from it) that generates validity.

Thus, if law is inherently internal to legal power, then dubious arguments about political right or absolute prerogatives become a kind of category error, as they misconceive the nature of law. We do not need constituent power to explain constitutionalism, nor do we need logical presuppositions as sources of law. A better starting point is to consider how the form of a legal power operates on its own terms, rather than as a fragment of the authorization exercised above. Thus Kelsen's *grundnorm* is perhaps better characterised as an inherent aspect of a "*grund-rechtsmacht*" (a basic power). At the foundation of law lies a basic legal power to create the law and state,[147] and this basic power is necessarily internally regulated and generated by power-conferring principles that act as the ultimate '*grundnorms'*. As such, this basic power is not unlimited power but is inherently purposive (in the constitutional context, the power is held to bring about a certain legal result, namely, law and the state itself) and prescribed and generated by law (via power-conferring principles).

It is beyond the scope of this thesis to consider in much greater depth how a *grund-rechtsmacht* can generate legal order itself.[148] However, it is within the purview of this thesis to understand how the fiduciary power-conferring principle at the centre of administrative and trusts law is a kind of "*grundnorm*" that generates validity in administrative and trusts law. Unlike Kelsen's *grundnorm*, the fiduciary power-conferring principle is not an empty logical presupposition but is internal to the representative act. Legal validity arises without the need for explicit authorization through an interpretive process in which the fiduciary's reasons and justifications addressed to the legal subject form the very core of legal validity. This process is

[147] Stephen Perry, "Law and Obligation" (2005) 50 Am J Juris 266 at 266–276; Stephen Perry, "Where Have all the Powers Gone? : Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law" in Matthew D Adler, ed, *The Rule of Recognition and the US Constitution* (Oxford: Oxford University Press, 2009) 295 at 298.
[148] Although see Chapter Five, section 5.3

explained by the power-conferring interpretation of reasonableness and loyalty that forms the architecture of representative action and provides for its legal effectiveness.

Given that power-conferring principles are necessary components of a legal power, they will be provided for by the common law where the statutory or settlor authorizations neglect to do so. This explains therefore why the common law will always require that the actions of administrators are reasonable and that the actions of trustees are loyal, despite the unfettered or absolute nature of any authorizations. This thesis is therefore able to explain some of the difficult cases of administrative law that seemingly run up against apparently contrary Parliamentary intention.

1.4.2. Why is Judicial Review Legitimate?

The second way in which this thesis makes an original contribution to scholarship is it presents a new understanding of why judicial review is legitimate. Once we understand that administrative authority is generated by power-conferring principles developed and applied by the common law, then the court is no longer imposing constraints upon administrative action, or at least not in the same sense as is usually understood. Consequently, the *legitimacy* of judicial review no longer depends upon the affirmation that such constraints are justified to prevent arbitrary power. Instead, the practice of judicial review creates a framework of representative, public decision-making by deploying power-conferring principles that lend legal validity to the administration's claims to authority. Accordingly, interpreting the doctrines of judicial review as power-conferring principles indicates that the legitimacy of the supervisory jurisdiction rests upon its facilitative and jurisgenerative as opposed to regulative character. Consequently, the court is not competing for supremacy with Parliament nor is it working against the administration, since it is merely supplying the architecture to facilitate the legality of public regulatory schemes. Judicial review therefore aids, guides and assists in facilitating Parliament's statutory design schemes as well as aids administrators by securing the legal validity of their claims to authority.

This interpretation may appear to be in tension with the majority's reasoning in *Vavilov* that reasonableness review is justified because it respects Parliament's "institutional design choice"[149] to delegate certain decision-making matters to regulatory bodies. The jurisgenerative interpretation

[149] *Vavilov*, *supra* note 11 at para 24.

of the doctrine appears in tension with the SCC's reasoning for two reasons. First, arguably the *court*, not simply Parliament, is engaged in an act of institutional design by deploying the common law power-conferring principles that are intrinsic to representative action. This designs the power held by the administrative decision-maker as other-regarding in nature, and thus constitutes the administrative state as a particular kind of institution, namely, as one held in trust on behalf of the public. Second, in contrast to the majority's findings that deference is justifiable because it respects Parliament's design choices, deference on the jurisgenerative model is justifiable because it is the only standard that answers the relevant question of legitimacy and validity –whether exercises of power are truly taken in the name of those they represent. However, the view presented in this thesis could be interpreted as merely taking the majority's argument to a further conclusion – that judicial review does not merely respect Parliament's institutional design choices, but actively collaborates with Parliament and the administration to facilitate those choices.

To support the argument that the court facilitates administrative power, I draw comparisons with the way in which the supervisory jurisdiction manifests in the Law of Trusts. As I will argue in Chapter Three, the supervisory jurisdiction over trusts administration (SJTA), unlike other areas of private law, is not enlivened due to breaches of duty. The SJTA is in fact an administrative jurisdiction that intervenes to aid and facilitate the execution of trusts and secures the integrity of trusts administration.[150] For example, the court can remove and replace trustees, advise or bless momentous trustee decisions, and authorise and oversee the provision of information to beneficiaries and facilitate an account of the trust.[151] These more forward-facing roles that the court plays are reminiscent of the "fire-watching" role of the Ombudsmen or other internal agency oversights preferred by the green light theorists of judicial review.[152] What is interesting, however, is that this role is performed by a court as part of its supervisory function. The purpose of this supervisory jurisdiction is not to correct a breach of duty but is to restore the good administration of the trust as a whole. The legitimacy of the supervisory jurisdiction thus rests on its desire to secure the smooth execution of trusts administration.

In Chapter Three, I argue that judicial review of trustee decision-making can likewise be understood as part of the court's broader jurisdiction to supervise trusts. This is because we can

[150] Daniel Clarry, *The Supervisory Jurisdiction Over Trust Administration* (Oxford: Oxford University Press, 2018).
[151] See Chapter Three, notes 48 – 60 and the accompanying text._
[152] Harlow & Rawlings, *supra* note 109 c 12.

interpret the doctrines that govern the exercise of trustee discretion as power-conferring principles that set the requirements that enable us to know when a trust has indeed been properly administered. As with the arguments presented above in connection to reasonableness in administrative law, I argue that the relevant/irrelevant considerations doctrine in trusts law can be interpreted as a power-conferring principle that makes possible trustee authority. On this interpretation, the court can be understood as effectuating the validity of trustee action and "facilitating the wishes"[153] of trustees by presupposing the necessary power-conferring principles that enable them to bring about normative changes in the position of the beneficiary. The purpose of judicial review, like other aspects of the SJTA, is thus to facilitate and secure the proper administration of a trust by setting the requirements that make possible valid trustee action and reviewing the exercise of power. The court is thus also engaged in institutionally designing the trust as a particular institution, namely as a gift of property held on behalf of specified beneficiaries. Furthermore, when a court reviews on grounds of relevant or irrelevant considerations, this does not vindicate a wrong done to the beneficiary per se. Instead, the court secures the integrity of trust administration by setting aside invalid decisions and restoring the trust to proper working order, so that the power can be subsequently exercised properly.

A related question then becomes whether judicial review's primary goal is, like the SJTA, to secure the integrity of public administration and furthermore, whether judicial review exhibits any similar facilitative and quasi-administrative features. I address this question in Chapter Six and I argue there are three ways in which we can understand the court as quasi-administrative. Firstly, like the SJTA, we can interpret judicial review as setting the requirements that enable us to know when public decision-makers have properly administered their powers. This secures the integrity of public administration by ensuring that actions purportedly taken by administrators are imbued with legal validity and ensures that administrators can actually administer their statutory schemes by facilitating their actions as legal in nature. Secondly, case law specifically supports the idea that judicial review's aim is to vindicate the public's interest in good administration.[154] This is why, for instance, legal subjects do not need to assert a right to apply for judicial review but merely an

[153] HLA Hart, *The Concept of Law*, 2d ed (Oxford: Clarendon Press, 1961) at 27.
[154] For example, see *AXA General Insurance Limited v Lord Advocate*, [2011] UKSC 46 [*AXA*]; *R v Lancashire CC Ex p Huddleston*, [1986] 2 All ER 941 [*Huddleston*]; *M v Home Office*, [1993] 3 WLR 433 I discuss these cases in depth in Chapter 6, section 6.2.2. and section 6.2.4.__

interest and why legal subjects can even stand as public interest litigants.[155] Thirdly, there are some interesting recent shifts in Canadian administrative law that indicate that the courts are appropriating a quasi-administrative jurisdiction. For example, the court is able to directly substitute the administrator's decision for its own if it wishes to stop the "merry go round" of remission,[156] which essentially allows the court to step in and perform the power for the administrator. The court can also indirectly substitute an administrator's decision by remitting the decision to the administrator with specific instructions on how to exercise the power. [157] In these roles, the court is thus engaging in a quasi-administrative function by articulating specifically how to exercise a power, or is directly exercising the power for the decision-maker. Such a quasi-administrative role perhaps follows from understanding the practice of judicial review as jurisgenerative in nature. Consequently, we can interpret judicial review as aiding and assisting in public administration.

1.5. Key Terminology

1.5.1 Authority vs. Authorization

This thesis makes a distinction between authorization and authority.[158] Authorization, Fox-Decent notes, is the delegative process that stipulates the specific purpose of the power, the grantee of the power, who benefits from the power, and usually the body chosen to administer the power.[159] Authorization however cannot explain authority's temporal character because authorizations are fossilized in time to a particular moment. This is the problem that social contract theorists often come up against – for even if there were such a thing as a social contract, the initial consent given to create the state does not explain the ongoing authority of the sovereign in a world where many do not consent.[160] Authorization also cannot hope to cover the entire field of discretionary decision-making. There is always a gap between the mandate held and the mandate exercised, and, in my view, power-conferring principles fill that gap.

---

[155] See Chapter 6, notes 63-70 and the text accompanying therein
[156] *Vavilov*, *supra* note 11 at para 142.
[157] *Sexsmith v Canada (Attorney General)*, 2021 FCA 111 at para 35; *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 84; *Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 65.
[158] See Fox-Decent, "Trust and Authority", *supra* note 146 at 176–179.
[159] See *ibid* at 176.
[160] *Ibid* at 183.

Authority concerns the nature of the power, the terms upon which a power can be exercised and the effects of its exercise.[161] These terms are the relevant power-conferring principles that secure the legal effectiveness *every time* the decision-maker decides to act. For trustees and administrators this means that every time they come to act, their decision must be taken on behalf of those subject to the power and/or on behalf of a purpose. Given that reasons form the core of their authority, authority is only ever held in relation to others and is exercised temporally over each interaction. When it comes to the sovereign, for example, the temporality of power-conferring principles enables his authority to continue beyond any initial social contract. The *ongoing* legal authority of the state, and the authority of those officials who claim to act in the name of it, relies upon representatives acting on behalf of the purpose for which the power is held and upon the provision of reasons for those decisions to legal subjects.

1.5.2. Power-Conferring Rules vs. Power-Conferring Principles

The reader may have wondered why I am using the term 'power-conferring principle' as opposed to the more familiar Hartian phrase 'power-conferring rule.'[162] This is first because I wish to emphasize that a power-conferring principle is not a law that *authorizes* a decisionmaker to act. Oftentimes scholars take 'power-conferring rules' to be the laws that literally confer a power,[163] for instance, a statute conferring a power to adjudicate upon a labour board. However, this is problematic because it renders power-conferring norms fragments of a prior, higher, authorizing norm. In other words, it leads us to asking, who conferred the power onto Parliament to confer a power onto the Labour Board? I am interested in understanding how powers internally generate their own authority. The second reason I label power-conferring principles as 'principles' is because I understand them as a standard that qualifies "the meaning or application" of an authorized power.[164] These norms pertain to the valid *exercise* of either an officially authorized or de facto power. I discuss this more in Chapter 2.2.2.1.

[161] *Ibid* at 176.
[162] Hart, *Concept of Law, supra* note 153 at 26–49.
[163] For example, see Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81:5 Yale LJ 823 at 836.
[164] *Ibid* at 835.

1.5.3. Jurisgenerative

I use jurisgenerative in two senses in this thesis. Jurisgenerativity refers to the production of meaning or validity outside of formal legal processes.[165] It is often the study of how legal subjects produce legal meaning via an interactive interpretative discourse, rendering them authors as well as subjects of law.[166] It also stands for the premise that the process of legal interpretation is necessarily jurisgenerative because it creates new meanings, draws upon old meanings, and does so in relation to others.[167] In this dissertation, the dialogic or reason-giving process between administrators and legal subjects could be understood as jurisgenerative in that it is the actual process of listening to a legal subject's submissions, and responding within a reasoned explanation, that produces validity. In other words, the validity of administrative action emerges through a jurisgenerative process in which the administrator's claim to validity rests upon a "discursive justification" to and with the legal subject.[168] This jurisgenerative process is itself legally made possible by fiduciary power-conferring principles that enable the public official to represent the beneficiary and produce valid legal results. In that sense, power-conferring principles are also jurisgenerative because they generate a power's capacity to produce validity in a way that legislation or authorization alone cannot explain.

1.5.4. Supervisory Jurisdiction and Judicial Review

This thesis often uses supervisory jurisdiction and judicial review as interchangeable terms. However, where there is a distinction, it is that judicial review refers only to the review of trustee or administrative discretionary decision-making. The supervisory jurisdiction, however, is a broader term that encompasses, at least in trusts law, its quasi-administrative and facilitative features.

[165] Robert M Cover, "Foreword: Nomos and Narrative Supreme Court 1982 Term" (1983) 97:1 Harv L Rev 4 at 11–18.
[166] Benhabib, *supra* note 108 at 15.
[167] *Ibid* at 125.
[168] *Ibid* at 74.

1.6. Methodology

1.6.1. Interpretive Method

The primary goal of this thesis is to develop an interpretive and normative theory of the supervisory jurisdiction in administrative law and trusts law. An interpretive methodology, Stephen Smith explains, seeks to interpret doctrine to the best explanation possible "by identifying intelligible connections" between features and doctrines of law in order to uncover "an intelligible order in the law" and to extract general principles.[169] The purpose is to reveal the law's intelligibility, coherence and moral justifiability.[170] This methodology requires a researcher to engage in an exercise of "reflective equilibrium"[171] in which the interpreter seeks coherence and challenges her beliefs through a process of deliberative judgment.[172] As this thesis provides a controversial interpretation of the doctrine, I seek to persuade the reader of the rectitude of the judgments I have made in interpreting doctrine.[173] My thesis also invites the reader to challenge their own beliefs about what law seeks to do.[174] Primarily, I seek to persuade the reader to adopt an interpretation of doctrine that prioritises law's constitutive as opposed to regulative dimension.

Interpretive theories tend to be "monist" theories of law.[175] A "monist" theory of law, according to Joanna Bell, is one which draws together legal principles to find one "meta" unifying concept.[176] This thesis argues administrative law can be linked to a meta-principle, the fiduciary principle, to unify and explain administrative law. Indeed, it takes that meta-principle to be a 'monist' *grundnorm* that generates legal validity in administrative law. Although Bell uses "monism" to argue in favour of a plural theory of administrative law, in my view, monist theories remain a

---

[169] Stephen A Smith, *Contract Theory* (Oxford, UK: Oxford University Press, 2004) at 5; John Bell, "Legal Research and the Distinctiveness of Comparative Law" in Mark van Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing, 2011) at 155.
[170] Implied Smith, *Contract Theory*, *supra* note 169 at 7–16.
[171] John Rawls, *A Theory of Justice*, original ed (Cambridge, Mass.: Belknap Press, 1977) at 20.
[172] Evan Fox-Decent & Evan Criddle, "The Internal Morality of International Law" (2018) 63:3–4 McGill LJ 765 at 774.
[173] Paul W Kahn, "Freedom and Method" in Edward L Rubin, Hans-W Micklitz & Rob van Gestel, eds, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge: Cambridge University Press, 2017) 499 at especially 501, 511.
[174] *Ibid.*
[175] Joanna Bell, *The Anatomy of Administrative Law* (Bloomsbury Publishing, 2020) at Chapter Seven.
[176] *Ibid* at 211; Paul Daly, *Understanding Administrative Law in the Common Law World*, 1st ed (Oxford: Oxford University Press, 2021) at 1.

helpful way to shine a "broad floodlight"[177] on an area of law. I by no means wish to suggest that the theory can explain everything about administrative law. This thesis, for example, rarely discusses the duty of fairness.

There are usually two kinds of interpretive theories, explanatory and normative.[178] An explanatory theory primarily seeks to explain the law to improve our knowledge of the law.[179] An interpretive, normative theory, by contrast, seeks not just to explain but also evaluate the law. Usually, a normative theory will seek to explain and justify principles in reference to some kind of political morality.[180] In my case, administrative power is justified when it can be genuinely interpreted by legal subjects and courts as solicitously responding to their interests. This view rests on a discursive or deliberative approach to law which understands legal subjects and officials as reciprocally producing validity through their interactions. This thesis also takes a republican approach in the sense that it takes law to be a tool to freedom. Law inherently enables us to achieve a unique kind of "communicative freedom"[181] in which legal subjects are treated as sources of law, not merely subjects of it, and where accountability is a condition of authority.[182]

1.6.2. Comparative Method

I seek to interpret a large body of law spanning two common law countries, Canada and the UK, and two areas of law, public and private. This thesis thus also adopts what is called a 'comparative' methodology. I believe the scope of this research is not too large but helps to serve the purpose of providing a comprehensive, yet broad, theory of judicial review.

An interpretive, comparative methodology usually looks to interpret multiple areas of law or the laws of many countries to find laws with the best coherence and intelligibility[183] and/or to

[177] Jan BM Vranken, "Methodology of Legal Doctrinal Research : A Comment on Westerman" in Hoecke *supra* note at 169, 111 at 112.
[178] Stephen A Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law*, 1st ed (Oxford, United Kingdom: Oxford University Press, 2019) at 26–27.
[179] Anne Ruth Mackor, "Explanatory Non-Normative Legal Doctrine. Taking the Distinction between Theoretical and Practical Reason Seriously" in Hoecke, *supra* note 169 45 at 49.
[180] Smith, *Rights, Wrongs, Injustices, supra* note 178 at 26.
[181] Benhabib, *supra* note 108 at 126–129.
[182] Anthony Simon Laden, "The Authority of Civic Citizens" in James Tully, ed, *On Global Citizenship: James Tully in Dialogue* (London: Bloomsbury, 2014). ; Gerald J Postema, "Trust, Distrust and the Rule of Law" in Miller & Harding, *supra* note 158
[183] Janina Boughey, "Administrative Law: The Next Frontier for Comparative Law" (2013) 62:1 ICLQ 55 at 94.

promote the harmonisation of laws.[184] The assumption is that different institutions can nevertheless produce similar principles and internal intelligibility.[185] This thesis adopts a modest comparative approach, acknowledging that Canadian and English administrative law grew from the same Diceyan roots.[186] For instance, Canadian administrative law, in its early years, followed the 'jurisdictional' model of review, a model which remains popular for *ultra vires* theorists in the UK.[187] However, Canadian law has developed its own distinct set of principles and features, most notably deference on questions of law and a distinct doctrine of reasonableness review.[188] This distinction between Canadian and UK law makes comparisons challenging, yet I think particularly fruitful for developing more coherent tests of 'reasonableness', particularly in the UK where beyond *Wednesbury* unreasonableness, such a doctrine is still developing.[189] On the other hand, the fundamental principle that administrative actors hold limited and not unfettered power unites both the UK and Canada and serves as the primary entry point for the comparisons laid out in this thesis.[190]

There are a few ways in which one can conduct research into the private-public divide. One is by seeking analogy either at a general level or by taking one doctrine and analogizing it.[191] The purpose is to demonstrate that the doctrines are "comparable in terms of the way they reach results and the purposes they serve."[192] Another way is to claim that certain features of the law transcend the public-private divide. Dawn Oliver for instance argues that certain doctrines in both public and private law "form part of a legal framework for the control of power."[193] Likewise, Lionel Smith argues that there is a law of loyalty that spans both public and private law.[194] This method pushes past analogy and claims that trustees and public officials are not simply like one another but are

[184] Bell, "Legal Research", *supra* note 169 at 157.
[185] *Ibid* at 158.
[186] Harry W. Arthurs, "Rethinking Administrative Law", *supra* note 67; Wade, *supra* note 114 at 7–12.
[187] For instance, see *Metropolitan Life Insurance*, [1979] SCR 756; David J Mullan, *Administrative law*, 2d ed (Agincourt, Ontario: Carswell, 1979) at paras 102–113.
[188] *CUPE*, *supra* note 61.
[189] This thesis implicitly suggests that the Canadian approach is more desirable than English law because Canadian law explicitly takes reasons to be the crux of legal validity.
[190] Boughey, "Administrative Law", *supra* note 183 at 78.
[191] Conaglen, "Public-Private Intersection", *supra* note 15 at 58.
[192] *Ibid* at 60.
[193] Oliver, "Review of Discretions", *supra* note 35 at 312; Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge: Cambridge University Press, 2010) at 194.
[194] Lionel Smith, *The Law of Loyalty* (Oxford: Oxford University Press, (forthcoming)).

the same because they both stand in legal relationships of trust.[195] This thesis takes this latter view and implicitly argues that public officials and trustees are required to act in similar ways because they both hold other-regarding power. This is why I argue in Chapter Six, for example, that there is a specific kind of supervisory jurisdiction that responds to relationships of trust, whether public or private.

To the extent that this thesis adopts a comparative methodology, it contributes to original knowledge in another unique way. First, comparative administrative law is still a relatively small field and deserves more attention by academics.[196] Second, while there is a growing literature on the comparisons between fiduciary law and administrative law, scholars have primarily focused their comparisons upon the doctrines that regulate the exercise of discretionary power.[197] This thesis takes the comparisons one step further and asks if the unique manifestation of the supervisory jurisdiction over trusts can tell us anything further about the facilitative nature of judicial review and its ability to aid, as opposed to control, the administrative state.

1.7. Remaining Chapter Summaries

1.7.1. Chapter Two

Chapter Two argues legal powers are facilitative laws that make possible new kinds of valuable legal relationships that may not otherwise be factually available to us. Thus, while a factual power causes certain effects in the world, legal powers bring about new normative, not causal changes. As such, legal powers require norms that generate those legal results and provide for the validity of action – I call these norms power-conferring principles. Given legal powers create new, non-causal normative results, the power-holder must follow the power-conferring principles in order to actually bring about the valid normative change. In other words, the act of exercising a power and the validity of the result is intrinsically related and cannot be disentangled. Power-conferring principles thus host an important jurisgenerative quality in that they incite normativity and generate the validity of action.

[195] Fox-Decent & Criddle, "Internal Morality", *supra* note 172 at 774–775.
[196] Boughey, "Administrative Law", *supra* note 183.
[197] See note 15 above.

In the second part of the chapter, I apply the power-conferring framework developed in the first half to argue we can interpret loyalty as the power-conferring principle that makes possible and constitutes the valid exercise of fiduciary authority. In fiduciary relationships, the fiduciary is required to exercise her power loyally, meaning that she must exercise her powers on behalf of those subject to it, or in some cases, on behalf of a publicly-avowable purpose. If we interpret loyalty as a power-conferring principle, this means that to act in the best interests of another is intrinsically connected to the validity of the normative change. In other words, to validly exercise her power, the fiduciary must act with the right motive or reasons, namely, she must act with a solicitude towards those subject to the power. Thus, because following the relevant power-conferring principle intrinsically brings about the normative change, we need to know the fiduciary's motives or reasons for acting to know if the power was validly exercised. A substantive consequence of other-regarding power is that decision-makers may need to provide reasons for their decisions, particularly in the case of public, other-regarding powers.

1.7.2. Chapter Three

Chapter Three argues that the supervisory jurisdiction over trusts aims to ensure the smooth and seamless execution of a trust. As mentioned above, the SJTA is a quasi-administrative and facilitative jurisdiction that is not purely enlivened in breaches of duty, nor does it administer corrective justice, as is usual in private law.[198] Instead, the court aids the trustee in administering the trust fund in a proper manner through, for instance, advising the trustee prior to any action being taken, facilitating accounting, or even administering the trust themselves.

I further argue that if we interpret the doctrines of judicial review as power-conferring principles, we can understand judicial review of trustee discretion as part of the court's wider jurisdiction to intervene in trusts administration. It is important to understand judicial review as assisting in the administration of trusts because it allows us to interpret all aspects of the supervisory jurisdiction as having the same overarching purpose, namely, secure the smooth administration of trusts administration. I thus apply the theoretical framework developed in Chapter Two to argue that the rule in *Re Hastings-Bass*[199] (known to public lawyers as the relevant and irrelevant considerations doctrine) is a power-conferring principle. The relevant/irrelevant

[198] Clarry, *supra* note 150.
[199] *Re Hastings-Bass*, [1975] Ch 25, [1974] 2 All ER 193 [*Hastings-Bass*].

considerations doctrine, as one aspect of loyalty, enables the beneficiary and court to interpret the fiduciary's actions as having been taken on behalf of the beneficiaries. In reviewing absolute trustee powers on grounds of relevant/irrelevant considerations, the court presupposes the doctrine as one power-conferring principle necessary to produce legitimate trustee authority. The court is thus not only regulating the use of arbitrary power but setting the requirements that make possible the valid exercise of trustee authority, thereby enabling us to say whether or not a trust has been properly administered. Consequently, we can interpret the practice of judicial review as assisting in the proper administration of a trust because the doctrines of review *facilitate* proper trustee action and enable the trustee to administer her powers according to law.

Another way in which judicial review assists the smooth execution of trusts is through the wide remedial flexibility the court possesses to respond to invalid exercises of authority. In addition to setting aside the decision and remitting it to the trustee, the court can remove and replace trustees or establish a scheme of distribution. Such remedies respond to systemic issues within the management of the trust and demonstrate that, even in judicial review, the court's concerns lie with the wellbeing of the trust. I end the chapter by considering the various ways in which we can interpret the court as facilitating trusteeship as an office situated in public order by augmenting the kind of trusts settlors can make and the powers held by the trustee.

1.7.3. Chapter Four

In Chapter Four I analyze the three foundational cases of substantive review in Canadian law – *Roncarelli,*[200] *CUPE*[201] *and Vavilov*[202], and argue that reasonableness is the ultimate power-conferring principle, or *grundnorm* of administrative law, that generates public authority. First, I consider *Roncarelli* and argue that because the motives of the defendants were central to determining the validity of the exercise of power, this implicitly suggests that public actors stand in a relation of trust with legal subjects. I then argue that, like the relevant/irrelevant considerations doctrine discussed in Chapter Three, the proper purpose doctrine can be interpreted as a power-conferring principle that establishes the framework of legitimate, representative decision-making and provides for the validity of administrative action.

[200] *Roncarelli cited to DLR, supra* note 2.
[201] *CUPE, supra* note 61.
[202] *Vavilov, supra* note 11.

I next consider *CUPE* and argue that the reasonableness doctrine, as it pertains to questions of law, is not a test that determines if a decision-maker acted beyond a jurisdiction, which would be a question of authorization. Instead, reasonableness is a test that determines whether the *exercise* of a power to interpret or determine a question of law is valid, which is a question of authority. Thus, even in the context of the administration's authority to determine questions of law, we can interpret reasonableness as a power-conferring principle that governs the proper exercise of an interpretive power or a power to determine a question of law. Finally, I analyze what 'reasonableness' entails in the current law by turning to the *Vavilov* decision. I argue that a fiduciary power-conferring theory explains why the vulnerability of the legal subject and the legal subject's submissions are critical to the valid exercise of authority.

Thus, in sum, Chapter Four argues that the doctrines of judicial review do not unduly impose constraints upon administrative action but are power-conferring principles that produce administrative validity. In this light, the court is not competing with Parliament's supremacy because administrative authority is *co-constituted* by the statutory purposes *and* the power-conferring principles that establish the nature of the power held and provide for the legitimacy of its exercise. I end the chapter by arguing that, similarly to the SJTA, the court thus plays a significant role in designing public administration as an institution held in trust for the public.

1.7.4. Chapter Five

Chapter Five develops and extends the findings of Chapter Four. I argue that the reasons for which public decision-makers act constitute not only the exercise of individual powers, but also constitute the state and/or state institutions. To make this argument, I analyze the concept of 'office' in the context of prerogative powers. The distinct feature of an office, I argue, is that it is a position held on trust for a public institution as well as for individuals. The officeholder must thus act with solicitude to individual legal subjects as well as demonstrate fidelity to a public institutional mandate. As with all other-regarding powers, the reasons for which the decision-maker acts are therefore constitutive of the proper exercise of this institutional mandate. This explains the recent decision *R (Miller) v. Prime Minister* (*Miller No.2),*[203] where the UK Supreme Court found that the exercise of the prerogative power of prorogation must be justified to

[203] *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41 at 2 [*Miller No.2*].

Parliament, as the institutional beneficiary of the Prime Minister's power. Furthermore, I explain the jurisgenerative quality of the Prime Minister's reasons by interpreting the requirement of a reasoned explanation as an unwritten power-conferring principle that makes such representative action valid and possible in law.

Drawing on Hobbes, I end the chapter by arguing that because the state is a *person by fiction*, the reasons for which officeholders act are constitutive of public institutions, and by extension are constitutive of the state itself. A person by fiction is a person that cannot, absent representation, author actions for themselves. This is either because they are deemed to be unresponsible non-legal persons, such as children, or because they are inanimate objects such as a bridge, or are fictional concepts, such as the state.[204] A person by fiction thus only exists due to representative acts and hence it is the representation by the sovereign of the multitude that makes possible the state. As with all exercises of other-regarding representative powers, the reasons for which officials act are the core of that constitution. As such the reasons for which public officials act in the course of exercising their institutional mandates are what constitute the state. Such a view humanizes public institutions and highlights that legal order is made up of a series of reasons, arguments and justifications. This explains the common law's unique public law tradition in which individual acts of officials are neither outside of public law nor purely abstracted to an artificial third body. Instead, individual acts of officials actively constitute the whole.

1.7.5. Chapter Six

The final chapter of this thesis is in conversation with Chapter Three's findings that the SJTA's goal is to secure the proper administration of a trust relationship. To structure the argument that judicial review secures the integrity of public administration, the chapter starts by analyzing and critiquing Lon Fuller's piece "The Forms and Limits of Adjudication."[205] Although I agree with Fuller's argument that adjudication primarily involves the presentation of proof and argument, I dispute his further claim that these presentations must be in the form of claims of right and accusations of wrongdoing. This claim, I argue, is based on a private law bias that cannot explain Equity or public law.

[204] Thomas Hobbes, *Leviathan*, revised ed, A.P Martinich & Brian Battiste, eds (Toronto: Broadview Editions, 2011) at 152–154.
[205] Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353.

Furthermore, in the supervisory jurisdiction, arguments are presented in the form of claims of legitimate authority by the public administrator and claims of recognition by the legal subject. Those who hold other-regarding positions of trust should not be converting their claims into self-regarding claims of right and, in theory, their claims of authority should already be within the form of a presented argument or reasoned explanation. Furthermore, the official must not approach adjudication as if she were fighting her own corner, but act in collaboration with the court and legal subject towards vindicating the relevant other-regarding interests at stake. For the legal subject, adjudication is a space to petition the administrative actor to explain the use of power ("why do you have the power to do X?") and to claim that she does not feel sufficiently represented, as the beneficiary of the power, within the claims of representative authority made by the official. The goal of adjudication for all parties is thus to secure the ongoing integrity, administration and constitution of public authority, *and* public institutions, by ensuring all interests are properly recognised.

Consequently, the formal properties of public law adjudication may more similarly reflect that of the SJTA. As John Allison argues, judges may need to hold certain "collaborative investigation"[206] tools to properly adjudicate such matters, such as holding flexible remedial discretion to assist in securing good public administration. In the SJTA, the court holds many powers to intervene in the administration of the trust, but in public law, these interventions are more limited. However, I present evidence that the court is becoming more willing to take on a facilitative and quasi-administrative function in administrative law, for instance, through directly or indirectly substituting the decisions of administrators. I end the chapter by bringing together the arguments of Chapters One-Five to argue that the supervisory jurisdiction cannot be excluded by statute

[206] JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Oxford University Press, 2000) at 205.

Chapter Two

2. The Form of Legal Powers

Prologue

This chapter introduces the idea of power-conferring principles. Power-conferring principles are laws inherent to the very form of a legal power that make possible legal, as opposed to factual power, and generate legal validity. My argument proceeds from the premise that legal powers create new, non-causal ways of interacting in the world. While a factual power causes consequences, legal powers bring about normative, not causal, changes. As such legal powers require laws that generate and incite those legal results and provide for the validity of action. In the second part of the chapter, I apply the power-conferring framework developed in the first half to argue we can interpret loyalty as the power-conferring principle that makes possible and constitutes the valid exercise of fiduciary authority.

Introduction

Judicial review is the body of law that supposedly regulates the exercise of public powers. But what exactly is a power and how does it equip public officials with a legitimate claim to authority? Traditional theories of judicial review and legal theory discussed in Chapter One view the official's claim to authority as rooted in their authorizing mandate. We identified two problems with theories that rest upon authorization. First, one always ends up climbing the magic beanstalk of legality to find a higher, more venerable, authorizing source, often forcing one to look outside of law for that source. Second, authorization does not sufficiently explain all facets of authority, particularly its temporal character. A better starting point is to consider how the form of a legal power can explain authority on its own terms. The purpose of the first part of this chapter is to argue that legal powers do not acquire their authority from an authorizing source. This is important because it enables us in later chapters to explain why unfettered authorizations of power delegated by Parliament, or powers with no statutory authorization, such as prerogative powers, are nevertheless constituted by law.

The first part of this chapter analyzes the nature of legal powers. Drawing on Raz, I note that legal powers create new, non-causal, normative ways of acting in the world. Unlike a factual power, where causation explains the consequences we see in the world, legal powers intrinsically bring about normative results such that the act of exercising the power cannot be disentangled from the ensuing legal result. As such, powers require norms that guide power-holders on how to exercise the power, as well as bring about the normative result, and secure the validity of the legal result. Amending Hart's formulation, I call these norms *power-conferring principles* because they both constitute and govern the application of legal powers.[1] As such every legal power contains a non-posited presupposed '*grundnorm*' that triggers legal authority. Power-conferring principles generate a power's legal authority because they constitute the power's nature and purpose, explain how the operation of discretion is governed by law and preclude the creation of unfettered powers.

In the second part of this chapter, I turn to analyse a specific kind of legal power, fiduciary or other-regarding powers, applying the framework developed in the first half. I argue that we can interpret loyalty as a power-conferring principle that intrinsically brings about the normative result of acting on behalf of another in law. In other words, loyalty informs the fiduciary that if she wishes to exercise her fiduciary power validly, she must exercise her power on behalf of the beneficiary. Given the legal acts and results are intwined, this means we need to know if the fiduciary acted for the right reasons in exercising her powers, as only if she did act to further the interests of the beneficiaries will she exercise proper authority. The fiduciary may therefore be required to explain and justify how and why the exercise of her power can be interpretable as furthering the interests of those subject to it. This explains why, as noted in Chapter One, public law in recent years inquires into the reasons for which decision-makers act.

2.1. Hohfeldian Power-Liability Relations

2.1.1. Hohfeld's Bilateral Correlatives and Opposites

Wesley Hohfeld is perhaps best known for his theory of duties and rights as bilateral correlatives and opposites.[2] Hohfeld wrote in the context of private law and his methodology was

[1] HLA Hart, *The Concept of Law*, 2d ed (Oxford: Clarendon Press, 1961) at 41–42.
[2] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16–59.

doctrinal, with some discourse theory.[3] He analyzed how lawyers use the terms 'rights' and 'duties' in different ways depending on context[4] and he boiled down legal relations to the following jural correlatives: right-duty; liberty-no right; power-liability; immunity-disability.

Importantly for our purposes, the correlative of a legal power is a liability. Hohfeld defined a legal power as follows:

> **A change in a given legal relation** may result…(2) from some superadded fact or group of facts which **are under the volitional control of one or more human beings**.[5]

A simple example in public law is public authority X holds the power to grant or revoke boxing licences, and Y, a boxing club within the application of the scheme, is liable to have their privilege extinguished.[6] Liability in this context thus means being in a position to have one's legal position or status changed by another. Another example, in private law, is property owner X has a power to grant a licence to Y to walk on his land. Y is liable to gain a new liberty to walk on X's land. The relevant legal change is the change from a duty to not walk on the property to a liberty to walk on the property owner's land. For the remainder of the chapter, I will refer to the person who holds a power as the power-holder, and the person who is liable to have their position changed the liability-subject.

2.1.2. Virtues and Pitfalls of Hohfeld's Analysis of Legal Powers

The first virtue of Hohfeld's schema is that it helps us analyse legal relationships with precision. A relevant example in public law is the distinction between a power and a liberty. These are often confused because both concern what one 'can' do. However, liberties are what legal persons are permitted to do ("everything not expressly forbidden is permitted") and regards a factual freedom to act. Permission alone is often inappropriate to explain the actions of public authorities because the rule of law demands that decisions are taken through an enablement that also provides for valid legal results ("everything which is not allowed is forbidden"[7]) The distinction between persons and public authorities, and liberties and powers, is obscured in relation

[3] J M Balkin, "The Hohfeldian Approach to Law and Semiotics" (1990) 44:5 U Miami L Rev 1119 at 1123.
[4] Pierre Schlag, "How to do Things with Hohfeld" (2015) 78:1–2 Law & Contemp Probs 185 at 189.
[5] Hohfeld, "Fundamental Conceptions", *supra* note 2 at 44.
[6] The facts of *McInnes v Onslow Fane and another*, [1978] 3 All ER 211.
[7] Sir John Laws, "The Rule of Law: The Presumption of Liberty and Justice" (2017) 22:4 Judicial Review 365 at 368; *R v Somerset CC, ex p Fewings*, [1995] 1 All ER 513 at 513 [*Fewings*].

to the Crown which is both a legal person holding "residual liberties" and a powerful public authority.[8] The problem is exemplified by the phone tapping case *Malone v. Metropolitan Police Commissioner*[9] in which the court found the practice to be legal because nothing rendered it unlawful. I return to the liberty-power distinction in relation to the Crown in Chapter Five.

The second virtue of Hohfeld's theory is that it is relational. By relational I mean that the bilateral correlatives necessarily entail one another and arise at the same time.[10] For example, it is impossible for a duty to exist without the correlative right also existing. This relational bilateralism is often taken to mean that jural relations must subsist in independent pairs as between only two individuals, but legal powers complicate this assumption. Penner notes that a legal power is not held over one individual with one corresponding liability, it is held over a *jural relation* because the exercise of a power creates a new right and obligation at the same time.[11] A legal power can thus easily involve a relation between three persons, for example, the agent (A) who contracts on behalf of the principal (B) changes the legal position of B vis-à-vis a third party (C). The simultaneous creation of the new right and obligation means that the power stands in relation to at least two, but usually more, interdependent liabilities. For instance, when a Trustee chooses to transfer all the trust property to Beneficiary A, she also changes the position of Beneficiaries B, C and D by extinguishing their interests under the trust, as well as extinguishing her own trustee powers.[12]

Another reason why legal powers stand in relation to multiple, interdependent liabilities is because all legal powers are indirectly "regulative powers."[13] Regulative powers, Raz points out, do not create new norms but apply "an existing law to new people in a new way."[14] For instance the power of sale regulates who holds the various powers, duties, rights etc. over that item, rather than creates new obligations and rights.[15] The power of sale also regulates the application of duties held by the rest of the world to "keep off" that property and regulates the application of laws

[8] BV Harris, "The 'Third Source' of Authority for Government Action" (1992) 108 Law Q Rev 626; Jason Grant Allen, *Constitutional Authority and Judicial Review: A Common Law Theory of Ultra Vires* (DPhil Thesis, University of Cambridge, 2017) [unpublished] at 95–108.
[9] *Malone v Metropolitan Police Commissioner*, [1979] Ch 344 [*Malone*].
[10] J E Penner, *Property Rights: A Re-Examination* (Oxford, New York: Oxford University Press, 2020) at 75.
[11] *Ibid* at 75–76.
[12] *Ibid* at 80.
[13] Joseph Raz, *Practical Reason and Norms* (Oxford, UK: Oxford University Press, 1999) at 103.
[14] *Ibid* at 99.
[15] *Ibid*.

conferring courts the power to adjudicate trespasses or occupational liability laws.[16] Powers are thus also "omnilateral,"[17] meaning, they link "everyone to everyone else"[18] and thus interestingly represent humanity's plural and interdependent nature, as opposed to our autonomous and independent nature. This omnilateral feature of powers perhaps also explains why legal powers are apt for building complex polycentric relations such as pension schemes or the administrative state.

The final virtue of Hohfeld's schema is his contention that legal changes result from one's "volitional control."[19] This volitional control by an individual distinguishes powers from operations of law, the latter being changes in legal status that occur by external or at least non-volitional acts.[20] However, one pitfall of Hohfeld's analysis is that not all legal changes or changes in status caused by individuals are exercises of legal powers.[21] For example, if I hit you with my car, I have changed your legal position in that now you have grounds to sue me, but my raw ability to damage your car is not a legal power. Likewise, murder is considered a volitional act and changes the victim's status to death, but again, this wrongful homicide is not the exercise of a legal power.[22] One problem with Hohfeld's reliance on volitional control, then, is that is it expresses power merely in terms of factual possibility and natural consequence.[23] So, as long as cars exist, I can always factually hit you with my car, whether or not tort law exists. Likewise, the change in legal status from life to death is a causal *consequence or "natural effect"* of, for instance, a volitional act of shooting a gun.[24] Scholars point out, therefore, that we need a more precise definition of a legal power that distinguishes factual powers from legal powers.

[16] Neil MacCormick & Joseph Raz, "Voluntary Obligations and Normative Powers" (1972) 46:1 Aristotelian Society, Supplementary Volumes 59 at 85.
[17] Implied by Lisa M Austin, "The Public Nature of Private Property" in J E Penner, ed, *Property Theory : Legal and Political Perspectives* (Cambridge, United Kingdom ; Cambridge University Press, 2018) 1.
[18] Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 196.
[19] Hohfeld, "Fundamental Conceptions", *supra* note 2 at 44.
[20] Andrew Halpin, "The Concept of a Legal Power" (1996) 16 OJLS 129 at 142.
[21] MacCormick & Raz, "Voluntary Obligations", *supra* note 16 at 93.
[22] Joseph Raz, "Normative Powers – Revised", King's College London Law School Research Paper No. 26-2019, online: <scholarship.law.columbia.edu/faculty_scholarship/2460> at 1
[23] Lars Lindahl, *Position and Change: A Study in Law and Logic* (Dordrecht, Holland: Reidel Publishing, 1977) at 207.
[24] H L A Hart, "Bentham on Legal Powers" (1972) 81:5 Yale LJ 799 at 820.

2.2. The Form of a Legal Power

2.2.1. Valuable Normative Acts

The primary distinction between legal powers and factual powers is that factual powers tend to operate by causation – they *cause* consequences to occur. To take Pratt's example, "a consequence of pulling a trigger may be that the window shatters."[25] Legal powers, by contrast, intrinsically and non-causally bring about a *result.* [26] By this I mean that the result and the action are correlative, and each take their meaning from the other such that to do the action *is* the result, and vice-versa.[27] To take Pratt's non-legal example "[t]he result of pulling the trigger is that the trigger is pulled."[28] To apply this to a legal example, if I effectuate a sale of land through deed, this act cannot be separated from the resulting transfer – the result of doing the acts of sale *is* the transfer.[29] In other words, the exercise of the power of sale "grounds" the legal result.[30] This can be contrasted with the consequences of the sale which is, for instance, that my change in address triggers a host of new tax liabilities.[31] Another example, provided by Essert, is persuading your neighbour to invite your friend over for dinner at your neighbour's. The persuasion causes the neighbour to invite the friend, but when she does indeed decide to invite your friend, she changes the legal situation between herself, and the friend, from a trespass to a licensed entry.[32] Importantly, however, the invite does not cause the licensed entry, it intrinsically brings about the licenced entry in a non-causal way.[33] In other words, legal powers produces normative or "invisible legal effects"[34] that are not perceivable to the naked eye.[35]

Legal powers are thus similar to what speech act theorist John L. Austin called "performative utterances." A performative utterance "has a certain *force* in saying something"[36]

---

[25] Michael G Pratt, "Promises, Contracts and Voluntary Obligations" (2007) 26:6 Law and Phil 531 at 541.
[26] Raz, *supra* note 13 at 103; Penner, *supra* note 10 at 72; Lisa M Austin, "The Power of the Rule of Law" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) at 277.
[27] Christopher Essert, "Legal Powers in Private Law" (2015) 21:3–4 Legal Theory 136 at 145.
[28] Pratt, "Promises", *supra* note 25 at 541.
[29] Austin, *supra* note 26 at 279.
[30] Essert, "Legal Powers", *supra* note 27 at 145.
[31] Raz, *Practical Reason*, *supra* note 13 at 102.
[32] Essert, "Legal Powers", *supra* note 27 at 143.
[33] *Ibid* at 142; Raz, *Practical Reason*, *supra* note 13 at 103.
[34] Lindahl, *supra* note 23 at 211.
[35] Thus the distinction then between Pratt's trigger example, and the legal examples, is that legal powers bring about normative results that are invisible to the naked eye rather than bring about factual results that are.
[36] J L Austin, *How to Do Things with Words*, 2nd ed, J. O. Urmson & Marina Sbisà, eds (Cambridge, Massachusetts: Harvard University Press, 1975) at 121.

meaning that the utterance entails "performing an act."[37] Thus, when a judge utters "I order" the result of the utterance is that an order has taken place. In other words, the purpose of the speech (to order) is completed through the performance of the utterance "I order". Marianne Constable explains: "To utter "I promise I will come tomorrow" is "not to describe my doing of what should be said in so uttering to be doing…[neither is it]…to state that I am doing it. *Rather "it is to do it."*[38] The result of the utterance "I promise" is that I am bound to go to movies with you tomorrow, which is different from the consequences of the promise, e.g. I will rent a car to do so.[39]

Legal powers, as "acts-in-the-law"[40], operate in the realm of the non-causal, and consequently, powers are usually created to bring about new, valuable, purposive legal results that are otherwise not factually possible.[41] One stark example of this is the power to make wills, which as Shapiro explains, "allow property holders to do something they ordinarily would not be able to do. This exercise of control from beyond the grave would be unavailable absent the rules conferring power on testators."[42] Another example is ownership. The factual state of use is transformed by ownership into decision-making authority over an object.[43] Ownership, Austin writes, thus enables the owner to put down the object, plan for future use of the object and still be protected from interference by others.[44]

Another relevant example is a fiduciary power, which will be explained further below. Fiduciaries exercise legal powers or decide significant practical interests on behalf of others, "altering the terms on which the fiduciary and beneficiary and/or benefactor of the power relate."[45] The fiduciary holds a power of representation in which she is legally able to "step outside of herself"[46] to personate the beneficiary and exercise part of the beneficiary's autonomy.[47] Fiduciary

---

[37] *Ibid* at 139.
[38] Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (Stanford: Stanford University Press, 2014) at 21.
[39] Essert, "Legal Powers", *supra* note 27 at 142, n 17.
[40] Allen, *supra* note 8 at 94.
[41] L. Austin, "Rule of Law" *supra* note 26 at 269.
[42] Scott Shapiro, *Legality* (Cambridge, Mass.: Harvard University Press, 2011) at 62.
[43] Larissa Katz, "Ownership and Offices: The Building Blocks of Legal Order" (2020) 70:6 UTLJ 267.
[44] L. Austin, "Rule of Law", *supra* note 26 at 278–280.
[45] Paul Miller, "The Fiduciary Relationship" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, 2014) at 70.
[46] A phrase used by Lionel Smith, "Stepping Outside of Ourselves: How we Act for Others in Law", (Manuscript Draft delivered at Faculty of Law, McGill University, 18 September 2020)
[47] Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) 130 LQR 608 at 628.

powers thus allow us to act through people in novel ways that as factually separate persons, we are not usually able to do. In some fiduciary relationships, such as parent-child, the juridical representation of the child by the parent or guardian allows the child to legally act in the world when ordinarily they would not be considered responsible actors.

There are some legal powers, however, that do not have such striking spatio-temporal effects, for instance, marriage. Nonetheless, marriage is a status which is legally and conceptually transformative because there are privileges, rights and duties etc. that attach to the status which are only available to those who hold the power of marriage.[48] Moreover, powers can bring about causal consequences and non-causal results if certain other conditions exist, namely, (i) where actions that cause certain consequences become **recognised** as also resulting in valid legal effects and (ii) where such actions are considered to be **valuable**. I will consider each in turn.

Raz argues that a causal act will be recognized as a legal power, as opposed to an operation of law or de facto power, when it is "reasonable to expect that actions of that type will…standardly be performed only if the person concerned wants to secure these legal consequences."[49] A good example is offered by Penner concerning the Law of Trusts.[50] Initially, the Chancery imposed ad hoc duties on trustees by operation of law to prevent them using trust property in unconscionable ways. Over time, the law began to recognise that conferring property to trustees for the benefit of others was an exercise of a power to create a trust.[51] Put differently, the Chancery recognised that non-causal or normative results attached to certain actions that previously the settlor merely hoped would cause particular legal consequences.[52]

The fact that acts must standardly be performed to bring about certain results helps us understand why some volitional acts that change the normative position of others are not legal powers. While the actions of settlors are often performed to make a trust, committing the volitional act of homicide, for example, is not standardly performed by many people with the intention to merely change the legal status of the deceased. However, as Raz points out, the main reason we do not recognise a power of murder is because we do not consider it to be valuable. Raz notes a

[48] MacCormick & Raz, "Voluntary Obligations", *supra* note 16 at 81.
[49] *Ibid*.
[50] Penner, *Property Rights*, *supra* note 10 at 73.
[51] *Ibid*.
[52] In Chapter Four we see the prerogative power of prorogation make the switch from a factual to legal power.

legal power will be recognised only where it is "desirable that that person should be able to bring the change about or prevent it by performing that act."[53] Raz explains,

> "If people would not have the power to make promises or to get married, or to make laws for their communities, much would be lost beyond the value accruing from their use of these powers. The further loss is of the value of having these powers in expanding the range of free choices that people have."[54]

By contrast, if people could not factually murder nothing valuable would be gained by creating a legal power to kill. This is not just a case of subjective or community recognition, however. Legal powers are intrinsically limited by their function as generative laws; their inherent purpose is to generate new and legally secure ways of acting in the world. This substantively limits a legal power to those activities which are consistent with equal positive liberty and also respect the dignity of agents. A power of murder would undermine the value of equal liberty inherent in legal powers by allowing some persons to have the choice to extinguish all options of living from others. By contrast, to change the settlor's actions from an operation of law to a legal power expands a range of choices in two ways. First, it enables a new, non-factual, spatio-temporal activity in property law – the concept that property can both belong, and not belong, to a trustee.[55] Second, the law enables people to choose if or when to exercise the power to make a trust with certainty, rather than relying on Equity's conscience. Thus, it is not just that the legal result the power facilitates must be valuable, but also that it is valuable that someone hold a discretion over choosing if and when to bring about that result.[56]

2.2.2. Power-Conferring Principles

2.2.2.1. What are Power-Conferring Principles?

The intrinsic relation between the legal act and legal result highlights the important distinction between *having* a legal power, usually created by an authorization, and *exercising* the power, meaning, to follow the acts prescribed by law that bring about valid normative changes.[57]

---

[53] Raz, *Practical Reason, supra* note 13 at 102.
[54] Raz, Normative Powers, *supra* note 22 at 6
[55] Penner, *Property Rights, supra* note 10 at 73.
[56] MacCormick & Raz, "Voluntary Obligations", *supra* note 16 at 95.
[57] L. Austin, "The Rule of Law", *supra* note 26 at 275.

A good example is a will needing to be signed by the testator and three witnesses in order to be valid. The valid exercise of the power is made dependant upon this condition, and when these instructions are followed, the normative effect (the production of a valid will) is intrinsically brought about. However, as Raz points out, this manner and form requirement does not confer the power to make a will but appears to be a rule that qualifies the rules that authorize a person to make a will. Critiquing Dworkin's examples of rules, and pointing out that all of Dworkin's principles are principles of obligations, [58] Raz questions whether one of Dworkin's examples of a rule, ("a will is invalid unless signed by three witnesses"), is actually a rule at all. Raz instead implies it is a *standard or principle* that qualifies "the meaning or application" of the power to make a will, or in other words, it is a principle of powers. This is because the rule

> "[N]either prohibits any action nor dos it impose an obligation to behave in any way. It is not even a power-conferring rule … for it does not confer the power to make wills nor does it confer the power to witness making a will. The rule itself qualifies the rule conferring power to make wills; it makes the successful exercise of this power depend on three witnesses having signed the will"[59]

Raz's analysis suggests that laws governing the exercise of power are principles that condition or qualify the validity, scope and effect of the power's exercise and secure the successful exercise of that power. Many of the standards in public law that govern the manner in which one can exercise a power are principles. In particular, reasonableness, fairness, loyalty, impartiality, no conflict or proportionality are standards or principles that qualify the effect of an authorization in public law and fiduciary law. Administrators and fiduciaries, we will see in later chapters, are required to follow these principles in the exercise of their powers in order to produce valid legal acts.

There is thus potentially an important distinction between power-conferring rules on the one hand, and power-conferring principles on the other. The authorizing mandates that set out the scope of a power could be understood as "power-conferring rules" in that they stipulate expressly what one can or cannot do with a particular power. Often when we discuss the breach of a power's scope we talk in black and white terms, like a rule, – the administrator was either *intra* or *ultra*

[58] Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81:5 Yale LJ 823 at 836.
[59] *Ibid* at 835.

vires their jurisdiction. However, norms that pertain to the valid exercise of authority vary in structure and form in that sometimes they are principles, like impartiality or independence, sometimes formalities such as signatures or seals, or perhaps rules, such as the rule against non-delegation. However, one thing they all have in common is they act like principles in the Dworkinian sense, meaning, they qualify the application of power-conferring rules. In my view we can thus term these norms "power-conferring principles." They confer power in the sense that they make the successful exercise of a power possible in law, and they are principles in the sense that they modify the application of an authorized power. As we have seen, these principles are critical to the very form of legal powers because they intrinsically bring about the non-causal legal results the power is intended to facilitate. Without them, no legal results could be possible at all as they ground the effect and validity of the result. Arguably these principles are therefore internal to the very form of a legal power and a legal power cannot exist without them.

2.2.2.2. Power-Conferring Principles and the Form of Legal Powers

Power-conferring principles are important to the form of a legal power in seven ways. First, to take the example of a will, the principle that 'a will is invalid unless signed by three witnesses' communicates the consequences of certain actions to power-holders, so they have a discretion to choose if and when to make a will. Without power-conferring principles, the power-holder would not know the legal results of her actions, or conversely what actions to do to achieve the desired legal result.[60] This would undermine the key function of legal powers - to facilitate purposive and volitional legal action. Second, when a power-holder does choose to exercise the power to make a will, the power-conferring principles explain to the power-holder how to exercise the power.[61]

Third, as Austin points out, power-holders "*follow* rather than obey"[62] power-conferring principles. Given the act and result are intrinsically connected, we follow the acts prescribed by law usually only because we wish to bring about the legal results.[63] A power-holder thus must decide or intend to exercise the power, rather than unwittingly fulfil instructions as abstract

[60] L. Austin, "The Rule of Law" *supra* note 26 at 277.
[61] *Ibid*.
[62] *Ibid*.
[63] MacCormick & Raz, "Voluntary Obligations", *supra* note 16 at 81; L. Austin, "The Rule of Law" *supra* note 26 ("these instructions usually involve acts that individuals would have few reasons to engage in, apart from securing the desired legal consequences" at 277).

conditions of change.[64] Furthermore, as Essert persuasively argues, if power can only be exercised with intent, then in order to know when power has been exercised, that intent needs to be readily apparent to others, particularly to the liability-subject.[65] In other words the liability-subject must implicitly recognise the power-holder's intention to make a will as well as recognise that she did indeed make a will.[66]

Moreover, as noted above, powers are held over jural relations, meaning at least two persons are liable to have their legal positions changed *at the same time*, usually, the power-holder and at least one other person. This relational correlativity, plus the intrinsic relationship between the act and result, implies that powers need to be, Essert writes, "constituted entirely by facts that are public as between"[67] the power-holder and liability-subject. Thus, the exercise of a power is not merely brought about by following instructions but is "exercised through…the *communication of an intention* to change the legal situation in the relevant way."[68] The exercise of power is a public affair, explaining why many power-conferring laws prescribe unusual, public formal acts to exercise the power, such as registration, signing, raising hands, or public ceremony which "ensure their suitability as distinctly public communicative acts."[69] Thus an important substantive consequence of a power's form is that one cannot exercise a power 'privately' – it is always exercised as part of a process of public communication. Although it is unlikely that liability-holders will always know or be aware of an intention to exercise a power, Essert argues that the exercise of a power does not depend upon the knowledge of an intention to exercise, but its "availability for recognition"[70] or its "knowability"[71] usually through constructing an objective intention.

Fourth, power-conferring principles are what provide authority with its temporal quality. While *having* a power is a result of a formal delegation, the principles governing the exercise of a power

[64] Halpin, "Legal Power", *supra* note 20 at 140.
[65] Essert, "Legal Powers", *supra* note 27 at 146.
[66] Jennifer Hornsby, "Illocution and its Significance" in S L Tsohatzidis, ed, *Foundations of Speech Act Theory: Philosophical and Linguistic Perspectives* (Abingdon, Oxon: Taylor & Francis Group, 1994) (the speaker relies on the audience's receptiveness for "the utterance to work for her as illocutionary meant: the audience takes her to have done what she meant to do" at 192.).
[67] Essert, "Legal Powers", *supra* note 27 at 154.
[68] *Ibid* at 138.
[69] *Ibid* at 149.
[70] *Ibid* at 151.
[71] *Ibid*.

enable the power-holder to choose if and when to exercise a power and explains how to do so validly. Statute, trust deed, agency contract or any other consensual undertakings or delegations of power are all "discrete and datable"[72] "static or nounlike sentences or statements" [73] whereas acts-in-the-law are "dynamic or verb-like acts or activities of language."[74] Jennifer Raso helpfully points out there is a "gap" between formal discretion (the holding of a power) and operational discretion[75] (the exercise of a power) where authority is always in "a crucial state of becoming."[76] That "becoming" is found in the constitutive connection between following the prescribed laws and legal results, meaning authority is always being temporally generated. Put differently, power-conferring principles allow authority to be exercised temporally in a moment of space and time, rather than held statically.

Fifth, while these laws can be "manner and form" requirements, such as having three witnesses sign a will, often they also articulate or constitute the purpose and nature of the power-holder's authority. For example, judges are instructed to exercise their powers impartially and independently, but these requirements also constitute what it means to be a judge.[77] The value or purpose of judicial powers is to adjudicate a dispute between two parties (impartially) outside of the political branches of government (independently). These principles both regulate the exercise of a judge's power and are the formal requirements that generate the very notion of judicial power. Again, the intrinsic relation between act and result elucidates, for to be impartial and independent *is* in significant measure what it means to be a judge, and to act impartially and independently as a judge *is* to exercise valid judicial power. Even those instructions that appear more formalistic, such as offer, acceptance and consideration in contract law, can be interpreted as constituting contract as co-operative bilateral agreements for value. Significantly, therefore, power-conferring principles are constitutive laws; they constitute the nature of the power and terms upon which that power can be exercised.

---

[72] Evan Fox-Decent, "Trust and Authority" in Paul Miller & Matthew Harding, eds, *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, 2020) at 16.
[73] Constable, *supra* note 38 at 21.
[74] *Ibid*.
[75] Jennifer Marie Raso, *Administrative Justice: Guiding Caseworker Discretion* (SJD Thesis, Department of Law, University of Toronto, 2018) [unpublished] at 18–31.
[76] *Ibid* at 67.
[77] Fox-Decent, "Trust and Authority", *supra* note 72 at 179; *Valente v The Queen*, 1985 CanLII 25 (SCC), [1985] 2 SCR 673.

The offer and acceptance example also highlights that while statutes can prescribe the laws necessary to exercise powers, the common law will also provide instructions that regulate, and form the validity and legal effect of powers. Put differently, if an authorization is unfettered, or there is no explicit authorization, we can examine the nature and features of the relationship and then presuppose, attach or specify the relevant instructions that comprise those features and provide for its legal effectiveness.[78] The law will only do this, however where other conditions exist, such as the recognitional and value conditions discussed in the previous section.

Sixth, as I explained above, power-conferring principles do not simply instrumentally explain how to exercise a power, but have an important productive quality – they actually produce normative change and secure or provide for the validity of the action.[79] Power-conferring principles possess an important jurisgenerative quality that makes it possible for a purported legal act to be a genuine and valid legal act, perhaps as a kind of internal *grundnorm*. As noted in Chapter One, for Hans Kelsen, the *grundnorm* comes from within the legal system as a kind of constitutional non-posited presupposition or logical necessity that makes all other norms possible.[80] Kelsen placed this *grundnorm* as an authorizing norm that stretches across all legal systems. However, the view I offer here can take the important lesson of Kelsen (that legal power must be generated *within* a legal system) and explains why it is internal to power without relying on fictional, empty presuppositions.

Given that all legal powers must necessarily come with power-conferring principles in order to allow power-holders to act and make decisions with legal validity, power-conferring principles operate as *grundnorms* internal to the very concept legal powers. These norms can therefore explain difficult cases of legal powers, such as why "the sovereign has…powers regardless of any law purporting to grant them to him."[81] Power-conferring principles can explain why the sovereign's political power to create law and the state is *legal* as well as political in character. This is because even if sovereign power were authorized, for instance, by a Declaration of Independence or a logical presupposition, this would not be enough to render the exercise of that power legal in character. What makes a power *legal* in character is that subjection to it means

[78] Fox-Decent, "Trust and Authority", *supra* note 72 at 177.
[79] L. Austin, "The Rule of Law", *supra* note 26 at 277.
[80] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford University Press) at 150.
[81] MacCormick & Raz, "Voluntary Obligations", *supra* note 16 at 84.

that one is subject to a non-causal liability to a change in one's legal position (e.g. a change to one's liberty, status, duties or entitlements) and that that normative change is made possible by power-conferring principles. As I will argue in Chapter Five, a crucial institutional change the sovereign's power makes possible is the creation of the state. Thus, when the sovereign purportedly exercises a power to create the state, we can theorise this power as *legal* in nature by presupposing power-conferring principles that legally produce the state. In short, power-conferring principles are legal norms that make legal validity possible and inhere within the very concept of a legal power.

Seventh, power-conferring principles, as principles, hold weight rather than exist in an all-or-nothing character.[82] Thus, while as Richard Janda notes, a rule is the black and white conclusion of a moral debate,[83] a principle, Dworkin argues, "states a reason that argues in one direction, but does not necessitate a particular decision."[84] Hence, power-conferring principles form part of an moral argument about one's claim to authority, offering *reasons* as to *why* one's exercise of power is legitimate and valid. This interpretation fits with Nicole Roughan's understanding of the official's "claim, to authority". She reads the word "claim" not as a mere claim of right or a bald assertion of authority, but as an *argument* in favour of the power-holder's authority.[85] Roughan argues that on this view, officials become "advocates for those subject to law; they *seek to justify law's authority* over subjects rather than asserting authority on law's behalf."[86] An important substantive consequence is thus that decision-makers may be called upon to justify the exercise of their powers by reference to the power-conferring principles that they claim produce their legal authority. This justification may even need to include a reference to the purposive legal change that the power-conferring principles make possible. For example, property owners may be required to justify how the use of their power over an object contributes to the purpose for which the normative powers of ownership were conferred. Larissa Katz places that purpose as determining worthwhile uses for objects.[87] The property owner can thus *abuse* her office when she uses her

[82] Ronald M Dworkin, "The Model of Rules" (1967) 35:1 U Chicago L Rev 14 at 27.
[83] Richard Janda, "Law's Limits" (1990) 63:3 S Cal L Rev 727 at 733.
[84] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 26.
[85] Nicole Roughan, "The Official Point of View and the Official Claim to Authority" (2018) 38:2 Oxford J Leg Stud 191 at 204.
[86] *Ibid*; See also Constable, *supra* note 38 at 79.
[87] Larissa Katz, "Governing Through Owners: How And Why Formal Private Property Rights Enhance State Power" (2012) 160:7 U Pa L Rev 2029 at 2037.

authority spitefully or maliciously or as leverage to achieve an aim that causes harm to others.[88] Her abusive action is "neither an adequate nor an appropriate ground for determining a worthwhile agenda for a thing."[89] Thus, sometimes, even private, self-regarding power-holders may need to justify why the exercise of a power is valid.

As I will demonstrate in the second half of this chapter, this justification component becomes particularly salient in the context of fiduciary powers. This is because the primary power-conferring principle, loyalty, informs the power-holder that if she wishes to exercise her power validly, she must exercise her power on behalf of those subject to it. As such, the reasons for which the decision-maker act become central to the inquiry of validity because we need to understand whether or not the power-holder was motivated by the interests of the liability-subject. I will now turn to analyse fiduciary powers more closely.

2.3. Fiduciary Relationships

2.3.1. What is a Fiduciary?

Fiduciary duties arise where one person holds a discretion or power in relation to an entrusted legal or practical interest on behalf of someone other than themselves or on behalf of an impersonal purpose.[90] Often the fiduciary will hold this power in an ongoing managerial or administrative capacity.[91] Directors, for example, hold discretionary powers to advance the purposes of the articles of association[92] and perhaps more generally for the purposes of advancing growth and profit.[93] Management involves more than a one-time exercise of power but requires, for instance, the ongoing supervision of assets,[94] taking decisions about corporate financing and structuring, ensuring directors possess relevant information to make decisions such as annual

[88] Larissa Katz, "Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right" (2012) 122:6 Yale L J 1444 at 1448.
[89] *Ibid* at 1459.
[90] *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 at para 60, Wilson J. [*Frame*].
[91] See generally Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford; New York: Oxford University Press, 2011) at Chapter 4.
[92] *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560 [*BCE*].
[93] As suggested by David Ciepley, "Beyond Public and Private: Toward a Political Theory of the Corporation" (2013) 107:1 Am Polit Sci Rev 139.
[94] *Peoples Department Stores Inc (Trustee of) v Wise*, [2004] 3 SCR 461.

accounts or takeover doctrines[95] and "considering the impact of a decision on affected corporate constituents."[96]

Fiduciary powers are purposive meaning they are held for the purpose of advancing the welfare of others or for the advancement of a more specific impersonal mandate.[97] As such the distinction between powers held in service of individuals and powers held to advance mandates are unified by this more transcendent purpose of the fact the power is not held for one's own self-interest.[98] Thus, where doctrine speaks of fiduciary's acting for improper purposes or the "wrong reasons,"[99] this relates both to the more specific purpose or object of the fiduciary's mandate, which probably has a close connection to the statute, trust deed, contract, or articles of association, as well as to the more general purpose of the power being held for something or someone other than oneself. It is also these various purposes that helps us to analyse the distinction, and interaction, between the authorization and authority held by the fiduciary. A fiduciary decision maker needs to give due and solicitous consideration to (i) the scope of the authorizing mandate, (ii) the purposes of the mandate and, if relevant, (iii) the persons liable to have their normative positions changed by the exercise of a power.

When the fiduciary acts, she represents the legal personality of the beneficiary such that it is as if the beneficiary had acted himself.[100] The fiduciary thus is not exercising a power merely in relation to the beneficiary but for the beneficiary in relation to third parties.[101] This appropriation of another's autonomy and legal personality places the beneficiary in a uniquely vulnerable position because she has little option but to trust that the fiduciary will use her own autonomy in her best interests. Fiduciary relationships are thus characterised by a relationship of trust.[102] The quintessential fiduciary duty is that of loyalty, which broadly means a duty to act in the best

---

[95] Stephen Bottomley, "From Contractualism to Constitutionalism: A Framework for Corporate Goverance" (1997) 19:3 Sydney L Rev 277 at 298–299.
[96] Claudio R Rojas, "An Indeterminate Theory of Canadian Corporate Law" (2014) 47:1 UBC L Rev 59 at 66; See also *BCE*, *supra* note 92 at 565.
[97] Fox-Decent, *supra* note 91 at 37.
[98] cf. Paul B Miller & Andrew S Gold, "Fiduciary Governance" (2015) 57 Wm & Mary L Rev 513.
[99] Lionel Smith, "Prescriptive Fiduciary Duties" (2018) 37:2 U Queensland LJ 261 at 277.
[100] Fox-Decent, *Sovereignty's Promise*, *supra* note 91 at 134.
[101] Paul B Miller, "Fiduciary Representation" in Evan J Criddle et al, eds, *Fiduciary Government* (Cambridge, United Kingdom ; Cambridge University Press, 2018) at 35 citing; Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967) at 112.
[102] *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, McLachlin J. ("[t]he essence of a fiduciary relationship…is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged" at 543)].

interests of the beneficiary. Loyalty I will explain further below, is best interpreted as a power-conferring principle. This interpretation is controversial because it relies firstly upon viewing the requirement of loyalty as primarily triggered by a relationship, rather than by consent or contract, and second because it argues that the duty of loyalty is not a duty in the Hohfeldian sense but a power-conferring principle. I will thus first consider whether a fiduciary relationship arises by contract or is relational in nature, then I will turn to argue loyalty is not a duty.

2.3.2. Approaches to the Duty of Loyalty

2.3.2.1. Contractarian and Relational Approaches to Loyalty

How and when fiduciary duties arise in the first place remains a contested point in fiduciary scholarship and jurisprudence.[103] One reason for this is because loyalty is an onerous duty of self-denial which for some private fiduciary relationships is as onerous as acting exclusively for the benefit of the beneficiary.[104] The fiduciary is bound to act in the best interests of the beneficiary, is not to conflict herself with her duty or between beneficiaries, and is not to profit from the position. Thus, like judicial review, fiduciary law is animated with the crucial question – why can the courts of Equity impose the onerous duty of loyalty onto bilateral agreements for value that otherwise attempt to exclude or omit such a requirement? Given many fiduciary relations are found in private law, courts often are concerned to interfere in private arrangements to "set aside acts which, between persons in a wholly independent position, would have been perfectly valid."[105] Within commercial relations this anxiety is often heightened further.[106] The debate about why the duty of loyalty is justified primarily subsists between those who see the fiduciary relationship as arising due to a contract or consent on the one hand, and those who see it arising due to a particular relationship or status on the other. It is beyond the scope of the chapter to enter the contract/status debate in any depth. This author will take the relational view and explain that loyalty is inherent to the fiduciary relationship because it is a power-conferring principle that makes the fiduciary

[103] There is a vast literature on such a topic, and I will not discuss all of it here. Although the debate is important background to this thesis, I will primarily be defending a relational approach and relying upon this as an accepted premise for the development of the argument. For an overview, see Paul B Miller & Andrew S Gold, *Contract, Status, and Fiduciary Law*, 1st ed (Oxford, United Kingdom ; Oxford University Press, 2016).
[104] I say private law because in public law or trusts law the power is held for multiple classes of beneficiaries and so the duty is not one of acting *exclusively* for the beneficiary.
[105] *Re Coomber*, [1911] 1 Ch 723, CA at 728–729.
[106] Sarah Worthington, "Four Questions on Fiduciaries" (2016) 2:2 CJCCL 723.

relationship, and power, possible. As background to this argument, I will briefly explain the distinction between the contract and relational approaches.

For some, only a finding of an undertaking by the fiduciary can justify the imposition of onerous duties, such as the duty of loyalty. This may either mean the relationship is understood as contractual,[107] or means that we are more broadly trying to locate a consent by the fiduciary to undertake the position. It also could mean that loyalty is reasonably expected by the parties. The problem with the contractarian argument is it implies fiduciary relations are a bilateral agreement, which may work in the case of agency contracts, but is incongruous with many fiduciary relationships. For example, corporate directors' positions are often established by Royal Charter. Furthermore, the director's office exists over long, extended periods of time and many different persons may step into the position; the position thus exists above and beyond a contractual arrangement.

A better alternative is one that James Edelman takes, which is that like a contract, fiduciary duties are voluntary obligations, but unlike a contract, can be unilaterally undertaken. For Edelman, the precondition of a fiduciary obligation is "the existence of an undertaking, objectively manifested."[108] In many situations a fiduciary can be to manifest an intention to undertake the role.[109] Parents, for example, through birth or adoption may be understood to unilaterally undertake a parental role to which the child does not consent to.[110] However, we may legitimately question whether a unilateral undertaking or choice is always present in parent-child fiduciary relations. Harding argues that many parents do not choose to be parents, and abusive and neglectful conduct cannot be constructed to demonstrate an objective undertaking. He claims:

> "[U]ltimately a parent owes moral duties to serve her child's interests simply because she is a parent. Indeed, given the profound vulnerability of children, the nature of the family as

[107] *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504
[108] James Edelman, "The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties" in Gold & Miller, *Philosophical Foundations*, *supra* note 45 at 21
[109] *Grimaldi v Chameleon Mining NL (No 2)*, (2012) 287 ALR 22, Finn J ("... a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest ..." at para 177).
[110] See Evan Fox-Decent, "Fiduciary Authority and the Service Conception" in Gold & Miller, *Philosophical Foundations*, *supra* note 45 at 363.

> a social and economic institution, and human traditions and cultures, it is difficult to think of a social role in which moral duties are less likely to be a matter of choice."[111]

Harding suggests here that although in many cases there may be an (objective or subjective) undertaking, this undertaking is not what *justifies* the duty of loyalty.[112] The most salient aspect of a fiduciary relationship is the other-regarding nature of the *power*. If, as Harding suggests, obligations are choice-dependant, there is no reason to suppose the same logic applies to legal powers. Choice is relevant to a legal power at the point of its exercise, but choice or consent is not "the *normative source* of the powers; *the powers are instead presupposed*."[113] Marriage, for instance, is hopefully voluntary and consensual, but the requirements that instruct us how to execute the contract of marriage are determined by presupposed power-conferring norms.

By contrast, some view the *relationship* subsisting between the parties as the signifier of a fiduciary relationship.[114] This approach tends to isolate fiduciary law as a relationship based upon trust in which one party holds decision-making authority on behalf of another.[115] In so doing, this approach draws our attention to the power-liability relationship subsisting between the parties and suggests fiduciary law is concerned with the proper constitution of legal powers and curbing any abuse of this trust relationship.[116] We thereby look to the *legal* vulnerability of the beneficiary, that he is liable to have his position changed for him, and that the fiduciary holds part of his autonomy or legal personality.[117] Accordingly, it is not just that the fiduciary holds discretion nor that the interest is particularly important which is merely a "necessary but not sufficient condition"[118] of a fiduciary relationship. What marks the presence of fiduciary relations is, as Paul Miller

---

[111] Matthew Harding, "Fiduciary Undertakings" in Miller & Gold, *Contract, Status, supra* note 103 at 75.
[112] Ibid, at 72-75. See also *In re Goldcorp Exchange Ltd*, [1995] 1 AC 74 at 98.
[113] Harding, Fiduciary Undertakings, *supra* note 111 at 76-77
[114] *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 [*Lac Minerals*], La Forest J ("[r]ather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship" at 648).
[115] *Hospital Products Ltd v United States Surgical Corporation*, 1984 HCA 64 [*Hospital Products*], Mason J ("[t]he critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense" at 96-97); See the work of these scholars, Smith, "Fiduciary Relationships", *supra* note 47; Remus Valsan, "Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment" (2016) 62:1 McGill LJ 1. Paul B Miller, Fiduciary Relationship, supra note 45 at 63
[116] *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*, [2010] HCA 19 (asks if there is an "entrustment or custodianship to be abused" at 93).
[117] Miller, "Fiduciary Representation", *supra* note 101.
[118] Frank H Easterbrook and Daniel R Fischel, 'Contract and Fiduciary Duty' (1993) 36 J L and Econ 425 at 436

underscores, that the fiduciary is a representative.[119] The fiduciary holds a representative normative power to act on behalf of another within a relationship of trust. A relational approach understands the fiduciary-beneficiary relationship as a juridical other-regarding power relationship in its own right, where the relevant change of position is not only what may follow on the exercise of the power (e.g. an imposition of a new contractual obligation) but the changes the relationship between parties to one of trust.[120]

2.3.2.2. Loyalty: Duty or Virtue?

Although "the distinguishing obligation of the fiduciary is the obligation of loyalty"[121] there are differing interpretations of the exact nature and content of the duty of loyalty. One reason for this is because a "duty of loyalty" is an "entirely open-ended"[122] positive duty to do what is in the "best interests of the beneficiary". As Edelman muses, "an "obligation" to be "loyal" invites the question: loyal to what end?"[123]

According to much doctrine, loyalty is a prescriptive, subjective requirement to judge what the fiduciary believes to be the best interests of the beneficiary.[124] Loyalty is process-centered, meaning it is concerned with *how* one acted in the course of exercising one's power and the motives, reasons and intents for which the decision-maker acts.[125] Irit Samet thus argues loyalty is an Aristotelian virtue, meaning the fiduciary must develop a "commitment to the relationship"[126] when exercising her duties.[127] She argues a fiduciary's work should be "fortified with an earnest

[119] Miller, "Fiduciary Relationship", *supra* note 45 at 70
[120] See *ibid*.
[121] *Bristol and West Building Society v Mothew*, [1998] Ch 1 at 18 per Millet LJ [*Mothew*].
[122] Lionel Smith, "Can We Be Obliged to Be Selfless?" in Gold & Miller, *Philosophical Foundations*, *supra* note 45 141 at 143.
[123] Edelman, *supra* note 108 at 22
[124] *Eclairs Group Ltd v JKX Oil & Gas plc*, [2015] UKSC 71 at paras 15-16 [*Eclairs*]; *Regentcrest plc v Cohen*, [2000] 2 BCLC 80 at para 120; *British Airways Plc v Airways Pension Scheme Trustee Ltd*, [2018] EWCA Civ 1533, CA; *Hindle v John Cotton Ltd*, 1919 SLR 625; *TMO Renewables Ltd (in liquidation) v Yeo*, [2021] EWHC 2033 (Ch) at 389–392; *Lehtimäki and others v Cooper*, 2020 UKSC 33 at paras 187-189 [*Lehtimäki*]; *Kain v Hutton*, 2008 NZSC 61 at para 19; Smith, "Fiduciary Relationships", *supra* note 47; Remus Valsan, *Understanding Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law* (DCL Thesis, Faculty of Law, McGill University, 2012) [unpublished]; P D Finn, *Fiduciary Obligations* (Sydney: Law Book Co., 1977) at 13–14.; Smith, "Can We Be Obliged" *supra* note 122.
[125] *Vatcher v Paull*, [1915] AC 372 at 378 [*Vatcher*].
[126] Irit Samet, "Fiduciary Loyalty as a Kantian Virtue" in Gold & Miller, *Philosophical Foundations*, *supra* note 45, 125 at 127.
[127] Conal Condren, *Argument and Authority in Early Modern England: the Presupposition of Oaths and Offices* (Cambridge; New York: Cambridge University Press, 2006) at 86.

feeling of responsibility for her principal"[128] so that she "will be directly and favourably moved by the thought that [the beneficiary is] counting on her."[129] A virtue ethics approach draws our attention to the fiduciary's motivations in the course of deliberative action.[130] This is why the concept of a "loyal Nazi" sounds perverse. If virtue forms a deliberative practise, then the Nazi is no longer loyal in any meaningful sense of the word. As Hannah Arendt notes, he is simply impulsively following orders to the exclusion of any practical reasoning or motives whatsoever.[131] Virtuous, representative decision-making must be deliberate and guided by motive.

The closest ethical duty to the duty of loyalty, it has been noted, is the Kantian imperfect duty of benevolence to "advance the happiness of others, with their happiness in mind, or their happiness being the motivation of the act."[132] Unlike a perfect duty, it must be possible to say *why* an imperfect obligation was performed. However, it would be very difficult, if not impossible, to actually enforce this duty because, as Arthur Laby points out, "no one can force another to have a motive."[133] More than this, to enforce it would rob the action of its virtue; to be forced to give to charity guts the action of its benevolence.[134] In other words, to turn the virtue of loyalty into a perfect obligation undercuts the discretion held by the fiduciary and undercuts the point the fiduciary must be guided by benevolent motive. Thus, a virtue ethics approach to loyalty explains why loyalty is open-ended, why fiduciary law is concerned with the subjective intentions of the fiduciary, and why it is unimpressed with apathetic and indeliberate fiduciaries.[135] On the other hand, a virtue ethics perspective does not explain why the duty of loyalty is, despite its subjective open-ended nature, enforceable in courts of law. Therefore, we need to interpret loyalty from the

---

[128] Samet, supra note 126 at 138
[129] Karen Jones, "Trust as an Affective Attitude" (1996) 107:1 Ethics 4 at 6. Paul Faulkner, "Fiduciary Grounds and Reasons" in Miller & Harding, *supra* note 72, 17 at 32–34.
[130] Daryl Koehn, "A Role for Virtue Ethics in the Analysis of Business Practice" (1995) 5:3 Business Ethics Quarterly 533 at 534.
[131] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, N.Y.: Penguin Books, 2006) at 227.
[132] JE Penner, "We All Make Mistakes: A 'Duty of Virtue' Theory of Restitutionary Liability for Mistaken Payments" (2018) 81:2 MLR 222 at 229; See also Arthur B Laby, "Fiduciary Obligation as the Adoption of Ends" (2008) 56:1 Buff L Rev 99–168. and Smith, "Can We Be Obliged" *supra* note 122.
[133] Laby, "Fiduciary Obligation", *supra* note 132 at 142.
[134] JE Penner, "Equity, Justice and Conscience" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford, New York: Oxford University Press, 2020) at 66.
[135] *Vatcher*, *supra* note 125 at 378 (fiduciaries must "turn their mind" to the power); *Turner v Corney*, (1841) 6 Beav 516 617 (fiduciaries cannot delegate their powers); *Erceg v Erceg*, 2017 1 NZLR 320 at paras 55-56. [*Erceg*] (trustees must decide whether or not to disclose particular information to the beneficiaries. The list of factors the trustee needs to take into account when deciding whether or not to hand over information to a beneficiary has been codified in New Zealand in the Trusts Act [NZ], 2019/38, s 53.).

perspective of a different legal relationship that can more comfortably host the subjective and prescriptive content of loyalty.

2.4. Loyalty as a Power-Conferring Principle

Placing a deliberative duty within a legal relationship may sound like a challenge, especially if we take seriously the claim that enforcing a motive is incongruent with the concept of ethical decision-making. However, we have already seen that the reasons or justifications for action can be relevant to the proper exercise of a legal power, and that fiduciary law is primarily characterised by the presence of other-regarding powers. Thus, understanding fiduciary law, and the duty of loyalty from the perspective of a Hohfeldian power-liability relationship seems like a more natural place to interpret loyalty. This is what Prof. Lionel Smith does, as he persuasively contends that we can interpret loyalty, not as a duty, but as a condition or requirement for the valid exercise of power.[136] Smith explains,

> "Loyalty—or at least this aspect of loyalty, the "acting in the best interests" aspect—is better understood as a requirement or a prerequisite for the effective exercise of fiduciary powers... It is still a juridical construct: it is part of the articulation of the power, inasmuch as *it determines how the power can be validly exercised*."[137]

In other words, loyalty is a constitutive principle that modifies the nature of the legal power held by the fiduciary and governs the proper exercise of the power. Or in the formulation developed above, loyalty is the primary power-conferring principle or the central *grundnorm* of fiduciary law that makes possible the valid exercise of fiduciary power. As argued above, power-conferring principles are acts-in-the-law that make possible new kinds of legal relationships. The normative legal relation the power-conferring principle of loyalty generates is that of *representation*. Fiduciaries exercise legal powers or decide significant practical interests on behalf of others, which normatively changes the nature of the relationship between the beneficiary and fiduciary to one of trust.[138] Thus while an agent changes the normative position of the principal vis-à-vis another by entering into a contract, the very fact this is done *for* the principal is also a normative change that acts on top of, or as well as, the contractual normative change. Thus, the normative relation that

[136] Smith, "Prescriptive Fiduciary Duties", *supra* note 99 at 280.
[137] Lionel Smith, Aspects of Loyalty (July 27, 2017).online: SSRN: <ssrn.com/abstract=3009894> at 5
[138] Miller, "Fiduciary Relationship", *supra* note 45 at 70

other-regarding power makes possible is a "broadly [an] agential form of authority in which a person or group of persons (the fiduciary / fiduciaries) personates another."[139] In short, the fiduciary holds a power of representation in which she is legally able to personate the beneficiary and exercise part of the beneficiary's autonomy.[140]

Consequently, the representative is to "make present" another's legal personhood or a purpose in her actions as a representative.[141] In some fiduciary relationships, particularly agency, this presence will involve responding to ongoing directions given by the delegate.[142] However, representation can also mean being, in Pettit's phrase, "indicative of the representee,"[143] particularly where the representor is understood to be representing a body, an institution or a public purpose. Here, the fiduciary is to *interpret* the principal's purpose, and her decision is to reflect or track the other-regarding purposes of the mandate.[144] Most fiduciary relationships would be of this latter kind, as the fiduciary will often need to independently decide how to promote the beneficiary's interests and be seen to advance their interests.[145]

Crucially, therefore, the beneficiary ought to be able to recognise herself in the exercise of the power – she ought to be able to interpret the fiduciary's actions as genuinely representing her interests. Where she cannot recognise her interests in the fiduciary's actions, legal validity is either compromised outright or put under stress. As Harding notes, while extorting profits from a beneficiary is obviously a breach of trust, a fiduciary still breaches the beneficiary's trust when she "acted in a way that could not be justified by an account that gave [the beneficiary's] interests their due recognition."[146] Furthermore, when we plan on behalf of others, it follows that the power-holder must consider how her decision respects the freedom and moral agency of the beneficiary "as if the beneficiary herself had exercised her own autonomy and had acquired the new obligations herself."[147] Authentic representative decision-making can never subsume the

---

[139] Miller, "Fiduciary Representation", *supra* note 101 at 28; Smith, "Fiduciary Relationships", *supra* note 47 ("part of the autonomy—part of the choice-making ability—of the beneficiary" at 628).
[140] Smith, "Fiduciary Relationships", *supra* note 47 at 628.
[141] See Miller, "Fiduciary Representation", *supra* note 101 at 35.
[142] Laby, "Fiduciary Obligation", *supra* note 132 at 132.
[143] Philip Pettit, "Representation, Responsive and Indicative" (2010) 17:3 Constellations 426 at 428.
[144] Laby, "Fiduciary Obligation", *supra* note 132 at 135.
[145] Miller, "Fiduciary Representation", *supra* note 101 at 40.
[146] Matthew Harding, "Responding to Trust: Responding to Trust" (2011) 24:1 Ratio Juris 75 at 80, paraphrasing; Joseph Raz, *Engaging Reason: On the Theory of Value and Action*, first edition ed (Oxford ; New York: Oxford University Press, 1999) at 275.
[147] Fox-Decent, *Sovereignty's Promise*, *supra* note 91 at 134.

beneficiary into the ends of the fiduciary. Where a fiduciary is disloyal, this evokes a moral concern of subsuming that person's inviolability into their own ends,[148] even where the fiduciary is not necessarily doing so with malevolent intentions and whether or not harm is caused to the beneficiary.[149]

The next thing to note is, like other legal powers, it is not possible to parse apart doing the acts prescribed by law that intrinsically generate the legal result, from the validity of that ensuing legal result. Thus, in this instance, when a fiduciary acts on behalf of the beneficiary, the valid representation of the beneficiary's interests is intrinsically produced. In other words, there is an intrinsic relationship between furthering the interests of the beneficiary, or furthering an impersonal purpose, and a valid exercise of the fiduciary power. Given the legal acts and results are intwined, this means we need to know if the fiduciary acted for the right reasons in exercising her powers, as only if she furthered the interests of the beneficiaries will she exercise proper authority. This is why, as I noted in Chapter One, trusts law is concerned with the subjective motives of the fiduciary and why public law is concerned with inquiring into the justifications put forward by the administrator.

While not all fiduciary relationships require the fiduciary to give reasons,[150] this does not mean the law provides no public communication of intent or accountability to the beneficiary. For example, an exercise of a power of advancement must be intended by the trustee,[151] and must be executed usually by deed,[152] and these advances must then be brought into account.[153] These accounts are, as of right, available to the beneficiary and include information about what distributions have been made and what has been done with the assets.[154] Furthermore, where disclosure of certain information is necessary to hold trustees to account the court will generally be in favour of ordering disclosure unless there are "exceptional circumstances."[155] Moreover, often the invocation of the relevant power-conferring principles themselves will enable the

[148] Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55:3 McGill LJ 511 at 523.
[149] *Regal Hastings v Gulliver*, [1967] 2 AC 134 at 144 [*Regal Hastings*]; *Vatcher*, *supra* note 125 at 378; *Boardman v Phipps*, [1966] UKHL 2; *Lac Minerals*, *supra* note 114.
[150] See Chapter 3, section 3.2.4. for more discussion on this point.
[151] *Kain v Hutton*, *supra* note 124.
[152] *Sieff v Fox*, [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 at para 38.
[153] Nicole Hoddinott "Trustees' Powers of Advancement" (29 July 2021), online (blog): *So Legal* < www.solegal.co.uk/insights/trustees-powers-advancement>
[154] *Ball v Ball and Anor*, [2020] EWHC 1020 (Ch) [*Ball*].
[155] *Erceg*, *supra* note 135 at para 62; *Lewis v Tamplin*, [2018] EWHC 777 (Ch).

beneficiary and the court to interpret the fiduciary's actions as exercised on behalf of the beneficiary. This includes an invocation of the central *grundnorm* itself, but as we will see in Chapter Three, there are other doctrines in fiduciary law that likewise can be interpreted as instructing the fiduciary on how to properly exercise her discretion. For example, in order to represent another, one cannot be acting for an improper purpose, or take into account extraneous considerations, or refuse to disclose information to the person whose affairs and information you are dealing with, or delegate out the beneficiary's legal personality to others without consent. All these requirements are concrete standards that instruct the fiduciary on how to act for another, secure the validity of the legal results the fiduciary wishes to bring about, constitute the very act of what it means to be a fiduciary, and lets courts and beneficiaries know if the fiduciary acted with other-regarding motives. Conversely, where a fiduciary does not act for proper purposes, relevant considerations etc. or where the fiduciary has no reasons for deciding on a particular course of action,[156] or no reason for inaction,[157] the court will conclude there has been no real and genuine exercise of discretion.[158]

A final point is that understanding loyalty as a power-conferring principle consequently explains why there is no need to demonstrate harm to the beneficiary to access a remedy. The law in this context is not concerned with harm but with validity and the primary remedy for non-compliance is rescission, meaning the transaction is set aside as invalid.[159] Furthermore, the fact that wrongdoing is not a precondition to rescission suggests that the primary purpose of the loyalty requirement is not to make it "more likely"[160] that the fiduciary will remain faithful,[161] but rather is to help the fiduciary constitute representational authority as she exercises her power. Remus Valsan has persuasively argued that the no conflict rule serves to help the fiduciary in situations

---

[156] Gary Watt, *Trusts and Equity*, 8th ed (Oxford University Press, 2018) at 367.
[157] *Wight & Anor v Olswang*, [2000] EWCA Civ 310.
[158] *Marsella v Wareham (No 2)*, [2019] VSC 65 [*Marcella*].
[159] Equitable compensation may in some cases be available, but the quantum is determined only after the inquiry into validity. Furthermore, equitable compensation is perhaps better thought of as a restitutionary remedy as opposed to a corrective one. For more on this, see Chapter 3, notes 172-175 and the accompanying text.
[160] Miller, "Fiduciary Representation", *supra* note 101 at 40; This is implied in Matthew Conaglen, *Fiduciary Loyalty : Protecting the Due Performance of Non-Fiduciary Duties* (New York : Hart Publishing, 2010). He argues that loyalty makes it more likely one will perform one's non-fiduciary duties (ibid. at 202).
[161]Robert H Sitkoff, "An Economic Theory of Fiduciary Law" in Gold & Miller, *Philosophical Foundations, supra* note 45 at 201. See, for instance, *Hodgkinson v Simms*, [1994] 3 SCR 377 at 452–454, La Forest J. ; *Murad v Al-Saraj*, 2005 EWCA Civ 959 at para 74, Lady Arden [*Murad*]; Robert H Sitkoff, "An Economic Theory of Fiduciary Law" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (OUP Oxford, 2014) at 201.

where she does not even know if extraneous interests interrupted her other-regarding discretion.[162] Equity assumes that a trustee or fiduciary is a "good person";[163] i.e. a person who may not always be sure how to act on another's behalf, and is one whom equity can assist so as to guard against improper influences that could besmirch their conscience. Loyalty can thus be interpreted as actually instructing the fiduciary on how to exercise her other-regarding power. Thus, while loyalty has a negative dimension in that it limits how the fiduciary can use the power, crucially it also has a positive dimension in that it explains *how* to validly represent the affairs of others.[164]

Accordingly, we do not need to locate consent to impose a duty of loyalty. This is because loyalty is an inherent *grundnorm* of fiduciary power, necessarily presupposed so as to make it possible for power-holders to act on behalf of others in law. Loyalty thus makes possible the very concept of acting on behalf of others and generates the representation that fiduciary law governs. Without the power-conferring principle of loyalty, there would be no norms guiding the fiduciary upon how to act, and no norms intrinsically bringing about valid legal results. Although the power-conferring approach is similar to Smith's idea of a requirement attached to the power, a power-conferring approach squarely views loyalty as a constitutive norm as opposed to viewing loyalty only as antecedent of duty-imposing norms i.e. as a condition that comes prior to or necessary for the imposition of a duty. Seeing loyalty as a power-conferring principle helps us therefore isolate how loyalty establishes a framework of representative decision-making.

Conclusion

One of the biggest conundrums of public law and fiduciary law is why public officials and fiduciaries are regulated and constituted by laws that do not come from any particular authorizing source. The purpose of this chapter was to argue that legal authority can be generated absent explicit authorizations. Authority is generated, I argued, by power-conferring principles that inhere within the very concept of legal powers. This is because legal powers, as non-causal acts-in-the-law require laws that generate normative results that are not otherwise possible. As I will demonstrate in later chapters, where authorizations fail to make explicit these norms, or where

[162] Valsan, "Fiduciary Duties", *supra* note 115 at 18; *Bray v Ford*, [1896] AC 44 at 51, Lord Herschell.
[163] *Lehtimäki*, *supra* note 124 at para 189, Lady Arden.
[164] Valsan, "Fiduciary Duties", *supra* note 115 ("It tells a fiduciary what to do when exercising discretion, rather than what is a relevant consideration for each decision" at 34).

there is no explicit authorization at all, the law will nevertheless presuppose the existence of power-conferring principles in order to secure the validity of a purported power-holders action.

In the second part of the chapter, I applied the power-conferring framework to fiduciary powers. As with other power-holders, the fiduciary power-holder will exercise authority when she follows the power-conferring principles that confer her authority and provide for the validity of her action. Loyalty, as the central power-conferring principle in fiduciary law, instructs the fiduciary that if she wishes to exercise her power validly, she must act with the right kind of motive or reasons, meaning, she must be acting in the best interests of the beneficiaries or furthering the purpose for which the power is held. As we will also explore more in later chapters, this is why the motives or reasons for which the fiduciary acts become central to the question of validity and legitimacy. The next chapter will explore these points more in the context of trustee powers.

Chapter Three

3. The Supervisory Jurisdiction Over Trusts Administration

Prologue

The supervisory jurisdiction over trusts aims to protect the integrity of trust administration. It does so, for example, by advising or blessing momentous trustee decisions, overseeing the provision of information to beneficiaries, removing and replacing trustees, and if necessary, performing the trust. In this chapter, I argue that the practice of judicial review is also essential to the proper administration of a trust because the doctrines of judicial review, as power-conferring principles, constitute trustee authority. In other words, as power-conferring principles, the doctrines of judicial review set the various requirements on trustees that enable us to know when a trust has indeed been properly administered. To build the argument that the doctrines of judicial review are power-conferring principles, I closely analyze the relevant and irrelevant considerations doctrine and show these doctrines, as an extension of the *grundnorm* loyalty, make possible the valid exercise of trustee power.

Introduction

A trust is a fiduciary relationship where one person or a group of persons, the trustee(s), holds, or deals with, property on behalf of others, the beneficiaries.[1] Trustees generally hold legal title to the property, whereas beneficiaries hold equitable title, meaning they are considered to be the true owners of the property in Equity.[2] To create a valid trust, the settlor needs to abide by the three certainties.[3] First, there needs to be a certainty of intention on the part of the settlor.[4] Second, there must be a certainty of subject matter, meaning the assets that comprise the trust must be certain.[5] Finally, there must be a certainty of objects, meaning the identity of the beneficiaries should be sufficiently clear.[6] There are many different types of trust. For instance, in a fixed trust,

[1] See *Trusts Act* 2019 (NZ) 2019/38 s 13
[2] David J Hayton et al, *Law Relating to Trusts and Trustees*, 19th ed (London, UK: LexisNexis UK, 2016).
[3] *Knight v Knight*, (1840) 3 Beav 148 [*Knight v Knight*] at 173, Lord Langdale.
[4] *Jones v Lock*, (1865) 1 LR 1 Ch App 25 [*Jones*].
[5] *Palmer v Simmonds*, (1854) 2 Drew 221 [*Palmer*].
[6] *Re Baden (No 2)*, [1973] Ch 9 [*Re Baden*].

beneficiaries are identified in the trust deed and the trust deed makes clear how the assets should be distributed.[7] In a discretionary trust, the beneficiaries are often defined as a broad class of persons and the trustee holds a discretion over how the assets should be distributed and to whom.[8] The court holds a vast array of powers to assist the trustee in the ongoing management and administration of a trust.[9] For example, the court holds the power to review and set aside invalid exercises of trustee discretion,[10] to advise and bless momentous trustee decisions,[11] authorise renumerations,[12] remove and replace trustees,[13] and if necessary, compel performance and administer the trust.[14] This chapter is concerned with looking at the nature and extent of this supervisory jurisdiction over trusts administration (SJTA).

The SJTA has not been often theorised, yet it reveals much about Equity's place amongst other areas of private law.[15] As the Privy Council in *Crociani v Crociani*[16] noted, the court's "power to supervise the administration of trusts, primarily to protect the interests of beneficiaries… represents a clear and, for present purposes, significant distinction between trusts and contracts."[17] The distinction is significant because contract law governs corrective justice, which aims to correct

[7] CT Emery, "The Most Hallowed Principle – Certainty of Beneficiaries of Trusts and Powers of Appointment" (1982) 98 Law Q Rev 551 at 559.
[8] *Ibid* at 569.
[9] *Lehtimäki and others v Cooper*, 2020 UKSC 33 [*Lehtimäki*] at paras 174-204, Lady Arden; For an overview, see Daniel Clarry, *The Supervisory Jurisdiction Over Trust Administration* (Oxford: Oxford University Press, 2018).
[10] Some early cases include, for example, *Gisborne v Gisborne*, 1877 (1876-1877) LR 2 App Cas 300 (HL) [*Gisborne*]; *Re Beloved Wilkes's Charity*, (1851) 3 Mac & G 440 [*Re Beloved Wilkes's*]; *Dundee General Hospitals Board of Management v Walker*, [1952] 1 All ER 896 [*Dundee General Hospitals*]; *Fox v Fox Estate*, (1996) 28 OR (3d) 496, [1996] OJ No 375 [*Fox*].
[11] *Public Trustee v Cooper*, [2001] WTLR 901 [*Cooper*]; *Re Toigo Estate*, 2018 BCSC 936 [*Re Toigo Estate*]; *X v A*, [2005] EWHC 2706 (Ch), [2006] 1 WLR 741 [*X v A*] at para 12.
[12] *Re Duke of Northfolk's Settlement Trusts*, [1982] Ch D 61, CA [*Re Duke of Northfolk*]; *Thompson v Lamport*, [1945] SCR 343 [*Thompson v Lamport*].
[13] For example, *Letterstedt v Broers*, (1884) 9 App Cas 371 [*Letterstedt*]; *Conroy v Stokes*, 1952 CanLII 227, 4 DLR 124 [*Conroy*]; *Titterton v Oates*, [2001] WTLR 319 [*Titterton v Oates*]; *Thomas and Agnes Carvel Foundation v Carvel*, 2007 EWHC 1314 (Ch) [*Carvel*].
[14] *In re Gulbenkian's Settlements*, [1970] AC 508, HL, [1968] 3 WLR 1127 [*In re Gulbenkian's*], Lord Upjohn ("the trustees must exercise the power and in default the court will" at 525); *McPhail v Doulton*, [1971] AC 424, HL, [1970] 2 WLR 1110 [*McPhail*], Lord Wilberforce ("in the case of a trust power, if the trustees do not exercise it, the court will" at 456G-457B).
[15] Cf. Clarry, *supra* note 9; Richard Nolan, "The Execution of a Trust Shall Be under the Control of a Court: A Maxim in Modern Times" (2016) 2 Can J Comp & Contemp L 469; Richard Nolan, "Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures" in Paul S Davies & James Penner, eds, *Equity, Trusts and Commerce* (London: Bloomsbury Publishing PLC, 2017); Matthew Harding, "Equity and Institutions" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford, New York: Oxford University Press, 2020); P G Turner, "Equity and Administration" in P G Turner, ed, *Equity and Administration* (Cambridge University Press, 2016).
[16] *Crociani v Crociani*, [2014] UKPC 40 [*Crociani*].
[17] *Ibid* at para 36.

the claim-rights of individuals vis-à-vis the person who broke a correlative obligation.[18] However this is not the primary goal of the justice administered by the SJTA. Amending Harding's point that equity concerns itself with the "integrity of the trust structure,"[19] in my view, trusts law's primary goal is to secure the "integrity" of trust administration by seeing that trusts are properly executed.[20] The justice that governs trusts law is therefore one that aims to secure the smooth and seamless administration of a trust. Many of the court's supervisory powers, I argue, aim to either facilitate due administration or remedy any maladministration in the execution of the trust fund.

In Chapter One, I noted that the doctrines governing the proper exercise of trustee discretion can be compared with those found in judicial review of administrative action. However, public lawyers may immediately be struck both by the breadth of the SJTA, as well as by its primarily administrative and facilitative, as opposed to adjudicative, character. Arguably there are more instructive parallels between the SJTA and the internal workings of administrative agencies than those found with judicial review. Both the SJTA and administrative agencies fashion alternative and ongoing supervisory remedies, facilitate and regulate complex administrative schemes and in one way or another, are affiliated with the Crown.[21] On the other hand, judicial review of trustee discretion remains a significant aspect of the supervisory jurisdiction. Doctrines that regulate and constitute trustee discretion parallel almost verbatim the doctrines found in judicial review of administrative action. For example, trustees must act only for proper purposes,[22] act honestly and in good faith,[23] not delegate their discretion,[24] and must not act unreasonably or irrationally.[25]

---

[18] For an overview of corrective justice, see Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012).
[19] Harding, *supra* note 15 at 342.
[20] *Ibid* at 342, ("equity's interest in institutions [ensures] institutions flourish as arrangements or frameworks for human action" at 334); Jessica Hudson, *Assuring the Express Trust: The So-Called "Beneficiary's Proprietary Claim"* (PhD, University of New South Wales, 2019) [unpublished] ("equity controls power to give effect to its institutional commitment to the express trust" at 8).
[21] Turner, "Equity and Administration", *supra* note 15; Cristie Ford, "Dogs & Tails: Remedies in Administrative Law" in Lorne Mitchell Sossin, ed, *Administrative Law in Context* (Toronto : Emond Montgomery Publications, 2013).
[22] *Duke of Portland v Lady Topham*, (1864) 11 HLC 32 [*Duke of Portland*] at 54; *Cloutte v Storey*, [1911] 1 Ch 18 [*Cloutte*]; *Vatcher v Paull*, [1915] AC 372 [*Vatcher*] at 378; *Edell v Sitzer*, 2001 CanLII 27989, 55 OR (3d) 198 [*Edell*] at para 164, Cullity J; *TLC The Land Conservancy of British Columbia v The University of British Columbia*, 2014 BCCA 473 [*TLC v UBC (CA)*] at para 67.
[23] *Karger v Paul*, [1984] VR 161 [*Karger v Paul*] at 164; *Re McLaren*, (1922) 69 DLR 599, 51 OLR 538 [*Re McLaren*].
[24] *Turner v Corney*, (1841) 6 Beav 516 617 [*Turner v. Corney*]; *Speight v Gaunt*, (1883) LR 22 Ch D 727 [*Speight v Gaunt*]; *Scaffidi v Montevento Holdings Pty Ltd*, [2011] WASCA 146 [*Scaffidi*] at para 150.
[25] *Ex parte Lloyd*, (1882) 47 LT 64 [*Ex parte Lloyd*] at 65, Jessel MR.

A challenge for this chapter, however, is understanding how judicial review fits within the SJTA's function as a wider, administrative jurisdiction to supervise and manage trust administration. Some scholars doubt that judicial review, as an adversarial jurisdiction, can be interpreted as part of the court's jurisdiction to secure the smooth administration of trusts, instead arguing judicial review should be theorised as part of the court's adjudicative and remedial jurisdiction. However, I will argue that we can indeed understand judicial review as part of the SJTA. To argue that the practice of judicial review is essential to the proper administration of a trust, I interpret the doctrines of judicial review as power-conferring principles. As power-conferring principles, the doctrines of judicial review make it possible for the trustee to properly execute her trust by bringing about valid normative changes in the position of the beneficiary. In other words, power-conferring principles set the various requirements on trustees that enable us to know when a trust has indeed been properly administered.

To build the argument that the doctrines of judicial review are power-conferring principles, I analyze the relevant and irrelevant considerations doctrine, as applied in *Pitt v Holt.*[26] In this case, Lord Walker found that the relevant/irrelevant considerations doctrine governs the validity of the *exercise* of a trustee's power as opposed to the *scope* of the trustee's power. The relevant considerations doctrine, as an aspect of the fiduciary principle, thus explains to a trustee how she can validly exercise her power in an other-regarding fashion. The practice of reviewing on these grounds, therefore, supplies the necessary framework for trustees to properly exercise their authority, ensuring that the trust can be properly administered according to law.

This chapter is organised into three broad sections. First, I provide an overview of the SJTA, particularly noting the ways in which this jurisdiction is administrative in nature. Second, I present my argument that the rule in *Re Hasting's Bass* is a power-conferring principle that generates and constitutes trustee authority, noting that this means judicial review can be interpreted as part of the SJTA. Finally, given supervision is concerned with protecting the trust, I argue in the third section that this means the court will only facilitate trust arrangements that it considers in good conscience is for the benefit of trust administration as a whole.[27] I end the chapter by postulating whether, as

[26] *Pitt v Holt and Futter v Futter*, 2013 UKSC 26, [2013] 2 AC 108 [*Pitt v Holt (SC)*].
[27] Harding, *supra* note 15 at 342.

an office-holder, trustees also bound to consider the smooth and seamless execution of trusts administration when exercising their discretionary powers.

3.1. What is the Supervisory Jurisdiction Over Trusts Administration?

'How many suits must you defend,
In numbers odd or even?'
Said he, 'To say I can't pretend:
I think, though, there are seven.

…

'The cash is gone, the suit runs on,
Each day requires a fee!'
'Twas waste argument, for still
He said, 'I've not to pay a bill,
I'm only a trustee.'

Punch, 1848[28]

This excerpt is from a satirical poem published in *Punch,* a Victorian magazine. Much like Charles Dickens' *Bleak House,* the poem satirises the chancery court, in particular, the length of time a trust would sit in court, paralysed, awaiting execution - "men would die, and suits in chancery would survive."[29] This satire may have resonated in Victorian England, as trusts played a prominent role in family wealth management and the rising commercial trust market.[30] The administration of justice in the Chancery in the 19th Century was delayed and expensive because

[28] Punch Magazine, 1848, printed in full in Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge; New York: Cambridge University Press, 2002) at 1–2.
[29] John Williams MP in Parliament cited in Michael Lobban, "Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I" (2004) 22:2 Law Hist Rev 389 citing The Times, 8 March 1811.
[30] Stebbings, *supra* note 28 at 3–5.

of unwieldy procedures[31] and more importantly for our purposes, the kind of justice administered by the supervisory jurisdiction.[32]

According to Clarry, the supervisory jurisdiction historically had two main goals: to supervise the proper administration of a trust and to protect the office of trusteeship.[33] The court took very seriously its duty to see that trusts were properly performed honestly, in good faith, on behalf of the beneficiaries and within the terms of the trust.[34] As the equitable maxims go "the execution of a trust shall be under the control of a court"[35] and "a trust shall not fail for want of a trustee." Equity's justice is complete,[36] meaning that non-performance of a trust is abhorrent in a way that breach of duty in common law is not.[37] Procedurally this meant that once a trustee filed an 'administration order', the trustee could not perform the trust without court approval,[38] causing backlogs of cases.[39]

As frustrating as this sounds, the purpose of enabling trustees to request administration was to help trustees, in order to encourage honest people to take up the office of trusteeship.[40] Trusts bind the conscience, and if one commits an unconscionable act in the course of office, one could risk damnation.[41] The supervisory jurisdiction provided regulatory oversight to protect trustees from inner turmoil,[42] administrative strife, personal liability,[43] and strong fiduciary remedies that

[31] See Fiona R Burns, "The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion" (2000) 21:2 U Queensland LJ 198 at 199–200.
[32] Clarry, *supra* note 9 at 22–38; Lynton Tucker et al, *Lewin on Trusts*, 20th ed (London: Sweet & Maxwell, 2020) at 619.
[33] Clarry, *supra* note 9, ch 2.
[34] *Brown v Higgs*, (1803) 32 ER 473 [*Brown v Higgs*], Lord Eldon LC ("if the person who has this duty imposed upon him, does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place" at 476).
[35] *Morice v Bishop of Durham*, (1805) 32 ER 947 (Ch) [*Morice*] at 954, Lord Eldon LC.
[36] Clarry, *supra* note 9 at 50.
[37] *Ibid* at 35.
[38] *Brumsden v Woolredge*, (1765) Amb 507 [*Brumsden v Woolredge*]; Tucker et al, *supra* note 32 at 618–620.
[39] Clarry, *supra* note 9 at 23.
[40] *Gonder v Gonder Estate*, 2010 ONCA 172 [*Gonder*] at para 22; *Lehtimäki*, *supra* note 9 at para 189, Lady Arden; *Finers v Miro*, [1991] 1 WLR 35 [*Finers v Miro*] at 45.
[41] James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008) ("as all readers of Dante know, medieval office-holders faced the risk of damnation if they committed sin in the course of their official acts" at 3).
[42] Matthew Stone, "The Contradictions of Conscience: Unravelling the Structure of Obligation in Equity" (2019) 30:2 Law Critique 159 at 159.
[43] Doyle v Blake 1804 2 Sch & Lef 231, 243 (Lord Redsdale LC)

could target them, such as disgorgement of profits and constructive trusts.[44] The protective aspect of the supervisory jurisdiction suggests the court saw trusteeship as an office of public importance within legal order. Indeed, in Victorian England one-tenth of property was bound up in a trust,[45] and smooth performance of the trust was necessary to support socio-economic advance.[46]

Trusts remain an important part of family, commercial, and public life and the supervisory jurisdiction is not best characterized as an antiquated institution of Victorian satire. The court still holds a vast array of powers to assist in the ongoing management and administration of a trust. There is not one comprehensive summation of the supervisory jurisdiction in case law, but it can be discerned from practitioner textbooks.[47] The supervisory jurisdiction over trusts is generally said to include the following (this list is not exhaustive):

- Administration of the trust[48]
- The removal of trustees,[49] even when it has not been expressly asked for by the parties[50]
- Appointment of new trustees[51]
- Accounting[52]
- Equitable compensation for breach of trust[53]
- Authorising breaches of trust[54] including varying the terms of the trust[55]
- Authorising remuneration of trustees, even if it is not stipulated in the settlement[56]

---

[44] *FHR European Ventures LLP v Cedar Capital Partners LLC*, [2014] UKSC 45 [*FHR Europen Ventures*]; Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) CLJ 720.
[45] Stebbings, *supra* note 28 at 5.
[46] Clarry, *supra* note 9 at 45.
[47]I extracted this list from Hayton et al, *Trusts and Trustees*, *supra* note 2 at 69.1-73.1; Tucker et al, *supra* note 32; A H Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff On Trusts*, 9th ed (Toronto: Thomson Reuters Canada, 2019), pt V.
[48] *Re Estate Late Chow Cho-Poon*, 2013 NSWSC 844 [*Re Estate Late Chow Cho-Poon*] at para 177-178; *McLean v Burns Philp Trustee Co Pty Ltd*, [1985] 2 NSWLR 623 [*McLean*]. However, for all intents and purposes, administration orders are redundant. They are still possible under Civil Procedure Rules 1998 (UK) r64.2(b) .
[49] See the references contained in note 13
[50] *Wrightson v Cooke*, [1908] 1 Ch 789 [*Wrightson v Cooke*].
[51] *Re Skeat's Settlement*, (1889) 42 Ch D 522 [*Re Skeat's Settlement*]; *Scaffidi*, *supra* note 24.
[52] *Ex p Adamson*, (1878), 8 Ch D 807 [*Ex p. Adamson*]; *AG v Cocke*, [1988] Ch 414 [*AG v. Cocke*]; *Libertarian Investments Ltd v Hall*, 2013 HKCFA 93 [*Hall*].
[53] *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, [1991] CarswellBC 269 [*Canson*]; *AIB Group (UK) Plc v Mark Redler & Co*, [2014] UKSC 58 [*AIB Group (UK) Plc v Mark Redler & Co*].
[54] s57(1) Trustee Act 1925 (UK); s35(1) Trustee Act, R.S.O. 1990, c. T.23
[55] Variation of Trusts Act, R.S.O. 1990, c. V.1 ; Donovan Waters, MR Gillen & Lionel Smith, *Waters' Law of Trusts in Canada.*, 4th ed (Toronto: Carswell, 2012) at 1235–1256.
[56] *Re Duke of Northfolk*, *supra* note 12 at 76–77.

- Authorising the beneficiary's access to information and letters of wishes[57]
- Reviewing the exercise of powers by trustees[58]
- Advising, blessing or directing trustee discretion[59]
- Casting the deciding vote when trustees are deadlocked[60]

Public lawyers will note that, unlike the court's supervision over administrative action, the supervisory jurisdiction over trusts is administrative, flexible, and varied. Judicial review of trustee decision-making is but one of many supervisory powers held by the court. Supervision is not adjudicative or adversarial in the usual sense, but remains largely an administrative and facilitative jurisdiction. Taxonomically speaking, private trusts are part of private law but as Nolan writes, trust supervision, "works in a manner fundamentally different from the paradigm common law bipartite right-remedy form of action."[61] I will elaborate with a few examples.

The court of Equity grew out of the King's prerogative to intervene in the course of justice. This jurisdiction, as with the King's Council, was inquisitorial, and did not follow due process.[62] The law of Equity possessed inquisitorial procedures that enabled courts to probe into "issues of intention or states of mind"[63] in ways not provable at common law. At common law, all issues of fact were tried by jury, but in Equity, the Chancellor was able to inquire into the truth and parole evidence could contradict deed.[64] Macnair argues that 'conscience' therefore meant "the knowledge or belief of legally relevant facts"[65] beyond which could be proved by common law. Equity's procedural ability to inquire into reasons for action fits with Equity's past and continued interest in the reasons for which fiduciaries act.

[57] *Schmidt v Rosewood Trust Ltd*, [2003] UKPC 26 [*Schmidt*] at para 66.
[58] See Section 3.2.1 below and the references contained therein
[59] See note 11 above
[60] *Re Kaptyn Estate*, 2011 ONSC 3491 [*Re Kaptyn Estate*] at paras 2-4, G.R. Strathy J; *Re Allen-Meyricks Will Trusts*, [1966] 1 WLR 499 [*Re Allen-Meyricks Will Trusts*] at 743–744.
[61] Nolan, "Administrative Jurisdiction", *supra* note 15 at 151.
[62] John Baker, "Equity and Public Law in England" in *Collected Papers on English Legal History* (Cambridge: Cambridge University Press, 2013) 945 at 947.
[63] Mike Macnair, "Equity and Conscience" (2007) 27:4 Oxford Journal of Legal Studies 659 at 679.
[64] Lionel Smith, "Equity is Not a Single Thing" in Klimchuk et al. *supra* note 15 at 11 n 49.
[65] Macnair, *supra* note 63 at 674.

Equity's concern for the conscience and motives of persons is connected also to Equity's "good person" theory of law.[66] Good people perform their obligations, and so in contrast to common law's bad people breach-and-pay mentality, the court principally supervises the performance of primary obligations, seeking to administer complete justice.[67] Lionel Smith argues, for example, that the "no profit" rule in fiduciary law is a rule of primary attrition. The fiduciary therefore "immediately comes under a primary duty to render the profit to the beneficiary"[68] rather than paying a secondary obligation of compensation. Accounting is also a primary right arising from the fiduciary relationship;[69] it is not a compensatory remedy enlivened due to breach of trust.[70] Accounting works more like an inquisitorial process, via a decree to account, which Bray notes involves no antagonism between the judge and trustee.[71] Thus, in contrast to corrective justice, which adjudicates between two hostile litigants, the supervisory jurisdiction can be enlivened absent any hostility or wrongdoing.

The most obvious example of amicable intervention is the court's jurisdiction to direct and bless momentous trustee decisions.[72] The leading case is *Public Trustee v. Cooper,*[73] in which Mr. Justice Hart set out three categories of this jurisdiction. The trustee can:

1. Ask the court to confirm whether a proposed action is within the trustee's powers (a question of scope and construction of the trust deed)
2. Seek the opinion on whether the proposed action is a proper exercise of trustee powers (a question of the legitimate exercises of power)[74]

---

[66] David Hayton, "'The Development of Equity and the "Good Person" Philosophy in Common Law Systems'" (2012) 76 The Conveyancer and Property Lawyer 263.
[67] L. Smith "Equity is Not", *supra* note 64 at 8
[68] Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another" (2014) 130 LQR 608 at 628.
[69] Clarry, *supra* note 9 at 146.
[70] *AIB Group (UK) Plc v Mark Redler & Co*, *supra* note 53.
[71] Samuel L Bray, "Fiduciary Remedies" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law*, [Oxford handbooks] (New York, NY: Oxford University Press, 2019) at 460.
[72] In the UK, these applications are dealt with under CPR Part 64.2(b). In Canada, each province has its own legislation, for instance, Trustee Act, R.S.O. 1990, c. T.23, s 60 (Ontario); Trustee Act, R.S.B.C. 1996, c.464 s 86(1) (British Columbia)
[73] *Cooper*, *supra* note 11.
[74] *Tamlin v Edgar*, 2011 EWHC 3949 [*Tamlin v Edgar*], Sir Andrew Morritt C ("it is not enough that they were within the class of beneficiary and the relevant disposition within the scope of the power. It must be demonstrated that the exercise of their discretion is untainted by any collateral purpose ...They must satisfy the court that they considered and properly considered their proposals to be for the benefit of the advancees or appointees" at para 25).

3. Surrender their discretion to the court, which will only be accepted for "good reason" such as trustee deadlock or conflicts of interest.

As with the "green light" theory of administrative law's preference for facilitation and the *ex ante* prevention of abuse of power,[75] in this advisory jurisdiction, the court plays a prospective role, preventing, not remedying, breaches of trust. The court is even able to advise trustees upon whether future adjudication is appropriate.[76] The advisory jurisdiction is exempt from Article 6 of the European Convention of Human Rights ("right to a fair trial") because the court does not adjudicate rights.[77] Arguably in exercising the advisory jurisdiction, the court acts as a facilitator of, and partner to, the ongoing administration of the trust.[78] The court's advisory jurisdiction has even been described by one commentator as going "well beyond"[79] the probate court's inquisitorial jurisdiction.[80] The advisory jurisdiction's concerns are inquisitorial because "the Court will need to be appraised of all the material relevant to the decision under review"[81] and are also institutional,[82] looking to the welfare and best interests of the trust estate.[83] Moreover, although it is rare, the court can call on the SJTA to perform the trust in the place of the trustee.[84]

The court also can remove trustees and appoint new ones.[85] The court's primary concern is with "the competent administration of the trust"[86] meaning "the welfare of the beneficiaries."[87]

---

[75] Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge University Press, 2006) at Chapter 1.
[76] *Re Beddoe*, [1893] 1 Ch 547 [*Re Beddoe*]; *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand*, [2008] HCA 42 [*Macedonian Orthodox Church*].
[77] *3 Individual Present Professional Trustees of 2 Trusts v An Infant Prospective Beneficiary of one Trust & Ors*, [2007] EWHC 1922 (Ch) [*3 Professional Trustees*]; For an interesting discussion on this aspect of the advisory jurisdiction see Clarry, *supra* note 9 at 271–276.
[78] *X v A*, *supra* note 11 at para 12.
[79] C D Freedman, "The Opinion, Advice and Direction of the Court: Principles, Procedures and Judicial Blessings" (2012) 32 Est Tr & Pensions J 379 at 384.
[80] *Otis v Otis*, 2004 CanLII 311 (ON SC) [*Otis v. Otis*]; *Ettorre v Ettore Estate*, [2004] OTC 780 [*Ettorre v. Ettore Estate*].
[81] *National Westminster Bank v Lucas*, [2014] EWCA Civ 1632 [*National Westminster Bank v Lucas*] at para 53, Patten LJ.
[82] Paul B Miller & Andrew S Gold, "Fiduciary Governance" (2015) 57 Wm & Mary L Rev 513 at 562.
[83] *Marley v Mutual Society Merchant Bank and Trust Co Ltd*, [1991] 3 All ER 198 [*Marley*] at 201; *Ban v Public Trustee of Queensland*, [2012] QCA 93 [*Ban*] at para 56-57; *Re Toigo Estate*, *supra* note 11 at para 15; *PGT v Colwell*, 2004 BCSC 1622 [*PGT v Colwell*] at para 33.
[84] *In re Gulbenkian's*, *supra* note 14 at 525, Lord Upjohn ; *McPhail*, *supra* note 14 at 456G-457B, Lord Wilberforce ; *McLean*, *supra* note 48 at 633.
[85] *Letterstedt*, *supra* note 13 at 386.
[86] Tucker et al, *supra* note 32 at 665.
[87] *Carvel*, *supra* note 13 at para 46.

There are many reasons why the court will remove trustees, and this is not restricted to situations of dishonesty[88] but also an inability to exercise office,[89] holding opinions opposite to the purpose of the trust,[90] or problems with the internal management of the trust.[91] These remedies thus respond to *systemic problems* with the internal management of the trust, demonstrating the court's concern for the ongoing, proper administration of a trust.

Therefore, unlike common law adjudication, the court holds tools to respond to 'polycentric' problems that arise, particularly in the administration of complex trusts, such as discretionary trusts, pension schemes and charities. Arguably this ability to respond to systemic problems is similar to the way in which administrative agencies are able to fashion alternative remedies to remedy systemic problems. Human Rights Tribunals, for instance, may not only provide compensation for breaches of human rights codes but may also require employers to receive human rights training so as to remedy any systemic problems that repeatedly occur within an organization. Similar remedies, such as mandating that charity volunteers undertake training on how to count donations, can also be found as part of the court's supervisory jurisdiction over charities.[92] This overlap between Administrative Law and the Law of Equity, Henry Smith notes, is because both evolved with the same institutional concerns and attributes.[93] Administrative agencies, Smith notes, share equity's vision of ensuring flexibility over formal rules and curbing opportunism, particularly economic opportunism.[94]

In my view, the bipolar corrective justice, model of private law does not adequately explain the administrative nature of the supervisory jurisdiction and its concern for the smooth and seamless administration of trusts. Furthermore, perhaps using the framework of 'private law' is unhelpful, especially since the court's primary concern is with seamless execution over and above the determination of individual rights and obligations. This concern for securing the integrity of trust administration fits better perhaps within a framework of public law, where, outside of human rights claims, the court in judicial review is concerned with securing the good administration of

[88] *Confederation Treasury Services Ltd*, 1995 [1995] CarswellOnt 1169; 37 CBR (3d) 237 [*Confederation*] at para 14.
[89] *Buchanan v Hamilton* [1801) 5 Ves. Jr. 702. (moving abroad)
[90] *AG v Pearson* (1835) 7 Sim, 290 (dissidents of a Presbyterian sect were trustees for a church)
[91] *RSPCA v AG*, [2001] 3 All ER 530, [2002] 1 WLR 448 [*RSPCA*].
[92] *Malik v Sabha*, [2020] OJ No 4679 [*Malik*].
[93] Henry E Smith, "Equity and Administrative Behaviour" in Turner *supra* note 15 at 328.
[94] *Ibid* at 348

public institutions in the public interest.[95] Interestingly, Honoré notes that trusts are an "institution of public law"[96] because,

> "[T]he trust beneficiary's basic right is to insist that a trust be carried out according to its terms and that the court, if necessary, devise a scheme to ensure that this is done…It is in effect a right of a quasi-public character to specific performance of the trust".[97]

There are three aspects to the quasi-public nature of trusts which help explain the unique role supervision plays in legal order. First, trust law exhibits an administrative justice dimension, meaning it is concerned with ensuring the trust is properly administered according to its terms. Most of the administrative justice dimension has been discussed in this section. The second way trusts law exhibits public law features is through its review of trustee decision-making. We can call this trust law's administrative law dimension, which will be discussed in section 3.2. Finally trusts law exhibits a constitutional law dimension meaning the office of trusteeship is constituted as part of legal order (see section 3.3)).

3.2. Judicial Review of Trustee Discretion and Power-Conferring Principles

3.2.1. Trustee Discretion

Trustees hold many discretionary powers. These powers are typically categorised as falling into two types: dispositive powers and administrative powers. Dispositive powers enable trustees to decide who benefits from the trust and also to decide whether and how to create and dispose of proprietary rights (e.g. powers of advancement, powers to pay or apply capital or income to beneficiaries). Administrative powers relate to the management of the property (e.g. investment powers, powers of sale, powers to appoint new trustees or beneficiaries.)[98] The exercise of trustee powers are governed by equitable doctrines analogous to doctrines governing the exercise of

[95] See further below, section 3.2.3__
[96] Edwin Cameron et al, *Honoré's South African law of trusts.* (Lansdowne: Juta, 2002) at 57.
[97] Tony Honoré, "Trusts: The Inessentials" in Edward Hector Burn, ed, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London, UK: LexisNexis UK, 2003).
[98] For a discussion of the different administrative and dispositive powers of trustees, see Oosterhoff, Chambers, & McInnes, *supra* note 47 at 916–923.

discretion by officials in public law. Trustees must ask the right questions,[99] turn their minds to the exercise of the power,[100] not shut their eyes to the facts,[101] consider relevant considerations and not consider irrelevant ones,[102] act only for the purpose which the power is conferred,[103] act honestly and in good faith,[104] not fetter their discretion,[105] consider whether or not to exercise the power and exercise a power if coupled with a duty[106] not delegate their discretion[107] (even to legal or financial advisors),[108] act impartially[109] and not act unreasonably, irrationally or capriciously.[110] Like all fiduciaries, the trustee is also bound by the duty of loyalty – she must act with the best interests of the beneficiaries in mind[111] and abide by the no profit and no conflict rules.[112]

Although judicial review of trustee discretion shares doctrines with judicial review, it is important to note that unlike public law, judicial review of trustee action is just one of the powers held by the supervisory jurisdiction. Thus, the jurisprudential basis of judicial review over trustee action must be analysed in light of the court's wider jurisdiction to intervene in trust administration. I contend that by interpreting the doctrines of judicial review as power-conferring principles, we can understand judicial review as part of the SJTA. I will do so principally by arguing that the relevant/irrelevant considerations doctrine governs the valid exercise of trustee authority. In line

[99] *Dundee General Hospitals*, *supra* note 10 at Lord Reid; *Sieff v Fox*, [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [*Sieff v Fox*]; cf. *Pitt v Holt (SC)*, *supra* note 26, (implies there is no such thing as an objectively "right" question in the exercise of powers. See discussion below).
[100] *Turner v Turner*, [1984] Ch 100; [1983] 3 WLR 896 [*Turner*].
[101] *Medforth v Blake*, [2000] Ch 86 [*Medforth*] at 103; *Sieff v Fox*, *supra* note 99.
[102] *Re Hastings-Bass*, [1975] Ch 25, [1974] 2 All ER 193 [*Hastings-Bass*]; *Fox*, *supra* note 10; *Banton v Banton*, 1998 CanLII 14926, 164 DLR (4th) 176 [*Banton*].
[103] See note 22 above
[104] *Karger v Paul*, *supra* note 23 at 164; *Redwood Master Fund Ltd v TD Bank Europe Ltd*, [2002] EWHC 2703 (Ch) [*Redwood*]; *Canadian Aero Service Ltd v O'Malley*, 1973 CanLII 23 (SCC), [1974] SCR 592 [*Canadian Aero Service Ltd. v. O'Malley*] at 606.
[105] *Re Gibson's Settlement Trusts*, [1981] Ch 179 [*Re Gibson's Settlement Trusts*] at 182; *Swales v IRC*, [1984] 3 All ER 16 [*Swales v. IRC*] at 24.
[106] *Re Hay's Settlement Trusts*, [1982] 1 WLR 202 [*Re Hay's Settlement Trusts*] at 209; *In re Gulbenkian's*, *supra* note 14 at 518; *Re Locker's Settlement*, [1977] WLR 1323 [*Re Locker's Settlement*] at 1325; *Re Haasz*, (1959) 21 DLR (2d) 12, [1959] OWN 395 [*Re Haasz*] at 16.
[107] *Turner*, *supra* note 100.
[108] *Scott v National Trust for Places of Historic Interest or Natural Beauty*, [1998] 2 All ER 705 [*Scott*] at 717.
[109] *Edell*, *supra* note 22 at para 173; *Re Haasz*, *supra* note 106 at 19; *Cowan v Scargill*, [1985] Ch 270 [*Cowan v. Scargill*] at 286–287; *Edge v Pensions Ombudsman*, [2000] Ch 602 [*Edge v. Pensions Ombudsman*] at 627.
[110] *Ex parte Lloyd*, *supra* note 25 at 65, Jessel MR; *Re Manisty's Settlement*, [1974] Ch 17 [*Re Manisty's Settlement*] at 26; *Pilkington v IRC*, [1964] AC 612 [*Pilkington v IRC*] at 641.
[111] *Lehtimäki*, *supra* note 9 at para 44, Lady Arden; *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 [*Frame*] at para 60.
[112] *Chan v Zacharia*, (1984) 53 ALR 417 [*Chan v Zacharia*] at 432–433, Deane J.; *Tito v Waddell (No 2)*, , [1977] 3 All ER 129 [*Tito No.2*].

with the framework of this thesis, we can therefore interpret the doctrine as a jurisgenerative power-conferring principle.

3.2.2. *Pitt v Holt; Futter v Futter*

The leading case on trustee discretion in UK law is *Pitt v Holt.* The case concerns the doctrine of relevant and irrelevant considerations, or as it is more commonly known in trusts law, the rule in *Re Hastings-Bass*. The rule in *Re Hastings-Bass* is formulated as follows:

> [W]here … a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."[113]

The rule thus has two branches. The first branch concerns excessive execution. This means that the trustee acted *ultra vires*, either because she went beyond the terms of the trust deed or because she offended some rule of law, such as the rule against perpetuities. The second branch considers whether exercises of power *within* the scope of the trustee's authorization are nonetheless invalid because the trustee did not take relevant considerations into account, or considered irrelevant ones. The second rule therefore relates to the proper *exercise* of fiduciary power. It is this rule that was most at issue and discussed in depth in *Pitt v Holt; Futter v Futter.*

In *Pitt v Holt,* Mrs. Pitt was the receiver for a discretionary trust of damages in favour of her disabled husband following a car accident. After receiving financial advice, the trust had come under substantial inheritance tax liabilities. In the case of *Futter v Futter,* the trustees (of which Mr. Futter was one) brought a claim to set aside an exercise of a power of advancement that was supposed to limit capital gains tax but did not have the desired outcome. In both *Pitt* and *Futter* it was the trustees who applied to have the decision set aside under the *Re Hastings-Bass* rule. In both cases Her Majesty's Revenue and Customs opposed the applications for the exercises of

[113] *Hastings-Bass*, *supra* note 102 at 41.

discretion to be set aside. In the Court of Appeal,[114] Lloyd LJ comprehensively analyzed the jurisprudence, particularly noting tension between a line of cases originating from *Mettoy Pensions v Evans*[115] on the one hand, and cases following *Abacus Trust v. Barr*[116] on the other.

In *Mettoy,* the trustees of a pension scheme executed a new deed to replace an old one. It was within the scope of their mandate to execute a new deed, but the problem was, pursuant to some professional advice, the trustees had vested a discretion over the surplus of the pension fund in the employer rather than the trustees. The trustees issued an originating summons asking advice from the court about the construction and validity of the second deed.[117] Interestingly therefore, as an originating summons, the review of the exercise of the power did not emerge out of adversarial proceedings.[118]

It was argued before the court that all previous case law following *Re Hastings-Bass* concerned the first branch of the rule and that therefore the second branch of the rule from *Re Hastings-Bass* should be narrow in scope. However, Warner J. held that it did not matter if the failure to take into account a relevant consideration was "due to [the trustees] having overlooked … some relevant rule of law, or limit on their discretion, or due to some other cause."[119] He further held that the duty to take into account relevant considerations was not "affected by the amount or quality of the professional advice."[120] In other words, for the second branch of the rule to bite, it does not matter why the relevant consideration had been overlooked – it could be due to the fact the trustee had not known about an objective rule of law, or due to the fact a relevant consideration was inadequately deliberated by the trustee.

The implication of Warner J's analysis is that the court does not only inquire into the adequacy of the trustee's deliberations but asks whether all the information in front of the trustee is (objectively) correct. In so doing, Warner J essentially elided the first branch of the rule in *Re Hasting-Bass,* which concerns excessive execution due to "external factors such as perpetuity,"[121]

---

[114] *Pitt v Holt*, [2011] EWCA Civ 197 [*Pitt v Holt (CA)*] at para 99.
[115] *Mettoy Pensions Trustees Ltd v Evans*, [1991] 2 All ER 513, [1990] 1 WLR 1587 [*Mettoy Pensions*].
[116] *Abacus Trust Co (Isle of Man) and another v Barr*, [2003] EWHC 114 (Ch) [*Abacus v Barr*].
[117] Now found in Part 8, Civil Procedure Rules 1998 – Alternative Procedure For Claims. This allows a trustee to seek an answer to a question that will not involve a substantial dispute or is not contested by the beneficiary.
[118] Noted by Clarry, *supra* note 9 at 236–237.
[119] *Mettoy Pensions*, *supra* note 115 at 552–553.
[120] *Ibid* at 1624, Warner J.
[121] *Pitt v Holt (CA), supra* note 114 at para 66, Lloyd LJ.

with the second branch of the rule, which is concerned with inquiring into the trustee's reasoning process.[122] Much case law following *Mettoy* involved setting aside decisions that resulted in disastrous tax consequences, taken because of bad financial advice.[123] Although tax is a relevant consideration for trustees to consider,[124] arguably in most of these cases, the trustees had scrupulously deliberated the tax consequences and meticulously acquired information on the point.[125] It was thus perhaps somewhat of a stretch to imply there was a failure of adequate deliberation.

In *Abacus Trust Co. v Barr* Lightman J. doubted the development of the case law. He argued:

> "If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect"[126]

Lightman J. also suggested that while the first branch of the rule renders the trustee's actions *void ab initio,* the second branch of the rule renders the decision voidable at the instance of the beneficiary.[127] The implication is that because the first branch of the rule is a question of what the fiduciary has been authorised to do, the exercise of the power would be void. By contrast, the second branch of the rule concerns taking into account an irrelevant consideration in the course of exercising one's power *intra vires*, and is thus merely rescindable.

Lloyd LJ in *Pitt* endorsed Lightman J.'s interpretation of the rule in *Abacus.*[128]

In the Supreme Court Lord Walker followed the decision of Lloyd LJ. He agreed that in cases concerning "inadequate deliberation,"[129] the trustee must breach a fiduciary duty in the

---

[122] *Pitt v Holt (SC), supra* note 26 at paras 23-25.
[123] For example, in *Abacus Trust Co (Isle of Man) Ltd v NSPCC*, [2001] STC 1344 [*Abacus v NSPCC*] (Re Hasting's Bass was applied to set aside a deed that was executed before the end of the tax year by a trustee who had not referred properly to advice given by legal counsel.).
[124] *Pitt v Holt (CA), supra* note 114 at para 115.
[125] *Pitt v Holt (SC), supra* note 26 at para 65.
[126] *Abacus v Barr*, *supra* note 116 at para 23, Lightman J.
[127] *Ibid*.
[128] *Pitt v Holt (CA), supra* note 114 at para 99.
[129] *Pitt v Holt (SC), supra* note 26 at para 60.

course of exercising her discretion in order for the court to set aside the transaction.[130] Lord Walker affirmed the non-intervention principle, which cautions against intervening in the decision-making autonomy of the fiduciary.[131] He held therefore that the inadequacy of the deliberation must be "sufficiently serious so as to amount to a breach of duty… because only a breach of fiduciary duty justifies judicial intervention."[132] Consequently, Lord Walker also found that it would usually be inappropriate for trustees to apply by originating summons to have the exercise of discretion set aside.[133] Instead, beneficiaries will have to bring adversarial proceedings.

Some commentators, and jurisprudence, express concern that the ratio of *Pitt* problematically rests judicial review on an adversarial and remedial jurisdiction.[134] For example, Clarry argues Lord Walker "stretched the duty of care over the duty to consider, such that discharge of the duty of care in obtaining advice as to relevant matters effectively discharges the duty to consider such matters."[135] Clarry also argues the beneficiary may now need to prove the trustee's conduct caused foreseeable damage to trust property or the beneficiary's interests, although this was rejected by the courts in Guernsey.[136] In my view, Clarry misreads what Lord Walker meant by a breach of duty in this context and overlooks Lord Walker's strong affirmation of the court's administrative jurisdiction in this area.

Regarding the issue of what breach of duty means in this context, Lord Walker's argument that the beneficiary will need to bring adversarial proceedings was bound up with the view that reviewing *intra vires* exercises of power are voidable at the suit of the beneficiary, as opposed to *void ab initio.*[137] In other words, the trustee was technically *intra vires* her power, but she abused that power such that the exercise of the power was invalid. This argument fits with the fact that rescission at the suit of the beneficiary is the usual remedy for breach of fiduciary duty.[138]

---

[130] *Ibid* at paras 71-90; cf. *Sieff v Fox*, *supra* note 99 Lloyd LJ had preferred the original approach and dismissed the argument that a breach of duty was necessary.
[131] *Lehtimäki*, *supra* note 9; *Gisborne*, *supra* note 10; *Re Haasz*, *supra* note 106 at 19; *Re McLaren*, *supra* note 23.
[132] *Pitt v Holt (SC)*, *supra* note 26 at para 70.
[133] *Ibid* at para 69.
[134] *Lehtimäki*, *supra* note 9 at paras 196–198, Lady Arden.
[135] Clarry, *supra* note 9 at 250; See *Pitt v Holt (SC)*, *supra* note 26 at para 80 for a passage that perhaps supports Clarry's reading.
[136] See *M v St Annes Trustees Ltd*, 12 Jan 2018 [2018] 1/2018 [*M v St Annes Trustees Ltd*]; Case note, see Paul Buckle, "Another wrong turn? The rule in Hastings-Bass in Guernsey" (2018) 24:8 Trusts & Trustees 799.
[137] *Pitt v Holt (SC)*, *supra* note 26 at para 70, affirming Lloyd LJ in; *Pitt v Holt (CA)*, *supra* note 114 at para 127.
[138] *Pitt v Holt (SC)*, *supra* note 26 at para 93.

Importantly, Equity generally does not care for any proof of harm, unlike ordinary adversarial proceedings in private law.[139]

Moreover, Lord Walker's judgment takes the fiduciary duty to be a subjective requirement that inquires into the trustee's reasoning process, rather than views loyalty as an objective duty in the strict sense.[140] Part of the problem with the prior precedent, such as the *Mettoy* case, was that it focused on the objective rightness or wrongness of professional advice.[141] The objective correctness of the advice may be relevant in a common law professional negligence lawsuit,[142] or as part of a review on the merits,[143] but it does not get to the heart of fiduciary law's concerns. As discussed in the previous chapter, Equity is often concerned with how and why a decision-maker acts, not what she decides. Lord Walker asserts that an inadequate deliberation qualifies as a breach of fiduciary duty in the "full sense of that word."[144] This implies that the salient inquiry is whether the deliberation was so inadequate as to be *disloyal*, meaning, the decision cannot be said to be in the best interests of the beneficiaries.[145] The court is concerned with the "failure of trustees to perform their decision-making function"[146] and inquires into the trustee's decision-making process.[147] The question is whether the trustee's judgment was tarnished by an irrelevant or extraneous factor, or, if the trustee overlooked something relevant to decision-making that means he may have acted differently.

Furthermore, cases that were cited with approval were squarely concerned with how the trustee's reasoning process impacted her loyalty. In the *Barr* case, the trustee had relied on the advice of a lawyer to the point that he had failed to ascertain the intention of the settlor, failed to consider the purposes of the trust, and most importantly, failed to consider the best interests of the

---

[139] L. Smith, "Fiduciary Relationships", *supra* note 68 at 627.
[140] *Pitt v Holt (SC)*, *supra* note 26 at para 25.
[141] *Ibid* at para 80. Lord Walker calls the need for professional advice to be objectively correct "truly a last-ditch argument" ibid at para 88.
[142] Implied by Lord Walker, *ibid* at para 90.
[143] *Ex parte Lloyd*, *supra* note 25 ("so utterly unreasonable and absurd that no reasonable man would so act" at 65).
[144] *Pitt v Holt (SC)*, *supra* note 26 at para 73.
[145] *Banton*, *supra* note 102, Cullity J ("[proper purposes and extraneous considerations] flow from the fiduciary principle" at para 172); See also Tang Hang Wu, "Rationalising Re Hastings-Bass as a Duty to Act on Proper Bases" 21:2 Trust Law International 62 at 76; cf. *Pirani v Pirani*, 2020 BCSC 974 [*Pirani*] at para 126.
[146] *Pitt v Holt (SC)*, *supra* note 26 at para 91.
[147] Implied in *ibid* at para 88, citing; *Re Beloved Wilkes's*, *supra* note 10, Lord Truto LC ("[supervision is] confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases" at 448).

beneficiaries.[148] In *Klug v Klug*, the court found the trustee had failed to consider whether a power of advancement was in the best interests of her daughter because she had taken into account her dislike of her daughter's husband.[149]

Pitt also is important because it affirms that the duty of loyalty in this context goes beyond the no profit and no conflict rules. Lord Walker sees the duty of loyalty as principally about how one deliberates in the course of exercising one's powers. Subsequent UK case law confirms the improper purpose doctrine, like the relevant/irrelevant considerations doctrine, flows from or is a "portmanteau"[150] of the central requirement to act in the best interests of the beneficiary. It also confirms that the proper purposes doctrine is subjective in nature.[151] In *Eclairs Group Ltd v JKX Oil & Gas plc*[152] Lord Sumption argued the proper purpose rule is

> "concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. "Where the question is one of abuse of powers," said Viscount Finlay in *Hindle v John Cotton Ltd*(1919)56Sc LR 625, 630,"the state of mind of those who acted, and the motive on which they acted, are all important""[153]

Lord Sumption's reasoning in *Eclairs* also highlighted that improper decision-making is an abuse of power, and because of that, requires an inquiry into the actual process of decision-making behind the decision.[154] Thus Clarry's point that the rule in *Re Hastings-Bass* has been folded into the duty of care proper does not give due consideration to the subjective, deliberative requirement of loyalty of which Lord Walker sees the *Re Hastings-Bass* rule to be a part of.

The second reason why Clarry's reading of *Pitt* is unsatisfactory is because Lord Walker argued that rescission is not the only appropriate response to inadequate trustee deliberation.[155] Rescission is a discretionary remedy, and the court will only intervene, Lord Walker said, "if it

---

[148] *Abacus v Barr*, *supra* note 116 at para 27; aff'd *Pitt v Holt (SC)*, *supra* note 26 at para 84.
[149] *Klug v Klug*, [1918] 2 Ch 67 [*Klug*]; aff'd *Pitt v Holt (SC)*, *supra* note 26 at para 64.
[150] *MNRPF v Stena Line Ltd & Ors*, [2015] EWHC 448 (Ch) [*MNRPF*] at para 229.
[151] *Lehtimäki*, *supra* note 9.
[152] *Eclairs Group Ltd v JKX Oil & Gas plc*, [2015] UKSC 71 [*Eclairs*].
[153] *Ibid* at paras 15-16.
[154] See also *Howard Smith v Ampol Petroleum*, [1974] AC 821 [*Howard Smith*] at 834, Lord Wilberforce.
[155] *Pitt v Holt (SC)*, *supra* note 26 at para 63 (the options listed did not include damages for negligence. The court also noted that the fact one could claim damages for the breach of the duty of care and skill changes nothing about the rule in Re Hastings-Bass, ibid. at para 90).

thinks fit to do so."[156] However, the court can decline to remit the decision back to the trustees and simply replace the decision with its own,[157] or, impose a more appropriate remedy. In support of his argument, Lord Walker cited the landmark decision *McPhail v Doulton*.[158] In this case, Lord Wilberforce argued that when a court administers a discretionary trust fund in place of the trustee, the court will effectuate the purpose of the trust:

> "[B]y appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis of distribution appear by itself directing the trustees so to distribute."[159]

Lord Walker's reference to this passage underscores the "high degree of flexibility in the range of the court's possible responses"[160] to setting aside trustee decisions on grounds of relevant and irrelevant considerations. Those responses even include removing trustees or establishing a 'scheme' operationalizing what the fiduciary said she "would" or "might" take into account differently.[161] Such systemic and ongoing supervisory remedies contrast with the limitations we see the court possessing in administrative law, where traditionally the court merely sets aside the administrative decision and remits it back to the original decision-maker. Thus, despite limiting intervention to breach of duty, Lord Walker's judgment also *upholds* rather than denies the flexible remedial discretion held by the SJTA.

3.2.3. Power-Conferring Principles and why Judicial Review is Part of the SJTA

In Chapter Two, I argued loyalty is the *grundnorm* that makes possible fiduciary power. There is thus an intrinsic, normative relation between the fiduciary acting in a loyal manner, and a legally effective exercise of the fiduciary power. Equally, we can interpret the relevant/irrelevant considerations doctrine as a power-conferring principle that constitutes the valid exercise of

---

[156] *Ibid* at para 91.
[157] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 141-142; *Finch v Telstra Super Pty Ltd*, [2010] HCA 36 [*Finch*] at para 67-68; *Pitt v Holt (SC)*, *supra* note 26 at para 62.
[158] *McPhail*, *supra* note 14.
[159] *Ibid* at 457.
[160] *Pitt v Holt (SC)*, *supra* note 26 at para 92.
[161] *Ibid* at para 91.

fiduciary authority. After *Pitt,* the relevant/irrelevant considerations doctrine, and more broadly any doctrine concerning the "decision-making function" of the trustee, is interpreted by courts as relating to the valid exercise of a power, rather than pertaining to the scope of the power.[162] Furthermore, the relevant/irrelevant considerations doctrine is, to borrow Lionel Smith's phrase, interpreted by Lord Walker as an "aspect of loyalty,"[163] which I suggest is an aspect of the central *grundnorm* of fiduciary law. A trustee who does not deliberate about all the relevant factors, or deliberates about an irrelevant one, is not able to make a genuine, properly informed decision that can be interpreted as being in the best interests of the beneficiary.[164]

The idea that relevant/irrelevant considerations flows from, or is an aspect of, loyalty is recognised in Canadian law. Canadian law recognizes that taking account of an extraneous factor guts validity because the trustee is "not concerned with the welfare or benefit of the beneficiary of the trust."[165] In *Walters v Walters*,[166] the testatrix established a trust to provide income to her husband, Gerald, for his "support, care and comfort", appointing their children as trustees. The trustees declined to increase their father's income, in essence, because they did not like their father. Of this Pepall JA said, "Their dislike of Gerald had nothing to do with his comfort and well-being.... It was irrelevant to the purpose for which their discretion had been granted and ought not to have influenced their exercise of discretion."[167] In focusing on their own dislike and interests, rather than the beneficiary's well-being, the trustees acted in a disloyal, self-regarding capacity.[168] Pepall JA rescinded the action and directed the trustees, noting *"*court intervention into the exercise or failure to exercise a discretionary power *flows from a trustee's fiduciary status.*"[169]

In my view, interpreting the doctrines of judicial review as power-conferring principles enables us to understand why judicial review of trustee discretion is one aspect of the court's broader jurisdiction to assist in the administration of trusts. This is because the doctrines of judicial review,

---

[162] *Ibid* at paras 43, 99.
[163]Lionel Smith, "Aspects of Loyalty" (July 27, 2017) online: SSRN: <ssrn.com/abstract=3009894> (date accessed 14 September 2022)
[164] Lionel Smith, "Prescriptive Fiduciary Duties" (2018) 37:2 U Queensland LJ 261 at 277.
[165] *Fox*, *supra* note 10 at 500, Galligan JA; See also *Edell*, *supra* note 22 at para 160-172, Cullity J; *TLC v UBC (CA)*, *supra* note 22 at para 67; *Banton*, *supra* note 102 at para 172, Cullity J.
[166] *Walters v Walters*, 2022 ONCA 38 [*Walters*].
[167] *Ibid* at para 73.
[168] Implied in, *Edell*, *supra* note 22 at para 165. Evan Fox-Decent, "Constitution of Equity" in Klimchuk et al. *supra* note 15 at 128
[169] *Walters*, *supra* note 166 at para 48.

as power-conferring principles, do not principally aim to control the actions of trustees, but instead they serve to produce the legal validity of the trustee's exercises of power. Power-conferring principles thus set the requirements that enable us to know when a trust has been properly executed. In other words, power-conferring principles explain to the trustee how to execute her discretionary powers, enabling trustees to exercise their powers properly according to law and ensure therefore that the trust is properly executed. Furthermore, like other aspects of the SJTA, power-conferring principles *assist* and *protect* the trustee. They do so by explaining to her how to exercise her power validly, and protect the trustee's actions by making it possible for her to bring about secure normative results. Put differently, without power-conferring principles making it possible for trustees to execute their powers validly, there could be no smooth and seamless administration of the trust fund. The fact these power-conferring principles *make possible* fiduciary power means that without them, the powers held by the trustee would not be other-regarding in character and therefore the trustee would be unable to execute her trust as a trustee. She would essentially not be able to execute property on behalf of the beneficiaries because there would be no norms conferring and structuring a power to act in an other-regarding fashion. The execution of trusts therefore depends on fiduciary power-conferring principles enabling the fiduciary to intrinsically bring about valid normative changes in the position of the beneficiary.

Thus, another reason why we can interpret judicial review as part of the SJTA is these power-conferring principles are constitutive of what it means to hold and exercise trustee powers. The reasoning in *Pitt, Walters* and *Eclairs* imply that, as aspects of loyalty, the relevant/irrelevant considerations doctrine, the proper purpose doctrine, and by extension other doctrines such as impartiality, the rules against fettering and delegation, etc. all constitute what it means to occupy a fiduciary office.[170] Without these doctrines, trusts law would not make possible the same kind of normative legal relationship, in particular, trusts would not be a legal relationship that enables one person to act on behalf of others.[171] The practice of reviewing on these grounds therefore makes the trust capable of housing institutionally an authority to make legally valid decisions over the interests of others. In other words, the court articulates the trust as a particular legal relationship in which the trustee administers property for the beneficiary. This more constitutive aspect of

[170] L. Smith, "Prescriptive Fiduciary Duties", *supra* note 164 at 277.
[171] Waters, Gillen, & L. Smith, *supra* note 55 at 42 (emphasis added); *Pirani*, *supra* note 145 at para 120.

judicial review could also be interpreted as part of the SJTA because it makes possible, protects, and secures, the trust as a particular kind of office.

Finally, judicial review is an aspect of the court's broader jurisdiction to supervise trusts because the purpose of judicial review is not to vindicate the claim-rights of beneficiaries, but is to set aside invalid exercises of power to restore the trust back to good administrative order. While beneficiaries of fixed trusts could be understood to have proprietary claim-rights, in discretionary trusts, the interests of the beneficiaries are unfixed and dependent upon the trustee actually exercising powers.[172] This is why remedies for breach of trust aim to restore the trust fund back to good administrative order.[173] While the remedy is often pecuniary, equitable compensation "is not compensation for loss but *restitutionary or restorative*."[174] Furthermore, as noted above, the court holds an important remedial flexibility to respond to systemic problems in the management of the trust. These remedies again suggest that the court's overarching concern lies not with repairing harm to individual beneficiaries, but with the proper governance of the trust.

Although the beneficiary may not hold a proprietary right, she does have the right *"*to have the trust duly administered in accordance with the provisions of the trust instruments."[175] She also holds a *power* to access the supervisory jurisdiction and have decisions set aside that are not taken in her best interests.[176] In complicated discretionary trusts, the beneficiary is one of a series of individuals, and like public law, the beneficiary must generally demonstrate she holds an *interest* in the trust fund to access the court.[177] Furthermore, akin public interest standing in public law, where the applicant stands not for herself but on behalf of the public to vindicate good administration, in accessing the supervisory jurisdiction, the beneficiary stands on behalf of all beneficiaries and seeks to restore the good administration of the trust. Richard Nolan explains:

---

[172] J E Penner, "Purposes and Rights in the Common Law of Trusts" (2014) 48:2 Revue juridique Thémis de l'Université de Montréal 579 at 582–583.
[173] *Ex p. Adamson*, *supra* note 52 at 819.
[174] *Hall*, *supra* note 52 at para 168, Lord Millet (emphasis added); Harding, *supra* note 15 ("The liability here is not to meet the claim of any particular beneficiary; it is a liability to preserve the integrity of the institutional structure within which beneficiary claims fall to be considered and dealt with" at 341).
[175] *Target Holdings Ltd v Redferns*, [1996] AC 421 [*Target Holdings*] at 434.
[176] In Walters, for instance, Gerald applied for directions from the court by a notice of application for a consent order *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 75.06
[177] *Schmidt*, *supra* note 57 (the beneficiary must demonstrate "more than a theoretical possibility of benefit" at para 67).

> "[The beneficiary is] seeking a remedy for the benefit of himself and *all others interested in the fund*… The aim of his action is not to repair harm done to him, but to restore the proper functioning—the due administration—of an organisation from which he may or will see benefit."[178]

In my view, judicial review of trustee discretion thus functions more like public law adjudication than private law adjudication. Aside from human rights adjudication, which typically involves claim-rights, the supervisory jurisdiction over public administration reviews "decision-making processes *in the public interest*"[179] to promote "the rule of law and *good administration*…even where a particular decision does not affect the interests of the individuals."[180] Likewise, when a beneficiary accesses the supervisory jurisdiction to set aside a decision on grounds of relevant or irrelevant considerations, this does not vindicate a wrong done to the beneficiary *per se*, but a misadministration of the trust fund. Supervision works to restore the trust to proper working order by setting aside the decision, rather than punishing the trustee through an order of damages, so that the power can be subsequently exercised properly.

To conclude here, if we interpret the doctrines of judicial review as power-conferring principles, we can understand judicial review as an aspect of the SJTA for three reasons. Judicial review (i) sets the requirements that secure the proper administration of the trust (ii) articulates or constitutes trusteeship as a position of trust in which individual(s) hold property on behalf of others and (iii) returns the trust back to good administrative working order by setting aside invalid exercises of power.

3.2.4. Reasons and Natural Justice – Are the Tides Changing?

Before turning to the final section, it is worth addressing what the reader might see as an important difference between private fiduciary law and administrative law. In the latter, but not

[178] Nolan, *supra* note 15 at 174–175.
[179] Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge: Cambridge University Press, 2010) at 171; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012) (duties are "owed to the public at large" at 205); *AXA General Insurance Limited v Lord Advocate*, [2011] UKSC 46 [*AXA*] (judicial review ""is not brought to vindicate a right vested in the applicant, but to request the court to supervise the actings of a public authority so as to ensure that it exercises its functions in accordance with the law" at para 159); Sir Harry Woolf, "Public Law-Private Law: Why the Divide? A Personal View" (1986) PL 220 (public law "enforces the proper performance by public bodies of the duties which they owe to the public" whereas private law "protects the private rights of private individuals" at 221). Fox-Decent, "Constitution of Equity", *supra* note 168 at 25
[180] Oliver, *supra* note 179 at 32.

the former, there is now a widespread requirement that the decision-maker provide reasons for a decision. Readers familiar with trusts law will know that although information about the trust is readily available to beneficiaries,[181] the court will generally decline to order disclosure if the information itself contains reasons for the decision.[182] There is also no general duty of fairness in trusts law.[183] Fortunately, there is some indication that the law is evolving to bring reasons and natural justice requirements to the trusts or fiduciary law context. I will begin by discussing reasons.

It is trite law that in general trustees do not need to provide reasons for decisions.[184] In *Re Londonderry's Settlement*, Harman LJ noted that the rule rests upon protecting the trustee and ensuring people take up the office.[185] Salmon LJ also pointed out that "nothing would be more likely to embitter family feelings"[186] than if the trustee were forced to provide reasons. However, as Watt points out, it is hard to square the idea that trustees do not need to provide reasons with the fact trustees owe a duty to account.[187] Reasons could easily be bound up in documents demonstrating how the trustee distributed the property and what she did with the assets (both of which are composite requirements of the duty to account).[188] It is also hard to square the fact that while family trusts remain a large part of trusts law, there are reems of professional and offshore trustees or commercial trustees to whom considerations of 'family feelings' do not apply. Finally, as Smith suggests, it is hard to reconcile the idea that the trustee administers property on behalf of another and yet is not required to provide reasons for their decision.[189]

However, there are a few recent examples of the law chipping away at these limitations on disclosures to beneficiaries. First, The Data Protection Act (DPA)[190] in the UK provides "data subjects" with rights to obtain any personal information about themselves from "data holders," unless the information is subject to legal professional privilege.[191] However, the court in *Dawson-*

[181] *Schmidt*, *supra* note 57.
[182] *Erceg v Erceg*, 2017 1 NZLR 320 [*Erceg*] at para 56.
[183] Thomas Lewin et al, *Lewin on Trusts*, 9th ed (London: Sweet & Maxwell, 2012) at 29–170.
[184] *Re Beloved Wilkes's*, *supra* note 10 at 448, Lord Truro.
[185] *Re Londonderry's Settlement*, [1965] Ch 918 [*Londonderry*] at 929, Harman LJ.
[186] *Ibid* at 937, Salmon LJ.
[187] Gary Watt, *Trusts and Equity*, 8th ed (Oxford University Press, 2018) at 367.
[188] *Ball v Ball and Anor*, [2020] EWHC 1020 (Ch) [*Ball*] at para 24.
[189] Lionel Smith, *The Law of Loyalty* (Oxford: Oxford University Press, (forthcoming)) at Chapter Three.
[190] *Data Protection Act 1998* (UK), replaced and repealed by *Data Protection Act 2018* (UK) (DPA)
[191] *ibid*., para 10 Schedule 7

Damer,[192] found even this exemption does not apply to beneficiaries of trusts who wish to access trust information that includes legal advice. The implication is that any document protected by disclosure by the *Londonderry* principle, including therefore information that reveals the reasons for decisions, will be available to beneficiaries under the DPA. Secondly, in a recent decision, *Parsons*,[193]the court confirmed that, as a general rule, if trustees wish to receive immunity from liability by accessing the court's protective supervisory jurisdiction, then they must disclose and explain their reasons for the order. Thus, any cases involving "blessing orders" require "full and frank disclosure", of the reasons for decisions and beneficiaries must be parties to the case.[194]

Thirdly, in *Lewis v Tamplin*,[195] beneficiaries of a trust over a farm held concerns about option agreements the trustees had entered. The beneficiaries made multiple requests for information which were ignored and so the beneficiaries sought a disclosure order from the court. The trustees argued that disclosure may expose the actual and allegedly sensitive reasons for which decisions were made in the management of the trust. However, this contention was rejected, and the court ordered disclosure. First, the court explained that beneficiaries could "normally expect the assistance of the court"[196] especially where they act "for precisely the right reasons, namely, to hold the trustees to account."[197] Second, the court limited the *Londonderry* principle to dispositive decisions, clarifying that the rule did not apply to the exercise of administrative powers. Judge Matthews found that the trustee is thus obliged to disclose information about how he dealt with the trust assets, even if disclosure reveals why the trustees decided to sell an asset.[198]

The final example is found in an Australian High Court decision *Marcella v Wareham No.2*.[199] The case demonstrates what kind of information the court is willing to take as the reasons for the decision, and shows the high level of scrutiny the court will bring to bear on them. In this case, the beneficiaries of a pension fund argued that the trustee had not exercised her dispositive power upon a "real and genuine consideration."[200] They argued the trustee had mischaracterised the nature

[192] *Dawson-Damer and others v Taylor Wessing LLP*, [2017] EWCA Civ 74 [*Dawson-Damer*].
[193] *Parsons and another v Reid and another*, [2022] EWHC 755 (Ch) [*Parsons*].
[194] *Ibid* at para 22.
[195] *Lewis v Tamplin*, [2018] EWHC 777 (Ch) [*Lewis v Tamplin*].
[196] *Ibid* at para 42.
[197] *Ibid* at para 43.
[198] *Ibid* at para 47.
[199] *Marsella v Wareham (No 2)*, [2019] VSC 65 [*Marcella*].
[200] *Karger v Paul*, *supra* note 23.

of her power, dismissed the conflict of interest at hand, and mischaracterised one beneficiary as a non-object.[201] Furthermore, they argued that the minutes of a distribution meeting only perfunctorily referred to "the possible interests of all dependants"[202] to give the impression that a genuine consideration had taken place.[203] All of these arguments were based on the "reasons" found in resolutions of meetings and correspondence between lawyers. The court found that the trustee's decision was "grotesquely unreasonable"[204] because "the dismissive tenor of the correspondence"[205] between the lawyers, along with the self-serving "formulaic"[206] reasons, indicated there was no real or genuine consideration of the beneficiary's interests.

The case is interesting for two reasons. First the case demonstrates, as in public law, that the court is not afraid to "connect the dots"[207] of the records and correspondence and takes those to be the reasons for the decision.[208] Thus, even though there may be no formal requirement to provide reasons, the court is still very much concerned with inquiring into *why* the decision-maker acted by holistically analyzing the context and record of the decision.[209] Second, like public law, boilerplate or perfunctory conclusions are deemed insufficient to discharge the reasonableness requirement.[210] The implication is that decisions must contain discernible statements of facts about the interests of each beneficiary and a reasoned explanation as to why certain interests are deemed more relevant or significant than others. The effect is that correspondence and resolutions perhaps will be more transparent or detailed.

I will now consider the claim that beneficiaries have no right to be heard. In *Scott v National Trust*,[211] Walker J (as he was then) argued that although trustees must be fair as between classes of beneficiaries, trustees "are not a court or an administrative tribunal. They are not under a general

---

[201] *Marcella*, *supra* note 199 at para 56.
[202] *Ibid* at para 55.
[203] Jim O'Donnell, "A matter of trust: The Importance of genuine decision making when exercising discretionary powers" (2022) 46:4 Brief 7.
[204] *Marcella*, *supra* note 199 at para 37.
[205] *Ibid* at 57.
[206] *Ibid* at para 55.
[207] *Vavilov*, *supra* note 157 at paras 97, citing; *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 [*Komolafe*] at para 11, Rennie J.
[208] For an example of the court taking informal notes to be the reasons for the decision, See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 [*Baker*].
[209] *Vavilov*, *supra* note 157 at para 97.
[210] *Ibid* at para 102; *Osun v Canada*, 2020 FC 295 [*Osun v Canada*] at para 26.
[211] *Scott*, *supra* note 108.

duty to give a hearing to both sides."[212] Similarly in *Baldwin,* Jack Beatson QC argued "the public law rules of natural justice *strictu sensu* are not applicable to charities."[213]

However, in a more recent case, *Lawson,*[214] the court does at least advance the view that natural justice may be appropriate where it accords to the purpose of the charity.[215] This at the very least opens the door for natural justice to be a requirement in certain circumstances, depending on the nature and terms of the trust. Another exception to the rule is found in the case Wight v Olswang.[216] The court found that beneficiaries were entitled to an explanation as to why the trustees had failed to exercise any discretion at all. Another interesting exception is where the charity is also a voluntary association. In the UK the court recognised that members of a religious association can access the jurisdiction of the civil courts if a disciplinary proceeding "breaches in a fundamental way the rules of fair procedure."[217] It is unclear why the same should the same not apply for all beneficiaries of charities as part of the court's supervisory jurisdiction over trusts.

More generally, there appears to be little reason why natural justice ought not to apply as a general rule, given that trustees make decisions that affect the rights and interests of individuals in very significant ways.[218] Furthermore, other-regarding powers are unique because the fiduciary is representing the legal personality of the fiduciary. As such, one would expect it to be necessary for the fiduciary to hear from the person she is acting for. As Smith points out, the position in trusts law contrasts with other fiduciary relationships, such as the agent-principal relationship in which often the principal will give instructions to the fiduciary about how to exercise the power. [219] It also differs from the doctor-patient relationship. In *Cuthbertson v. Rasouli,* a case concerning end-of-life plans, McLachlin CJ. noted,

> "The doctor's obligations should include, for example, providing notice and a thorough and accommodating process for determining the condition and best interests of the patient."[220]

---

[212] *Ibid* at 718.
[213] *R v Charity Commissioners, Ex p Baldwin*, [2001] WTLR 137 [*Baldwin*] at para 48.
[214] *Trustees of the Celestial Church of Christ, Edward Street Parish (a charity) v Lawson*, [2017] EWHC 97 (Ch) [*Lawson*].
[215] *Ibid* at para 38.
[216] *Wight & Anor v Olswang*, [2000] EWCA Civ 310 [*Wight & Anor v Olswang*].
[217] *Shergill & Ors v Khaira & Ors*, [2014] UKSC 33 [*Shergill & Ors v Khaira & Ors*] at para 48.
[218] L. Smith, *Law of Loyalty, supra* note 189 at Chapter Three.
[219] *Ibid*.
[220] *Cuthbertson v Rasouli*, 2013 SCC 53 [*Cuthbertson*] at para 171, McLachlin CJ (emphasis added).

In *Scott,* Lord Walker suggested that the reason why the court did not allow natural justice was because "in many situations 'both sides' is a meaningless expression."[221] This may be why, as Beatson QC noted in *Baldwin,* trusts law *"*focuses on the information available to the person making the decision*"* whereas public law "focuses on the individual's opportunity to be heard before a decision."[222] Focusing on information may sound paltry in comparison to a right to be heard, but in Australian law the idea that trustees must be properly informed prior to a decision has attracted a natural justice requirement. In *Flegeltaub* the court noted,

> "[O]ne cannot ordinarily decide a question of fact in good faith and give it real and genuine consideration without conducting some investigation and in some cases that will entail making an inquiry of a person who is willing to provide information and is in the best position to do so. It is not a matter of natural justice but bona fide inquiry and genuine decision making."[223]

Despite the court underscoring that making inquiries is not a natural justice requirement, the effect of the decision is to essentially require that, in some circumstances, trustees must hear from beneficiaries who can provide them with relevant information about their financial wellbeing.

Another way of supplying a form of natural justice in a context where "hearing the other side is meaningless" is Walker J's suggestion of a doctrine of legitimate expectations. Lord Walker suggested it would be "unreasonable" (as opposed to unfair) to cut off an "elderly, impoverished beneficiary" who had received £1,000 per quarter for 10 years "without any warning, and without giving the beneficiary the opportunity of trying to persuade the trustees to continue the payment, at least temporarily." [224] In other words, some form of procedural fairness may be necessary not just in situations where the beneficiary is adversely affected, but where she held a legitimate expectation that she would continue to benefit from the trust.

Thus, courts are showing an increasing willingness to allow disclosure of documents, probe into reasons, and potentially require some level of natural justice. In the next and final section, I will argue the Court of Equity augments the kind of trusts settlors can make and in so doing,

---

[221] *Scott*, *supra* note 108 at 718.
[222] *Baldwin*, *supra* note 213 at para 49 (emphasis added).
[223] *Telstra Super Pty Ltd v Flegeltaub*, [2000] VSCA 180 [*Telstra Super Pty Ltd v Flegeltaub*] (emphasis added). Discussed in ; David K L Raphael, "An Australian view on a Trustee's duty to account and to keep records and identify just what records should be kept and to discuss what are trust documents" (2020) 26:10 Trusts & Trustees 956 at 990; See also *Finch*, *supra* note 157 at para 66.
[224] *Scott*, *supra* note 108 at 718.

facilitates trusteeship as an office situated in public order. However, judges will not assist in the administration of trusts that do not respect the power-conferring principles that make the trust a particular kind of office in which one person holds property on behalf of another. This is because the court's concern for the integrity of trust administration is an impersonal, institutional purpose that Chancery judges must further in the exercise of their supervisory powers.

3.3. The Constitution of Trusteeship in Public Order

3.3.1. Office

Trusteeship is usually considered to be an office. The nature of offices will be discussed further in Chapter Five, but suffice to say for now, offices are independent and impersonal positions of authority, filled by a human representative, who acts on behalf of the office's purpose.[225] Offices are necessarily other-regarding, and as with all persons who occupy a trust-like position, the valid exercise of authority depends upon acting for the right motive or reasons. What is unique about offices, however, is that they are decision-making positions connected to public institutions within a legal order.[226] As such, officeholders act on behalf of publicly-avowable mandates.

Trusteeship partially fits this description of offices. Trusts are impersonal because they exist abstractly or independently until they are performed. Equity ensures there is a seamless transition of authority and requires someone with the relevant qualifications to perform the trust. However, as Penner writes, "it matters not who that person is. The law will see to it that someone will operate that structure, the court itself if necessary."[227] In so doing, Equity communicates there is an important institutional and public concern for the performance of trusts. As Clarry writes:

> "The need for protection to be provided to trustees was tied to the idea that the office of trusteeship was a publicly important function for private persons to perform… The necessary existence of an abstract office…established trusts as a legal institution that could be used by private persons to fulfil a variety of economically and socially important purposes"[228]

[225] Christopher Essert, "The Office of Ownership" (2013) 63:3 UTLJ 418 at 430.
[226] Larissa Katz, "Ownership and Offices: The Building Blocks of Legal Order" (2020) 70:6 UTLJ 267 ("an office exists if at all as part of a collective plan for allocating authority in society – a legal order" at 268).
[227] J E Penner, "Exemptions" in Peter Birks & Arianna Pretto-Sakmann, eds, *Breach of Trust* (Oxford: Hart Publishing, 2002) at 246.
[228] Clarry, *supra* note 9 at 48 (emphasis added).

The supervisory jurisdiction continues to play an important role in facilitating and maintaining trusts as a social, economic and public institution,[229] and trustees continue to play a crucial public function in assisting in that mission. In other words, perhaps both the court and trustee exercise their powers on behalf of some publicly-avowable purpose beyond the interests of determinate beneficiaries. Judges of the Chancery Court, as officeholders themselves, arguably hold and exercise their powers of supervision on behalf of a publicly-avowable purpose. As will be explained more in Chapter Five, section 5.3.1., we could specify that purpose as the Crown's ambition to secure justice and the "will to do right," [230] where the common law fails to see to it.[231] Part of this broad institutional mandate is the guarantee that the Chancery will supervise and administer trusts.[232] The court will thus only supervise trusts considered to be valuable or which reflect the purpose of trusteeship in legal order.

3.3.2. Institutionalizing Trusts of Value

In the previous chapter, I argued that legal powers facilitate new kinds of legal relationships. A legal power will only be recognized, Raz argues, where actions are standardly performed to try and bring about certain consequences[233] and where it is "desirable that that person should be able to bring the change about."[234] Trusts are thus a quintessential example of Raz's two recognitional conditions. Initially, trusts could only be enforced by appealing to the conscience of the Chancery. Over time, however, power-conferring rules and principles came to structure and facilitate the standard actions that settlors performed to create trusts.[235]

Arguably Equity facilitated trusts because the Chancery believed trusts were desirable normative arrangements. The value of a trust, Penner helpfully offers, is that it enables "donors to fine-tune their power to give, to structure their gifts…extending their effects over time"[236] by

[229] Derwent Coshott, "To Benefit Another: A theory of the Express Trust" (2020) 136:2 LQR 221.
[230] McLean, *supra* note 179 at 27.
[231] Larissa Katz, "Pathways to Private Rights" in Klimchuk et al *supra* note 15 at 172.
[232] Piyel Haldar, "Equity as a Question of Decorum and Manners: Conscience as Vision" (2016) 10:2 Pólemos 311; Dennis R Klinck, "Lord Nottingham and the Conscience of Equity" (2006) 67:1 Journal of the History of Ideas 123 at 138.
[233] Joseph Raz, *Practical Reason and Norms* (Oxford, UK: Oxford University Press, 1999) at 81.
[234] *Ibid* at 102.
[235] JE Penner, "Equity, Justice and Conscience" in Klimchuk et al. *supra* note 15 at 54-55
[236] James Penner, "Justifying (or Not) the Office of Trusteeship With Particular Reference to Massively Discretionary Trusts" (2021) 34:2 Can JL & Jur 365 at 390.

providing "resources to those who matter to them, so as to enhance their autonomy."[237] This concept therefore empowers persons to engage in long-term administrative planning to achieve particular objects and purposes on behalf of others.[238] Penner's analysis also suggests that the settlor's power to make a trust, and the powers held by trustees, reflect, and are conceptually limited, by the very general moral purpose of a legal power, which if the reader recalls from Chapter Two, is to enhance positive liberty. Due to the Law of Equity's uniquely facilitative and discretionary history, trusts remain an area of law that is responsive to imaginative legal arrangements.[239] Where willing and able, the court accommodates the wishes of settlors. However, since the office of trusteeship is an office situated within legal order (and not outside it) and is liable to be performed by the court upon default, the court zealously shepherds the office of trusteeship and the kinds of offices that are available to settlors to create.

For example, in *McPhail v Doulton,* The House of Lords brought the certainty of objects test for trusts in line with that of mere powers of appointment, such that if a certain individual could be said to fall within or outside the class of beneficiaries, then the trust was certain enough. The case began as a summons for advice and thus discussions of the certainty of objects should be kept with this aspect in mind. If the trustee has requested advice, the trust deed needs to be sufficiently certain *for the court* to be able to *provide advice* on topics such as the construction of the deed or the scope of the powers or exercise of discretion. It was for this reason that the minority regretted that the trust was not of a type that the court could "control and execute."[240]

However, the court will not accommodate a trust arrangement where there is no obvious value. Massively discretionary trusts (MDTs) or discriminatory trusts are perhaps examples. MDTs present a challenge because often there are no named beneficiaries in the document, and thus there are no discernable enforcement rights by beneficiaries.[241] Penner points out that because we cannot construct a consistent intention on the part of the settlor, the objects of the power will radically

[237] *Ibid* at 381.
[238] *Larochelle v Soucie Estate*, 2019 BCSC 1329 [*Larochelle*] at para 17.
[239] *Ibid* at para 173-5, discussing how "alter-ego trusts" have become "recognized as legitimate estate-planning tools".
[240] *McPhail, supra* note 14 at 440 per Lord Hodson; J W Harris, "Discretionary Trusts. An End and a Beginning?" (1970) 33:6 Mod L Rev 686 at 688.
[241] *Re Manisty's Settlement, supra* note 110 (the court cannot control a power if it is impossible to discern any sensible intention on behalf of the settlor as to how the power should be exercised.).

change depending on who steps in to perform the 'trust.'[242] The settlor thus simply has to personally rely on the trustee to effect his expectations.[243] In these arrangements, Penner argues, the 'trustee' holds the powers in a personal role, rather than as part of an impersonal office.[244] He further suggests that turning trusteeship from an office into a personal role is problematic because it renders beneficiaries like children,[245] totally incapacitated and subject to the discretion of the "bon père de famille."[246] As a result, the intrinsic value of a trust, a temporal gift that enhances the autonomy of future generations, is undercut.[247] I would add that the intrinsic moral purpose of a legal power is subverted, as there is no respect for the agency or equality of the potential beneficiaries.

The value of a trust as a structured gift is also undercut when it is used purely as a tax avoidance scheme (which MDTs often are). Hostility to tax avoidance lay behind the court's refusal in *Pitt* to extend the supervisory jurisdiction's helping hand. Lord Walker said, "[t]hose who still regard family trusts as potentially beneficial to society as a whole… the greater danger is not of trustees thinking too little about tax, but of tax and tax avoidance driving out consideration of other relevant matters."[248] There is nothing particularly familial about offshore trusts; the settlor's family is often unknown to the trustees. The beneficiaries 'best interests' thus become too abstract and subsumed within tax obsessions, as opposed to a question of judgment that looks to the actual needs of each family member or class of beneficiaries.[249] Furthermore, in the eventuality the court is called upon to perform such trusts, we may feel uncomfortable with judicial officeholders enforcing such "webs of camouflage."[250]

A final example is discriminatory trusts that are void for public policy. For instance, in *Re Peach Estate*,[251] a will requiring the estate trustee to violate provincial human rights legislation by

[242] Penner, "Justifying MDTs", *supra* note 236 at 384.
[243] *Re T R Technology Investment Trust plc*, [1998] BCLC 256 [*Re T R Technology Investment Trust plc*] at 263–264.
[244] Penner, "Justifying MDTs", *supra* note 236 at 383.
[245] *Ibid* at 386.
[246] *Spread Trustee Company Ltd v Hutcheson & Ors (Guernsey)*, [2011] UKPC 13 [*Spread Trustee*].
[247] Penner, "Justifying MDTs", *supra* note 236 at 389.
[248] *Pitt v Holt (SC)*, *supra* note 26 at para 65.
[249] cf. *Cowan v. Scargill*, *supra* note 109 ("the best interests of the beneficiaries are normally their best financial interests" at 287). However, these financial interests relate to the particular situations and interests of people, not simply amassing wealth within a trust for the purpose of tax avoidance.
[250] *Schmidt*, *supra* note 57 at para 36.
[251] *Peach Estate (Re)*, 2009 NSSC 383 [*Peach Estate (Re)*].

only selling the testator's property to Anglicans or Presbyterians was found to be void for public policy. Similarly, in *McCorkill v. McCorkill Estate* a testator left a residue of his estate to a neo-Nazi group. The will was void because it "would have facilitated the financing of hate crimes."[252] The reason these wills were void, unlike other discriminatory wills,[253] is because *trustees* cannot exercise their powers in a discriminatory fashion and the court cannot in good conscience supervise and administer such trusts.[254] The fact trustees cannot exercise their powers in a wicked discriminatory fashion implies that trustees, as officeholders, are also charged with upholding the trust institution.[255] I turn to consider this next.

3.3.3. Trustees as Quasi-Public Officers

Trustees hold an office that is liable to be collapsed into a public institution, the court, to be performed upon default. We may reasonably ask, therefore, if trustees, as office-holders, hold publicly-avowable mandates. If so, then like Chancery Judges, arguably trustees need to turn their minds to the integrity of trust administration as a whole or the intrinsic value of a trust when exercising their powers. A proper defense of this claim is beyond the scope of this thesis, but I provide some examples to suggest what such an argument could look like.

For instance, in choosing to exercise a dispositive power for a family trust, a trustee will need to consider the how to best effectuate a trust arrangement whose purpose is to provide for a family over generations. The overarching purpose of what trusts law is for thus actually guides the assessment of the needs of each beneficiary.[256] A good example is the *Walters* case discussed above. The court found the trustee's action invalid because disliking Gerald was irrelevant to administering a familial trust that had as its intrinsic purpose or value, the support, care and comfort of the beneficiary. Another example could be the trustee's power to access the court's supervisory

[252] *McCorkill v Streed*, 2014 NBQB 148 [*McCorkill*] at para 67.
[253] For example, *Spence v BMO Trust Company,* 2016 ONCA 196 [*Spence v. BMO Trust Company*]. A woman was disinherited from her father's will for having a child with a white man and wanted to have the will set aside on public policy grounds. The court decided that the will was valid because in carrying out the will, BMO would not be acting contrary to law.
[254] *Fox, supra* note 10 ("the exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control… and that control can and must prevent her from exercising her discretion in a fashion which offends public policy.").
[255] Harding, *supra* note 15 at 347–348; Adam Parachin, "Public benefit, discrimination and the definition of charity" in Darryn Jensen & Kit Barker, eds, *Private Law: Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013) 171.
[256] Penner, "Purposes and Rights", *supra* note 172 at 585.

jurisdiction to ask for advice, blessings or directions. In approaching the court, the trustee must be "full and frank" [257] with "information which the trustee himself either has or ought to have to enable him to carry out his duties personally."[258] The trustee assists the court in its inquisitorial, advisory jurisdiction aimed at determining whether the proposed action is one a reasonable trustee would take for the benefit of the trust estate.[259]

A third example could be the conclusions of the *Dr. Lehtimäki* case.[260] The issue was whether a court order directing charitable trustees to exercise their discretion in a certain way was also binding on Dr. Lehtimäki, a voting member of the charity. The UKSC held Dr. Lehtimäki must exercise his discretion in line with the court order, but the court was split upon the reason why. Following *Pitt*, Lord Briggs for the majority argued it would be a breach of fiduciary duty for Dr. Lehtimäki to ignore the court order – any subjective duty of loyalty had been overridden by a final court determination on the matter.[261] Lady Arden, however, did not understand how Dr. Lehtimäki could be breaching his fiduciary duty because the court order was only binding on the trustees.[262] Instead, she argued that the court should make an exception to the non-intervention principle because otherwise the "achievement of what is in the best interests of the charity would be impeded."[263] For Lady Arden, intervention rested on the court's inherent jurisdiction to ensure the proper administration of a charitable trust.[264] In my view, we can unite Lord Briggs' breach of duty route with Lady Arden's proper administration route. Plausibly Dr. Lehtimäki's ambivalence to the court order had "no reasonable basis"[265] because he acted aloof to the proper administration of the trust, rather than because he ignored a court order that directly bound him. The court's inherent jurisdiction to supervise charitable trusts depends upon trustees also protecting the smooth, ongoing administration of charities by ensuring that their own trust is properly executed. In this case, we could interpret intervention as resting upon Dr Lehtimäki's breach of his office's institutional mandate to secure the integrity of charity administration.

[257] *Tamlin v Edgar* [2011] EWHC 3949
[258] *Marley*, *supra* note 83; *3 Professional Trustees*, *supra* note 77 at para 33.
[259] *Marley*, *supra* note 83 at 206; See also *Richard v MacKay*, (1997) 11 Tru LI 23 [*Richard v MacKay*].
[260] *Lehtimäki*, *supra* note 9.
[261] *Ibid* at paras 218, 226, 232, Lord Briggs.
[262] *Ibid* at para 192.
[263] *Ibid* at para 124.
[264] *Ibid* at paras 119-152.
[265] *Ibid* at para 232, Lord Briggs.

Finally, to tie us back to *Pitt v Holt*, a trustee who seeks the court's assistance to engage in tax avoidance arguably *abuses* her power to access the court's protective supervisory jurisdiction. This power, like the beneficiary's power to access the supervisory jurisdiction, is held on behalf of the trust estate, and its purpose is to facilitate the smooth and proper administration of the trust. As office-holders, trustees cannot exercise this power of recourse in a way that denigrates the value of trusts law.

Conclusion

The supervisory jurisdiction over trusts administration is an administrative and protective jurisdiction, primarily concerned with facilitating and securing the ongoing due administration of trusts. Judicial review of trustee discretion can be interpreted as part of this jurisdiction because the doctrines of judicial review, properly understood, are power-conferring principles that constitute trustee authority. Trusts law shares perhaps more in common with public law than private law – from an administrative justice angle, an administrative law angle, and a constitutional law angle. Seeing trusts through a public law lens offers a fresh look at where trusts law sits taxonomically within our legal order. More saliently for this thesis, the quasi-public nature of trusts implies that public law shares a lot in common with trusts law, and so comparisons between the two supervisory jurisdictions may run both ways. Much fiduciary–public law scholarship analyzes the doctrinal comparisons between judicial review of trustee discretion and judicial review of administrative action, but none ask whether these doctrinal overlaps imply that the supervisory jurisdiction in public law is an administrative jurisdiction like the SJTA. I return to that discussion in Chapter Six. The next chapter, however, argues that the reasonableness doctrine in public law, like loyalty in trusts law, is a power-conferring principle that constitutes public authority.

Chapter Four

4. Reasonableness as a Power-Conferring Principle and the Constitution of Public Authority

Prologue

In this chapter, I analyze three foundational cases of substantive review in Canadian law – *Roncarelli, CUPE and Vavilov*, and argue that reasonableness is a jurisgenerative power-conferring principle that produces public authority. Judicial review, like the SJTA, therefore sets the requirements that ensures public administration is properly administered and plays a role in designing what public institutions are for and upon what conditions public institutions are viewed as legitimate. A fiduciary power-conferring interpretation of reasonableness therefore suggests that designing public authority is a shared project between the political and judicial branches.

Introduction: The Tensions of Administrative Law

Administrative Law is always negotiating constitutional tensions between respect for parliamentary sovereignty, respect for the rule of law, the legitimacy of judicial review, and the administration's authority to interpret and determine questions of law. These percolating tensions come to the boil in cases where a public actor holds an unfettered or extremely broad discretionary power, as well as in cases where Parliament purports to shield an administrative agency from judicial review. Ouster or privative clauses and provisions are controversial because on the one hand Parliament specified that decision-makers should have an autonomous sphere of decision-making, but on the other hand, such provisions leave open the possibility that administrators may act illegally without judicial oversight.[1] Furthermore, in the case of ouster clauses, often Parliament has authorized administrative agencies to determine questions of law, yet law is traditionally the

[1] For a discussion of how different common law jurisdictions have responded to ouster clauses, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge; New York: Cambridge University Press, 2006) at 102–120.

province of the judiciary. Arguably judges should not relinquish their authority to correct the errors of law made by administrative tribunals.[2]

In Chapter One, I discussed the two main theories of judicial review that attempt to resolve and explain some of these tensions – the *ultra vires* theory and common law constitutionalism. What both these theories have in common, I argued, is they assume that the doctrines of judicial review impose constraints on administrative bodies, and that the court's role is to control excesses of governmental power. This assumption leads scholars to believe they must answer to the fact that judges are unelected and explain why they should be allowed to control or constrain administrative decision-makers. Furthermore, there is often an assumption that these common law constraints on legislative acts or executive decision-making are duties. Such an assumption rests on a post-Diceyan view that judges and courts trade in rights and duties, Parliament curates the institutional design of statutory schemes, and public actors administer substantive policy goals.

However, in the previous chapter, I argued that the SJTA's legitimacy rests on securing the smooth and seamless administration of a trust. I contended that judicial review of trustee discretion is one part of the SJTA because the doctrines of review explain to the trustee how she is to deliberate on behalf of another and secure the validity of trustee action. The practice of judicial review thus (i) sets the requirements that ensure trusts will be properly administered (ii) returns the trust back to good administrative working order by setting aside any invalid exercises of power and (iii) articulates or constitutes trusteeship as a position of trust in which individual(s) hold property *on behalf of* others.

Although there are important differences between the SJTA and judicial review of administrative action, I contend that we can interpret the practice of judicial review as likewise generating a framework of other-regarding decision-making. In so doing, the court does not constrain a power already fully constituted by law via a statutory delegation, but actually facilitates the legality of public regulatory schemes by constituting the administrator's powers as *legal* powers. Put differently, the standard of reasonableness generates public power as a position of trust in which public agencies, if they are to exercise their powers legitimately, must consider the interests of legal subjects and usually provide a reasoned explanation for their decision. Judicial

[2] Geneviève Cartier, "The Baker Effect : A New Interface between the Canadian Charter of Rights and Freedoms and Administrative Law" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart, 2004) at 65.

review, like the SJTA, therefore sets the requirements that ensure public administration is properly administered. In so doing, the court plays a role in articulating the conditions under which public institutions are viewed as legitimate and likewise plays a role in designing public institutions as institutions held on trust for legal subjects.

Furthermore, a fiduciary power-conferring interpretation explains why the court on judicial review starts with the reasons offered by the decision-maker. This is because the fiduciary power-conferring view presupposes the idea that authority is not solely located in a formal authorization, but rather depends on the reasons for which a decision-maker acts. This is because to exercise a valid other-regarding authority, the decision-maker must consider the interests of legal subjects. As such, reasons become central to the question of validity. Reasons emerge via an interpretive, jurisgenerative exercise, often in relation to and with the legal subject. Reasonableness review thus analyzes the adequacy of this deliberative and interpretive process.

To build the argument that the doctrine of reasonableness is the jurisgenerative *grundnorm* of administrative law, I analyze three landmark cases in Canadian Administrative Law that tackle the constitutional challenges outlined above. In the first section I look at *Roncarelli,*[3] and argue we can interpret the proper purposes doctrine as a power-conferring principle that produces administrative authority and constitutes the relationship between state and legal subject as a relationship of trust.

In the second section, I analyze the decision in *CUPE*[4] and argue that reviewing a tribunal's determination of law on a standard of reasonableness presupposes that questions of law are intra-jurisdictional. In other words, reasonableness review reviews the proper *exercise* of an interpretive power rather than reviews decisions on the grounds that the administrator acted *ultra vires* her authorizing mandate. This is important because it suggests reasonableness, even in the context of questions of law, is a doctrine that governs the proper exercise of power. This feature of reasonableness review consequently implies that reasonableness is a power-conferring principle that makes possible the proper exercise of interpretive authority.

[3] *Roncarelli v Duplessis*, [1959] SCR 121; [1959] 16 DLR (2d) 689 [*Roncarelli cited to DLR*].
[4] *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227 [*CUPE*].

In the third section I argue a fiduciary power-conferring theory explains *Vavilov's*[5] turn towards a 'culture of justification' and explains why the vulnerability of the legal subject, the submissions of the parties, and purposes of the statutory scheme, are key components of reasonableness review. I end by arguing that the view presented in the chapter suggests that, like the SJTA, the practice of review sets various requirements that enable us to say whether an agency's powers were properly exercised. The court thus constitutes or articulates public administration as an institution that holds power in trust for the public. This challenges the majority's assumption in *Vavilov* that the only body engaged in "institutional design choices" is Parliament.[6] Deference does not only respect Parliament's institutional design choices but allows the design of public institutions from the bottom up as institutions of trust.

4.1. Judicial Review of Discretion: *Roncarelli v. Duplessis, 1959*

4.1.1. The Authority and Authorization of the Attorney General

Frank Roncarelli was an owner of a successful restaurant in downtown Montreal. On multiple occasions between 1944-1946, Mr. Roncarelli bailed out fellow Jehovah's Witnesses, who due to the government's ire against the religion, were arrested for minor offences of canvassing without a licence. To punish Roncarelli, Maurice Duplessis, the Premier of Quebec directed Edouard Archambault, the Chairman of the Quebec Liquor Commission, to cancel Roncarelli's liquor licence. Archambault cancelled the licence without notice under s35 *Alcoholic Liquor Act* which read "The Commission may cancel any permit *at its discretion."*[7] All liquor was confiscated from Roncarelli's restaurant and after six months of a failing business, the restaurant shut down. Roncarelli commenced an action for damages against Duplessis. In his defence, Duplessis argued that directing Archambault was, as the Attorney General as well as Premier, an exercise of his function to ensure the good administration of justice. He argued he was protected from suit due to a time limitation in Article 88 Civil Code of Procedure:

[5] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (unless otherwise specified, when I pinpoint a reference to Vavilov, I am pinpointing the majority reasons).
[6] *Ibid* at para 26.
[7] *Alcoholic Liquor Act*, RSQ 1941, c 255, s35

> "No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the *exercise of his function*, …unless notice of such action has been given him at least one month before the issue of the writ of summons."[8]

In the Supreme Court, for the minority, Taschereau J. agreed Duplessis was within the remit of the Attorney General's mandate to ensure the good administration of justice, and he was thus entitled to the Article 88 immunity.[9] Fauteux J., also in dissent, found that Duplessis did not have any power to direct Archambault, but because in good faith he believed it to be part of his functions as Attorney General, Article 88 was determinate.[10] Cartwright J., the remaining dissenter, did not much consider Article 88 because in his view "within its province, [the Liquor Commission] is a law unto itself"[11] and there was no actionable wrong. While legal rights are the purview of the judiciary, a permit to serve alcohol is a "privilege," bestowed by the exercise of an administrative power.[12] Unless the statute proclaims differently, an administrative power is void of any legal norms or principles.[13] The Commission could thus take counsel from whomever they wish, in this case from Duplessis.

Cartwright J.'s argument is the quintessential *ultra vires* position, as he assumes all law, and authority, stems from Parliament. In this case there was no statutory law guiding the Commission's exercise of a power and the Commission was therefore free to act as it pleased.[14] However, as I argued in Chapter Two, it is impossible to hold a legal power and there be no rules guiding its exercise, since it is the nature of all legal powers that they have, at a minimum, implicit instructions pertaining to their exercise.[15] All legal powers come with jurisgenerative principles that explain to the power-holder how to exercise a legal power and secure and generate valid legal results. Furthermore, the exercise of a Hohfeldian power can change any legal position – a privilege, right, duty, or even another power. Hence, the rights/privilege distinction on which Cartwright J. relied is not relevant to determining the legality of an exercise of the power and the subsequent change

[8] Article 88 Civil Code of Procedure (1897)
[9] *Roncarelli cited to DLR*, *supra* note 3 at 695–696, Taschereau J.
[10] *Ibid* at 727, Fauteux J.
[11] *Ibid* at 715, citing Re Ashby [1934] O.R. 421 at 428, 3 D.L.R. 565 (C.A.), Masten J.A.
[12] *Ibid* at 715–717, Cartwright J.
[13] Implied *Roncarelli cited to DLR*, *supra* note 3, Cartwright J (he argues if a statute confers an unlimited power to remove such privileges, it is for the legislature to consider the "wisdom and desirability" of such a provision, at 716). See David Dyzenhaus, "The Deep Structure of Roncarelli v Duplessis" (2004) 53 UNB LJ 111 at 125–127.
[14] *Roncarelli cited to DLR*, *supra* note 3 at 714.
[15] *Ibid*.

in position. These confusions led Cartwright J. to conclude there was no need to provide notice, a hearing, or reasons for the cancellation of the licence,[16] and Roncarelli had no actionable right to ground any claim for damages.[17]

The majority, however, found that Archambault and Duplessis acted unlawfully, and Duplessis was ordered to compensate for the loss of profits and damage to personal reputation and goodwill. Martland and Abbott JJ. argued Duplessis was not "exercising his functions" because no statute enabled Duplessis to direct Archambault to cancel the licence,[18] and thus Article 88 did not apply.[19] Duplessis acted "without any legal authority whatsoever,"[20] and the fact Duplessis believed in good faith that he held a relevant public power was irrelevant to determining authorization.[21] Accordingly, Duplessis usurped the lawful exercise of Archambault's discretion and breached the non-delegation principle, which prohibits exercising a power "under the dictation of some other person or persons."[22]

The problem with Martland and Abbott JJ's judgments is, like Cartwright J., they assume authority is exhausted by a formal authorization. The primary difference between these approaches was that the majority focused on Duplessis' lack of a formal authorization, whereas Cartwright J. focused on the Commission's completely unfettered authorization.[23] Both, in their own way, adopt an all-or-nothing approach to court intervention. If there is no formal authorization, the court can intervene wholesale to set aside the unauthorized action, but if one holds a formal, unfettered authorization, this is sufficient to shield the exercise of power from review.[24]

---

[16] *Roncarelli cited to DLR*, *supra* note 3, Cartwright J (he did entertain the argument that ultra vires activity could give rise to damages but argued that if the power was quasi-judicial, as opposed to administrative, this would render the action voidable as opposed to void and thus no wrong could attach, ibid at 717).
[17] *Ibid* at 717.
[18] Specifically in *The Attorney-General's Department Act*, RSQ 1941, c.46, *The Executive Power Act*, RSQ 1941, c. 7 or *Alcoholic Liquor Act*, supra note 7
[19] *Roncarelli cited to DLR*, *supra* note 3 at 730–731, Abbott J.
[20] *Ibid* at 730, Abbott J.
[21] *Ibid*.
[22] *Ibid* at 743, Martland J.
[23] Cartwright J barely addressed the issue of Duplessis' authority and focused primarily upon the nature of the power held by the Commission, in particular, whether it was administrative or judicial. One can infer the importance was that if the power is administrative, the reasons for which the decision was taken did not matter, including, that it was taken on the direction of a third party.
[24] This formal approach leaves review susceptible to manipulation by the courts. See the unfortunate duo of cases, *Metropolitan Life Insurance*, [1979] SCR 756; *Bell v Ontario Human Rights Commission*, [1971] SCR 756.

In contrast to Abbott & Martland JJ's analysis of authorization, Rand J.'s analysis focused on how Duplessis abused his authority. Rand J. accepted that, in his role as Attorney General, Duplessis could advise administrative bodies on legal questions and direct the administration of justice.[25] However, Duplessis used his power to "deliberately and intentionally destroy the vital business interests of a citizen"[26] and this was such a "gross abuse of legal power,[27] it could not be said Duplessis acted with any good faith. He noted, "discretion necessarily implies good faith in discharging public duty" [28] and that good faith in this context "means carrying out the statute according to its intent and for its purpose" and thus to depart "from its lines or objects is just as objectionable as fraud or corruption." [29] Acting in bad faith, or for an improper purpose, Duplessis therefore "convert[ed] what was done into his personal act" [30] as opposed to an official act of office, and for that reason, his action was an intrusion upon the functions of the Commission.

More generally Rand J. fervently argued that there was no such thing as an "untrammelled power" and such a concept offended the "principles underlying public law of Quebec"[31] that law is not to be superseded "according to the arbitrary likes, dislikes, and irrelevant purposes" [32] of public officials. Rand J goes as far as to lay down that,

> "*No legislative act* can, without express language, be taken to contemplate an unlimited arbitrary power exercisable *for any purpose*, however capricious or irrelevant, regardless of the nature or purpose of the statute." [33]

Impliedly, Duplessis' motives did not track the purpose of his office, which were to direct the administration of justice, but were exercised in a private or self-regarding fashion. Hence, he could not avail himself of Article 88.[34] Whereas for Martland and Abbott JJ. the irrelevance of Article 88 followed because Duplessis had no jurisdiction whatsoever to counsel the Commission, for Rand J., it was Duplessis' reasons or motives in the "exercise of his function" that gutted the

[25] *Roncarelli cited to DLR, supra* note 3 at 707.
[26] *Ibid* at 703.
[27] *Ibid* at 706.
[28] *Ibid* at 705.
[29] *Ibid*.
[30] *Ibid* at 707 (for Rand J, good faith related to the exercise of the power, rather than relating to whether Duplessis believed he had been so authorised. See below).
[31] *Ibid* at 706.
[32] *Ibid* at 707.
[33] *Ibid* at 705 (emphasis added).
[34] *Ibid* at 708.

exercise of that function of any authority. In other words, to properly *exercise* his functions and be shielded by Article 88, Duplessis' needed to act for the right reasons, and his reasons, are what formed the core of his authority. In that sense, *reasons* for Rand J. had a critical jurisgenerative quality in that they actually formed the base of Duplessis' authority. Thus, Rand J's abuse of office reasoning, read in conjunction with the Article 88 issue, makes his judgment particularly iconic from a rule of law perspective.[35] Despite the wide and purportedly unfettered power held by Duplessis or the Liquor commission, *legal* authority cannot be exercised arbitrarily or unreasonably such that it is unaccountable to law and review by a court.

4.1.2. The Constitution of Public Office

4.1.2.1. A Relationship of Trust

In my view, Rand J.'s argument that all public authority is held for a purpose and for that reason cannot be exercised "on any ground or for any reason," [36] implicitly suggests that public actors stand in a trust relationship vis-à-vis legal subjects. In Chapters Two and Three I suggested that a valid exercise of fiduciary authority transpires when the fiduciary furthers the reasons for which her power is conferred. This is because other-regarding power is not held for the purpose of benefitting the power-holder, but is held for purpose of benefitting others or for advancing an impersonal purpose. As it was put by Lord Woolf MR in *Equitable Life v Hyman*;

> "Parliament confers wide discretionary powers on the Government of the day, *so that they can be used in the nation's and the public's interests*…The recipients of the powers, whether national or local… are entrusted to them so that they can exercise them *on behalf of the public* or a section of the public."[37]

Accordingly, the doctrines that traditionally comprise review of discretion on grounds of reasonableness can be interpreted as part of the requirement of loyalty because they follow from the position of trust held by the public official. If an official acts with bad faith, for improper purposes or irrelevant considerations, she is not adequately deliberating on behalf of the legal

[35] Robert Leckey, "Complexifying Roncarelli's Rule of Law" (2010) 55:3 McGill LJ 721 ("readers who applaud Justice Rand for his treatment of discretion and official liability while dismissing Article 88 as easy underestimate the extent to which he defended the rule of law" at 732).
[36] *Roncarelli cited to DLR, supra* note 3 at 705.
[37] *Equitable Life Assurance v Hyman*, 2002 1 AC 408 at para 18, [2000] 2 All ER 331, CA; Although the case concerned pensions, he cites the classic administrative law case *Padfield v Minister of Agriculture,* [1968] AC 997 [*Padfield*] for the proposition .

subject or the impersonal purpose of her mandate. An official who unduly fetters or delegates her discretion is not exercising her other-regarding power in a deliberate or conscientious manner. An official who acts partially or is swung by conflicting interests cannot be interpreted as acting on behalf of *all* those subject to her powers. The relevant question is therefore whether the inadequacy of the reasoning process is so "sufficiently serious"[38] that the decision cannot plausibly be interpreted as exercised on behalf of those subject to it. Loyalty, in this context, is less a requirement to act exclusively on behalf of certain beneficiaries, but is a requirement to reasonably consider the interests of each beneficiary (the duty of reasonableness)[39] and a requirement to be even-handed as between classes of beneficiaries (the duty of fairness). In this instance, Duplessis' lack of solicitude to Roncarelli's interests, particularly towards the impact of the decision upon Roncarelli's livelihood, as well as using his office to maliciously punish a member of a particular class of legal subjects, was an unreasonable and partial exercise of power.

A fiduciary interpretation of public authority explains why Rand J. saw good faith as an implied requirement for the proper exercise of *public* power,[40] but not a relevant requirement in private law. He distinguished the *ratio* of *Allen v Flood*,[41] relied on by Duplessis, that an otherwise unactionable claim does not become so by the malicious motives of the defendant. While a contractual right to fire employees is expected to be exercised on behalf of one's own self-interest, Rand J. held that Duplessis acted "in relation to a public administration" and impacted an interest held by a legal subject.[42] The inference is that public administrators are expected to take seriously the best interests of those subject to his authority.[43]

4.1.2.2. Reasonableness as a Power-Conferring Principle: Exercises of Discretion

We can explain the jurisgenerative quality of Duplessis' reasons by interpreting reasonableness as a power-conferring principle that produces administrative validity. Rand J.'s judgment is iconic

[38] *Vavilov*, *supra* note 5 at para 100.
[39] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford; New York: Oxford University Press, 2011) at 35.
[40] *Roncarelli cited to DLR*, *supra* note 3 at 705.
[41] *Allen v Flood*, [1898] AC 1.
[42] *Roncarelli cited to DLR*, *supra* note 3 at 708.
[43] Mark Aronson, "Misfeasance in Public Office: A Peculiar Tort" (2011) 35:1 Melbourne UL Rev 1 at 8; *Three Rivers District Council v Governor and Co of the Bank of England (No 3)*, [2003] 2 AC 1; [2000] 2 WLR 15 at 235, Lord Millet [*Three Rivers*].

because it holds that a decision-maker can technically act within her mandate but nevertheless abuse her power if she acts for "improper intent."[44] This starkly contrasts with Cartwright J.'s view that within its province, an agency is a law unto itself. However, as noted, legal powers necessarily come with instructions for use, rendering unfettered and arbitrary legal powers an impossibility.[45] Legal powers are only legal if there are principles explaining to public decision-makers how to exercise their mandate, and which intrinsically secure the validity of the change in the legal subject's position. In other words, the valid exercise of every legal power is generated by an internal *grundnorm* that produces the legal validity of a given exercise of power. Thus, while Parliament may regulate the kinds of measures public agencies may use to implement their mandates, the classic doctrines of administrative law regulate the *terms* upon which public power can be held and exercised.

In choosing to review for improper purposes, relevant considerations, the non-delegation principle and good faith, Rand J. therefore infused the purportedly empty administrative 'province' with power-conferring principles that make representative action possible in law. In so doing, Rand J. transformed the factual power held by Archambault, by sheer dint of his position as Commissioner, into a *legal* power by presupposing the power-conferring principles that intrinsically generate and produce valid legal effects. In this case, the legal effect that is produced is acting for another and, like all other-regarding legal powers, this power therefore becomes purposive – it is held for the specific purpose of acting on behalf of another in certain ways. Thus, notwithstanding that s. 35 of the *Alcoholic Liquor Act* had not, at least expressly, laid down any specific purpose or "rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted,"[46] public powers are necessarily purposive because they are held *for* another, and this limits the *terms* upon which the decision-maker is entitled to act.

Furthermore, authentic representative decision-making can never subsume the beneficiary into the ends of the fiduciary because the fiduciary is to represent or personate the beneficiary.[47] The terms upon which the public decision-maker and legal subject relate change from one of

[44] *Roncarelli cited to DLR*, *supra* note 3 at 707.
[45] See Chapter Two
[46] *Roncarelli cited to DLR*, *supra* note 3 at 714, Carwright J.
[47] Fox-Decent, *Sovereignty's Promise*, *supra* note 39 at 134.

absolute discretionary power to one where the fiduciary must recognise and respond to the beneficiary's interests. Flowing from this fiduciary relationship, therefore, is the beneficiary's right to not be treated instrumentally or arbitrarily, and the substantive implication is that such power is to be exercised in favour of the liberty, equality and dignity of the beneficiary.[48]

Another substantive right that follows from the nature of public authority as one of trust is that the legal subject is entitled to know the reasons for the decision. Exercises of other-regarding powers, unlike self-regarding powers, duties or rights, require justification. As was said recently by the Ontario Superior Court of Justice, "[r]easonableness is "not about "right" or "wrong". *It is about "why."*[49] Other-regarding authority requires us to know why a decision was taken and the administrator's intention needs to be known or readily knowable so beneficiaries and courts can ascertain if the exercise of the power was valid. This is because it is only where fiduciary acts for the right reasons does she normatively bring about valid legal changes in the interests or position of the legal subject. We would expect therefore, that the public actor be required to communicate why her decision takes seriously the interests of those subject to it. Unlike trusts law where this requirement is still evolving, in administrative law, public actors are often required to provide reasons for their decisions, and these reasons, at least since *Vavilov*, must be shown to respond to the vulnerability of the legal subject.[50] Reasons, as opposed to authorizations, are the source of a public actor's authority. To explore this latter point further, I will turn to consider the reasonableness doctrine within the context of review for error of law.

4.2. Judicial Review of Questions of Law: *C.U.P.E. v. NB Liquor Corp,* 1979

The current law from *Vavilov* takes reasons to be at the core of administrative authority, even in situations where the administrator is determining a question of law. Accordingly, this view presupposes that administrative authority is not located in a frozen jurisdictional boundary but is located in the reasons the administrator gives for the *exercise* of her power to determine a question of law, or so I shall argue. The argument requires us to understand how Canadian law eschewed

[48] Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55:3 McGill LJ 511 at 523.
[49] *Scarborough Health Network v Canadian Union of Public Employees, Local 5852,* 2020 ONSC 4577 at para 27 [*Scarborough Health Network*].
[50] *Vavilov, supra* note 5 at para 135.

jurisdiction as the backbone of review in *CUPE*. I show this by comparing the development of the law in Canada with the UK's decision in *Anisminic v FCC.* [51] In *Anisminic* the UK House of Lords opined that all questions of law are to be interpreted as jurisdictional questions and thus as questions about the *scope* of the power. The result is that almost all questions of law in England are reviewed on a standard of correctness.[52] By contrast, Canadian law takes the approach that almost all questions of law or discretion are intra-jurisdictional questions of substance.[53] In other words, all questions of law are *exercises* of an interpretive *power* held by the decision-maker. The exercise of these intra-jurisdictional powers to determine questions of law thus require jurisgenerative power-conferring principles. We can see the court over time finding 'reasonableness' in various iterations as the *grundnorm* of administrative law. Reasonableness, as it developed out of the landmark *CUPE* decision, is thus a power-conferring principle that generates and regulates the proper exercise of interpretive authority. The key question becomes whether the exercise of these other-regarding interpretive powers have been adequately reasoned.

4.2.1. *Anisminic v. Foreign Compensation Commission*

Anisminic Ltd, a British company, held property in Egypt. Following the Suez Crisis, the Egyptian government sequestrated Anisminic's property to an Egyptian company for less than market value. Anisminic sought compensation under section 3 of the Foreign Compensation Order (FCO),[54] but the claim was dismissed by the Foreign Compensation Commission (FCC) because the "successors in title" of the property were Egyptian, not British. Anisminic sought a declaration that the FCC wrongly interpreted the phrase "successors in title" to include the re-selling of property. The FCC argued, however, that they were protected from judicial review by section 4 FCO, which stated, "the determination by the commission… shall not be called into question in any court of law."[55]

---

[51] *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 [*Anisminic*].
[52] cf. *In re Racal Communications Ltd*, [1981] AC 374; *R v Hull University Visitor, ex parte Page*, [1993] AC 682, HL at 703 [*Page*]; There is an indication that the court is moving away from such a strict jurisdictional approach in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others*, 2019 UKSC 22 [*Privacy Intl*] I discuss this case in Chapter 6.4.1.
[53] Furthermore, the classic grounds of judicial review are seen as aspects of reasonableness review, not aspects of 'illegality'.
[54] *Foreign Compensation Act* (UK) 1950, 14 Geo VI, c12, s 3. [FCO].
[55] *FCO*, *supra* note 54 at s 4(4).

Prior to *Anisminic,* a privative clause shielded an *intra vires* decision from *certiorari,*[56] but such clauses would not reach jurisdictional errors.[57] *R v Bolton,*[58] the leading precedent, defined jurisdiction as a question at the start of the inquiry that the decision-maker had to get right to enter the zone of its authority.[59] Lord Morris in the minority followed *Bolton's* precedent[60] and held that determining "successors in title" was within the Commission's jurisdiction,[61] and thus, the privative clause could not bite. However, this reasoning entails that all jurisdictional questions are reviewed on a standard of correctness, and that within the zone of jurisdiction, legality is absent.[62]

Taking an *ultra vires* position, Lord Reid extended the concept of jurisdiction so that almost any error of law renders the decision a nullity.[63] The ouster clause therefore becomes wholly ineffective because Parliament is said to have only intended to shield "real", not null or void determinations of law, from the court's supervisory jurisdiction.[64] The effect of Lord Reid's judgment, albeit perhaps not the intention,[65] was that all errors of law, including exercises of discretion conducted in bad faith, or for improper purposes, unfairly or unreasonably rendered the decision *ultra vires.*[66] Any meaningful distinction between *intra* and *ultra* vires review, as well as

[56] *Certiorari* is the prerogative writ that quashes invalid administrative decisions. Most of the prerogative writs are placed in statutory form now, see for example *Federal Courts Act* RSC 1985, c. F-7, s 18(1). In the UK *certiorari* is officially now called 'the quashing order', *Supreme Court Act 1981* (UK), s 29, as amended by *The Civil Procedure Order 2004* (UK), s 3.
[57] Otherwise called malversation of office. See *R v Cheltenham*, (1841) 1 QB 468.
[58] *R v Bolton*, (1841) 1 QB 66; For a discussion of Bolton and the history of error of law, see Philip Murray, "Escaping The Wilderness: R. v Bolton and Judicial Review for Error of Law" (2016) 75 CLJ 333.
[59] Canadians understood this as the condition precedent doctrine.
[60] *Anisminic*, *supra* note 51 at 181C, Lord Morris.
[61] *Anisminic*, *supra* note 51, Lord Morris "([it was the] inescapable duty of the commission to consider and decide what the phrase [successors in title] signified" at 184E).
[62] After determining the Commission were at their heart of their duty, Lord Morris never discussed any way in which judicial intervention was warranted on any grounds. This omission suggests that within jurisdiction, the Commission was not subject to law.
[63] *Anisminic*, *supra* note 51 at 170.
[64] *Ibid*.
[65] *Anisminic*, *supra* note 51, Lord Reid (he argued that the court still held a power to intervene and correct intra vires errors of law, indicating there was no abolition of intra-jurisdictional review, at 171). See David Feldman, "Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective" in Satvinder Juss & Maurice Sunkin, eds, *Landmark Cases in Public Law* (Oxford: Hart Publishing, 2018); See also *Privacy Intl*, *supra* note 52 at paras 181, Lord Sumption; cf. Lord Carnwath, para 43; However the case has been interpreted to mean that all errors of law render a decision null and void. See *Page*, *supra* note 52; *Boddington v British Transport Police*, [1999] 2 AC 143 at 158D-E [*Boddington*]; *R (Lumba) v Secretary of State for the Home Department*, 2011 UKSC 12 at paras 66, Lord Dyson [*Lumba*]; *R (Cart) v Upper Tribunal*, [2011] UKSC 28 at paras 18, Lady Hale [*Cart*].
[66] There is some confusion around the place of Wednesbury unreasonableness - is it part of the illegality head of review or a separate head, and if so, does that make it void or voidable? Compare *Lumba*, *supra* note 65 at paras 66, Lord Dyson; and *Privacy Intl*, *supra* note 52 at paras 184, Lord Sumption (minority); and Jason Varuhas, "The Principle of Legality" (2020) 79:3 Cambridge LJ 578 at 609.

between void and voidable errors of law was eliminated.[67] The judgment in essence precluded any space for agencies to interpret and determine questions of law. Such a result is in tension with Parliament's more obvious intention to delegate decision-making to the executive, as well as keeps the authority claims of the administration firmly tethered to Parliamentary intention and legislative delegation.

The judgment by Lord Wilberforce takes a more common law constitutionalist approach to the privative clause. Lord Wilberforce argued the privative clause should not be construed narrowly because the Commission is a sophisticated and specialised tribunal of particular expertise.[68] However, he argued that to exclude totally judicial review would be constitutionally problematic because tribunals have a derived "interpretatory power to decide" and "the field within which it operates is marked out and limited"[69] including,

> "certain fundamental assumptions [that] necessarily underlie the remission of power to decide such as … the requirement that a decision must be made in accordance with principles of natural justice and good faith."[70]

In other words, judicial review is justified because the administration holds a derivative "power to decide", including on "questions of construction," and that the valid exercise of this "interpretatory power"[71] must accord with fundamental constitutional assumptions about its use. This reasoning is of immediate interest because Lord Wilberforce finds that where a question of law has been left to the tribunal, the court reviews not the *vires* of the action, but the *exercise* of "interpretatory power,"[72] on grounds of bad faith, procedural fairness and relevant or irrelevant considerations.[73] On the facts, however, he found the meaning of "successors in title" was not a

[67] David Feldman, "Error of Law and the Effects of Flawed Administrative Decisions and Rules", University of Cambridge, Legal Studies Research Paper No. 18/2014 ("it debases the notion of 'error of law' to say that taking account of an irrelevant consideration, or acting bias…is an error of law. They are merely examples of procedural steps which fail to meet legal requirements" at 4-5)
[68] *Anisminic, supra* note 51 at 207A-C, Lord Wilberforce.
[69] *Ibid* at 207D.
[70] *Ibid* at 207E-F.
[71] *Ibid* at 209E-F.
[72] Hence going against the grain of the precedent that *intra vires* decisions were protected by privative clauses from *certiorari*.
[73] *Anisminic, supra* note 51 at 210; Perhaps also improper purposes and relevant considerations following *Padfield, supra* note 37, but interestingly, the case was not cited.

question left to the tribunal, but a question of jurisdiction reserved for the courts.[74] Thus, applying a correctness standard, he concluded "successors in title" was incorrectly interpreted by the FCC.[75]

4.2.2. Reasonableness Review in Canadian Law, *CUPE – Dunsmuir*.

4.2.2.1. *C.U.P.E v. N.B Liqor Corp*., 1979

In *CUPE,* The Canadian Union of Public Employees (CUPE) filed a complaint with the Public Service Labour Relations Board (The Board) that the New Brunswick Liquor Corporation (NBLC) replaced striking employees with management during a lawful strike. They argued this was contrary to s102(3)(a) of the Public Service Relations Act (the Act):[76]

> (a) the employer shall not replace the striking employees or fill their position with any other employee…

Before the Board, NBLC argued that "with any other employee" referred to the word "replace" as well as "to fill their positions."[77] Given management did not fall within the statutory definition of employees, the NBLC claimed they were not replacing striking employees with any person defined as an employee. However, the Board found for CUPE, arguing the NBLC's interpretation would frustrate Parliament's intention to restrict picket line violence. NBLC applied for judicial review of the Board's decision, and the Board argued it was protected by section 101 of the Act:

> "[E]very order, award, direction, decision, declaration, or ruling of the Board … is final and shall not be questioned or reviewed in any court."[78]

Similar to the minority in *Anisminic*, the New Brunswick Court of Appeal characterised the interpretation of s102(3)(a) as a condition precedent that needed to be construed correctly for the Board to have the jurisdiction to embark on its inquiry.[79] The privative clause therefore did not

---

[74] *Anisminic*, *supra* note 51 at 209F.
[75] Lord Wilberforce placed a lot of emphasis on the word "shall" in the statute as clearly indicating this was a question for the courts, *ibid* at 212D-F. In placing emphasis upon this aspect of the statute, he did not apply the more contextual questions he had implied may be relevant at 209F-G.
[76] *Public Service Labour Relations Act*, RSNB 1973, c. P-25, s 102(3)(a). [PSLR]
[77] See *CUPE*, *supra* note 4 at 230.
[78] PSLR, supra note 76, s 101
[79] *New Brunswick Liquor Corp v Canadian Union of Public Employees, Local 963,* [1978] NBJ No 1, 21 NBR (2d) 441 at paras 20–21 [*CUPE (NBCA)*].

protect the Board from review.[80] However, the unanimous judgment of the Supreme Court, delivered by Dickson CJ., rejected the Court of Appeal's approach. Dickson CJ famously stated, "what is and what is not jurisdictional is often very difficult to determine" and that the court "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so." [81] Dickson CJ., like Lord Wilberforce in *Anisminic,* recognised that administrators are often authorized to interpret questions of law and even sometimes develop a specialised jurisprudence around their home statutes.[82] Thus,

> "[N]ot only would the Board not be required to be "correct" in its interpretation, but one would think that the Board was entitled to err, and any such error would be protected from review by the privative clause in s. 101."[83]

Nevertheless, privative clauses cannot protect arbitrary decisions. Dickson CJ stated that if the Board applied an interpretation of s102(3)(a) that was so patently unreasonable, it would take "the exercise of its powers outside the protection of the privative or preclusive clause."[84] Examples of patent unreasonableness included,

> "[A]cting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it."[85]

In other words, irrespective of any privative clause, and hence any absolute and final parliamentary authorization, the *exercise* of an agency's interpretive *authority* will be *abused* if the decision is patently unreasonable. Canadian jurisprudence thus began to eschew the idea that jurisdiction formed the basis of both the administration's claim to authority and legitimate judicial intervention. Instead, tribunal validity and court intervention rests upon whether exercises of interpretive powers or powers to determine questions of law are reasonable. In other words,

---

[80] The issue of the privative clause was mentioned in passing in relation to another decision made by the Board which was intra vires. *Ibid* at para 2, Hughes CJNB.
[81] *CUPE, supra* note 4 at 233.
[82] *Ibid* at 235–236.
[83] *Ibid* at 236.
[84] *Ibid* at 237.
[85] *Ibid* citing; *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Association*, [1975] 1 SCR 382 at 389 [*Nipawin*].

reasonableness is not a doctrine that mandates review for excess of jurisdiction, but reviews for the valid exercise of interpretive power. Thus, in the framework of this thesis, we can interpret reasonableness as the power-conferring principle that makes possible the valid exercise of that interpretive power. By implicitly presupposing reasonableness as the power-conferring principle that generates public authority, the court also constitutes that power as other-regarding in nature, as only where the decision-maker reasonably considers the legal subject's interests will the decision be valid.

In the next section, I will discuss some features and developments in Canadian law prior to *Vavilov* that support this argument, particularly highlighting that the law viewed reasonableness as a doctrine that reviews *intra vires* questions of substance as opposed to *ultra vires* questions of legality. This is important because we know from Chapters One through Three that power-conferring principles are the norms that constitute and regulate exercises of authority rather than pertain to the *vires* of the power.

4.2.2.2. Reasonableness as a Power-Conferring Principle: Questions of Law

The first feature of Canadian law that supports interpreting reasonableness as a power-conferring principle is the evident parallel between Dickson CJ's examples of patent unreasonableness and the doctrines that govern the exercise of discretionary powers discussed above. The intent of Dickson CJ's judgment was a retention of a "meaningful distinction between jurisdictional and non-jurisdictional errors of law,"[86] with the latter reviewed on a standard of patent unreasonableness. In 1984, Lamer J in *Blanchard* held that intra-jurisdictional errors occurred when a decision-maker abuses "the *exercise* of its jurisdiction" rather than "acting without jurisdiction"[87] and for that reason intra-jurisdictional errors were subject to the patent unreasonableness standard. Similarly, Beetz J. in *Bibeault* held that intra-jurisdictional errors found to be patently unreasonable "amount to a fraud on the law,"[88] language reminiscent of the

[86] Mark Walters, "Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law" in Christopher Forsyth et al, eds, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010) at 305; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 160 DLR (4th) 193 at Bastarache J [*Pushpanathan*] (the 'pragmatic and functional test' replaced the preliminary fact doctrine as a way to determine if a question was within the jurisdiction of the body or was a jurisdictional error meaning "an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown." at para 28); See also *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, 1988 CanLII 30 at paras 114–115 [*Bibeault*].
[87] *Blanchard v Control Data Canada Ltd*, [1984] 2 SCR 476 at 492, 1984 CanLII 27 [*Blanchard*].
[88] *Bibeault, supra* note 86 at para 114; *Blanchard, supra* note 87 at 480–481.

'fraud on the power' or improper purpose doctrine in trusts law.[89] The language used in the 1980's also implies that the court's concern was whether the administrator's reasons for adopting an interpretation of law aligned with the purposes for which the power was conferred.

In the 1990s and early 2000s, the court continued to distinguish correctness and patent unreasonableness along the lines of intra-jurisdictional and jurisdictional questions of law.[90] However, whether a question was a 'jurisdictional' or 'intra-jurisdictional' was not the conclusion of "ossified interpretations of statutory formulae,"[91] but the conclusion of what was known as the pragmatic & functional test.[92] The test asked judges to consider various contextual and substantive factors, such as the expertise of the agency, the presence of a privative clause, or the purpose of the act as a whole.[93] However, the concept of *ultra vires* re-emerged as an explanatory crutch for judicial intervention. Some cases interpreted the patent unreasonableness test as "principally a jurisdictional test,"[94] meaning the decision had to be so "clearly irrational"[95] to amount to an excess of jurisdiction.

Thus, subsequently in *Southam,* the court held that it was not necessary to find an 'excess of jurisdiction' to intervene in cases where the statute contained a statutory appeals clause. Iacobucci J. held that the patent unreasonableness standard was an inappropriate standard of review in this context.[96] He thus added a third standard of review dubbed 'reasonableness *simpliciter*. The standard gave "respectful attention" to the administrator's reasons but probed into the "logical process" by which conclusions were drawn,[97] and "whether any of those reasons adequately support the decision."[98] The importance of this development for our purposes is that reasonableness *simpliciter*, and court intervention on these grounds, was explicitly founded upon *not* needing to locate an excess of jurisdiction. Reasonableness *simpliciter*, I submit, was designed

[89] *Vatcher v Paull*, [1915] AC 372 at 378 [*Vatcher*].
[90] *Pushpanathan*, *supra* note 86 at paras 26, Bastarache J.
[91] *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 25, McLachlin CJ [*Dr. Q.*].
[92] *Pushpanathan*, *supra* note 86 at para 28.
[93] For a full list of factors, see *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 1997 CanLII 385 at paras 28-53, Iacobucci J [*Southam*]; *Pushpanathan*, *supra* note 86 at paras 29-38.
[94] *Southam*, *supra* note 93 at para 55.
[95] *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247 at para 52 [*Ryan*].
[96] *Southam*, *supra* note 93 at paras 32 and 55, Iacobucci J.
[97] *Ibid* at para 56.
[98] *Ryan*, *supra* note 95 at para 49, Iacobucci J.

to enable courts to set aside *intra vires* exercises of interpretive authority that, although not resulting in a loss of jurisdiction, were nevertheless inadequately reasoned and therefore invalid.[99]

In the subsequent *Dunsmuir*[100] framework, the court collapsed patent unreasonableness and reasonableness *simpliciter* into one single standard, reasonableness.[101] On paper, reasonableness looked more like reasonableness *simpliciter* than patent unreasonableness because the *Dunsmuir* framework prioritized respect for the reasons offered by the administrator,[102] reviewed the reasoning process and the outcome,[103] and jurisdiction was said to "play no part in the courts' everyday work of reviewing administrative action."[104] The court thus moved further away from understanding reasonableness, and review in general, as a jurisdictional question and became more focused on the reasons for which a decision-maker acts when exercising its powers to interpret questions of law.[105]

The final important development in Canadian law that suggests reviewing questions of law is primarily concerned with the proper exercise of authority, as opposed to jurisdiction, is that since 1999, review of discretion has been subsumed into the standard of review analysis.[106] In collapsing the two under one banner of substantive review, L'Heureux-Dubé J. noted that,

> "It is…inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making… In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules

[99] Implied *Southam*, *supra* note 93 at para 69.
[100] *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].
[101] *Ibid* at para 72; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*], Binnie J (deference was therefore a sliding scale that "takes its colour from the context" at para 59).
[102] *Dunsmuir*, *supra* note 100 at para 48.
[103] *Ibid* at para 47.
[104] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 97-98 [*Alberta Teachers*]; cf. *Dunsmuir*, *supra* note 100, Bastarache and Lebel JJ (jurisdiction remained a controversial presumption in favour of correctness review - "[a]dministrative bodies must also be correct in their determinations of true questions of jurisdiction or vires" at para 59); See also *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at 56–74, Côté J (dissenting) [*West Fraser Mills*].
[105] *Catalyst Paper Corp v North Cowichan (District)*, [2012] 1 SCR 5, 2012 SCC 2 (CanLII) at para 12 [*Catalyst Paper*].
[106] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 at paras 51–56 [*Baker*]; *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 33–34, Abella J [*Wilson*].

involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options."[107]

Collapsing together review of law and review of discretion presupposes that there is not one objective or correct interpretation of a provision, fossilised within a formal statutory utterance. Instead, this view presupposes the idea that authority is a deliberative "interpretative process"[108] which must be "*exercised* in accordance with the principles of the rule of law, general principles of administrative law" as well as be consistent with the Charter.[109] Authority emerges from an "interactive construction"[110] or "interpretive discourse"[111] in relation to other administrative actors, the legal subject, and the court. Legal subjects participate in the interpretive exercise, we will see in the next section, through submissions to the agency, and other mechanisms of procedural fairness. Courts also participate in the interpretive discourse because, upon review, the court must be convinced the agency's interpretation is justified, and courts will offer their own reasons.[112]

The view that authority emerges as part of an interpretive exercise continues to be presupposed in the current *Vavilov* framework, which explicitly acknowledges that "public decisions gain their democratic and *legal authority* through a *process of public justification*."[113]Accordingly, reasonableness is now the presumed standard of review, and the court's inquiry is even more focused on the administrator's deliberative process and *how* a decision is made. The court thus sets aside exercises of interpretive powers that are inadequately reasoned.

To conclude this section, there is much evidence to suggest that the reasonableness doctrine governs the proper exercise of a power to determine or interpret questions of law. Once the court

---

[107] *Baker*, *supra* note 106 at para 54, L'Heureux-Dubé J.
[108] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 64, Lebel and Cromwell JJ [*Mowat*].
[109] *Baker*, *supra* note 106 at para 53, emphasis added.
[110] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, UK: Cambridge University Press, 2009) at 409.
[111] See Mark Walters, "Deliberating about Constitutionalism" in Ron Levy et al, eds, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018); See also T R S Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford, UK: Oxford University Press, 2013) ("moral dialogue" at 328); David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford, UK: Hart Publishing, 1997) at 303; *Vavilov*, *supra* note 5, concurring reasons ("interpretive choices" at 210).
[112] *Vavilov*, *supra* note 5 ("each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context." at para 90).
[113] Jocelyn Stacey & Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74 SCLR (2d) 211 at 220 (emphasis added); cited in *Vavilov*, *supra* note 5 at para 79.

accepted that administrative agencies held the power to interpret questions of law, the common law recognised that such powers cannot be unfettered or unaccountable to law, because such powers require jurisgenerative power-conferring principles to generate legal validity. Reasonableness was implicitly found to be the necessary power-conferring principle that makes possible valid exercises of administrative authority. Genuine representative acts cannot be exercised in a capricious, arbitrary or unreasonable manner, for they cannot be interpreted as being performed in a way that takes seriously the interests of the legal subject. In choosing to review on a standard of reasonableness, despite the presence of privative clauses, the court presupposes the jurisgenerative power-conferring principles necessary to constitute delegated power as legitimate, other-regarding public authority. Given these common law doctrines are what make possible the very concept of other-regarding power, judges, inasmuch as they articulate the principles of the common law, are engaged in designing the administrative state as a particular kind of institution, namely, as one held in trust for legal subjects. Before turning to discuss that conclusion further in the final section, in the next section I argue a fiduciary power-conferring theory explains the current law as articulated in *Vavilov,* highlighting how the theory explains why reasons are central to review.

4.3. Jurisdiction to Justification: *Canada v. Vavilov,* 2019

4.3.1. The Centrality of Reasons to the Judicial Review Inquiry

The current leading case on substantive review in Canadian law, *Vavilov,* aimed to bring clarity, simplicity, and coherence to the law on substantive review.[114] The majority identified that one source of discontent with the prior precedent, *Dunsmuir,* was the "relatively little guidance on how to conduct reasonableness review in practice."[115] A reasonable decision in the *Vavilov* framework is one that is transparent, intelligible and justified,[116] remaining mindful that

[114] For some critiques of the Dunsmuir jurisprudence, see *Wilson*, *supra* note 106 at para 27 (disguised correctness review); *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 27 [*Rogers*] (whether expertise is an institutional presumption or applied to each individual decision-maker). *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12 [*Newfoundland Nurses*] (whether the court can supplement reasons); See also *Alberta Teachers*, *supra* note 104; For academic discussion, see Lorne Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003) 27:4 Adv Q 478.
[115] *Vavilov*, *supra* note 5 at para 73.
[116] *Ibid* at paras 15 and 82, citing; *Dunsmuir*, *supra* note 100 at para 47.

'administrative justice' will not always look like 'judicial justice,'[117] and that decisions that appear puzzling to a judge, may accord "with the purposes and practical realities of the relevant administrative regime" and nevertheless be reasonable.[118] The court should not survey the possible range of outcomes, but start with and respect the reasons offered because they are the primary way in which a decision will be shown to be reasonable "both to the affected parties and the court."[119] It is important to note, however, that not all administrative decision-makers are required to give reasons and the court must instead "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn."[120] Reasonableness is concerned with both the outcome and the "reasoning that led to the administrative decision,"[121] such that,

> "While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis."[122]

Thus, where the exercise of power was done on an improper basis, such as where the decision-maker fettered her discretion, the court will set it aside because it had been inadequately deliberated, even if the outcome itself is considered to be reasonable. Where reasons are expressly provided, or can be impliedly discerned from the record and surrounding circumstances,[123] there is a marked shift towards analyzing the "reasoned explanation"[124] or justification given by the decision-maker, rather than the justifiability of the outcome.[125] Reasons are thus central to the question of *validity*,[126] and in the terminology of this thesis, reasonableness is the jurisgenerative power-conferring principle that makes that validity possible. As argued in Chapter Two, in the

---

[117] *Vavilov*, *supra* note 5 at para 92.
[118] *Ibid* at paras 93–95.
[119] *Ibid* at para 81, see also paras 82-87. The court can look at outcomes first in situations where reasons are not required, alongside the history and context of the proceedings (ibid at paras 94 and 137-138); See also *Canada (Citizenship and Immigration) v Montoya*, 2022 FC 105 at para 19 [*Montoya*].
[120] *Vavilov*, *supra* note 5 at paras 97, citing; *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, Rennie J [*Komolafe*]; cf. see *Montoya*, *supra* note 119 (the "blanks [cannot] simply be filled in by a reading of the hundreds of pages of the record" at para 18).
[121] *Vavilov*, *supra* note 5 at para 85.
[122] *Ibid* at para 86.
[123] *Ibid* at 88–90; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 33 [*Mason*].
[124] *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 7, Stratas JA [*Alexion*]; *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 53, Stratas JA [*Portnov*]; *Mason*, *supra* note 123 at para 31; *Fawcett v College of Physicians and Surgeons of Alberta*, 2022 ABQB 452 at para 14.
[125] *Vavilov*, *supra* note 5 at para 86.
[126] *Ibid* at para 84.

exercise of a fiduciary power, there is an intrinsic non-causal relationship between acting for the right reasons and the validity of the result. Reasons therefore, are not just a record of the decision; reasons, where applicable, *are* "the" decision[127] and thus, like speech acts, they are what we termed in Chapter Two an act-in-the-law, that "*perform* a symbolic legal act or transaction."[128] The provision of reasons thus (i) communicates an intention to exercise the power,[129] (ii) actually constitutes the exercise of the power, and, (iii) forms the argument by which the public actor claims to hold authority. Correlatively the beneficiary does not merely recognise the fiduciary's intention to exercise the power, but must recognise that the power was, at least in part, intended to be exercised *on her behalf*. This explains why, as I discuss below, the *Vavilov* framework places much emphasis on the public official *responding to* or recognising the legal subject's submissions within her reasons for the decision. If the official does not respond to the submissions of the party, thereby recognising the legal subject in her decision, the decision will be deemed unreasonable.

In that spirit, there are two "fundamental flaws" that will render a decision unreasonable in the *Vavilov* framework. First, decisions that reveal logical fallacies, fail to reveal a rational chain of analysis or cannot be followed when read in conjunction with the record, may be unreasonable.[130] The reviewing court traces the coherence between the reasons given and the conclusion reached; boilerplate answers or perfunctory conclusions are thus insufficient[131] and administrators must explain how expertise is being brought to bear on its decisions.[132] Second, a decision may be unreasonable in light of the constellation of legal and factual constraints that bear on the decision.[133] The court listed some legal and factual constraints, emphasising these are not a checklist because reasonableness is to be assessed as a whole.[134] What is reasonable in a given

[127] *Ibid* at para 91.
[128] Dawn Oliver, "Void and Voidable in Administrative Law: A Problem of Legal Recognition" (1981) 34:1 Current Leg Probs 43 at 52.
[129] If the reader recalls, power-holders must communicate an intention to exercise a power. See Chapter Two, section 2.2.2.2., notes 66-71
[130] *Vavilov*, *supra* note 5 at para 103.
[131] *Ibid* at para 102; *Thavaratnam v Canada (Citizenship and Immigration)*, 2022 FC 967 at para 19; *Yu v Canada (Citizenship and Immigration)*, 2021 FC 1236 at para 30 Also see text below accompanying notes 144-148.
[132] *Vavilov*, *supra* note 5 at para 93; Paul Daly, "Canadian Labour Law after Vavilov Commentary on Cases, Legislation and Policy: Comment" (2021) 23:1 Canadian Lab & Emp LJ 103 at 114.
[133] *Vavilov*, *supra* note 5 at paras 99–100.
[134] *Ibid* at para 90; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 32, Justice Rowe [*Canada Post*].

context, and the extent to which "a complete, comprehensive, public explanation"[135] is necessary, will be informed by these factors.[136] The governing statutory scheme

- Other relevant statutory or common law principles
- The principles of statutory interpretation
- The evidence before the decision-maker and the facts of which the decision-maker may take notice
- The submissions of the parties
- Past practices and decisions of the administrative body
- The potential impact of the decision on the legal subject.

These factors act as more specific power-conferring norms, as aspects of 'reasonableness.' As noted, a reasonable decision does not necessarily require the public actor to follow every single power-conferring principle, but only those that are sufficient, in the relevant context, to produce and demonstrate her authority. In other words, as *principles,* these factors point to whether or not the exercise of a power is valid and form part of the official's implicit argument for authority located in her reasons.[137]

I will analyze four factors: (i) the governing statutory scheme and (ii) principles of statutory interpretation (grouped into 'interpretive power') and (iii) the submissions of the parties and (iv) the impact of the decision on the legal subject (grouped into 'responsiveness'). My main points are first to emphasise the clear break from the idea of authority as jurisdiction to the idea of authority as justification, and second that those reasons must be justified in light of the statute's *purpose* and the *vulnerability* of the legal subject. The court implies that reasonableness, makes possible a certain kind of legal relationship, namely, a relationship of trust.

4.3.2. Interpretive Power

Legislative intent, and the purpose and object of the statute, remain the "polar star"[138] of substantive review. Administrative decision-makers are to follow the rules of statutory

[135] *Portnov*, *supra* note 124 at paras 54, Stratas JA.
[136] *Vavilov*, *supra* note 5 at para 88-90; *Portnov*, *supra* note 124 at para 54.
[137] See Chapter Two, Section 2.2.2.2., text accompanying notes 82 – 89
[138] *Vavilov*, *supra* note 5 at para 33 citing; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.

interpretation and read provisions "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"[139] However, administrators need not survey all possible outcomes[140] but must demonstrate judgment,[141] and "*properly justify* [the chosen] interpretation."[142] The heart of review is thus whether the interpretation was "cogently explained"[143] and whether the administrator could reasonably conclude it had the statutory authority to act.[144]

Thus, parroting boilerplate reasons does not demonstrate a sufficient reasoning process or explanation. In *Vavilov* itself, the court found that exempting a child of Russian spies from Canadian citizenship was unreasonable because the Registrar "did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text."[145] Merely pointing to a statutory authorization and perfunctorily or retrospectively claiming the interpretation falls within the range of possible interpretations, extracted via a formalistic construction, may thus be insufficient to discharge the requirement of reasonableness.[146] In other words, even if the decision-maker "acts according to the letter of the power,"[147] if she does not explain how she is furthering the purpose of the statutory scheme, the decision may be set aside.[148]

Explaining how an interpretation furthers the rationale or purpose of the statute becomes particularly salient when the meaning of a provision is disputed, or where the statute uses "broad, open-ended or highly qualitative language."[149] For instance, in *Salmonid Association v HM*,[150] the

---

[139] *Vavilov*, *supra* note 5 at para 107 citing; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21; For more on the modern principles of statutory interpretation, see Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016).
[140] *Canada Post*, *supra* note 134 at para 40, Rowe J.
[141] *Vavilov*, *supra* note 5 at para 102.
[142] *Ibid* at para 109.
[143] *Canada Post*, *supra* note 134 at para 30.
[144] *Abbcar Properties, LLC v Vancouver (City)*, 2022 BCSC 190 at para 72.
[145] *Vavilov*, *supra* note 5 at para 172; See, Citizenship Act, RSC 1985, c. 29, (The Registrar found Mr. Vavilov's parents were "other representatives or employees in Canada of a foreign government" at s. 3[2][a]).
[146] See *ibid* at 102, citing; Roderick A MacDonald & David Lametti, "Reasons for Decision in Administrative Law" (1990) 3 Can J Admin L & Prac 123 at 139.
[147] *Three Rivers*, *supra* note 43 at 235, Lord Millet.
[148] *Vavilov*, *supra* note 5 at para 118; *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 [*Salmonid*] (The official needs to "be alive to the essential elements of statutory interpretation" at para 74); Paul Daly, "One Year of Vavilov" Ottawa Faculty of Law Working Paper No 2020-34, online: <10.2139/ssrn.3722312> at 15.
[149] *Vavilov*, *supra* note 5 at para 110, see also para 108.
[150] *Salmonid*, *supra* note 148.

Minister decided he did not need to assess a proposed expansion of a salmon hatchery for environmental compliance. He argued the statute only enabled him to conduct environmental assessments for new undertakings, but the expanded hatchery would be using existing underwater sea-cages. However, the statutory language appeared to authorize assessments "before and after the commencement of an undertaking."[151] On a jurisdictional, correctness model of review, such an oversight may have been sufficient to legitimize judicial intervention. Yet on a justification model, the primary question is *why* the Minister chose the narrow construction of the disputed provision despite the wording of the statute, previous precedents, and the "interpretive principles of environmental legislation."[152] The decision was thus unreasonable because the Minister "did not explain his reasons for his adoption of an interpretation that he was aware was one of two valid but opposite readings"[153] one of which was in tension with the statute's *purpose* of environmental protection.[154]

Another example is *Ministère du Travail,* where the TAQ interpreted "pensions earnings" as a deductible "benefit," with the effect that the applicant's welfare benefits would be cut. The applicant, however, argued before the TAQ that his pension earnings should be treated as liquid assets, which would not result in deductibles. The court found the TAQ's decision unreasonable first, because they did not demonstrate they were alive to the applicant's argument for an alternative interpretation,[155] and second, they failed to explain why the decision, despite the harsh consequences, best fit the statutory purpose of social welfare.[156] The judge held the TAQ's decision did not accord with principles of statutory interpretation developed *in the context of social security* where "ambiguity should be resolved in favor of making benefits available."[157] Interpretations should thus adopt a meaning that falls in favour of respecting the Charter rights and the dignity of the applicant.[158]

---

[151] Environmental Protection Act, SNL 2002, c E-14.2, Part X, s 46
[152] *Salmonid*, *supra* note 148 at para 46.
[153] *Ibid* at para 74.
[154] *Ibid* at paras 71–73.
[155] *RL c Ministère du Travail, de l'Emploi et de la Solidarité sociale,* 2021 QCCS 3784 at para 76 [*Ministère du Travail*].
[156] *Ibid* at para 34; *Vavilov*, *supra* note 5 at para 133.
[157] *Ministère du Travail*, *supra* note 155 at para 28.
[158] *Ibid* at para 32, citing; *Hills v Canada (Attorney General)*, [1988] 1 SCR 513 at paras 93 and 128; See also *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554 [*Mossop*].

More generally the case suggests that in situations where the statute confers wide powers, or the meaning of the provision is disputed, public decision-makers should be guided by the other-regarding and representative nature of their powers. As a fiduciary, public administrators must consider the "impact on the individual"[159] and act a with solicitous concern towards, and respond to, the beneficiary's interests. The underlying relationship of trust means decision-makers thus ought to choose an interpretation that promotes the liberty, equality and dignity of the legal subject. It also suggests that the decision-maker must take seriously, and be responsive to, any plausible alternative interpretation offered by the legal subject. As a fiduciary, the public actor's interpretive power is exercised for or on behalf of the legal subject as well as the wider public, of which she is a member. The voice of the legal subject, and their views about how the power ought to be exercised, thus become highly relevant to ensuring that the fiduciary has taken seriously the views and interests of the legal subjects. The legal subject should thus be able to recognise herself in the exercise of the power. If the subject cannot recognise herself, she may be able to set aside the decision on the grounds that it was unreasonable because it was unresponsive to her interests, the topic we examine in greater depth now.

4.3.3. Responsiveness

The *Vavilov* framework, with its focus upon justification and reasons, treats the position and voice of the individual legal subject as a proper matter of public concern. Public power "must be justified, intelligible and transparent, not in the abstract, but *to the individuals subject to it.*"[160] Reasons "explain how and why a decision was made" and "help to show affected parties that their arguments have been considered."[161] Reasons also demonstrate that "the decision was made in a fair and lawful manner", and provide a bulwark against "the perception of arbitrariness in the exercise of public power."[162] The vulnerability of the individual,[163] as well as any harsh consequences that result from the decision, heighten the risk of arbitrariness and the need for justification.[164] For example, the impact on the individual is often high in deportation cases that

[159] *Ministère du Travail*, *supra* note 155 at paras 25 and 68.
[160] *Vavilov*, *supra* note 5 at para 95 (emphasis added).
[161] *Ibid* at para 79.
[162] *Ibid*.
[163] *Ibid* at para 135.
[164] *Vavilov*, *supra* note 5 ("arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable" at para 134).

involve humanitarian and compassionate considerations, and decision-makers must be "alert alive and sensitive" to the best interests of any children that may be affected.[165]

Prior to *Vavilov,* the impact on the practical and legal interests of the individual were only relevant factors to determining the nature and extent of procedural fairness.[166] *Vavilov* thus clarifies that vulnerability and the impact on the individual are relevant for the purposes of substantive review and applies to any situation that involves an "individual's life, liberty, dignity or livelihood."[167] In these circumstances, the "requirement of a reasoned explanation is higher… the reviewing court might insist that the administrator show it has understood and grappled with the *consequences* of its decision."[168] A relationship of trust would be meaningless if the decision-maker did not have to have due regard to the impact of the decision and the vulnerability of the beneficiary. Reasoned explanations that grapple with consequences show that the individual's interests have been taken seriously, and invites administrators to engage in a proportionality-like analysis in order to give due regard to the rights and interests of the affected individual.[169]

As a fiduciary, the administrator must sufficiently demonstrate that her actions make present and respond to the best interests of the individual.[170] Part of making present the legal subject in the action of the administrator is to ensure the decision is responsive to "the perspective of the individual or party over whom authority is being exercised."[171] Responsivity is a high hurdle, for instance, past practice does not demonstrate the responsiveness necessary to discharge the requirement of a reasoned explanation to the individual.[172] As noted in *Scarborough Health Network:*

---

[165] *Vieira Sebastiao Melo v Canada (Citizenship and Immigration)*, 2022 FC 544 at paras 46–75; *Baker*, *supra* note 106 at paras 74-75.
[166] *Baker*, *supra* note 106 at para 25.
[167] *Vavilov*, *supra* note 5 at para 133.
[168] *Alexion*, *supra* note 124 at para 21.
[169] *Vavilov*, *supra* note 5 (if a decision negatively impacts the individual, the administrator must demonstrate why the decision tracks the purpose of the statutory scheme, at para 133-135) ; See also Cartier, *supra* note 2 at 61.; This is why I do not see there being a conflict between Vavilov and Doré v Barreau du Québec, 2012 SCC 12, see Richard Stacey, "A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338.
[170] *Vavilov*, *supra* note 5 at para 133.
[171] *Ibid* at para 132.
[172] For example, see *Scarborough Health Network*, *supra* note 49 at paras 6-8 (the reasons were insufficient because there was no substantive justification for using the past practice in this case.).

> This approach, *centred as it is on justification, requires that reasons demonstrate analysis of the submissions and positions of the parties. It is not enough to summarize the parties' positions.* Only through reasons can the parties know that the issues of concern to them have been the subject of reasoned consideration.[173]

Reasons, therefore, are only logical in the context of a particular relationship and dialogic exercise. The administrator must adequately respond to the submissions made by the parties, and in so doing, legal subjects are invited to engage in an interpretive dialogue with the administrator in which the resulting reasons must "*reflect the arguments made by the parties.*"[174] Given that reasons must reflect that serious attention has been paid to the parties' submissions, responsiveness therefore ensures that administrators can be said to stand and act in a representational capacity vis-à-vis the affected parties..

Another example of the importance of responsiveness is *Burlacu v Canada*.[175] In this case, Mr. Burlacu complained that his employer failed to live up to expectations established in the Labour Values and Ethics Code because, in respect of a grievance, he adopted an unfair interpretation of s124 of the Canada Labour Code that reads all employers must ensure the health and safety of workers.[176] However, the Board's reasons for dismissing the grievance made no mention of the Values and Ethics Code that Mr. Burlacu deemed as relevant to the construction of the statute. The judge noted the Board therefore "failed to engage with the real issues in dispute"[177] by not listening to the legal arguments made by the employee.[178] What this reasoning suggests is that the legal subject's submissions and interpretations of law are to be taken seriously by the administration and figure productively in the reasons. In other words, because interpretations of law are not determined by formal, abstract authorizations, but emerge out of an interpretive exercise, and because reasons are constitutive of the authority exercised, the responsiveness requirement empowers the legal subject to be part of that interpretive, constitutive exercise. As a result, the duty of fairness is now thoroughly folded into the proper exercise of substantive authority through

---

[173] *Ibid* at para 15 (emphasis added).
[174] *Vavilov*, *supra* note 5 at para 28; Geneviève Cartier, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (SJD Thesis, Department of Law, University of Toronto, 2004) [unpublished] ("discretion be both exercised at the close of a meaningful and authentic communication between the parties involved, and justified in the light of the content of that communication" at 285); See also Cartier, *supra* note 2 at 83.
[175] *Burlacu v Canada (Attorney General)*, 2021 FC 610 [*Burlacu*].
[176] Canada Labour Code, RSC 1985, c L-2, s 124.
[177] *Burlacu*, *supra* note 175 at para 25, Mr. Justice Zinn.
[178] *Ibid* at para 26.

the centrality of reasons.[179] Furthermore, the introduction of responsiveness extends the right to be heard into a right *to be listened to.*[180] Usually when an unfair decision is set aside and remitted to the decision-maker, substantively nothing is guaranteed. Now, however, passivity and apathy are not acceptable, and a lack of responsivity renders a decision potentially unreasonable, and also potentially unfair.[181]

4.4. Constituting Public Authority and Institutional Design Choices

Throughout this chapter I have argued that we can interpret reasonableness as the ultimate power-conferring principle or *grundnorm* that makes possible legitimate exercises of administrative authority. This unwritten power-conferring principle generates the conditions that make possible valid representative action, and means that the reasons for which a decision-maker acts are the normative materials through which the law's principles and the administrator's will produces acts that enjoy legal validity. I consider now how understanding reasonableness as a power-conferring principle implies that the court is engaged in an act of institutional design. This view pushes against the majority's view in *Vavilov* that deference is legitimate, and necessary, because it respects *Parliament's* "institutional design choices to delegate certain matters to non-judicial decision makers through statute."[182]

Parliamentary authorization of course designs the administrative state by *distributing* administrative powers. Parliament authorizes administrative agencies to fulfil certain mandates and the statute designs the exact modulation and purpose of a board, including specifying the standard of review or including statutory appeals clauses.[183] However, authority is *co-constituted* by statutory purposes *and* the power-conferring principles that establish the nature of the power held, and that provide for the legitimacy of exercises of the relevant power. In this sense, we can understand the court as co-conferring, with the legislature, effective authority onto administrative bodies, or creating the framework within which administrative power can be exercised legitimately. The practice of reasonableness review therefore does not merely submit to

[179] This includes the parties' legitimate expectations, see *Vavilov*, *supra* note 5 (parties may hold legitimate expectations about the consistency of administrative decisions which "determine both whether reasons are required and what those reasons must explain" at para 131).
[180] *Ibid* (responsivity means the decision maker "actually listened to the parties" at para 127).
[181] *South East Cornerstone School Division No 209 v Oberg*, 2021 SKCA 28 at para 113.
[182] *Vavilov*, *supra* note 5 at para 26.
[183] *Ibid* at paras 36-52.

Parliament's institutional design. Instead, the practice of judicial review is actually engaged in an act of institutional design because, in articulating a framework of representative power, it constitutes public office as a position of trust held on behalf of legal subjects. In other words, reasonableness review designs the administrative state as an institution held on trust for the public.

In institutionally designing a framework within which administrative power can be exercised legitimately, the practice of review thereby sets the requirements that enable us to know if public administration has been properly executed. Consequently, without norms conferring and structuring a power to act in an other-regarding character, the administrator would essentially be unable to administer regulatory schemes on behalf of legal subjects, and she would thus be unable to administrate as an administrator-qua-fiduciary. The execution of public administration, as a particular kind of institution that is held on trust for legal subjects, therefore depends on fiduciary power-conferring principles enabling the administrator to intrinsically change the normative position of the legal subject. As such, like the SJTA, judicial review of administrative action assists in the ongoing execution of public administration. This is because without power-conferring principles making it possible for administrators to execute their powers validly, there could be no smooth and seamless administration of public regulatory schemes.

Another consequence of designing the administrative state as an institution held on trust is it makes possible the kind of republican vision some common law constitutionalist's support. First, administrators are required to "track the relevant interests"[184] of the legal subject[185] and second, power cannot be used to arbitrarily, meaning the power-holder is unanswerable to a power's exercise.[186] As a result, legitimate fiduciary authority respects the agency of the individual and ensures individuals are not subject to the domination of others.[187] This interpretation of judicial review, in my view, better explains common law constitutionalism's inclination that government must both be *constituted by* and regulated by law. Common law constitutionalism sometimes fails to capture this dual function of administrative law, often referring to reasonableness and fairness as merely restraining power to protect individual rights, rather than conferring power to generate

[184] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press) at 58.
[185] Fox-Decent, *Sovereignty's Promise*, *supra* note 39 at 134.
[186] Gerald J Postema, "Fidelity in Law's Commonwealth" in Lisa M Austin & Dennis Klimchuk, eds, Private Law and the Rule of Law (Oxford: Oxford University Press, 2014) at 19.
[187] Dennis Klimchuk, "Equity and the Rule of Law" in Austin & Klimchuk, *supra* note 186.

legal validity.[188] However, to view reasonableness merely as a constraint implies that a delegation by Parliament is sufficient to exhaust authority and that the doctrine merely decreases the arbitrary impact of that preordained power. By contrast, reasonableness as a power-conferring principle transforms authorized powers to exercise might into positions of legal authority.

In *Vavilov,* the court only identified three formal, textualist "institutional design" features of public administration: delegation, prescribed standards of review, and statutory appeal clauses. They argued "it is the very fact that the legislature has chosen to delegate authority" that reasonableness should be the presumed standard of review.[189] However, on my interpretation, reasonableness is the presumed standard of review because it is the only standard that answers the relevant question of legitimacy –whether exercises of trustee-like power are truly taken in the name of those they represent. Only a standard of reasonableness can maintain the integrity of a public administration designed as a relationship of trust. Correctness review, by contrast, does not facilitate a trust-like relationship because the reasons for which the decision-maker act are not central to the inquiry of legitimacy.

Furthermore, the majority's interpretation of institutional design is so overly formal it overlooks the substantive reasons Parliament chooses to establish an administrative state: expertise,[190] substantive equality, and human dignity.[191] In many instances, administrative law attempts to create the conditions of substantive equality through human rights commissions, labour boards, securities regulation, consumer safety and protection etc. Judicial review can assist this 'design choice' by making the statutory purpose, and the surrounding context, the guiding star of valid exercises of interpretive power held on behalf of the public. In *Salmonid,* the court saw the Canadian value of environmental protection as relevant to the legitimate exercise of the interpretive power, and similarly, the public good of social security should have guided the TAQ in *Ministère du Travail*. Furthermore, the court assists in facilitating this equality-promoting design choice by creating a republican vision of the state wherein, for instance, employers and

[188] T R S Allan, *Constitutional Justice : A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2003) at 32; Dyzenhaus, *Constitution of Law, supra* note 1 at 3.
[189] *Vavilov, supra* note 5 at para 30.
[190] *Ibid* at para 236, concurring judgment.
[191] Dyzenhaus, "Politics of Deference", *supra* note 111 at 301; David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" in Dieter Grimm, Alexandra Kemmerer & Christoph Möllers, eds, *Human Dignity in Context* (Bloomsbury Publishing, 2018) 239.

employees are equally enabled to make submissions about the meaning of statutes and have a right to be taken seriously. By creating a framework of other-regarding decision-making, the practice of review helps ensure administrative decisions respect the autonomy, dignity and equality of those subject to the power. This provides a legal framework within which the equality mission of the administrative state, if properly understood by reviewing judges, is able to flourish.

A consequence of the view offered here is that the goals of the supervisory jurisdiction align with that of Parliament. Instead of competing for supremacy, the court and Parliament co-constitute the authority of the administrative state as a shared enterprise, geared towards assisting in the proper administration of the administrative state. Thus, as Kate Glover notes judicial review is always about constitutionalism with a small "c" because the practice of review augments the ongoing relationships between the branches of government.[192] In this instance, judicial review blurs the functions of the court and Parliament because both are engaged in a shared project of institutionally designing the administrative state.

Finally, it is not just the legislature, or courts, who control "institutional design choices." The point of deference is that the administration also engages in institutional design choices by "applying its particular insight"[193] to the statutory scheme, the development of internal procedures and policies and by engaging with other officials and legal subjects.[194] The centrality of reasons also gives legal subjects an important place within the constitution of authority, as they too through submissions will provide their particular insight, which must be heard and taken seriously by the courts. Critics of judicial review often worry that judicial review is an inherently undemocratic practice, but in my view, the representative framework the practice of judicial review creates is democratic in nature. An administrative agency's democratic authority is not only found in its statutory origin, but in its ability to justify the use of public power to legal subjects, who's interpretations of law, submissions and voice must be responded to in those justifications.

[192] Kate Glover Berger, "The Missing Constitutionalism of Canada v Vavilov" (2021) 34:1 J L & Soc Pol'y 68.
[193] *Vavilov*, *supra* note 5 at para 121; *Primeau v Canada (Attorney General)*, 2021 FC 829 at para 55.
[194] Glover Berger, "Missing Constitutionalism", *supra* note 192 at 82–90 (She notes that the majority's structural reasoning means "the administrative state has been demoted from active agent to legislative observer" at 82). It is unclear how institutional design interacts with the legal and factual constraints. In so doing the court misses the opportunity to demonstrate a more nuanced idea of institutional design as contextual and relational.

Authority therefore becomes, as Fuller noted, a "product of an interplay", between the official and legal subject, rather than a "one-way projection"[195] from state to subject.

Conclusion

In this chapter I argued that reasonableness is the ultimate power-conferring principle or *grundnorm* of administrative law. Once the court recognised that power is not held in a jurisdiction, but exercised temporally, this temporal exercise of powers needed to be governed by norms that secure the validity of that action. In *Roncarelli* we saw that Rand J. implicitly infused the purportedly empty province of administrative power with power-conferring principles such as proper purposes, relevant and irrelevant considerations and more generally reasonableness so as to facilitate the legality of the Liquor Licence regime. In *CUPE* we saw that Dickson J. rejected jurisdiction as the backbone of review and instead understood the valid exercise of an interpretive power held by the Labour Board as governed by reasonableness. *Vavilov* continued this trajectory and we saw that the requirement for a reasoned explanation to the legal subject forms the core of the other-regarding authority that administrators possess. Accordingly, the court in these cases implicitly presupposed the jurisgenerative power-conferring principles necessary to constitute the delegated power as legitimate, other-regarding public authority.

Importantly therefore, the doctrines of judicial review do not unduly impose constraints upon administrative action but are power-conferring principles that produce administrative validity. This suggests judicial review is not so much a regulative practise, but is fundamentally a jurisgenerative practise that produces administrative validity and generates a public administration held in trust for legal subjects. In this light, the court is not competing with Parliament's supremacy because administrative authority is *co-constituted* by the statutory purposes *and* the power-conferring principles that establish the nature of the power held and provide for the legitimacy of its exercise. The next chapter will consider further the importance of reasons by arguing that reasons constitute public institutions and the state itself. I will also address prerogative powers to explain how the practice of judicial review itself generates public authority, even without explicit statutory authorization in place.

[195] Lon L Fuller, *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1969) at 204.

Chapter Five

5. Office, Prerogative Powers, and the Constitution of State

Prologue

Chapter Five argues that the reasons for which public officials act are themselves constitutive of public institutions and the state itself. I do so by arguing that when public officeholders exercise their other-regarding powers, they are representing not just individual legal subjects, but what Hobbes called a person by fiction. A person by fiction, Hobbes argued, is a legal person that does not exist at all prior to representation. It is therefore the very act of representation, located in the reasons for which officials act, that generates the state as a legal person. Such a view humanizes public institutions and highlights that the basis of legal order is a series of reasons, justifications and arguments. To clarify and develop this argument, I use as officers of the Crown as a case study. This is because prerogative powers are not formally authorized by statute and thus the explanation for their legitimacy (if any) must lie elsewhere. Prerogative powers, properly understood, reveal how reasons and power-conferring principles legitimize and constitute public authority, and by extension, the institutions that exercise it.

Introduction: Theorizing the Crown

It is a trite fact that Parliament is sovereign in Westminster constitutional systems. However, Dicey wrote historically that the Monarch was "the most powerful part of the sovereign power."[1] Today, formally at least, it is King Charles III who declares war, signs treaties,[2] regulates and legislates ceded British Overseas Territories,[3] and prorogues and dismisses Parliament,[4] all in the exercise of his prerogative powers. Prerogative powers are usually, however, exercised "through the medium" of the Crown's Ministers.[5] Thus, as noted by the majority in *R (Miller) v SS for Exiting the European Union* (*Miller I*) the Crown is not "anomalous or anachronistic. There are

[1] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: LibertyClassics, 1982) at 354.
[2] *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 at para 54 [*Miller No.1*].
[3] *R (on the application of Bancoult) v Secretary of State For Foreign and Commonwealth Affairs*, [2008] UKHL 61 at para 80, Lord Rodger [*Bancoult No. 2*].
[4] *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41 [*Miller No.2*].
[5] *Edwards v Cruickshank*, (1840) 3 D 282 at 306–307, Lord President Hope.

important areas of governmental activity…essential to the effective operation of the state and which are not covered, or at least not completely covered, by statute."[6] Nevertheless, the concept of the Crown remains undertheorized in jurisprudence. The Supreme Court of Canada, for instance, recently avoided answering if the "honour of the Crown" was a unique constitutional principle capable of voiding statutes.[7] Commentators note that the Crown and prerogative are "slippery"[8] concepts, replete with maxims, such as the honour of the Crown, or the Queen Can Do No Wrong, which "conjure sovereignty."[9]

In England, there are two main debates in Crown theory. The first debate concerns what prerogative powers are and how to identify them. Blackstone, followed by Wade and Harris, argued that the prerogatives are "those rights and capacities which the King enjoys alone, in contradistinction to others."[10] As such, Harris argues that there must be a "third source" of governmental power,[11] of residual liberties, that any person has by virtue of being a (legal) person, such as making a contract. A potentially problematic conclusion of this analysis is that it means the Crown, like legal subjects, holds liberties to do whatever has not been prohibited.[12] By contrast, Dicey held the wider view that prerogative powers were the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[13] This view enables us to understand all the Crown's actions, including the making of contracts, as powers of the Crown. Consequently, Crown actors must demonstrate that they hold the relevant power in law.

---

[6] *Miller No.1*, *supra* note 2 at para 49; See also *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 245 DLR (4th) 33 [*Haida Nation*], McLachlin J ("[the Crown] is not a mere incantation, but rather a core precept that finds its application in concrete practices" at para 16) .
[7] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 62 [*Toronto City*].
[8] Rodney Brazier, "Constitutional Reform and the Crown" in Maurice Sunkin, ed, *The Nature of the Crown : A Legal and Political Analysis* (Oxford ; Oxford University Press, 1999) 337.
[9] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37:3 OHLJ 537 at 558.
[10] William Blackstone, *Commentaries on the Laws of England: in Four Books*, 5th ed (Oxford: Clarendon Press, 1773) at 239.
[11] BV Harris, "The 'Third Source' of Authority for Government Action" (1992) 108 Law Q Rev 626.
[12] See *Malone v Metropolitan Police Commissioner*, [1979] Ch 344 [*Malone*]; Harris, "Third Source", *supra* note 11 at 636; But see *R v Somerset County Council, ex p Fewings*, [1995] 1 All ER 513 [*Fewings*], Laws J (he argues that, in contrast to private citizens, public bodies "must be justified by positive law" at 524).
[13] Dicey, *supra* note 1 at 420.

A related question is how we identify prerogative powers. Prerogative powers are traditionally identified by reference to historical precedent.[14] However, in the *Miller* jurisprudence, the cases that arose out of Brexit, the court began to change its approach. In *Miller I,* the case about whether the executive could trigger the Brexit process without Parliament's approval, it proved difficult to locate the power of Treaty withdrawal through precedent alone. Lord Carnwath noted, "[p]recedents are hard to find. Counsel have taken us on an interesting journey through cases and legal sources from four centuries and different parts of the common law world."[15] Alternatively in *Miller II,*[16] the case about the whether the Prime Minister could prorogue Parliament to forestall Brexit negotiations, the UK Supreme Court (UKSC) adopted the principle of legality to construct the *vires* of the prerogative power of prorogation. The court argued that fundamental principles of the constitution illuminated the boundaries of the power, and that the exercise of the power would be unlawful "if the prorogation has the effect of frustrating or preventing, *without reasonable justification*, the ability of Parliament to carry out its constitutional functions."[17] After *Miller II,* prerogative powers are identified by precedent, fundamental principles, and most significantly for this thesis, the reasons or justifications offered for their exercise.

The second debate in English law is whether the Crown is a corporation sole or corporation aggregate. As a corporation sole, it was said in the *Duchy of Lancaster,* the Monarch's office is understood as a successional entity in which prerogative powers are connected to the King in his personal capacity.[18] The corporate sole interpretation is usually contrasted with Maitland's pluralistic view of the Crown as an organic corporation aggregate, or body politic, with the King as the head.[19] As a corporation aggregate, the Crown "wears many hats"[20] by many different officers, who represent the Crown from time to time. Both the corporation sole and corporation

[14] *Burmah Oil v Lord Advocate*, [1965] AC 75 (HL), [1964] 2 WLR 1231 [*Burmah Oil*], Lord Reid ("so I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?" at 101).
[15] *Miller No.1*, *supra* note 2 at para 246, Lord Carnwath, dissenting. (The only precedent referred to was a Canadian Federal Court decision *Turp v Ministry of Justice & Attorney General of Canada* 2012 FC 893 concerning withdrawal from the Kyoto Protocol on Climate Change).
[16] *Miller No.2*, *supra* note 4.
[17] *Ibid* at paras 50, Lord Reed (emphasis added).
[18] *The Duchy of Lancaster Case*, (1561) 1 Plowden 212 at 213.
[19] See generally, Frederic William Maitland, *State, Trust, and Corporation*, David. Runciman & Magnus. Ryan, eds (Cambridge University Press, 2003) at 32–51.
[20] *Wewaykum Indian Band v Canada*, 2002 SCC 79, Binnie J ("The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting" at para 96).

aggregate interpretations rest on a medieval theory called "The King's Two Bodies"[21]– one mortal or natural, one divine or politic, such that "the King never dies."[22] According to Martin Loughlin, the theory of the King's Two Bodies, along with various impersonalisation efforts,[23] is the closest England ever had to a "Republic," meaning, a clear concept of state distinguishable from Sovereign.[24] However, Loughlin laments that the King was never fully separated from his Crown,[25] and the King's two bodies thus remained "together indivisible" [26] due to a "distrust of abstraction."[27] This prevented the proper development of a distinct public law in British thought.[28] The lack of a distinct public law perpetuates the Diceyan view that public officials are held liable through private law and that the Crown is immune from suit ("The Queen Can Do No Wrong"). The corporate aggregate option is therefore preferred by Loughlin because it affirms the existence of a distinct artificial personality of state disconnected from the Monarch personally and distinct from other officials. This is important because it pushes against the Diceyan idea that public officials are regulated through private law by instead allowing a distinct public law to emerge where the state itself is held liable for damages.

In my view, the best way to explain the main tensions in Crown theory is through the concept of office. Offices are independent and impersonal positions of authority, filled by human representatives, who act on behalf of the office's purpose and the institutions to which their offices are attached.[29] Offices are inherently other-regarding, and officeholders are entrusted with representing public institutions.[30] Like all positions of trust, the valid exercise of authority depends upon acting for the right reasons, which explains the concern for reason-giving in *Miller II*. In the context of this chapter, officers of the Crown are connected to, and represent, the state institution

[21] Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, N.J.: Princeton University Press, 1957).
[22] *Willion v Berkley*,(1559) Plowden 233a, Southcote J.
[23] Martin Loughlin, "The State, the Crown and the Law" in Sunkin, *supra* note 8 at 33
[24] Maitland, *supra* note 19 (Maitland notes that Queen Elizabeth I's secretary could refer to the English Republic with no irony, ibid at 38).
[25] Loughlin, "The State" *supra* note 23 at 33
[26] *The Duchy of Lancaster Case*, *supra* note 18 at 213.
[27] Loughlin, "The State" *supra* note 23 at 56
[28] Much of Loughlin's work argues for the existence of a distinct public or fundamental law. See, Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2004); Martin Loughlin, *Foundations of Public Law* (Oxford,: Oxford University Press, 2010).
[29] Christopher Essert, "The Office of Ownership" (2013) 63:3 UTLJ 418 at 430.
[30] Larissa Katz, "Ownership and Offices: The Building Blocks of Legal Order" (2020) 70:6 UTLJ 267 ("an office exists if at all as part of a collective plan for allocating authority in society – a legal order" at 268).

of the Crown, and by extension, I will argue, the state itself. Drawing on Hobbes, I will argue these institutional representative powers are fundamental to legal order because it is the act of representing state institutions, by the officials themselves, that constitute the state and state institutions. This explains the common law's unique state and public law tradition in which individual acts of officials are neither outside of public law nor purely abstracted to an artificial third body. Instead, individual acts of officials actively constitute the whole.

The rest of this chapter is organized into three parts. First, I delineate the concept of office, drawing primarily upon the theories of Jean Bodin, Coke CJ, and Maitland's corporation aggregate theory of the Crown. Second, I look at the recent case *R (Miller) v. Prime Minister,* in which the UKSC argued that exercises of prerogative power, to be valid, must have a reasoned justification. I use the case to argue that prerogative powers are constituted by unwritten power-conferring principles and the exercise of authority depends upon the reasons for which Crown officials act. Finally, drawing on Hobbes, I argue that it is the act of representing state institutions, by officials themselves, that constitute the state.

5.1. Office and Crown

5.1.1. Governing Through Offices

The Renaissance theorist Jean Bodin set out an interesting theory of office and lawful government.[31] Bodin sought to distinguish Seignorial government, in which the King exercised power directly, from legal government whereby sovereign power was "exercised indirectly through some legal scheme of delegation and agency."[32] Parsing the sovereign into offices "enabled the exercise of sovereign power to be moderated, regulated, controlled"[33] because officers are accountable to the terms and purposes on which they "borrowed" such authority.[34] Consequently, the official does not, like a Seignior, merely parrot the unilateral or arbitrary orders of the Sovereign.[35] Instead, an officeholder holds an independent and perpetual position of authority,[36] in which he acts for the purpose of his office, distinct from both sovereign command

[31] Jean Bodin, *Six Books of the Commonwealth.*, 2nd ed, translated by M.J. Tooley (Oxford: Blackwell, 1967).
[32] Daniel Lee, "'Office Is a Thing Borrowed': Jean Bodin on Offices and Seigneurial Government" (2013) 41:3 Political Theory 409 at 419.
[33] *Ibid* at 427.
[34] Bodin, *supra* note 31 at III, 2.
[35] Lee, "Office Is a Thing Borrowed", *supra* note 32 at 412–415.
[36] Bodin, *supra* note 31 at IV,3.

and from his own private whim.[37] In the Bodinian model, Lee notes, the officeholder thus "borrows" sovereign power and holds office in trust.[38] It follows that the powers of office cannot be exercised for self-interest but must be held and exercised "*on behalf of the office.*[39]"

The purposes of offices, given they are borrowed from sovereign power, are ordinarily publicly-regarding in nature. Criddle & Fox-Decent argue that officeholders therefore usually represent a public institution "designed to produce a potentially comprehensive public good."[40] Thus, officeholders must, on the one hand, exercise their powers with a solicitude towards the individual legal subject whose position is being changed. On the other hand, officeholders must remain loyal to the purposes of their office. To take a concrete example, at one level, Labour Boards adjudicate disputes between employers and employees or certify or decertify specific bargaining units. At a more institutional level, however, Labour Boards act on behalf of a system of labour relations that provides "safe, fair and harmonious conditions" in the workplace for everyone.[41] Fox-Decent and Criddle argue these institutional mandates make sure that fiduciaries do not overzealously further the interests of individual beneficiaries at the expense of public institutions designed to ensure the liberty and equality of everyone.[42] Thus, although all offices are other-regarding, not all fiduciaries are officeholders because not all fiduciaries are entrusted with securing the integrity of public institutions. In choosing to govern through offices, as opposed to a different kind of system of government, public powers become limited by public purposes.

---

[37] Implied Bodin, *supra* note 31 ("[judicial offices] for the common good and profit were made perpetuall officers, with an ordinarie and perpetuall charge and power committed unto them: their old and former name of commissioners, yet by abuse or for the honor of that court still remaining" at III,2); On offices and purposes, see generally Essert, "Office", *supra* note 29 at especially 434 and 437; Loughlin, *supra* note 28"[office] distinguishes between the duties which attach to the post and the personality of the post-holder. It is on such a basis that the public can be differentiated from the private" at 157].

[38] Bodin, *supra* note 31 ("there is no doubt, but that all estates, magistrats, and offices, do in propertie belong unto the Commonweale…offices rest and remaine in the possession and propertie of the Commonweale, as a thing put in trust" at III,5).

[39] Essert, "Office", *supra* note 29 at 430; See also, Conal Condren, *Argument and Authority in Early Modern England: the Presupposition of Oaths and Offices* (Cambridge; New York: Cambridge University Press, 2006) (offices are held for "an other-directed, non-selfish interest, sometimes expressed as serving a common good or public weal" at 21).

[40] Evan J Criddle & Evan Fox-Decent, "Guardians of Legal Order: The Dual Commissions of Public Fiduciaries" in Evan J Criddle et al, eds, *Fiduciary Government* (Cambridge, UK: Cambridge University Press, 2018) at 81.

[41] Ontario Labor Relations Board, "The Board and Its History" (2022), online: Ontario Labour Relations Board <www.olrb.gov.on.ca/History-EN.asp> [perma.cc/5SSL-XK84]

[42] Criddle & Fox-Decent, "Guardians", *supra* note 40 at 68.

The landmark public law case that demonstrates this consequence of choosing to govern through offices is *Bagg's* case.

5.1.2. Independence and Purposes: *Bagg's Case* and *Prohibitions del Roy*

James Bagg, chief burgess of Plymouth, was "unduly and without reasonable cause"[43] removed from office by Mayor John Clement for criticizing and verbally assaulting him (calling him, in Shakespearian comedic fashion, a "cozened knave!")[44] Bagg argued this was not a legal basis for his disenfranchisement, and Coke CJ agreed that no officeholder could be removed without express authority "by due course of law."[45] The case is famous for Coke CJ's use of the *mandamus* remedy[46] to compel Bagg's reappointment to office.[47] Controversially, Coke argued that *mandamus* covered any manner of misgovernment, not merely errors of law,[48] a claim which historian Edith Henderson argues was unsupported by authority.[49] This assertion of *mandamus* is connected, Henderson contends, to Coke CJ's more general theory of the supervisory jurisdiction, based on the concept that judges hold offices independently from the King.[50] While the King once held an institutional power to see that "due and prompt justice" or "right and reason should be done,"[51] now

> "This power the King has delegated to his Court of the King's Bench; he cannot now exercise it personally because in some sense this case is *propria causa regis,* and no man can be judge in his own cause."[52]

In *Prohibitions del Roy*[53] Coke CJ further underscored that it was the court's role, not the King's, to declare the "artificial reason" of the common law. In that case, Coke CJ rejected the King's argument that the power to administer justice was merely delegated and so the King still

[43] *Bagg's Case*, (1572-1616) 11 Co Rep 93, (1572) 77 ER 1271 at 1272.
[44] *Bagg's Case*, *supra* note 43.
[45] *Ibid* at 1278.
[46] Edward Jenks, "The Prerogative Writs in English Law" (1923) 32:6 Yale LJ 523.
[47] *Bagg's Case*, *supra* note 43 at 1281.
[48] *Ibid* at 1277–1278.
[49] Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press, 2013) at 72.
[50] *Ibid* at 70–71.
[51] *Ibid* at 60–61.
[52] *Ibid* at 69.
[53] *Prohibitions del Roy*, (1607) 12 Co Rep 63, 77 ER 1342.

retained the right to take back the office and adjudge cases in person. By rejecting that view, Coke CJ protected both judicial independence and the principle "no man can be a judge in his own cause."[54] Yet most interestingly for our purposes his reasoning suggests that judicial offices are held for the legally significant *institutional purpose* of securing due justice and declaring the artificial reason of common law. A consequence of delegating the King's power into judicial offices, is that the Crown official can disregard the direct wishes of the King while simultaneously claiming to act behalf of the Crown's will to do justice.[55] Thus Coke CJ could defy the King's wish to take back the office and adjudge the case personally because Coke's office demanded he act to secure justice. Justice, however, would not be served if the King could act as a judge in his own cause. This ability to disregard the King whilst claiming to further the Crown's institutional mandate places officials, Janet McLean argues, in "a crucial 'interstitial space' between the citizen and the state."[56] The official's positionality is legally reflected in the fact that officials must consider how the exercise of their power impacts individual legal subjects on the one hand, but they also must further the institutional mandates they have been entrusted to administer on the other.

As *Prohibitions* suggests, delegation does not simply establish independence from the Crown but paradoxically also establishes a formal connection to the Crown. Delegation means the King will technically be, Coke CJ noted, "always present in Court in the judgment of law."[57] It was the formal connection to the Crown that enabled Coke in *Prohibitions* to argue that the King can no longer adjudge personally because he would be acting as a judge in his own cause.[58] The office's independence from, and connection to, the Crown can co-exist, in my view, if we interpret the King as delegating sovereign power from his Body Politic, or the state, as opposed to from his

[54] *Ibid*, Coke CJ (the "King in his own person cannot adjudge any case" but "in the King's Bench he may sit, but the Court gives the judgment : and it is commonly said in our books, that the King is always present in Court in the judgment of law; and upon this he cannot be nonsuit: but the judgments are always given per Curium; and the Judges are sworn to execute justice according to law and the custom of England" at 1343).
[55] James Hart, The Rule of Law 1603– 1660: Crowns, Courts and Judges (Routledge, 2014) at 208, quoted in Janet McLean, "The Authority of the Administration" in Elizabeth Fisher, Jeff King & Alison Young, eds, *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press, 2020) at 50.
[56] Janet McLean, "Between Sovereign and Subject: The Constitutional Position of the Official" (2020) UTLJ 167 at 170.
[57] *Prohibitions del Roy*, *supra* note 53 at 1343.
[58] We still see this presence expressed in the fact the courts are Her Majesty's, Parliament is technically The Queen in Parliament, and executive actors are Crown officials.

Body Corporeal.[59] The King's authority to do justice is thus also depersonalised from the King himself,[60] and the will to do justice is thus an impersonal mandate, delegated by the state, impressed into the court's office, the King's office, Ministers of the Crown or Crown officials.[61] In the next section I argue that this office-centered interpretation of *Bagg's* case and *Prohibitions* can unify the corporation sole and corporation aggregate theories of the Crown introduced above.

5.1.3. Corporation Sole and Corporation Aggregate

As noted in the Introduction to this chapter, sometimes the Crown is theorized to be a corporation sole and sometimes a corporation aggregate, and these two forms are often understood to be mutually exclusive. The former means that the office is successively held by one person, the Monarch. The latter mean many officials make up or represent the Crown.[62] Coke CJ is usually thought to have supported the corporation sole interpretation of the Crown,[63] but in *Bagg's* case, he must have envisioned the Crown as an aggregate. This is because he chose this moment to develop the remedy *mandamus*, with the result that the King's courts compelled the King's officials to perform a public duty. By contrast, in *M v. Home Office* it was argued that the Queen's Courts cannot compel the Queen's Ministers to act, because both "share the same source of authority: namely, the Crown."[64] However, as Lord Rodgers put it in *Bancoult II* that latter argument is "merely a makeweight"[65] and unsupported by the early precedent. In *Edwards v. Cruickshank*, for example, Lord President Hope held;

> "[The courts] have power to compel every person to perform their duty [and] though at first sight it may appear to be a startling proposition - the law can compel the Sovereign himself to do his duty…[Yet] the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done … or

[59] For an overview of Coke's interpretation of the King's Two Bodies, see Marie-France Fortin, "The King's Two Bodies and the Crown a Corporation Sole: Historical Dualities in English Legal Thinking" (2021) History of European Ideas 1 at 5–10.
[60] McLean, "Authority of Administration", *supra* note 55 ("these legal struggles to discipline the personal rule of Kings involved the invocation of the concept of office in relation to the King himself" at 51).
[61] *Ibid* ("[t]he Crown was not to be considered an estate in fee but rather a property in trust...Once an office is constituted and regulated by law as legally separate from the person and the state" at 51).
[62] Fortin, "Historical Dualities", *supra* note 59 at 5–10.
[63] *Ibid* at 5–6.
[64] Adam Tomkins, *Our Republican Constitution* (Oxford ; Hart Publishing, 2005) at 119.
[65] *Bancoult No. 2*, *supra* note 3 at para 106, Lord Rodger.

> if he exceeds his duty…the Court would proceed, according to the nature of the case, by injunction or mandamus, or a writ of quo warranto."

In my view, *Bagg's* case suggests that a corporation sole and corporation aggregate can exist concurrently.[66] As Jason Allen helpfully explains, the Crown, as a corporation sole, secures the temporality and seamless transition of officers to ensure a continuous and stable legal order.[67] Many offices, particularly Ministers such as the Home Secretary or the Foreign Secretary are corporation soles and filled successionally, yet, these Ministers, in the exercise of prerogative powers, are also understood to be "representing the Crown."[68] In other words, Ministers can be both corporation soles and a part of the corporation aggregate that make up the Crown. This also means there is no reason that the King cannot hold an office that also makes up the Crown. The Crown is at the "apex"[69] of a network of aggregate officeholders who are connected to, and represent, the institutional mandate of the Crown that's delegated by the King's Body Politic.

The institutional mandate of the Crown is primarily security,[70] and it involves two parts. First, the Crown's purpose is the security of the country in foreign relations (e.g. treaty-making) and the security of the country at home (e.g. the keeping of the peace.) Most of the prerogative powers tend to cluster around such purposes. Lord Mansfield even argued the prerogative writs can be interpreted as assisting such purposes:

> "[Mandamus] was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."[71]

---

[66] See also *M v Home Office*, [1993] 3 WLR 433 (Lord Woolf argued and that both the sole and aggregate descriptions appear apt, ibid at 448.).
[67] Jason Grant Allen, *Constitutional Authority and Judicial Review: A Common Law Theory of Ultra Vires* (DPhil Thesis, University of Cambridge, 2017) [unpublished] at 216.
[68] *Bancoult No. 2*, *supra* note 3 at para 106.
[69] Allen, *supra* note 67 at 221 and 226.
[70] Joseph Chitty & John Francis Sir Rotton, *Chitty's Prerogatives of the Crown* (London: Joseph Butterworth and Son, 1820) ("Protection, that is, the security and governance of his dominions according to law, is the duty of the sovereign" at 71) quoted with approval in ; *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority*, [1989] 1 QB 26 (CA) at 54 [*Northumbria*].
[71] *Rex v Barker*, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824-25 (K.B. 1762).

The second purpose is, as already discussed, the will to do right or secure due justice as between all legal subjects.[72] Such a view emerges from the "conviction that the prerogative was created for the benefit of the people."[73] Part of this impersonal, institutional mandate includes delegating and creating other offices and institutions, like the courts, that likewise have this institutional mandate impressed on them.[74] In more modern terms we could interpret this power as the power to create institutions that secure the liberty and equality of all subjects.[75] Thus, while corporation soles ensure the temporality of authority, aggregation ensures that all the spaces public actors operate in are infused with legality. All offices represent the other-regarding mandate of a public institution which, if they wish to validly exercise the powers entrusted to them, they must do so with loyalty to their institutional and legal-order-creating mandate that, in this instance, they hold on behalf of the Crown.

In line with the argument of this thesis, a loyal exercise of power involves more than pointing to a formal delegation but requires the decision-maker to act for other-regarding reasons. Thus, while 'delegation' from the King's body politic may be a necessary condition to holding a Crown office, it is not sufficient for the proper exercise of *authority.* Recently, in the *Miller* jurisprudence, the court switched from viewing prerogative authority as purely source-based to instead insisting that the authority claims of officers of the Crown come from the *reasons* for which they act. The court implicitly presupposed that the exercise of the power of prorogation was governed by the power-conferring principle of reasonableness or justifiability that infuses the actions of Crown officials with legal legitimacy. As such, the representation of the Crown's impersonal institutional mandate becomes a fully-fledged fiduciary requirement that requires the office-holder provide reasons for her decision, demonstrating how they further the purpose for which their power is held.

---

[72] *Northumbria, supra* note 70, Croom-Johnson LJ ("I have no doubt that the Crown does have a prerogative power to keep the peace, which is bound up with the undoubted right to see that crime is prevented and justice administered" at 44).
[73] Loughlin, "The State", *supra* note 23 at 60
[74] Implied *Prohibitions del Roy, supra* note 53; See also Larissa Katz, "Pathways to Private Rights" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford, New York: Oxford University Press, 2020) ("the executive had exclusive jurisdiction to create offices and an ancient right to command the service of its subjects in those offices" at 172).
[75] Evan Fox-Decent, "Fiduciary Authority and the Service Conception" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (OUP Oxford, 2014) 363 ("legal authorities are public agents empowered to establish legal order through the exercise of moral sovereign powers" at 372).

5.2. The Constitution of Prerogative Powers

5.2.1. *Miller I* and Identifying Sources of a Prerogative Power

In June 2016, the UK voted to leave the European Union (EU). The UK government, headed by Prime Minister Theresa May at the time, thus wished to trigger Article 50 of the Treaty on European Union (TEU) to begin the Brexit process. Ms. Gina Miller, a concerned citizen, brought a judicial review claim, asking if the decision to invoke Article 50 was part of the prerogative power of Treaty-making and conducting foreign affairs, or if the government needed Parliamentary approval via statute. The court examined both the extent of the prerogative power of Treaty-making and if the European Communities Act 1972 (ECA)[76] reversed the presumption that the prerogative cannot be used to change domestic law unless statute allows it.[77]

The majority found that statutory approval was necessary. They defined the prerogative along Dicyean terms, as "the residue of powers which remain vested in the Crown…exercisable by ministers…[and] consistent with Parliamentary legislation."[78] Ascertaining what prerogatives remain vested in the Crown, and the scope of such powers, was traditionally identified by finding a formal authorization via historical precedent.[79] For instance, in *Bancoult II* the minority argued there was no precedential authority "in which the royal prerogative had been exercised to exile an indigenous population from its homeland."[80] Comparably in *Northumbria* the court said the prerogative to keep the peace was traced "probably" to the Norman Conquest.[81]

However, in *Miller I,* the majority used a "fundamental principle"[82] or principle of legality approach to determine the extent of the Treaty-withdrawal power. The court placed the construction of the ECA and the prerogative on a foundation of long-standing constitutional principles, such as parliamentary sovereignty and the principle found in the *Case of Proclamations*[83] that the Monarch cannot change domestic rights and obligations without

[76] *European Communities Act 1972* (UK)
[77] *Miller No.1*, *supra* note 2 at para 50.
[78] *Ibid* at para 47.
[79] Noted to be a difficult task in *Miller No.2*, *supra* note 4 at para 38.
[80] *Bancoult No. 2*, *supra* note 3 at para 70, Lord Bingham (dissenting).
[81] *Northumbria*, *supra* note 70 at 58, Nourse LJ.
[82] *Miller No.1*, *supra* note 2 at para 81.
[83] *Case of Proclamations*, (1610) 12 Co Rep 74.

parliamentary assent.[84] The court also used the principle of legality to decide if the ECA had, or had not, enabled Ministers to bring "far-reaching change to the UK constitutional arrangements" without statutory approval.[85] The court argued the "unprecedented," "dynamic process"[86] of EU law (known as direct effect) meant rights and obligations came directly into UK law via a "conduit pipe."[87] The ECA thus had a "constitutional character"[88] making it a source of domestic law.[89] Triggering Article 50 would thus be tantamount to changing domestic rights and obligations. The prerogative power to commence Treaty withdrawal had in this case been limited by the constitutional nature of the ECA. The important takeaway for our purposes is that the court began to use the principle of legality, as opposed to historical precedent and analogy, to construct the extent of prerogative powers. This framework was developed further in *Miller II.*

5.2.2. *Miller II* and the Principle of Legality

After *Miller I,* Brexit negotiations, tensions and uncertainty trundled on. In the melee, another case about the prerogative found its way to the Supreme Court. On 10th September 2019, Her Royal Majesty, upon the advice of Prime Minister Boris Johnson, commanded that Parliamentary proceedings were to be prorogued until 14th October, meaning all parliamentary activity was immediately suspended. Although a short prorogation is usual procedure when a new Prime Minister takes office (Boris Johnson at the time taking over from Theresa May), the prorogation came at a critical Brexit juncture, with the UK set to leave the EU on 31st October. Vocal critics in Parliament and the media claimed the prorogation's length and timing was calculated to evade scrutiny of the new government's Brexit legislation. Judicial review proceedings were brought in England by Ms. Gina Miller again, and by Joanna Cherry in Scotland. In Scotland, the Inner Court declared the advice was unlawful because it was given for the improper purpose of stymying Parliament.[90] By contrast, in England the claim in the Divisional

[84] *Miller No.1*, *supra* note 2 at para 42-46; See also *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry,* [1990] 2 AC 418 [*Tin Council*].
[85] *Miller No.1*, *supra* note 2 at para 81.
[86] *Ibid* at para 60.
[87] *Ibid* at para 65.
[88] *Ibid* at para 67; *Thoburn v Sunderland City Council*, [2002] EWHC 195 (Admin) [*Thoburn*] Laws J (he defines constitutional statutes as those which "[a] conditions the legal relationship between citizen and State in some general, overarching manner, or [b] enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights" at para 60-63); See also *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*, 2014 UKSC 3 at paras 58–70, Lord Neuberger and Lord Mance.
[89] *Miller No.1*, *supra* note 2 at para 68.
[90] *Cherry v Advocate General*, 2019 CSIH 49.

Court was unsuccessful on the grounds that prorogation, and proceedings in Parliament, were not justiciable.[91] The cases leap-frogged to the Supreme Court. The court found the case was justiciable for four reasons.

First, the court underscored prorogation is a legal power "that is to say, a power *recognised by the common law"* and exercised by the sovereign in person,[92] acting on advice from the Prime Minister.[93] Convention binds the Monarch to follow the relevant advice and therefore it is the Prime Minister who has a "constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament."[94] Second, the court noted that just because a dispute involves politicians and political controversy does not make it non-justiciable.[95] Third, the court found that parliamentary accountability does not preclude legal accountability.[96] Fourth, and most significantly, the court found there is a distinction between on the one hand whether a prerogative power exists, its extent, and if it is exercised in its limits, and on the other hand whether an exercise of a power is open to legal challenge on the basis of irrationality,[97] and perhaps also improper purposes.[98] It was said the former is justiciable by the courts but irrationality depended on the nature and subject matter of the prerogative.[99]

Against these justiciability issues, it seems the court fudged the thorny issue around whether the exercise of prerogative powers could be reviewed for irrationality and sought to review the power for illegality. The court thus considered "where a legal limit lies in relation to the power to

[91] *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, [1984] 3 WLR 1174 [*The GCHQ case*], Lord Roskill ("[m]any examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process" at 418).
[92] *Miller No.2*, *supra* note 4 at para 30.
[93] *Ibid* at paras 3–6.
[94] *Ibid* at para 30.
[95] *Ibid* at para 31.
[96] *Ibid* at para 33; citing *R v Secretary of State for the Home Department, Ex p Fire Brigades Union*, [1995] 2 AC 513, [1995] 2 WLR 464, Lord Lloyd ("ministerial responsibility is no substitute for judicial review" at 573).
[97] *Miller No.2*, *supra* note 4 at para 35.
[98] Implied *ibid* at para 58.
[99] *Ibid* at paras 35, citing; *The GCHQ case*, *supra* note 91 at 411, Lord Roskill. Cf. ibid at 397-398, Lord Fraser (he implied all review for the exercise of a power was non-justiciable.) Interestingly, it was Lord Fraser's passage that was cited with approval in; *Miller No.1*, *supra* note 2 at para 55.

prorogue Parliament"[100] and noted that unlike interpreting the text of a statute, determining the limits of a prerogative power is difficult.[101] The court thus found:

> "Since the power is recognised by the common law, and has to be compatible with common law principles, those principles may illuminate where its boundaries lie. In particular, the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, *and indeed determined*, by the fundamental principles of our constitutional law."[102]

The power of prorogation is determined by two constitutional principles: parliamentary sovereignty and executive accountability. Lord Reed's reasoning suggests prorogation is a legal power, and possibly constitutional power, reviewable by the courts. It is arguably a constitutional power because it is conferred by the Constitution to the executive branch (the Sovereign and the Prime Minister) to regulate the workings of Parliament. In a country with no written constitution directly conferring a legal power of prorogation, the power is implicitly established, or "*determined"* and structured, by these principles.[103] The court thus argued that a lawful exercise of the power to prorogue Parliament must be compatible with Parliamentary sovereignty,[104] and must take into account the interests of Parliament.[105]

To answer the question of compatibility, the court applied what Jason Varuhas helpfully labels the "augmented principle of legality."[106] The "augmented" principle of legality holds that exercises of powers that interfere with fundamental rights, or in this case fundamental constitutional principles, are only valid if they are proportionate (even if the statute, or common law power, purports to confer an unfettered or wide discretion).[107] In, *Leech*, for instance, the Minister enacted regulations, pursuant to s47(1) of the Prison Act, enabling prison guards to screen letters between prisoners and their lawyers. The statute clearly envisioned some screening, but the

[100] *Miller No.2*, *supra* note 4 at para 37.
[101] *Ibid* at para 38.
[102] *Ibid* at para 38 (emphasis added).
[103] This reasoning seems to suggest that unwritten principles confer and structure constitutional powers. Unwritten constitutional principles therefore play a role in designing the kind of institutional powers held by state institutions. Contrast these conclusions with *Toronto City*, *supra* note 7 (The SCC found that unwritten principles did not have "full legal force" in the sense of invalidating legislation ibid at para 84.).
[104] *Miller No.2*, *supra* note 4 at paras 38 and 42.
[105] *Ibid* at para 30.
[106] Jason Varuhas, "The Principle of Legality" (2020) 79:3 Cambridge LJ 578 at 594.
[107] *Ibid* at 590.

Minister had to demonstrate a "pressing need" for a policy that screened *all* correspondence.[108] The augmented approach has been more recently defined in *R(UNISON) v Lord Chancellor*, the only case on this point cited in *Miller II,* where Lord Reed, again for a unanimous court, stated "courts have set a limit to the *exercise of the power* by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle *must have reasonable justification*."[109]

Applying the augmented principle, Lord Reed in *Miller II* argued the power to prorogue will be unlawful "if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions."[110] On the first part of the test, the court quite quickly found that "of course" the *effect* of a five-week prorogation would be to frustrate parliamentary sovereignty and executive accountability.[111] In answering the second part, whether Johnson had a reasonable justification for truncating these principles, the court highlighted Johnson's rather embarrassing reasons for the decision. These included calling Parliamentary procedures "nothing more than a rigmarole"[112] leading the court to conclude ultimately that there were no reasons explaining "why it was *necessary* to curtail what time there would otherwise have been for Brexit related business."[113] The court held, "nowhere is there a hint that the Prime Minister, in giving advice to Her Majesty, is more than simply the leader of the Government seeking to promote its own policies"[114] and thus he forewent his "constitutional responsibility" to have regard to the interests of Parliament.[115] The court thus concluded that the Order in Council and prorogation lacked reasonable justification and were therefore unlawful and null "as if the Commissioners had walked into Parliament with a blank piece of paper."[116] Accordingly, Parliament resumed business the next morning.

---

[108] *R v Secretary of State for the Home Department, ex parte Leech*, [1994] QB 198 at 212–214, Steyn LJ, [1993] 4 All ER 539; Leech was cited and discussed in *R (UNISON) v Lord Chancellor*, [2017] UKSC 51 at paras 80-81 [*UNISON*].
[109] *UNISON*, *supra* note 108 at para 49, Lord Reed (emphasis added).
[110] *Miller No.2*, *supra* note 4 at para 50.
[111] *Ibid* at para 56.
[112] *Ibid* at paras 18 and 60.
[113] *Ibid* at para 60 (emphasis added).
[114] *Ibid* at para 60.
[115] *Ibid* at para 60, referring back to para 30.
[116] *Ibid* at para 69.

5.2.3. Affirming or Transcending the *Vires-Exercise* Distinction?

One important and controversial aspect of the case was that proportionality review was applied in all but name. The court adopted the language "reasonable justification" instead of "pressing need" and did not elaborate a "necessity" test in any great detail.[117] The augmented principle of legality does overlap with proportionality. Specifically, it is the kind of proportionality review concerned with scrutinizing justifications for interferences with human rights or EU principles.[118] Given that the court argued that irrationality review was non-justiciable, it is difficult to understand why applying an intrusive, substantive review into the necessity of Johnson's justifications was justifiable. The court justified its approach by linguistically asserting that they were conducting a review of the *vires* or scope of the power, not the *exercise* of the power. However, it may have been more persuasive to refer to precedent that supports the claim that proportionality reviews legality rather than substance. In another case, *Pham v SSHD,* Lord Reed distinguished the fundamental rights type of proportionality review from proportionality review understood to supplement or replace *Wednesbury* unreasonableness, which he called proportionality as a "general ground."[119] In contrast to fundamental rights proportionality review, the general ground of proportionality, he suggested, asks if the means are proportionate to the ends pursued.[120] The implication from his reasoning is that fundamental rights proportionality is related to the principle of legality, or to the *vires* of the action, whereas the general ground is related to the merits of a decision.

The distinction between a legality-based proportionality review and merits-based proportionality review is fragile, if tenable at all. The legality-based proportionality review still requires that a power's *"exercise* should be justified as being necessary to achieve the legitimate aim pursued."[121] As Fox-Decent notes in the context of parliamentary privilege, the necessity question is bound up in judging the adequacy of the justification and the weight given to various

[117] The court did imply Johnson failed to demonstrate why five weeks was "necessary" *ibid* at para 60.
[118] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, [1999] 1 AC 69, Lord Clyde ("whether: [i] the legislative objective is sufficiently important to justify limiting a fundamental right; [ii] the measures designed to meet the legislative objective are rationally connected to it; and [iii] the means used to impair the right or freedom are no more than is necessary to accomplish the objective" at 80).
[119] *Pham v Secretary of State for the Home Department*, [2015] UKSC 19 at para 113 [*Pham*].
[120] *Ibid* at para 114.
[121] *Ibid* at para 120.

factors by the decisionmaker.[122] In *Miller II* itself, for instance, the court viewed Johnson's reasons as inadequate because he had not given enough weight to the interests of Parliament, nor had he provided a reason as to why five-weeks, specifically, was necessary. The unnatural schism between scope and exercise was asserted with vigor in *Miller II* because justiciability meant the distinction mattered.[123] However, the distinction obfuscates that in substance the court's reasoning *transcends,* rather than confirms, the scope/exercise divide.

The reasoning substantively transcends the scope/exercise divide, first, because Johnson needed to demonstrate a reasonable justification as a precondition to having authority at all.[124] Placing justification at the heart of authority marks a turn away from a formal, historical approach to assessing the extent of prerogative power.[125] It is no longer sufficient to point to an historical authorization because Crown's officers must further demonstrate that the exercise of that power, if it effects constitutional principles, can be justified as necessary. Put in a positive construction, the exercise of the power of prorogation will be valid when it is used for the purpose for which it was conferred, namely, to provide the executive a reasonable time to put together a legislative agenda, consistent with allowing Parliament to carry out its functions.[126]

Secondly, if the extent or scope of the power is a question of necessity or reasonableness, then this question is inevitably tied up with analyzing whether the actual exercise of the power was necessary or reasonable. In other words, the question of justification or necessity is not an abstract question but responds to the facts, here, the "unusual circumstance"[127] of Johnson's actual exercise of the power to prorogue parliament for five weeks.[128] Third, by making justification the core of prerogative authority, the court invites the Prime Minister to engage in an interpretive exercise about the meaning and extent of the relevant constitutional principles and make the interpretive choice as to whether the exercise of his power will affect those principles. To exercise

---

[122] Evan Fox-Decent, "Parliamentary Privilege and The Rule of Law" (2007) 20 CJALP 118 at especially 128-138.
[123] A similar linguistic distinction was made in *Canada (House of Commons) v Vaid*, 2005 SCC 30 [*Vaid*]; See Fox-Decent, "Parliamentary Privilege", *supra* note 122 (he argues Binnie J. utilised the scope/exercise distinction to avoid the sticky question of whether reviewing the merits of a decision to invoke privilege is justiciable).
[124] Mark Elliott, "Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context" (2020) 16:4 European Constitutional Law Review 625 at 636.
[125] This approach problematically left prerogative powers outside the reach of judicial review. See Sian Evans, "The Rule of Law, Constitutionalism and the MV Tampa" (2002) 13 Public Law Review 94 at 99.
[126] *Miller No.2, supra* note 4 at paras 48 and 50.
[127] *Ibid* at para 51.
[128] Aileen McHarg, "The Supreme Court's Prorogation Judgment: Guardian of the Constitution Or Architect of the Constitution? Analysis" (2020) 24:1 Ed L Rev 88 at 93.

the power validly, the Prime Minister must interpret parliamentary sovereignty and executive accountability in a way that gives them due weight and consideration and explain how his action proportionately accorded to our shared normative commitment to representative democracy.[129] Furthermore, his interpretive choice must be explained to Parliament, to interested legal subjects and to the court as part of the review process. His justification will be deferred to so long as it is reasonable and/or necessary. In my view, the methodology adopted in *Miller II* is similar to reasonableness review in Canadian law discussed in the previous chapter. Thus, there is a kernel of democratic theory in *Miller II.* Whether or not deference flourishes depends on if the court takes up the mantel, and if those who support the idea that tribunals and government actors should play a role in interpreting legal principles do not caricature the case as legal constitutionalism gone rogue.[130]

5.2.4. A Fiduciary Office Interpretation of *Miller II*

In my view, a fiduciary powers interpretation explains why the court in *Miller II* understood a reasonable justification to be a precondition to the proper exercise of prerogative authority. There are many factual and legal parallels between *Roncarelli,* discussed in the previous chapter, and *Miller II.* Both involve the abuse of a public office to further a political agenda, and both involved seemingly unqualified discretionary powers. The augmented principle of legality or the reasoned justification doctrine in the UK can likewise be construed as a power-conferring principle that makes the exercise of the prerogative power *legal* in nature. This power-conferring principle thus transforms the unqualified "discretionary residue" of prerogative powers into a legal, fiduciary office.

However, before I elaborate on this argument, there is one important distinction between *Roncarelli* and *Miller II* that is important to acknowledge. In *Roncarelli,* Duplessis' improper exercise of public power maliciously impacted one legal subject by destroying his livelihood.

---

[129] *Miller No.2*, *supra* note 4 at para 55; Richard Stacey, "The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication" (2019) 67 Am J Comp L 435 (he argues that the proportionality question does not weigh rights against statutory objectives, but asks which competing objective better advances shared values, principles or normative commitments).

[130] For instance, Martin Loughlin, "The Case of Prorogation: The UK Constitutional Council's Ruling on the Appeal from the Judgment of the Supreme Court", 2019, online: Policy Exchange <policyexchange.org.uk/publication/the-case-of-prorogation/> ; Richard Ekins, "Parliamentary Sovereignty and the Politics of Prorogation", 2019, online: Policy Exchange < https://policyexchange.org.uk/publication/parliamentary-sovereignty-and-the-politics-of-prorogation/>

The fiduciary interpretation appears apt in such a case as there is a definable beneficiary whose financial interests Duplessis wrongfully prejudiced. By contrast, *Miller II* concerned the relationship between the Monarch, the Executive, Parliament, and the court, and how the unwritten constitution governs these relations. There was no obvious impact upon any specific legal subject and the Prime Minister is thus not obviously representing or acting for any particular person, as is commonly the case in private fiduciary relations. Neither Gina Miller or Joanna Cherry had personal interests affected by the exercise of the power and it is perhaps surprising that there was no issue of standing raised at bar.[131] Drawing on the analysis in section 5.1. above, arguably the Prime Minister is representing not an individual in the exercise of the prerogative power of prorogation, but the institution of the Crown. He thus holds his power for an institutional purpose, specifically for the purpose of regulating the workings of Parliament,[132] and generally for the purpose of the Crown's will to do right. In my view, power-conferring principles also must come to structure the institutional powers held by officeholders to reflect the relationship of trust between the sovereign and officeholders.

Prior to *Miller II,* the power of prorogation was thought to be a non-justiciable, political or factual power regulated by Convention and not by law. However, prorogation, the court made abundantly clear, is not an untrammeled power, but comes with legal principles that determine its scope and govern its exercise. Put differently, as soon as the court recognised the power of prorogation was legal as opposed to political, the court impliedly presupposed that such a power requires legal norms governing its exercise. *Miller II* can be interpreted as an instance of the law presupposing power-conferring principles capable of lending legal validity to the actions of Crown actors who invoke prorogation. *Miller II* specifies the power-conferring principles that constitute the power of prorogation, and regulate its exercise, in two ways.

First, the court identifies executive accountability and parliamentary sovereignty as the unwritten principles that actually *determine* or establish the constitutional power of prorogation. These principles impliedly *confer* the power of prorogation. In a country with no

[131] The issue of standing did not go unnoticed by critics, however. See John Finnis, "The Unconstitutionality of The Supreme Court's Prorogation Judgment, With Supplementary Notes", University of Oxford Research Working Paper No. 6/2020 ("any citizen moved by the desire to affect the political future of the country can demand that every communication amongst the Queen's ministers themselves, and of them with their advisors… be promptly handed over" at 7)
[132] Implied *Miller No.2*, *supra* note 4 at para 45.

written constitution, it is important to understand how law establishes and determines the powers held by government, and confers authority on institutions. In *Miller II* the court engages directly with the part of the constitution that "establishes state institutions and confers functions, responsibilities and powers on them."[133] However, if this is not convincing for those who doubt the existence of common law authorizations, we do not necessarily need to locate an authorization to understand how the power of prorogation is legal in nature. This is because the exercise of powers that lack express statutory authorization can be legal in nature if certain conditions exist. In Chapter Two we saw that these conditions include (i) the customary use of the power as a legal power and second (ii) the power possessing legitimacy and value as a legal power. If these conditions exist, the law presupposes power-conferring principles that make possible *normative results* as opposed to *factual consequences.* Put differently, the presupposition of power-conferring principles transforms the Crown's factual liberty or political power to prorogue Parliament into a legal power to change normative conditions; i.e. a power capable of changing one or more subjects' claim rights, duties, liberties, powers, liabilities or immunities.

Despite the court at times suggesting that prorogation is a kind of necessary evil, the court does specify that the valuable purpose of prorogation in legal order is: (i) to enable a government to establish its legislative agenda for scrutiny after an election,[134] and (ii) to promote Parliament's constitutional functions as the sovereign law-maker and supervisor of executive action by ensuring Parliament sits in reasonable, scheduled sessions.[135] Succinctly, the value of prorogation is that it enables the government to ensure the proper working of a constitutional, liberal democracy.

If a power is to be legal in nature, it must be accompanied by power-conferring principles that explain how to exercise the legal power and provide for its validity.[136] The common law of judicial review presupposes such principles and, in reliance on them, provides legal standards that guide and enable Crown actors to exercise their powers in a proportionate or reasonably justified manner, consistent with the interests of Parliament. We can thus think of the

[133] David Feldman, "The Nature and Significance of 'Constitutional' Legislation" (2013) 129 Law Q Rev 343 at 357.
[134] Implied *Miller No.2, supra* note 4 at paras 20-21 and 59.
[135] Implied *ibid* at para 45.
[136] See Chapter Two

requirement of proportionality or reasonable justification as power-conferring principles. The exercise of the power of prorogation will be valid when the *reason* the power is exercised is to establish a legislative agenda in a way compatible with the interests of Parliament. The power-conferring principles of proportionality or reasonable justification thus make it possible for Crown actors to legitimately exercise their prerogative powers. In other words, this requirement acts as a generative *grundnorm* that produces the legal authority that Crown official's claim to possess.

The Prime Minister's authority therefore stems from acting *on behalf of* the specific purpose for which the power is held, but also more generally, it stems from acting on behalf of the institution of the Crown. Above in section 5.1., I argued officeholders exercise their powers on behalf of public institutions. In this instance, the Prime Minister is acting as a representative of the Crown,[137] and the Crown's institutional mandate is thus entrusted to the Prime Minister's care. Of relevance here is the Crown's power to establish and maintain public institutions that make liberty and equality possible for everyone. As the court found, Johnson held a "constitutional responsibility"[138] to secure and safeguard Parliament as the institution of representative democracy that holds the government to account.[139] Furthermore, given that no interests of legal subjects were directly affected in the case, the requirement of a "reasoned justification" could not have been concerned with providing procedural fairness. Instead, the Prime Minister's office required him to further an institutional other-regarding mandate and the purpose of his office to exercise authority at all. Moreover, as Daly points out, the 'reasonable justification' requirement does not work like usual substantive review because there is no burden on the applicant to demonstrate unreasonableness.[140] Instead, there is a free-standing requirement to justify the decision and hand over reasons as part of the review process.[141] This suggests that reasons have an important institutional function to play. I come back to this in section 5.3 and argue that reasons are

[137] *Miller No.2*, *supra* note 4 at para 30.
[138] *Ibid* at paras 30, 61.
[139] *Ibid* at para 55.
[140] Paul Daly, "Some Qualms about R (Miller) v Prime Minister [2019] UKSC 41", online: *Paul Daly* <https://www.administrativelawmatters.com/blog/2019/09/24/some-qualms-about-r-miller-v-prime-minister-2019-uksc-41/>.
[141] *Ibid*. This significantly expands "the record" for prerogative power cases, reverses a procedural burden, and potentially impacts internal practices of communication, see Finnis, *supra* note 131 at 7

institutionally important because the reasons for which the officeholder acts constitute the state and state institutions.

A final point to note is that it is the very power-conferring quality of constitutional principles that makes actions intended to prorogue Parliament justiciable and accountable to law. In other words, because these power-conferring principles attach non-causal or normative results to political actions, these political actions become also normative actions and are thereby rendered accountable to the standards that make their legal status and validity possible. Thus, by recognizing that prorogation is legal in character, and presupposing necessary power-conferring principles, the reviewing court simultaneously renders prorogation justiciable to the legal standards that the power-conferring principles set. Consequently, the court is justified in intervening on the grounds that the decision-making power to prorogue was improperly exercised. Thus, the legitimacy of court intervention rests not on the fact that political power needs to be constrained by law, but that political power needs to be facilitated as normative via power-conferring principles. Put differently, it is because the political power needs to be constituted by power-conferring principles that intervention on those standards is justifiable.

5.3. Constituting Public Institutions

In this final section I want to bring together the points made in in sections 5.1. and 5.2. to argue that the reasons for which officeholders act constitute the state and state institutions. In Chapters One through Four, I argued that the fiduciary power of representation enables fiduciaries to personate or represent the beneficiary. However, as argued in this chapter, officeholders represent not only individual beneficiaries but public institutions and their institutional mandates. Drawing on Hobbes, I argue this act of representation, and therefore the reasons for which an officeholder acts in pursuit of their institutional mandates, are fundamental to the ongoing constitution and representation of state institutions.

Thomas Hobbes, like Bodin, built his theory of state around representation.[142] The sovereign represents an enduring structure, the state, that both is separate from the individual in

[142] Thomas Hobbes, *Leviathan*, revised ed, A.P Martinich & Brian Battiste, eds (Toronto: Broadview Editions, 2011) at 160–161, 202.

office but also separate from the collective of persons, the multitude, who benefit from the exercise of powers:

> "A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented … For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person"[143]

In this passage of *Leviathan,* Hobbes is asserting that 'the state' is not a collective of persons but is a separate stable and temporal entity. The separate entity is made possible by the sovereign's unified representation of the multitude, which he has been authorized by them to do for the "preservation of them all."[144] David Runciman interprets Hobbes to mean that it is the representation of the multitude that actually makes the state, as a legal person, possible.[145] Hobbes distinguishes between natural persons (those who author their own actions) and artificial persons (representatives), and then further argues that artificial persons can represent the actions of others either "truly" or "by fiction".[146] Runciman explains,

> "The former [true representation] are those whose words and actions are truly owned by those whom they represent; (that is, persons who can truly 'own up') and the latter [by fiction] are those whose words are actions are not truly owned by those whom they represent (and therefore cannot truly 'own up')"[147]

In most fiduciary relations, such as lawyer-client or agent-principal, the represented party is capable of authoring their own actions, but they are not able to act due to practical or legal constraints.[148] However, in some fiduciary relationships, such as parent-child, the law does not take the child to be responsible for their own actions and the child is not capable of authoring actions. Representation by the parent of the child's best interests is therefore what enables the child to act in the world as a "person by fiction." These kinds of fiduciary relationships show us

---

[143] *Ibid* at 153.
[144] *Ibid* at 267, 157–162.
[145] David Runciman, "What Kind of Person is Hobbes's State? A Reply to Skinner" (2000) 8:2 Journal of Political Philosophy 268.
[146] Hobbes, *supra* note 142 at 151.
[147] Runciman, "What Kind of Person?", *supra* note 145 at 269.
[148] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford; New York: Oxford University Press, 2011) at 101–105.

that the act of representation is itself a change in legal position, because without parents or guardianship, and the juridical form of the fiduciary relationship, children would not be able to be legal persons.[149] Likewise, the state is a "person by fiction" because although "states do have a presence in the real world… they do not really own up in person for what is done in their name."[150] Runciman notes that unlike a bridge or a child, for example, the state does not exist at all prior to representation.[151] In other words, the state is only able to exist and act through its representor - the sovereign.

However arguably one problem with this model is it creates a kind of smoke and mirrors effect to state responsibility. This is because while the state never can act on its own accord without its representative, the representative is not personally responsible for the actions of the state. Instead, the third-party state, the person by fiction, is liable for the actions of public officials.[152] In the civil law tradition, therefore, the state is deemed to be a responsible person and hence is liable for damages if officials are negligent. By contrast, in the common law tradition, actions of the state are understood to be taken by "real people" with officials potentially subject to ordinary private law.[153] However, it is important to note that the state only has the ability to be a responsible person through the representatives who are there to actually "effect the change."[154] This implies that the "real people", the representatives, play an important role in the constitution of the state, and that their actions should be seen to have legally significant effects. In particular, I suggest that the *reasons* for which a representor acts in the course of her representation of state institutions are legally significant. To understand if reasons are legally significant, it is important to apprehend that the sovereign's representative act is both an exercise of political power and the exercise of a legal power of representation.

Hobbes was clear that representation is at the heart of sovereign power. In my view, we can easily interpret the sovereign's power to represent the multitude as both legal and political in

[149] Runciman, "What Kind of Person?", *supra* note 145 at 270.
[150] *Ibid* at 278.
[151] *Ibid* at 274.
[152] See Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012) at Chapter One.
[153] See generally *ibid* at Chapter Two.
[154] Runciman, "What Kind of Person?", *supra* note 145 ("the state, like a bridge, does not exist as a person without a representative, and only those real persons who are in a position to maintain the fiction can effect the change" at 273).

nature. Crucially, representation enables the state to be a *legal person* and capable therefore of acting in the world by signing treaties, declaring war, creating institutions, and governing its people. This power, like all representative legal powers, is generated by the power-conferring *grundnorm* of other-regarding authority. In other words, the legal power of representation held by the sovereign to create the state and state institutions is generated by the *grundnorm*. As argued in Chapter One, this *grundnorm* is not an ultimate authorizing source productive of infinite regress or arbitrary foundation, but rather a basic constitutive norm internal to any legal power. The ultimate *grundnorm* of legal order is a fiduciary power-conferring principle, which enables the multitude to act together as a state and "achieve community and associated collective purposes."[155] The state is thus both a mode of political association, and, crucially, is a legally represented legal person. The sovereign's representative power is thus constituted by the fiduciary power-conferring principle, loyalty, and therefore requires the sovereign to exercise this power on behalf of the purpose for which the power is held, namely, to create a state that secures freedom and equality for all. It also requires the sovereign exercise the power with a solicitude towards those for whom the power is held on behalf of, namely, the legal subjects.

Thus, as with other representative powers, the *reasons* for which the sovereign acts become constitutive of the proper exercise of that authority. This is because, if we interpret the power to create the state as a legal power of representation, the state is the normative result, not factual consequence, of the exercise of the legal power. The distinction discussed in Chapter Two, is that factual powers *cause* certain factual consequences, whereas legal powers bring about legally significant results in non-causal or normative ways.[156] I noted that legal powers are therefore similar to speech acts because there is an intrinsic relation between the doing of the act and the ensuing result. In this instance, to represent the multitude *is* to create the state, which is a "person by fiction", which, as stated above literally does not exist but for the sovereign's representation of it. In other words, it is not possible to separate the act of representing the state by following the relevant fiduciary power-conferring principles from the normative result of constituting the state as a person by fiction. Thus, as with other fiduciary relations, there is an intrinsic relation between

[155] Paul B Miller, "Fiduciary Representation" in Evan J Criddle et al, eds, *Fiduciary Government* (Cambridge, United Kingdom ; Cambridge University Press, 2018) at 38; See also, Martin Loughlin, "Representation and Constitutional Theory" in Carol Harlow, Paul Craig & Richard Rawlings, eds, *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford ; Oxford University Press, 2003) at 54.
[156] Joseph Raz, *Practical Reason and Norms* (Oxford, UK: Oxford University Press, 1999) at 103.

acting for the right reasons, in this instance, acting for the purpose of creating a state protective of liberty and equality, and the ensuing legal result of state creation. Consequently, the reasons for which the sovereign acts are *constitutive of* the state and the sovereign becomes accountable to the reasons for which he acts.

In less abstract terms, we could say that where officeholders act on behalf of their institutional mandates, they likewise are constituting the public institutions to which their offices are attached through the reasons for which they act. So, for example, where the Prime Minister exercises his power of prorogation, the reasons for which he acts does not only constitute the exercise of the power, but constitutes also the institution he acts for (in this instance the Crown), and by extension the wider state apparatus. As such, officials play an important, ongoing role in the constitution of the state through their reasons.

A consequence of my analysis is that state power is humanized. At root the state is made up of a series of representative reasons provided by officials which "introduces human qualities into the picture, including matters of choice, doubt, critique, conscience, error, care, effort and discretion."[157] The state and state institutions are constituted purely by reasons, by claims or arguments about how the exercise of their powers further their legal-order-creating mandates. These reasons, that form the very constitution of the state, can be contested, rejected, debated, by legal subjects and the very foundation of state power rests upon public justification. Furthermore, if reasons are constitutive of office and state, this suggests that dialogue between public institutions and dialogue between officials and the legal subject, are also constitutive of state institutions. This introduces accountability into the very concept of state power as officials must provide reasons for their decisions, both to individual legal subjects and to other institutions (as what happened in *Miller II)*. An institutional consequence of this analysis is that there must exist robust, public, institutional channels of accountability that make such reasons available for review.[158] I return to

[157] Nicole Roughan, "The Official Point of View and the Official Claim to Authority" (2018) 38:2 Oxford J Leg Stud 191 at 212; See also Evan Fox-Decent, "Trust and Authority" in Paul Miller & Matthew Harding, eds, *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, 2020) at 190.
[158] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (Decision-makers cannot justify decisions based on "internal records that were not available to [the affected individual]" at para 21. This suggests there needs to be robust channels of accountability.); See Gerald J Postema, "Trust, Distrust and the Rule of Law" in Paul Miller & Matthew Harding, eds, *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, 2020) (he discusses the importance of institutional accountability at 267-272).

the idea that the supervisory jurisdiction is a precondition to legal order in Chapter Six, section 6.4.2.

Interpreting officials as constituting state institutions also coheres with the common law tradition that actions of state are taken by "real people" because the state is literally constituted by the individual actions of many different individual officeholders. However, where an officer fails to act for the right reasons, the state does not then insist on the validity of those actions but sets them actions aside as invalid. The bad apples, like Boris Johnson, do not rot the fruit basket, whereas the good apples protect the sovereign from its own folly and continue to (re)constitute the institution of the Crown and unify the state through valid representative action. Some of the more obscure or difficult aspects of Crown doctrine also begin to make sense on this office understanding of prerogative powers.

Take for instance, the doctrine that the Queen Can Do No Wrong, which is often mistaken as meaning the Queen is immune from civil suit. However, in the *Case of Alton Woods,* Coke CJ saw the maxim as a reason *in favour of* voiding prerogative action that was used to defeat property rights "by reason of the common law."[159] The maxim, as it relates to judicial review, is a question of legal validity. As noted, to exercise the office of the Crown validly one must have "the will to do right: it is the will to uphold the law… ensuring that right be done by his subjects."[160] In more modern terms, this could simply be interpreted as the best interests or proper purposes requirements – officers of the Crown must act for proper purposes or right reasons, and generally on behalf of all legal subjects by securing their liberty and equality.[161] Where officers of the Crown

[159] *The Case of Alton Woods,* (1600), 1 Co R 40b (KB) at 50a, 53a.; See Mark D Walters, "Is Public Law Ordinary?" (2012) 75:5 Mod L Rev 894 at 901–902.
[160] McLean, *Searching for the State, supra* note 152 at 27.
[161] Another place where humanization could matter to Crown doctrine is the Indigenous peoples – Crown fiduciary relationship. In *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 the court recognised the "honour of the Crown" as an unwritten constitutional principle gives rise to a "duty to consult and accommodate" where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. As noted by Richard Stacey, "Honour in sovereignty: Can Crown consultation with Indigenous peoples erase Canada's sovereignty deficit?" 2018 68(3) UTLJ 405, the theoretical basis for this doctrine is unclear, as the court was deliberately trying to move away from the fiduciary relationship model (*ibid* at 413). However, the view offered in this thesis is that a fiduciary relationship relies less on the ascertainment of a particular right, but instead requires ongoing accountability and justification in the personation of the beneficiary's interests. As such it is possible to understand the duty to consult as an aspect of a fiduciary relationship, if such a framework were to be considered desirable.

act for right reasons they constitute the Crown as the kind of institution it wishes to be, one that is honourable, virtuous, and directed towards the good of its subjects.[162]

Conclusion

In conclusion, *Miller II* marks a significant turning point for prerogative powers in English law. The case supports the view that prerogative powers are not a residue of discretionary power, as Dicey supposed, but are legal powers held by an aggregate of officers who represent the Crown in its official capacity. By this I mean they represent the purposes of the Crown as an institution, in particular, the securing of liberty and equality of all subjects. This explains why, since *Miller II*, the court views the source of prerogative authority as coming from the reasons for which the officer acted, as opposed to from specific historical authorization. However, given there was no legal subject that had any specific interest at stake, I noted that the reasonable justification requirement must answer to an important institutional purpose.

Drawing on Hobbes and my analysis of the intrinsic relation between act and result made in Chapter Two, I argued that reasons are institutionally important because the reasons of individual officials actually constitute the state institutions they represent. The Crown, and other institutions, have a legitimate interest in acquiring or knowing the reasons for which officers act because officers represent public institutions. Furthermore, *Miller II* demonstrates that unwritten power-conferring principles constitute unqualified discretionary powers as legal authority and the kinds of institutional consequences that follow. In particular, the importance of reasons to the constitution of prerogative power suggests that institutional channels of accountability, such as the supervisory jurisdiction, are preconditions of state constitution. I turn to this argument further in the next chapter. I also consider how the arguments presented in Chapters Four through Five explain the legitimacy of judicial review. I also argue that the court can be interpreted as a jurisdiction with parallels to the court's supervisory jurisdiction over trusts.

[162] Farrah Ahmed, "The Delegation Theory of Judicial Review" (2021) 84:4 Mod L Rev 772 at 781–782; Condren, *supra* note 39 at 121.

Chapter 6

6. The Nature, Form and Legitimacy of the Supervisory Jurisdiction

Prologue

In this chapter I argue that the supervisory jurisdiction in public law, like the supervisory jurisdiction over trusts administration (SJTA), ensures the smooth and seamless execution of public administration. In judicial review, the aim is not to vindicate claim-rights, but to vindicate the rule of law and good administration by setting aside decisions that do not sufficiently recognise the interests of legal subjects or the purposes of statutory regimes. Furthermore, as noted in Chapter Four, the practice of judicial review, like judicial review of trustee discretion, sets the requirements that ensures public administration is properly administered, thereby enabling public administrators to properly exercise their authority. Resultantly, judicial review may have a quasi-administrative form like that of the SJTA. I present evidence in this chapter that supports such an interpretation.

Introduction

This chapter argues that the supervisory jurisdiction in public law and Equity is a unique kind of adjudication that aims to secure and restore the integrity of trusts administration and public administration respectively. This aim calls for a unique adjudicative set-up, which we saw in Chapter Three in the context of trusts law, involves the court holding a quasi-administrative and facilitative jurisdiction. This conclusion is in tension with Lon Fuller's findings that the form of adjudication is inherently adversarial, bilateral and retrospective. However, Fuller's findings were based on the contention that the presentation of proof and argument must be converted to claims of right and accusations of wrongdoing. Yet in the supervisory jurisdiction, I argue in this chapter, arguments are presented in the form of claims of legitimate authority by the public administrator and claims of recognition by the legal subject.

As argued throughout this thesis, a claim to legitimate administrative authority rests on the adequacy of the reasons or justifications public official's advance for the exercise of their powers. These claims are already in the form of proof and reasoned argument and thus do not need

to be, nor should they be, "converted"[1] into self-regarding claims of right. Adjudication hosts a space for the public official to be answerable to their account of the legal subject's interests and a space in which the legal subject can claim they do not recognise that their interests were taken seriously in the official's purported claim. The court thus vindicates "the rule of law and good administration"[2] by restoring a relationship of trust so that the legal subject upon redetermination will receive the recognition, and hopefully benefit, he wishes. Another way the practice of judicial review over administrative action secures good administration is by articulating the power-conferring principles that enable us to know when a given exercise of power has been properly administered. The doctrines of review therefore assist public administrators by making it possible for them to administer their regulatory schemes according to law and enabling them to bring about normative changes in the position of the legal subject.

Consequently, the formal properties of public law adjudication may more closely resemble those of the SJTA. For instance, the judge may need to be made aware of the intersecting classes of beneficiaries and ought to hold flexible remedial discretion to assist in securing good public administration. To suggest this kind of quasi-administrative role for the court goes against our usual understandings of judicial review. It is curious, however, that we are willing to accept a blurring of functions in the administrative state itself,[3] but we are often not willing to accept a similar blurring of functions when it comes to the role of the court. We accept William Robson's comment that "administrators judge" but reject his correlative proposition that "judges administer."[4] However, recent doctrinal and remedial changes to judicial review, as well as more traditional but overlooked aspects of the public law form, suggest there is a quasi-administrative form emerging. In the third section of this chapter, I thus analyze the ways in which we can observe a growing quasi-administrative function for the court, noting particularly the rise in remedial flexibility, including advisory and prospective remedies, and the rise in court managerialism.

In the final section I bring together the arguments made in this chapter as well as from Chapters Four and Five to argue the supervisory jurisdiction cannot be excluded for two reasons: (i) judicial

[1] Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 at 369.
[2] Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge: Cambridge University Press, 2010) at 32.
[3] Mary Liston, "Bringing the Mixed Constitution Back in" (2021) 30 Constit Forum Constit 9.
[4] William A Robson, *Justice and Administrative Law; A study of the British Constitution.* (London: Stevens, 1951) at 5.

review's jurisgenerative nature creates the conditions of public authority and secures the integrity of public administration and (ii) judicial review creates a legal order based on trust and to exclude review removes the power-conferring principles that make that trust relationship possible.

6.1. Theories of Adjudication

6.1.1. Fuller's Theory of Adversarial, Private Law Adjudication

In Fuller's influential article "The Forms and Limits of Adjudication,"[5] Fuller argues adjudication is a distinct kind of social ordering that enables people to regulate their relations to one another.[6] He compared adjudication with two other social orderings – relationships of reciprocity and relationships of common aim, and argues each social ordering has its own distinct mode of participation.[7] Contract, he claims, is a formal expression of a "relationship of reciprocity", and its mode of participation is negotiation.[8] Elections are a formal expression of a "relationship of common aim", and its mode of participation is voting.[9] He argues adjudication is a social ordering and its mode of participation is the presentation of proofs and reasoned arguments.[10] Fuller is not explicit about whether adjudication is the formal expression of a relationship of reciprocity, common aim, or some other relationship.[11]

On the one hand Fuller argues that disputants and courts participate in articulating shared purposes, suggesting adjudication is a relationship of common aim.[12] Adjudication is only possible in a rule of law world, meaning a world where there are shared legal principles, standards of decisions and a community.[13] Adjudication is thus a mode of participating in this presupposed discourse and regulates human affairs within a community.[14] On the other hand, Fuller argues that adjudication primarily concerns relationships of reciprocity, although he provides little explanation for this assumption.[15] The assumption arises, I believe, from a common law bias that

[5] Fuller, "Forms and Limits", *supra* note 1.
[6] *Ibid* at 357.
[7] *Ibid* at 357–363.
[8] *Ibid* at 363.
[9] *Ibid*.
[10] *Ibid* at 365.
[11] *Ibid* at 363.
[12] *Ibid* at 378.
[13] *Ibid* at 374, 377–378.
[14] *Ibid* at 374.
[15] *Ibid* at 386 and 387.

court's adjudicate bilateral, private law relationships, as opposed to other kinds of legal relationships.[16] This also leads him to interpret the 'presentation of proof and reasoned arguments' narrowly. For instance, he implicitly assumes the presentation of proofs and arguments must only include two bilateral adversarial sides.[17] The assumption leads him to argue that the presentation of proof and arguments must be converted to claims of right and accusations of guilt,[18] which in turn leads him to limit adjudication to a bipartisan right-remedy corrective justice model.

He therefore argues that adjudication must be adversarial because in order to make the best decision, the judge must hear partisan arguments.[19] The case must involve live issues ruling out moot issues and, interestingly for judicial review, declaratory judgments.[20] The case must be party-initiated rather than initiated or managed by a judge.[21] And the process leading to and reasons for judicial decisions must be congruent**,** meaning, the final judgment must represent the case the parties laid before the judge,[22] limiting the judge's ability to fact-find or call-in outsiders or intervenors.[23] The decision must also be retrospective, correcting breaches of obligation that occurred in the past. Fuller argues this is because parties only represent themselves,[24] and thus courts do not hear all the perspectives necessary to engage prospective remedies or polycentric decision-making.[25]

After outlining these formal features, Fuller concludes the structure of adjudication is unsuitable to resolving polycentric issues. Fuller described polycentricity as problems that involve webs of interdependent relationships.[26] If one pulls upon a string in the web, by adjudicating upon one bilateral relationship, a whole host of unpredictable consequences may occur. This is because the judge is only informed by the litigants, who's views are limited by their own perspectives, and

[16] See, *ibid* at 368–370.
[17] Fuller never explicitly states there must only be two people, but his language suggests he presumed as much, Fuller, "Forms and Limits", *supra* note 1, "both sides" at 365, "both of the litigants" at 382 and more broadly the bilateral set-up of "claims of rights" and "accusations of wrong" throughout.
[18] *Ibid* at 369.
[19] *Ibid* at 384.
[20] *Ibid* at 392.
[21] *Ibid* at 385–387.
[22] *Ibid* at 388–391.
[23] *Ibid* at 383.
[24] *Ibid* at 392.
[25] *Ibid*.
[26] *Ibid* at 395.

will not be exposed to ample dialogue to be adequately informed of all the issues and repercussions.[27]

However, bilateral adversarialism is not necessarily a form of adjudication in and of itself, but is arguably a consequence of the bilateral relationship of reciprocity being adjudicated (such as would be the case in contract or tort). Public law and trusts law, however, arguably adjudicate complex, multilateral relationships affecting the interests of many different classes of legal subjects or beneficiaries.[28] If courts adjudicate multilateral relationships, then for the judge to make the best, impartial decision, this requires her to listen to multiple arguments, and be equipped with methodologies to manage intersecting issues. From this perspective perhaps inquisitorial methods are not to be feared but actually required to facilitate Fuller's vision of adjudication as the presentation of proof and argument.[29] There is also a curious contradiction between Fuller's argument that adjudication should be retrospective and Fuller's view that decisions should be able to regulate the future conduct of parties.[30] His latter point implies that there could be, in the right circumstances, space for ongoing, forward-facing remedies that enable the ongoing regulation and revision of interpersonal relations. This preference towards retrospectivity is perhaps based on the view that courts primarily correct wrongs, and on top of that, an assumption that the remedy is fused to the right.[31] However this latter assumption, even within the context of private law, is disputable.[32]

Crucially Fuller's claim that reasoned argument must be translated to claims of right causes him to dismiss both equity and public law as suitable for adjudication. He says the courts of Equity

---

[27] JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Oxford University Press, 2000) at 193.
[28] Modified from Abram Chayes, "The Role of the Judge in Public Law Litigation" (1975) 89 Harv L Rev 1281 at 1284.
[29] Allison, *supra* note 27 at 206; For instance, see the suggestion by Lord Woolf for an equivalent of the Director of Public Prosecutions in judicial review (Director of Civil Proceedings) Sir Harry Woolf, "Public Law-Private Law: Why the Divide? A Personal View" (1986) PL 220 at 235–6; Sir Harry Woolf, *Protection of the Public: A New Challenge*, Hamlyn lectures 41st ser (London: Stevens & Sons, 1990) (the Director would be "responsible for providing arguments to assist the court … in those cases where in his view the issues were such that inter partes argument might not adequately draw attention to the broader issues" at 110).
[30] Fuller, "Forms and Limits", *supra* note 1 at 357.
[31] Brice Dickson, "The Contribution of Lord Diplock to the General Law of Contract" (1989) 9 Oxford J Leg Stud 441 at 448.
[32] Those who subscribe to the "civil recourse theory" of tort law have misgivings about the corrective justice model where the right and remedy are seen as fused, see Benjamin Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 Geo L J 695 (One of Zipursky's concerns is the secondary duty to repair, ibid at 700, 704, 738-739).

are merely discretionary, and administrative law involves privileges, not rights.[33] We already considered the latter argument in Chapter Four with regards to Justice Cartwright's minority judgment in *Roncarelli*. The rights-privilege argument problematically suggests that, absent a specific right, legal powers are not constituted by any law, principle, or rule.[34] Given Fuller's broader theory of law, particularly his claim that law is itself a "moral power"[35] constituted by the rule of law, this argument is tendentious. Furthermore, it is problematic that the theory fails to explain two significant areas of law[36] (trusts law and administrative law) and fails to create space for the reality that courts do engage in polycentric decision-making. At the time Fuller was writing, there was already a blooming administrative role for courts in what Abram Chayes called 'public law litigation'.

6.1.2. Public Law Litigation: Abram Chayes' Challenge to Fuller

At the time Fuller wrote "The Forms and Limits of Adjudication", the role of the judiciary in American constitutional and public law litigation was shifting. This was primarily due to the assertion of equitable jurisdiction in public law litigation.[37] In particular there was the rise of the structural injunction, popular in the 1950s through 1990s, which enables courts to monitor and revise the ongoing implementation of statutory policies, such as those involving desegregation or social housing schemes.[38] The development of these quasi-administrative remedies in US law, and other noticeable shifts, spurred Abram Chayes' famous article, partially responding to Fuller, outlining the form of "public law litigation" in contrast to "private law litigation."[39] In private law litigation, as Fuller's arguments suggested, the judge is a passive arbiter, resolving a party-

[33] Fuller, "Forms and Limits", *supra* note 1 at 370.
[34] Fuller, "Forms and Limits", *supra* note 1 ("[A] decision denying admission to the bar need not be supported by any general principle" at 370).
[35] Lon L Fuller, "American Legal Philosophy at Mid-Century" (1954) 6:4 J Leg Educ 457 at 462; Lon L Fuller, *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1969) ("the power of law" at 155).
[36] Stephen A Smith, *Contract Theory* (Oxford, UK: Oxford University Press, 2004) at 18.
[37] For an overview of the development of equitable jurisdiction in public law, see Riley Keenan, Living Equity, 2022, Ala L Rev, Forthcoming, online: <dx.doi.org/10.2139/ssrn.4011398>
[38] For an overview, see Robert E Easton, "The Dual Role of the Structural Injunction" (1990) 99:8 Yale LJ 1983 at 1983–1984 and the cases cited therein; Allison, *supra* note 27 (Allison notes Fuller said the desegregation cases of the 1950s-1960s were a "serious moral drain on the integrity of adjudication" at 198).; *Brown v. Plata*, 563 U.S. 493, 502–10 (2011)
[39] Chayes, "Public Law Litigation", *supra* note 28; For a discussion and argument concerning the development of a distinct public law, see The Right Honourable Lord Woolf of Barnes, "Droit Public - English Style" (1995) PL 57.

initiated, bipolar dispute. The court retrospectively corrects breaches of obligations and assures pre-existing rights through recognizing a secondary right to compensation.[40]

However, public law litigation, involves "sprawling interests"[41] as opposed to fixed rights, and these interests are usually represented by one party through either a class action lawsuit or public interest standing.[42] The judge is active and managerial, calling upon a "wide range of outsiders"[43] to present information to assist the court (such as an amicus curiae and intervenors).[44] Fact-finding is thus predictive and prospective,[45] with broader ramifications of decisions and remedies considered and the court determines future interactions and adjusts future behaviour.[46] The right and remedy are not inevitably tied, enabling judicial remedial discretion, structural injunctions, and non-coercive declaratory remedies.[47] The ability to fashion these ongoing, supervisory remedies in the form of schemes is not all that dissimilar from the court's supervisory role over trusts.

Comparatively with trusts law's concern for the integrity of trust administration, including a concern for the best interests of the beneficiaries, the American scholars of the 1970's interpreted the court's concerns in public law litigation as assuring the "fair representation for all affected interests."[48] The purpose of public law is to ensure that decision-makers consider the interests of all classes of legal subjects to vindicate the good administration of statutory policy, rather than the vindication of rights.[49] Chayes' analysis of public litigation is dated and has always applied more obviously to administrative agencies themselves, rather than to what courts do upon judicial review. However, in section 6.3 below, I argue the policy of deference in Canadian law is shifting the public law form towards something recognisable as a distinct quasi-administrative 'public law adjudication'. Before I do so, I outline the form adjudication takes when adjudicating relations of trust.

---

[40] Chayes, "Public Law Litigation", *supra* note 28 at 1282–1283.
[41] *Ibid* at 1292.
[42] *Ibid* at 1289–1291.
[43] *Ibid* at 1284.
[44] *Ibid* at 1290.
[45] *Ibid* at 1296.
[46] *Ibid* at 1298.
[47] *Ibid* at 1293.
[48] Richard Stewart, "The Reformation of American Administrative Law" (1975) 88:8 Harv L Rev 1667 at 1712.
[49] Chayes, "Public Law Litigation", *supra* note 28 at 1284, 1295, 1302.

6.2. Adjudicating a Relationship of Trust in the Public Law Context

6.2.1. Claims of Legitimate Authority

In my view, the supervisory jurisdiction works somewhere between the public law litigation explained by Chayes and the private law litigation explained by Fuller. The reason Equity and public law are not suitable for Fuller's version of adjudication is because these areas of law are not primarily concerned with Hohfeldian right-obligation relationships, but with power-liability relationships. Both Equity and public law are intervening to regulate the proper use of *legal powers* and ask whether the normative position of the beneficiary or legal subject has been validly changed. Many of the original doctrines of administrative law, such as improper purposes, relevant/irrelevant considerations, the no fettering and no delegation rules are all concerned with governing the proper exercise of public power and ensuring that decision-makers act according to law.[50]

Consequently, the public official or trustee is not converting their arguments into claims of right, but into claims of legitimate authority; ("I have the power to do X.") In public law, particularly Canadian administrative law, these claims to legitimate authority are made not by pointing to statutory authorization, but by explaining why the decision is reasonable. In other words, authority is not a positivist source-based notion, but is an argument – a justification.[51] As Stacey persuasively argues, a commitment to the rule of law, properly understood, requires a respect for the legal subject's "moral autonomy and [their] capacity to reason."[52] This normative commitment to the legal subject's capacity to reason thereby requires that officials explain and persuade the legal subject that any infringement of a right or constitutional principle is "congruent with constitutional values."[53] Moreover, that argument or justification must be interpretable as

[50] Evan Fox-Decent, "Constitution of Equity" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *The Philosophical Foundations of the Law of Equity* (Oxford, New York: Oxford University Press, 2020) at 131.
[51] Nicole Roughan, "The Official Point of View and the Official Claim to Authority" (2018) 38:2 Oxford J Leg Stud 191.
[52] Richard Stacey, "A Service Conception of the Constitution: Authority, Justification and the Rule of Law in Proportionality Jurisprudence" (2019) 9 Const Ct Rev 219 at 239.
[53] *Ibid* at 240.

taking seriously the interests of the legal subject.[54] In trusts law, the claims to legitimate authority are similarly made by demonstrating that the fiduciary acted with the right motives.

Furthermore, reasons are not simply a method of accountability for a decision taken, in the past tense, but form the basis of the action's validity in the present tense.[55] In other words, the presentation of reasons or arguments explaining why action takes seriously the legal subject's interests, is part and parcel of an exercise of a legal power. Thus, the court reviews claims to legitimate authority that are already in the format of an argument, rather than adjudicates disputes converted into claims of right. Given the claim to legitimacy is already an argument based on principle (or it should be) there is no need to convert to any claim of right. This is why Canadian law no longer supplements reasons which would turn poor reasons into legitimate ones,[56] and why Tribunal standing is restricted.[57] As I will explain further below, even when entering adjudication, public agencies necessarily act on behalf of the public interest because they do not have self-regarding interests in the ordinary private law sense. Likewise, when trustees access the supervisory jurisdiction, they too must act on behalf of the trust estate and on behalf of the institutional mandate to secure the smooth and seamless administration of trusts (see Chapter Three, 3.3.3.)

Thus, an important distinction between a claim of right and claim of legitimacy is *why* a reasoned argument is important. In a claim of right, you show you have a pre-existing right, or prove a wrong, through reasoned argument. In a claim of authority, the reasoned argument itself is the source of your authority and its legitimacy; it is through properly explaining and being answerable to the liability-subject that you both make a claim, and become an instance of, legitimate authority.

---

[54] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 135 [*Vavilov*].
[55] See Chapter 4.3.1.
[56] *Vavilov, supra* note 54 at para 95-96.
[57] *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44; Laverne A Jacobs & Thomas S Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002) 81:3 Can Bar Rev; Christine Hickey, "Reasons First: Post-Vavilov Considerations for Tribunal Participation on Judicial Review or Appeal" (2022) 35:1 Cad J Admin L & Prac 103.

6.2.2. Claims of Recognition

Before turning to public law, it is perhaps worth reiterating why judicial review over trustee discretion involves no claims of right or accusations of wrongdoing.[58] While beneficiaries of bare trusts could be understood to have proprietary claim-rights, in most trusts, the interests of the beneficiaries are unfixed. Instead, beneficiaries hold a power to access the supervisory jurisdiction and need only demonstrate an interest to access the court. The beneficiary is seeking a remedy to restore the trust, as a whole, back to good administrative order,[59] possibly because either he will or hopes to receive a benefit, but not because he has aims to vindicate his property rights per se (the trustee rather than the beneficiary is the legal owner).[60]

This is one reason why trust remedies focus upon curing or preventing maladministration. The integrity of trust administration, as the goal of supervision, calls for flexible, systemic, and prospective remedies that restore and maintain the workings of the trust fund. These include, for instance, advising trustee's upon whether the exercise of a power is legal, removing trustees, holding inquisitorial powers, and the ability to make and supervise the implementation of schemes of distribution.[61] Furthermore, there is not necessarily any need for the trustee to be accused of any 'guilt' or misconduct because the goal is to vindicate the proper administration of the trust rather than to vindicate a specific right. The trustee is oftentimes approached benevolently by the court and is able to access the court for assistance. The supervisory jurisdiction over trusts is thus a distinct kind of adjudication that does not fit the form of adjudication that Fuller expounded.

The supervisory jurisdiction in public law shares many of these features. Legal subjects hold a power to access the supervisory jurisdiction to set aside decisions they do not believe represents their interests. According to the standing rules, legal subjects "may apply" for judicial review if they have been "directly affected by the matter in respect of which relief is sought."[62] Aside from human rights adjudications, legal subjects need not be asserting any claim of right –

[58] See Chapter 3.2.3. the text accompanying notes 169-180
[59] *Ex p Adamson,* (1878), 8 Ch D 807 at 819.
[60] Richard Nolan, "Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures" in Paul S Davies & James Penner, eds, *Equity, Trusts and Commerce* (London: Bloomsbury Publishing PLC, 2017) at 174–175.
[61] *Pitt v Holt and Futter v Futter*, 2013 UKSC 26, [2013] 2 AC 108 at para 91 [*Pitt v Holt (SC)*].
[62] *Federal Courts Act* RSC, 1985 c. F-7, s 18.1(1) ("an application for judicial review *may be made*")

they need only hold an interest to access the supervisory jurisdiction. As was said in *AXA General Insurance Limited v. Lord Advocate*,

> [Judicial Review] is not brought to vindicate a right vested in the applicant, but to request the court to supervise the actings of a public authority so as to ensure that it exercises its functions in accordance with the law."[63]

In *AXA*, the court considered whether applicants to the Scottish Court of Session needed to demonstrate an individual right to access the supervisory jurisdiction. The court categorically rejected that view, holding that a rights-based approach is "incompatible with the performance of the courts' function of preserving the rule of law."[64] Lord Reed noted that judicial review is "an *ex parte* application addressed to the court" and thus "an applicant for judicial review, unlike the pursuer in an ordinary action, does not need to assert any right to a remedy."[65] The remedy is granted to protect the public's interest in the proper exercise of public authority and to vindicate good administration. This also splits the remedy from the rights, which in theory enables more remedial flexibility (see section 6.3.1. below).

Given the purpose of judicial review is to vindicate good administration, and there is no need for the applicant to hold any claim-right, legal subjects are sometimes empowered to set aside governmental actions in the public interest.[66] Public interest standing started with the *Federation* case[67] in which Lord Diplock argued,

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."[68]

---

[63] *AXA General Insurance Limited v Lord Advocate*, [2011] UKSC 46 at para 159, Lord Reed (emphasis added). See also ibid at para 169 [*AXA*].
[64] *Ibid* at para 169.
[65] *Ibid* at para 162.
[66] Peter Cane, "Standing up for the Public" (1995) 276 PL at 266.
[67] *R v Inland Revenue Commissioners, Ex p National Federation of Self Employed and Small Businesses Ltd*, [1982] AC 617 [*Federation*] Prior to this the view was that only the Attorney General could represent the public, see ; *Gouriet v Union of Post Office Workers*, 1978 AC 435 at 477.
[68] *Federation*, *supra* note 67 at 644, Lord Diplock.

Likewise in Canada there has been a relaxation on the application of the three-part test for public interest standing[69] following a general pattern of relaxation throughout the commonwealth.[70]

Furthermore, the public official is not being accused of guilt by the legal subject, but is petitioned to explain the use of power ("why do you have the power to do X?"). Put differently, when legal subjects petition for judicial review, they too are making a claim, or perhaps are posing a question. To borrow and amend David Dyzenhaus' illuminating words, the official must sufficiently be able to answer the legal subject's question: "but how is that decision for me", meaning, how does it take seriously my/our interests?[71] Adjudication hosts a space for the public official to answer that question, particularly where that question has already been inadequately answered by poor or absent reasons. We could call this a claim of recognition.

Judicial review therefore enables individuals, or those who stand for the public interest or sections of the public, to contest the administrator's claim to legitimate authority and hold the administrator to account. Often when we think of accountability, we may think of a response to a wrongdoing, which implies an accusation of guilt. However, Judith Butler argues persuasively that we do not only account to people when we fear blame or punishment, but we account to others when we answer the question "who are you?"[72] To give an account is to "make myself recognisable" to others by narrating who I am within a world of shared norms.[73] However, the fiduciary is not giving an account of herself, but making recognizable, through representation, an account of the beneficiary. The fiduciary's reasons must respond to the submissions provided by the legal subject and represent the voice of the legal subject. Only by responding to the legal subject's interests and submissions can the official be said to be acting *for* the subject in an agential fashion. The official also arguably makes recognizable the kind of legal person the state is when she represents a public institution.

---

[69] *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, 2012 SCC 45 (The test is [1] is there a serious justiciable issue raised [2] does the plaintiff have a real stake or genuine interest and [3] is this suit a reasonable and effective means of bringing the issue to court? ibid at para 2).
[70] See Elizabeth O'Loughlin, "Decolonising Jurisprudence: Public Interest Standing in New Constitutional Orders" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Oxford UK ; Portland, Oregon: Hart Publishing, 2018).
[71] David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge, UK: Cambridge University Press, 2022) (Dyzenhaus phrases the question as 'But, how can that be law for me?").
[72] Judith Butler, *Giving an Account of Oneself*, 1st ed (New York: Fordham University Press, 2005) at 10–15.
[73] *Ibid* at 35.

In making her account, the fiduciary's arguments will often draw not only upon the submissions made by the parties but "the resources of legal principle"[74] and upon other shared normative commitments within a polity.[75] For instance, officials may rely upon a normative commitment to democracy to argue a statutory utterance holds a particular weight or to justify an infringement of a right.[76] The weight that statute has is also informed by shared principles of statutory interpretation. One important shared commitment or "interactional expectancy"[77] is that law itself holds the normative and moral power to actually change the position of legal subjects.[78] Arguments must seek to justify law's legitimacy to answer the legal subject's question "But how can that law be for me?"[79] The legal subject thus holds an interactional and legal expectation that law should be *for* them, meaning they expect the power of law to be other-regarding in nature and thus exercised in their interests. Legal subjects also expect that only the laws or decisions that they can interpret as seriously considering their interests will govern their conduct.[80] As such, there is less a rule of recognition and more a community of "mutual recognition"[81] – the legal subject recognises the legality of the power where the official has in turn recognised her interests when exercising his power. When legal subjects challenge the official's claim to legitimacy, legal subjects are essentially saying "that decision does not represent who I am; show me how it can be interpretable as such."

6.2.3. A Relationship of Accountability

To reiterate, supervision, as one type of adjudication, adjudicates other-regarding power – liability relationships in order to secure the integrity of trust administration and public administration. The primary form of this adjudication is not claims of right and accusations of wrongdoing, but claims of legitimate authority and claims of recognition. As noted above, Fuller never made clear whether adjudication was a relationship of common aim or a relationship of reciprocity. In my view, claims of legitimate authority and claims of recognition are not so much

[74] Dyzenhaus, *Long Arc, supra* note 71 at 26.
[75] Fuller, "Forms and Limits", *supra* note 1 at 372–381; Stacey, "A Service Conception", *supra* note 52 at 240.
[76] Stacey, "A Service Conception", *supra* note 52.
[77] Lon L Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 9–10.
[78] Stephen Perry, "Law and Obligation" (2005) 50 Am J Juris 266 at 266–276.
[79] Dyzenhaus, *Long Arc, supra* note 71.
[80] Fuller, *Morality of Law, supra* note 35 at 217–219.
[81] Gerald J Postema, "Fidelity in Law's Commonwealth" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) at 25.

indicative of a relationship of common aim, nor a relationship of reciprocity. Instead these claims are indicative of a relationship of accountability, in which the official is to provide an account of how her power tracks the interests of the subject and the subject is entitled to object if she believes it does not.[82] Furthermore, a relationship of trust itself is also a relationship of accountability because accountability is inherent to the very idea of a relationship of trust. This is because the fiduciary is answerable to the reasons or motives for which she acts and/or she must advance a reasoned justification. Thus, both supervision and relationships of trust, as relationships of accountability, are given their expression in the presentation of reasoned argument.

The idea that adjudication is a formal expression of a relationship of accountability is, perhaps, wide enough to include both private and public law litigation. Claims of right and accusations of wrong, based on right-obligation relationships, are a form of accountability because individuals are holding each other answerable to the promises they made and to the reciprocal limits on conduct. This kind of adjudication therefore vindicates a right and repairs a harm caused by the breach of a determinable obligation. However, when adjudicating a relationship of trust, where accountability is already present, adjudication hosts a space for the public official to be answerable to their account of the legal subject. Adjudication here secures the ongoing integrity and constitution of public authority, *and* public institutions, by ensuring all interests are properly recognised.

The fact both adjudication and relationships of trust share the same social ordering (a relationship of accountability) implies that, contra. Fuller, public law and equity are uniquely suited to adjudication, not uniquely absent from it. More than just suitability, the fact that accountability or answerability is fundamental to the proper exercise of an official's legal and moral authority suggests that adjudication, as a space of answerability, is non-negotiable. I come back to the idea that judicial review is non-negotiable and hence cannot be excluded below in section 6.4.

6.2.4. Securing the Integrity of Public Administration

I suggested in the previous section that the overarching purpose of judicial review is to secure the integrity of public administration. Such a role arguably emerges from the fact judicial review

[82] Postema, "Fidelity", *supra* note 81 (for an argument that law is a reciprocal relationship of accountability).

presupposes the power-conferring principles that produce legal validity. Power-conferring principles instruct administrators on how to produce valid exercises of normative power, thereby making it possible for them to execute their statutory mandates with authority, as opposed to by might. Thus, on the power-conferring view of administrative law, the aims of the court and the administrative state overlap in the sense that all parties are concerned with upholding high standards of public administration.

Case law supports the view that *all* parties to judicial review work towards a common shared purpose of vindicating good public administration. In the landmark case *Huddleston,*[83] the court developed what is known as the 'duty of candour', in which government bodies and their counsel are required to cooperate with the court, providing all relevant information about the case, the record and the decision-making process.[84] *Huddleston* concerned a rejection of an immigration application to study, and the council had refused to disclose their reasons for the decision as part of the judicial review process. The court held that the government must make "full and fair disclosure" to the court and held that this duty of candour was based on the principle that the government and court hold a "common aim, namely the maintenance of the highest standards of public administration."[85] The duty of candour, in a sense, follows from the fact judicial review is not concerned with claims of right, as in private law litigation, but with claims of legitimate authority, which should already be furthering the public interest:

> "[P]ublic authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law."[86]

Counsel and the public agency or the Attorney General must therefore present their case "dispassionately and in the public interest."[87] This framing of judicial review essentially tries to eliminate adversarialism, at least on the part of the public authority. This perhaps suggests judicial

[83] *R v Lancashire CC Ex p Huddleston*, [1986] 2 All ER 941 [*Huddleston*].
[84] *Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd*, [2002] EWCA Civ 1409 [*Quark*].
[85] *Huddleston, supra* note 83 at 945.
[86] *(Hoareau) v Secretary of State for Foreign and Commonwealth Affairs*, [2018] EWHC 1508 (Admin) at para 20; *R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office*, [2001] QB 1067 [*Bancoult CA*] (there is "a high tradition of cooperation between the executive and the judiciary in the doing of justice, and upholding the rule of law" at para 63).
[87] *Re Application by Brenda Downes for Judicial Review*, [2006] NIQB 77 at para 31.

review is asking a far more collaborative or inquisitorial question, as opposed to an adversarial one, geared towards discovering misadministration. An inquisitorial jurisdiction, to borrow John Allison's framework, is a "collaborative expert investigation" that involves a "responsible and purposive interaction"[88] between the parties, in this case, the courts, public actors, and arguably also legal subjects. Public interest applicants often intervene to provide alternative, important information to the judge about the broader ramifications of the case, assisting in this expert investigation. Even where the legal subject stands for herself, technically the Crown "lends its prerogative" to individuals to act *ex parte* to "ensure good and lawful government."[89] Thus in one way or another, all parties to judicial review are attempting to remedy misadministration and secure a high standard of public administration.

The "mutual respect and trust"[90] between the court and Crown was also noted by Lord Woolf in *M v. Home Office*. In this case, the court had to decide whether they could issue a contempt against the Home Secretary. The Home Secretary deported M in violation of an injunction order to return M back to England to complete a judicial review of his denied asylum claim. In making his decision, Lord Woolf generally seemed to understand judicial review as reflecting a relation of trust finding that "the Crown's relationship with the courts does not depend on coercion."[91] Thus, a declaration of contempt would suffice; "the object of the exercise is not so much to punish an individual as to vindicate the rule of law by a finding of contempt.[92]

M v Home Office brings our attention to the fact that judicial review is not primarily a coercive remedy that attempts to punish a wrong. Instead, judicial review involves an ongoing and non-partisan partnership between the courts and Crown, one geared towards pursuing the common aim of securing good lawful government. Judicial review acts as a "site of interaction"[93] between claims of authority by officials and claims of recognition by legal subjects.[94] Or put differently,

---

[88] Allison, *supra* note 27 at 205.
[89] Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012) at 116; Farrah Ahmed, "The Delegation Theory of Judicial Review" (2021) 84:4 Mod L Rev 772 at 802.
[90] *M v Home Office*, [1993] 3 WLR 433 Stephen Richards, Richard Gordon and Stuart Catchpole in arguendo.
[91] *Ibid* at 425B, Lord Woolf.
[92] *Ibid* at 425H-426A.
[93] Kate Glover, "The Supreme Court in a Pluralistic World: Four Readings of a Reference Democracy, Federalism, and Rule of Law: The Senate Reference Revisited" (2014) 60:4 McGill LJ 839 at 873–874.
[94] Anthony Simon Laden, "The Authority of Civic Citizens" in James Tully, ed, *On Global Citizenship: James Tully in Dialogue* (London: Bloomsbury, 2014).

review is an "inter-institutional meeting point,"[95] to collaboratively investigate what qualifies as a 'reasonable' decision, and whether that decision takes seriously the interests of those subject to the power.

Presentations of proof and argument are therefore aimed around asking what it means to exercise a power on behalf of the public and the conditions of public authority. In adjudicating these matters, the judge needs to be made aware of the intersecting classes of beneficiaries and the public interest to make any informed decision. A "collaborative expert investigation" means the adjudicator must consider the parties arguments and "consider the possible complex repercussions neglected by [the applicants] and affecting others."[96] She must have the tools, therefore, to effectively supervise the trust relationship and those tools can be, and should be, different from the adjudication of private rights and obligations. The judge needs to hold managerial powers to draw in an amicus curiae, intervenors, and other public bodies to ensure the public interest is properly vindicated. Likewise, she needs to have a flexible remedial discretion to fashion ad hoc and prospective remedies that determine future interactions, and work alongside the public administrators and legislators attempting to execute statutory policy.

We can observe judicial review shifting towards such a form in recent years, embracing remedial discretion and a kind of quasi-administrative jurisdiction similar to the kind we see in trusts law. In the next section, I first note that Canadian law's move to review *intra vires* questions of law on a standard of reasonableness has paved the way for greater remedial discretion. I then discuss remedies the court can grant and analyze how remedial flexibility has carved some quasi-administrative functions for the court. Finally, I note the rise in court managerialism enables the court to manage 'polycentric' cases with multiple intersecting issues.

[95] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, UK: Cambridge University Press, 2009) at 409.
[96] Allison, *supra* note 27 at 206.

6.3. The Quasi-Administrative Nature of Judicial Review

6.3.1. The Legitimacy of *Intra Vires* Review and the Liberation of Remedial Discretion

As I noted in Chapter Three, Canadian law and English law took different routes on the question of tribunal determinations of law. In *Anisminic*[97] the UK House of Lords held that all questions of law are to be interpreted as jurisdictional questions. *Anisminic* thus interprets all judicial review as a question of legality, a question of the *scope* of the power. By contrast, Canadian law takes the approach that all review outside of procedural fairness is substantive review, and almost all questions of law or discretion are intra-jurisdictional questions of substance. The key question is therefore whether adequate reasons have been given for the exercise of public powers. The distinction between *Anisminic* and *CUPE* is important for our purposes here because a policy of deference generates a quasi-administrative function for the courts. This is because, as Dyzenhaus writes, recognizing that administrators can determine questions of law comes at the price that such determinations must meet a legal standard of rationality.[98] In supervising the administrative process for rationality, the court inevitably reviews the dialogue that occurred, and reoccurs at review, between the legal subject and administrator[99] (including reweighing the evidence).[100] Consequently, *intra vires* review judicializes the administration by demanding administrators meet a legal standard of rationality, but also demands that the judiciary play a role akin to frontline decision-makers by enabling judges to review the merits of administrative decision-making across the board. In other words, deference generates a quasi-administrative function for the courts because "[t]o judge the administration is to administer, because any judgment that goes beyond superficial form requires the adjudicator to step into the shoes of the one judged."[101]

Deference also generates a quasi-administrative function for the court because it liberates remedial discretion. Traditionally, on the *ultra vires* model of review, there is very little space for

[97] *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 [*Anisminic*].
[98] David Dyzenhaus, "Formalism's Hollow Victory" (2002) 2002 NZ L Rev 525 at 548.
[99] Geneviève Cartier, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (SJD Thesis, Department of Law, University of Toronto, 2004) [unpublished] at 214–215, 267–268.
[100] cf. *Vavilov*, *supra* note 54 at para 125.
[101] Dyzenhaus, "Formalism", *supra* note 98 at 549.

remedial discretion because the court is said to merely declare whether an action is void or valid.[102] This is because judicial review, it is said, only operates retrospectively, as if the decision had never happened to begin with. There is thus no discretion about whether a given administrative decision should, or should not, be deemed invalid. However, such an approach is at odds with the practice of judicial review because in actual practice administrative decisions are treated as valid until they are challenged successfully through an application for judicial review. In other words, administrative decisions are *voidable,* meaning they are set aside at the suit of the legal subject and by the discretion of the court.[103]

In contrast to the *ultra vires* position, Canadian law embraces remedial discretion, with *Vavilov* devoting an entire section to it.[104] The court affirmed that the main remedy of judicial review is to quash a decision and remit the case back to the administrator "with the benefit of the court's reasons."[105] However, similar to the flexible supervisory jurisdiction in trusts law, the court can, in certain circumstances, quash the decision and replace it with its own.[106] I discuss this remedy in the next section.

The discussion in *Vavilov* is notable because it explicitly acknowledges the discretionary character of judicial review and confirms a flexible remedial discretion.[107] Canadian law's preference for remedial discretion arguably follows from interpreting questions of law as presumptively intra-jurisdictional questions, as opposed to converting all questions of law into jurisdictional questions.[108] This is because intervention is no longer tied to the concept of *ultra vires* but rather rests on whether the exercise of the power was adequately reasoned. From an analytical perspective, the court is reviewing the *intra vires* exercise of an interpretive power, and *intra vires* exercises of power that disclose inadequate deliberation are voidable as opposed to *void*

---

[102] Christopher Forsyth, "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law" in William Wade, Christopher Forsyth & Ivan Hare, eds, *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford; New York: Clarendon Press ; Oxford University Press, 1998).
[103] *Smith v East Elloe Rural District Council*, [1956] AC 736, HL at 769, Viscount Simonds [*Smith v East Elloe*].
[104] *Vavilov*, *supra* note 54 at paras 139–142.
[105] *Ibid* at para 139.
[106] *Ibid* at para 142; *Finch v Telstra Super Pty Ltd*, [2010] HCA 36 at paras 67–68 [*Finch*] (trusts law).
[107] *Farrier v Canada (Attorney General)*, 2020 FCA 25 ("a reviewing court has some discretion and latitude in the remedy to be granted" para 21).
[108] Implied *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 1997 CanLII 385 at para 69 [*Southam*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 at para 65, L'Heureux-Dubé J [*Baker*].

ab initio.[109] Indeed, Canadian administrative law is premised on the idea that acts or omissions of reasoning during the decision-making process *may* make decisions invalid.[110] The court is not hunting for particular errors,[111] but will set aside the decision if the reasons demonstrate "sufficiently serious shortcomings."[112] Even prior to *Vavilov* it was understood that if the court found the decision-maker had acted unreasonably, acted for irrelevant considerations or fettered their discretion etc. that this did not necessarily render a decision invalid.[113] Consequently, judicial review becomes more forward-facing in nature once it takes its own remedial discretion seriously, as a distinctive and constitutive feature of the institution. This opens up the way for there to be more flexibility in fashioning remedial responses, including prospective or quasi-administrative remedies. I consider these in the next section.

6.3.2. Advisory and Prospective Remedies

In the post-*Vavilov* world, the court is more obviously engaged in assisting the administrative state in its functions by prospectively guiding and structuring the exercise of discretion. As noted, the remedial discretion affirmed in *Vavilov* enables the court to directly substitute its view for the administrator's decision. The court has used this power to, for instance, grant a tenant immediate access to a premise,[114] grant the application of disability benefits,[115] and direct a local authority to conduct a consultation.[116] This is a full-throated assertion of a quasi-administrative jurisdiction, where the court is directly assisting in the ongoing management of the administrative state, by, as the Federal Court writes, "stepping in and doing what the [administrative body] should have

[109] This view was recently endorsed in the administrative law context by the Faulk's Committee, see United Kingdom, Ministry of Justice, Faulk's Committee, *The Independent Review of Administrative Law*, CP 407 (March 2021), at 71-72, para 3.60
[110] *Vavilov*, *supra* note 54 (Vavilov is peppered with the language of judicial discretion. For example, "failure may lead" at para 102; "may be unreasonable" at para 22; failure to grapple with key issues "may call into question" at para 128; "the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker" at para 106); *Canada Labour Relations Board v Halifax Longshoremen's Association*, [1983] 1 SCR 245 at 256, Laskin C.J.; See also Jonathan Morgan, "'O Lord Make Me Pure - But Not Yet': Granting Time for the Amendment of Unlawful Legislation" (2019) 135:4 Law Q Rev 585 at 605.
[111] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14 [*Newfoundland Nurses*].
[112] *Vavilov*, *supra* note 54 ("more than merely superficial or peripheral to the merits of the decision" at para 100); *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at paras 38-41 [*Mason*].
[113] *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 22 [*Dr. Q.*].
[114] *White et al v Upper Thames River Conservation Authority*, 2020 ONSC 7822 at paras 41–43.
[115] *D'Errico v Canada (Attorney General)*, 2014 FCA 95.
[116] *Pendergast v Sidney (Town)*, 2020 BCSC 1049.

done."[117] In some cases, such as the granting of disability benefits, this touches on polycentric issues that affect the application of limited funds, potentially to the detriment of others.[118] Another example of the way the court assists government purposes is the use of *mandamus* to speed up permanent residency or citizenship applications where there has been an "unreasonable delay."[119] The court, in essence, steps in to assist an overwhelmed government body by compelling the processing of applications that have been overlooked or delayed.[120] This role is similar to how historian Stanley de Smith says *certiorari* was used "for general governmental purposes"[121] by the King, rather than by legal subjects, to centralize and catalogue administrative decisions taken in the name of the Crown.[122]

The court can also indirectly substitute the administrative decision by remitting the case to the original decision-maker with specific guidelines as to how the future decision should play out.[123] For example, in *Crenna* the court ordered the decision-maker to redetermine the applicant's permanent residency application within six months, and essentially guided the new decision-maker to interpret "espionage" in a way that did not prejudice the claimant. Taking this even further, in *Sexsmith*[124] the court provided a detailed bullet point list running two full pages of factors firearms officers must consider in weighing the use of a restricted firearm.[125] Consequently, the judgment operates as a guideline about *how* to exercise a valid, reasonable discretion, suggesting a more advisory or hortatory function of judicial review.[126] Indirect substitution is also reminiscent of

[117] *Crenna v Canada (Citizenship and Immigration)*, 2020 FC 491 at para 110.
[118] *MacKenzie v Ottawa Community Housing Corporation*, 2021 ONSC 1640 at (polycentricity and scarcity of social housing was a reason to refuse mandamus, ibid at paras 13 and 30).
[119] *Conille v Canada (Minister of Citizenship and Immigration)*, [1998] 2 FC 33.
[120] *Bidgoly v Canada (Citizenship and Immigration)*, 2022 FC 283 (delay due to the COVID-19 crisis); See also *Djikounou v Canada (Citizenship and Immigration)*, 2022 FC 584.
[121] S A de Smith, "The Prerogative Writs" (1951) 11:1 Cambridge LJ 40 at 45.
[122] *Ibid* at 47; Louis L Jaffe, "Standing to Secure Judicial Review: Public Actions" (1961) 74:7 Harv L Rev 1265 at 1270.
[123] For a discussion of all the varying types of indirect substitution, see *Canada (Citizenship and Immigration) v Tennant*, [2019] 1 FCR 231 at paras 71-79, Laskin JA.
[124] *Sexsmith v Canada (Attorney General)*, 2021 FCA 111.
[125] *Ibid* at para 35; See also *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 84; *Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 65.
[126] Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge, UK: Cambridge University Press, 2009) at 669; Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge, UK ; Cambridge University Press, 2018) ("While judicial review's immediate role is the policing of administrative legality, it also has an important collateral role in articulating and elaborating the principles of good administration that ministers, public bodies and officials ought to honour" at 31).

Chayes's argument that public law litigation prospectively governs and determines the future interactions between the parties.

The impact of judicial review on administrative decision-making is especially evident in Labour Law. In *Scarborough Network,*[127] the labour board's decision was found to be unreasonable because the Board had not explained why its past practice was relevant to the applicant's case. Upon redetermination, the labour board handed down a judgment running fifty-five paragraphs responding directly to the party's submissions, explaining the board's past practice, and showing why it was relevant to the case.[128] The case demonstrates how rescission and remission addresses the invalid exercise of a power in the past tense, while also advising how the frontline decision-maker can validly exercise the power in the future.[129]

The reference procedure in s18.3(1) *Federal Courts Act* is also forward-facing and advisory. The provision confers a power on all federal tribunals to refer to the court any question of law, jurisdiction or procedure so long as the question is "one to which a possible answer is susceptible to putting an end to the dispute."[130] This prospective fire-watching role of the Federal Court underscores the collaborative nature of judicial review and is geared towards securing proper public administration. This is similar to how the Counseil d'État – the French administrative tribunal that explicitly holds both administrative and judicial functions – advises the government *before* the fact, as well as adjudicates upon the legality of exercises of power.[131]

Recently in *Mason,* the Federal Court advised federal tribunals to use the Reference procedure for settling "duelling administrative interpretations."[132] The Federal Court said it was not required to defer to decision-makers and the court should "receive all necessary evidence and

---

[127] *Scarborough Health Network v Canadian Union of Public Employees, Local 5852,* 2020 ONSC 4577 [*Scarborough Health Network*].
[128] *Scarborough Health Network v Canadian Union of Public Employees*, 2020 CanLII 100039 (ON LA).
[129] See Emily Hammond Meazell, "Deference and Dialogue in Administrative Law" (2011) 111:8 Colum L Rev 1722 (she discusses the ongoing dialogue internal to agencies, and between courts and agencies, after an administrative decision has been held unlawful.); Kavanagh, *supra* note 95 (discussing the Human Rights Act 1998 [UK] , she argues "it is just like a conversation between two people, where one suggests a particular course of action and the other considers that option, but then suggests another" at 410).
[130] *Reference re subsection 183(1) of the Federal Courts Act*, 2019 FC 261 at para 20 and 25; See also *In The Matter an Application for a Reference by Chief Brian Francis on behalf of the Abegweit First Nation Band Council and Abegweit First Nation of questions or issues of the constitutional validity of the custom rules governing elections for the Chief and Council of the Abegweit First Nation Band*, 2016 FC 750 at para 16.
[131] C J Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'état* (London: Stevens, 1954) at 7.
[132] *Mason, supra* note 112 at para 77.

submissions."[133] As with the SJTA, the implication is that to access the advisory jurisdiction, the public body must provide all relevant information to essentially surrender their discretion to the court and thereby receive what in practice would be immunity from judicial review. Declarations and *prohibitio* are also directly forward-facing remedies because they often occur prior to any administrative action being taken.[134] Furthermore, De Smith points out that *public authorities* used to be able to access declarations *ex ante* taking a decision to "obtain the authoritative guidance of a court" if the tribunal is unsure about "the scope of their powers which it wishes to exercise."[135] This is similar to how trustees are able to access the protective supervisory jurisdiction to ask the court to advise and bless momentous decisions.

The final example of prospective remedies in judicial review is the use of suspended declarations of invalidity[136] otherwise called "supervisory orders"[137] or "deliberative remedies."[138] A good example in Canadian constitutional law is *Re Manitoba Language Rights* case.[139] The SCC suspended a declaration that Manitoba was acting in breach of the Constitution because its statutes were not available in both English and French. For nearly a decade the court monitored the translation, printing, and publishing of statutes into French.[140] In Canadian Administrative Law, suspended declarations of invalidity can be used in the context of Indigenous rights.[141] The legitimacy of such ongoing supervisory remedies, reminiscent of the court's quasi- administrative role in equity, perhaps stems from the fiduciary relationship between the state and Indigenous peoples.

---

[133] *Ibid*.
[134] Chayes, "Public Law Litigation", *supra* note 28 at 1296.
[135] S A de Smith, *Judicial Review of Administrative Action*, 3r ed (London: Sweet & Maxwell, 1973) at 425 (de Smith directly compares the idea of resolving doubts about the exercise of the power with the court's supervisory jurisdiction over trusts and wills, ibid at 424-425).
[136] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*]; Cristie Ford, "Dogs & Tails: Remedies in Administrative Law" in Lorne Mitchell Sossin, ed, *Administrative Law in Context* (Toronto : Emond Montgomery Publications, 2013); Kent Roach, "The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies" (1991) 33 Ariz L Rev 859.
[137] Joanna Cave, "Remedies Matter: Evaluating the Efficacy of Remedies in Public Law Litigation for Executive Action" (2021) 30 Dal J Leg Stud 1 at 9–10.
[138] A term used by Carolyn Mouland, "Remedying the Remedy: Bedford's Suspended Declaration of Invalidity Sex Work: Court Responses and Discursive Analysis" (2018) 41:3 Man LJ 281 at 282.
[139] *Reference re Language Rights Under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867*, [1985] 1 SCR 721.
[140] Cave, "Remedies Matter", *supra* note 137 at 10.
[141] *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287.

In the UK, the Judicial Review and Courts Act 2022[142] explicitly introduces suspended quashing orders and prospective orders into judicial review. The court is invited to create ad hoc remedies that direct the legislative branch and supervise the ongoing implementation of the order.[143] The goal is to facilitate accountability in cases where legal subjects may ordinarily be refused relief. An example is the student fee case *Hurley and Moore*.[144] The High Court found that regulations enabling universities to charge £9,000 in fees breached public sector equality duties, but declined to quash the regulations because of the "significant economic implications" and "administrative chaos" it would cause if the decision was quashed.[145]

Suspended remedies are controversial for *ultra vires* theorists. These remedies are said to temporarily place a void decision on a life support machine,[146] are metaphysically impossible, and encourage long-term administration of a case.[147] However if one takes remedial discretion to be a constitutive part of judicial review, then the forward-facing nature of the remedy fits with the fact the court ought to have discretion over the kind of relief offered. Suspended remedies are also controversial amongst common law constitutionalists[148] and progressive civil rights groups[149] because they are seen to undermine judicial review's role in constraining the actions of government. However, this thesis has argued that this is not the primary role of judicial review. Instead, judicial review generates the conditions for the proper exercise of public authority and secures the due administration of public administration. Suspended remedies fit with this role because the court assists, in an ongoing manner, the implementation of statutory schemes. Furthermore, supervisory remedies fit a democratic conception of common law constitutionalism in the sense that they facilitate and sustain ongoing participation and reconciliation between parties.[150] Moreover, given the UK and Canada make use of such remedies in judicial review, it is

[142] *Judicial Review and Courts Act 2022* (UK), s 1
[143] Implied *ibid.* at s 1(2)
[144] *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills*, [2012] EWHC 201 (Admin).
[145] *Ibid* at para 99, Elias LJ.
[146] Christopher Forsyth, "The Rock and the Sand: Jurisdiction and Remedial Discretion" (2013) 18:4 Judicial Review 360 at 371.
[147] Forsyth, "Metaphysic of Nullity", *supra* note 102.
[148] Paul Craig, *Administrative Law*, 7th ed (London: Sweet & Maxwell, 2012) at 743.
[149] The Public Law Project, "Judicial Review: Proposals for Reform", 2021, online: *The Public Law Project* < publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf> at 12-17
[150] Roach, "Limits of Corrective Justice", *supra* note 136 at 861.

important to understand how we can fit suspended remedies within our theoretical understanding of the supervisory jurisdiction.

6.3.3. Managerial Judges

A final example of the way in which we can see a growing quasi-administrative role for the court is the rise of case managerialism. For instance, since *Vavilov,* the court has asserted the need to get its hands on reasons and records, even confidential ones. In *Canada v. Canadian Council for Refugees*,[151] Stratas JA argued, "courts are alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review."[152] He argued the court could respond to such a problem by fashioning flexible disclosure orders or appointing an amicus curiae who can make submissions in a closed hearing. The judge concluded that "the measures to which a court can resort are limited only by its creativity and the obligation to afford procedural fairness to the highest extent possible."[153]

Second, in contrast to private law, the applicant, in England at least, cannot access judicial review as of right but must obtain a preliminary permission.[154] It is therefore the court itself that manages the stream of cases that end up in court. In Canada, the applicant can apply directly, but what is unique about the Canadian process is that in some cases the decision-maker may not be a party to the dispute in court. In the Federal Court, for instance, a tribunal must apply for intervenor status.[155] Furthermore, other affiliated, interested public bodies can be joined to the case as intervenors.[156] In this way, courts play an important role in managing proceedings. This kind of managerialism also underscores that judicial review often involves submissions of multiple interests and multiple public bodies.

Vavilov itself is a good example of how courts manage multiple submissions to hear intersecting public interests. Unusually, the SCC announced their intention to "consider the nature

---

[151] *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72.
[152] *Ibid* at para 106.
[153] *Ibid* at para 120.
[154] Civil Procedure Rules 1998 (UK), Part 54.4; Senior Courts Act 1981 (UK) s 31 (3c)- 3(f) (courts can refuse permission where remitting the decision would not make a difference to the case's outcome.)
[155] Hickey, "Reasons First", *supra* note 57 at 104.
[156] *Gibralter Mines Ltd v Harvey*, 2021 BCSC 927 (in this case the Human Rights Commission was granted intervenor status but the initial decision was made by the Human Rights Tribunal).

and scope of judicial review of administrative action" in their reasons for leave to appeal.[157] The court invited counsel to submit arguments on this point, permitted a staggering twenty-seven intervenors to join the appeal and appointed an amicus curiae.[158] With this procedural set-up, the case was polycentric from the get-go. It involved debate over systemic issues and the broader repercussions of substantive review and discretion far beyond the individual applicants within the judicial review proceedings. Furthermore, the majority's judgment was considered by the concurring judges, Abella and Karakatsanis JJ. as "dramatically reversing course"[159] from previous jurisprudence, implying the majority judgment reads more like statutory reform than the common law's incremental methodology.[160]

To conclude this section, we can see the court adopting the necessary procedural and managerial forms that compliment its mission of accessing and reviewing reasons. In the next section I consider how the role that judicial review plays in securing the integrity of public administration suggests that the supervisory jurisdiction cannot be excluded by statute.

6.4. Accessing and Excluding the Supervisory Jurisdiction

The supervisory jurisdiction cannot be excluded for two reasons (i) judicial review's jurisgenerative nature creates the conditions of public authority and secures the integrity of public administration and (ii) judicial review creates a legal order based on trust and to exclude review would remove the power-conferring principles that make that trust relationship possible, thereby preventing the proper constitution of authority.

6.4.1. Jurisgenerativity and the Integrity of Public Administration

The practice of judicial review facilitates the legality of public regulatory schemes by presupposing the actions necessary for administrators to presumptively exercise valid legal authority. This in turn means that decisions of public official's are answerable to those standards and are therefore accountable and answerable to law. To remove the supervisory jurisdiction is thus to remove the conditions that make public authority and public administration possible. Thus,

---

[157] *Bell Canada, et al v Attorney General of Canada (Applications for Leave)*, May 2018, Case No 37896.
[158] *Bell Canada, et al. v. Attorney General of Canada*, Case Dossier, May 2018, Docket 37896, online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37896>
[159] *Vavilov*, *supra* note 54 at para 199, concurring reasons.
[160] For instance, they argue the majority judgment presented a "multi-factored, open-ended list of constraints on administrative decision making" *ibid* at para 284, concurring reasons.

the legitimacy of court intervention rests not on the fact that prerogative powers or statutory powers needs to be constrained, but that these powers need to be facilitated by power-conferring principles to render them legal in nature. Intervention is therefore legitimate because it is intervention, on grounds of reasonableness and loyalty, that actually makes legal power possible. However, this does not mean all judicial review is legitimate. The jurisgenerative nature of power-conferring principles, which empower and enable executive action, also provides a theoretical reason as to why we should be deferring to administrative decision-makers. A policy of deference makes space for administrative decision-makers to make good their claim to legitimate authority via the provision of reasons. Putting it differently, only where there is deference, where reasons matter to validity, will the administrator have been empowered to act on behalf of legal subjects and the purpose of her office. This is why, we shall now see, the UK Supreme Court's most recent proclamation on excluding the supervisory jurisdiction in *Privacy International*[161] is unsatisfactory.

The case concerned the exclusion of the supervisory jurisdiction over the Investigatory Powers Tribunal, a sophisticated tribunal composed of members of the judiciary. Both the minority and majority accepted that the rule of law, as opposed to jurisdiction is the theoretical basis for judicial intervention. Drawing on the *Constitutional Act* 2005, Lord Carnwath argued that the rule of law is a principle of the UK Constitution that is to be developed by the courts and thus "binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction, whether for excess or abuse of jurisdiction, or error of law."[162]

However, Lord Carnwath took a fairly narrow or court-centric view of the rule of law, emphasising in particular that certainty would be undermined if "local law" developed on questions of general law, usurping the function of the High Court as the "constitutional guardian of the rule of law."[163] This top-down approach to the rule of law precludes a general doctrine of deference on questions of law in the UK and the advancement of a richer, pluralistic conception of the rule of law.[164] However, the theory presented in this thesis takes the interaction between the

[161] *R (on the application of Privacy International) v Investigatory Powers Tribunal and others*, 2019 UKSC 22 [*Privacy Intl*].
[162] *Ibid* at para 144.
[163] *Ibid* at para 139.
[164] *Privacy Intl* affirmed that there would be times where intervention for error of law would not be necessary for the rule of law and discussed the cases that support deference of questions of law in the UK, namely, *Pearlman v*

legal subject and public official to be the critical axis of the constitution of authority, and the constitution of state, via the provision of reasons. The rule of law, Postema argues, sets itself against the idea that "the only relevant perspective on the action is that of the [official]; no other side or perspective need be considered"[165] Reasonableness review, in contrast to correctness review or constitutional review, facilitates that space of answerability.[166] This is because the legal framework necessary for exercising a fiduciary legal power is necessarily tied to answerability. Thus, if we agree that the 'rule of law' should be the benchmark of intervention, then the rule of law requires deference because it enables the perspective of the legal subject to be considered by the official. Judicial intervention is then warranted because the administrative body has not properly recognised the legal subject's interests in her actions.

Another reason judicial review cannot be excluded is because it secures the integrity of public administration. This rests on judicial review's jurisgenerative nature – on the fact that judicial review articulates the power-conferring principles necessary to produce the legal validity of the administrator's exercise of power. This ensures public administration is properly administered. Judicial review also secures the integrity of public administration by setting aside decisions that have not been properly executed, thus enabling the public administrator to redetermine the case and make the decision properly. Furthermore, as noted, the court even provides specific guidance to secure the integrity of the exercise of discretion in a forward-facing manner.

Again, the goal of good administration does not mean all judicial review is legitimate, but suggests review is legitimate where it works in partnership with the administration, towards vindicating the public interest in lawful and good administration, and legal order more generally. It becomes easier to see the court working in partnership with public administration now we have

---

Keepers and Governors of Harrow School, [1979] QB 56 at Geoffrey Lane LJ (dissenting), aff'd; *Re Racal Communications Ltd*, [1981] AC 374; *South Asia Firebricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*, [1981] AC 363; *R v Monopolies and Mergers Commission, Ex parte South Yorkshire Transport Ltd*, [1993] 1 WLR 23, HL at 32.

[165] Gerald J Postema, "Law's Rule: Reflexivity, Accountability, and the Rule of Law" in Xiaobo Zhai & Michael Quinn, eds, *Bentham's Theory of Law and Public Opinion* (New York: Cambridge University Press, 2014) 7 at 12; See also Stacey, "A Service Conception", *supra* note 52 (he argues that the rule of law's concern for predictability, stability etc. is valuable only because it "facilitates moral autonomy and the capacity to reason" at 239. A commitment to this view of legal subjects requires demonstration "through a process of persuasion and argumentation that its actions... are congruent with constitutional values" at 240. In other words, the rule of law's first and foremost aim is to require accountability and justifiability.).

[166] David Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law : Definitional Issues in Global Administrative Law. Part I" (2009) 41:2 Acta Juridica 3 (he explains that procedural fairness is accountability despite being "before the fact" because it has a participatory aspect, ibid at 25.).

interpreted the doctrines of judicial review as jursgenerative. These principles create the conditions for the legal operation of a public administration, rather than working to hinder public administration. A jurisgenerative lens to judicial review legitimizes judicial restraint but, as we have seen, opens up space for a quasi-administrative function for the court, similar to that of the SJTA. Furthermore, as argued in Chapter Five, vindicating the legal subject's interests is critical to the proper constitution of the state. There is thus an important public interest in creating and maintaining proper institutional channels of accountability.[167] In particular, the importance of reasons to the question of validity necessitates internal procedures and mechanisms that provide reasons to legal subjects, including hearing the submissions of subjects or other forms of procedural fairness. The practice of judicial review both makes possible and secures those channels of accountability and is itself a channel of accountability.

6.4.2. Mutual Trust and the Constitution of Authority

As noted in Chapters Four and Five, judicial review makes possible a certain kind of legal order based on trust. This is because the doctrines of judicial review, as power-conferring principles, constitute administrative power as other-regarding in nature. This suggests judicial review is a fundamental aspect of constitutional architecture, and that it cannot be excluded without fundamentally changing the nature of the trust relationship between state and subject to some other kind of relationship. Furthermore, judicial review generates a relationship of *mutual trust.* Officials are entrusted with executing their statutory or common law mandates on behalf of legal subjects, while legal subjects are likewise entrusted with a power of recourse to access the supervisory jurisdiction and make claims of recognition. The power of recourse reduces the imbalance of power between the fiduciary and beneficiary, enabling the individual to "look the powerful in the eye."[168] This precludes a unilateralism in which only the perspective of the power-holder is relevant to the exercise of authority,[169] and pushes the ideals of reciprocity and non-domination from ideal to reality.[170]

---

[167] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press) at 72.
[168] *Ibid* at 60–61.
[169] Postema, "Law's Rule", *supra* note 165 at 12. Evan Fox-Decent, "Unseating Unilateralism" in Austin & Klimchuk, *supra* note 81
[170] See William Lucy, "The Normative Standing of Access To Justice: An Argument From Nondomination" (2020) 2 Windsor YB Access Just 231 at 241–252.

The 2017 *UNISON* case[171] confirms that the power to access the supervisory jurisdiction is fundamental to legal order. UNISON (a trade union) challenged the legality of the Lord Chancellor's Fees Order that raised tribunal fees up to £1600. The complainant argued such draconian fee increases would have an impact on access to justice. Lord Reed agreed with UNISON's arguments and quashed the fees order. He asserted,

> "In order for the courts to perform [their] role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."[172]

In my view the reason that that the legal subject's power to access judicial review is a necessary condition of constitutional order[173] is because without accountability channels (such as judicial review) the sovereign is essentially disabled from exercising any legitimate power at all. The sovereign's power conceptually relies on the legal subject's power to hold officials to account, and the legal subject's power likewise relies institutionally on the sovereign establishing a legal system to provide legal powers and the occasion to act.[174] This mutual reliance means that the legal subject holds not merely a power but an *entrusted responsibility*[175] to use that power to vindicate the public interest and ensure proper representative acts are made upon redetermination. Furthermore, as was argued in Chapter Five, the official's reasons are constitutive of the state and state institutions. But because representation requires that officials are responsive to the claims put forward by legal subjects, the legal subject's deliberations and arguments also become folded into the constitution of law's institutions. As Fuller noted "institutions are constituted of a multitude of individual

[171] *R (UNISON) v Lord Chancellor*, [2017] UKSC 51 [*UNISON*].
[172] *Ibid* at para 68.
[173] This point is made about the right/power of civil recourse in tort law, see John C P Goldberg & Benjamin C Zipursky, "Torts as Wrongs" (2009) 88:5 Tex L Rev 917 (recourse is prelegal right to respond to wrongs committed against an individual. In civil society this right is forfeited but then is returned as a legal power through the state avenue of recourse, ibid at 982).
[174] Hannah Arendt, *The Human Condition.* (Chicago: University of Chicago Press, 1958) ("the dependence of the beginner and leader upon others for help and the dependence of his followers upon him for an occasion to act themselves" at 189).
[175] Postema, "Fidelity", *supra* note 81 at 36; Evan Fox-Decent, "Trust and Authority" in Paul Miller & Matthew Harding, eds, *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, 2020) at 186.

human actions"[176] over time, almost as if they are sites of collective memory.[177] We, in essence, create the state together through official-legal subject interactions.[178]

A consequence of this analysis is that the state cannot be instituted just for the purpose of generating mutual security. The state must also serve the purpose of creating spaces in which we are mutually empowered to act together to generate legitimate authority.[179] Given the state is constituted by official-legal subject representative interactions over time, it is arguably too important to not have a supervisory body that enables legal subjects to challenge decisions that are improperly exercised. Furthermore, for such interactions to be genuinely representative, the supervisory jurisdiction is necessary to provide the accountability – the claims of legitimate authority – that makes representation possible.

6.5. Objections and Concerns

To end this chapter, and thesis, it may be worth acknowledging that some readers may be concerned about judges undertaking a quasi-administrative role in judicial review. This is because, some may say, ultimately judges hold a different set of aims and values than public administrators and courts therefore should, as much as possible, avoid conferring discretion and playing any administrative function. Rod Macdonald, for instance, in his article "Call-Centre Government" outlined the ways in which lawyers and civil servants may respond to perceived problems in the administrative state in differing ways.[180] He argues that lawyers prioritise *ex post facto* redresses in the form of corrective justice and talk in a particular language of rights with "top-down categorizations of what counts as valid laws."[181] By contrast, civil servants focus on alternative dispute creation, discover *ex ante* preventive determinations of good governance and privilege discursive solutions that prioritize the legal subject's voice.[182]

---

[176] Fuller, *Morality of Law*, *supra* note 35 at 146.
[177] Postema, "Fidelity", *supra* note 81 ("law must take into account the fact that these individuals find themselves in complex networks of social interaction that are shaped by their own understandings, and the understandings of others" at 26). Susanne Karstedt, ed, *Legal Institutions and Collective Memories* (Oxford ; Hart Pub., 2009).
[178] Laden, *supra* note 94; Mark Antaki, "The Rationalism of Proportionality's Culture of Justification" in Bradley W Miller, Grant Huscroft & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 284.
[179] Arendt, *supra* note 174.
[180] Roderick A Macdonald, "Call-Centre Government: For the Rule of Law, Press #" (2005) 55:3 UTLJ 449.
[181] *Ibid* at 474.
[182] *Ibid* at 474–475, 481.

However, the view advanced in this thesis challenges some of Macdonald's dichotomies. First, the *Vavilov* framework of judicial review prioritises discursive solutions that respond to the legal subject's submissions. Such an approach prevents the top-down imposition of rights-language and top-down interpretations of how statutes "should" be read by lawyers by instead allowing the legal subject to craft alternative interpretations of the statutory scheme. I argued in Chapter Four that this aspect of the *Vavilov* doctrine fits with the fiduciary power-conferring theory of judicial review. This is because the reasons for which decision-makers act, to be genuinely representative in nature, must authentically reflect the voice of the legal subject. This discursive model at the administrative level is also reflected in judicial review itself because, as argued above, the court is reviewing claims of legitimate authority. The court therefore reviews the dialogue that occurred rather than asks that dialogue to be converted to a claim of right.

Second, the fiduciary power-conferring framework moves judicial review away from the corrective justice model that Macdonald says lawyers attempt to "subsume" distributive schemes into.[183] As noted, supervision is a unique adjudicative set-up that does not involve the language of rights per se, but the language of legitimate claims. Furthermore, these legitimate claims are not made by pointing to a formal statutory utterance and asking, "do I have the power,"[184] but asks the more substantive question "am I giving due recognition to legal subjects and the purpose of the statutory scheme?" The court's concern is not with the interferences of rights, but with the integrity of public administration, an aim that resembles the "good governance" aim of civil servants.[185] Moreover, the court is using remedial flexibility to prospectively guide administrators through directly and indirectly substituting administrative decisions to prevent, in an *ex ante* way, maladministration. This forward-facing role of judicial review challenges the idea that courts can only work in an *ex post facto* corrective fashion.

Third, if the reader is persuaded with my analysis in Chapter Two that all powers require power-conferring principles, then we need to locate where those power-conferring principles are in the context of trusts and administrative law. The normative value of interpreting the doctrines of judicial review as those power-conferring principles is to provide a theoretical framework within

[183] Roderick A MacDonald, "Understanding Regulation by Regulations" in Ivan Bernier & Andrée Lajoie, eds, *Regulations, Crown Corporations, and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81 at 135.
[184] *Ibid* at 139.
[185] Macdonald, "Call-Centre Government", *supra* note 180 at 474.

which we can interpret judicial review as assisting the administrative state. On that view, the purpose of judicial review is not to constrain the actions of officials but is to facilitate the legality of regulatory schemes along with Parliament and the administration itself through its internal policies, procedures and accountability mechanisms. If we borrow Hart's phrasing of power-conferring rules, then the doctrines of judicial review "facilitate the wishes"[186] of public administrators by enabling them to achieve and execute their statutory purposes.

Furthermore, while it is true that, unlike the Conseil d'état in France,[187] public law in common law jurisdictions grew in the ordinary courts, there is no need to assume that judicial review must continue to be a purely judicial and adversarial jurisdiction that aims to work against, rather than with, public administrators. Judicial review also used to primarily protect property rights and did not protect mere interests. There was also no such thing as public interest standing and courts did not defer on questions of law nor hold a flexible remedial discretion. Our views about what the court does in adjudication needs a rethinking in light of these fundamental shifts in judicial review doctrine.

If substantively the values of judges somewhat overlap with that of civil servants, then all that remains is the formal argument that judges should fundamentally not engage in public administration because that is not their role. However, such an argument relies upon the Diceyan formalism that administrative process scholars critique.[188] A final point is that this thesis is primarily an interpretive theory of judicial review. Despite the arguments in this section, my primary methodological aim has not been to say that a quasi-administrative function for the courts or the co-conferral of authority is normatively desirable. My methodological aim was instead to suggest the fiduciary power-conferring framework is interpretively viable. If my arguments are persuasive, then I invite debate around the normative undesirability of such a theory.

[186] HLA Hart, *The Concept of Law*, 2d ed (Oxford: Clarendon Press, 1961) at 27.
[187] François Lichère & John Bell, eds, "Courts and Judges" in *Contemporary French Administrative Law* (Cambridge: Cambridge University Press, 2022) 61; Allison, *supra* note 27 at Chapter 7.
[188] Roderick A Macdonald & Richard Janda, "Administrative Law I Recent Developments in Canadian Law" (1984) 16:3 Ottawa L Rev 597.

Conclusion

This chapter, and thesis, has explained multiple ways in which we can view the court in its supervisory role as collaborating and assisting in the due execution of trusts and public administration. The practice of supervision creates the conditions of public authority through the articulation of power-conferring principles that make the exercise of authority possible. In so doing, the doctrines of judicial review set the standards by which we know if power has been properly exercised. Furthermore, judicial review makes possible public administration as a particular kind of institution, one of trust, and the court supervises the ongoing administration of this public trust.

Unlike private law adjudication, relationships of trust are based on interdependent and multilateral power-liability relationships. Supervision thus engages many interests that intersect and acts as a site within which claims of legitimate authority and claims of recognition can be heard. The court provides a space of mutual recognition in which the public administration *qua* trust can be maintained and restored through devices such as public interest standing, management of multiple party submissions and intervenors, as well as systemic and prospective remedies. The supervisory jurisdiction's legitimacy thus rests upon its ability to create the conditions of legitimate authority and upon its ability to secure the integrity of public administration.

Over time, administrative lawyers have come to accept that legal interpretation and the rule of law are shared projects between the administration and the courts. Likewise, there could come a time where we accept that public administration can also be a shared goal, one attained in part due to the court's exercise of a quasi-administrative jurisdiction.

Chapter Seven

7. Conclusion

7.1. Answers to Research Questions

7.1.1. The Basis of Administrative Authority

This thesis challenges the assumption that administrative authority rests purely on a decision-maker's authorizing mandate. Instead, I have explained that administrative actors are empowered by jurisgenerative power-conferring principles that produce their legal authority. Thus, while Parliament distributes power to administrative actors, the doctrines developed and applied by the common law also confer power in the sense that they make the exercise of a power possible and valid in law. This argument is based on the analysis of legal powers provided in Chapter Two. In that chapter, I argue that every legal power contains a presupposed, internal *grundnorm* that generates legal authority. Legal powers work in the normative realm and so they create new ways of acting in the world or transform causal acts into normative results. The non-causal relationship that fiduciary power-conferring norms make possible is representation. Fiduciary power-conferring principles enable a person to act for another, or in the case of children or the state, even generate or create their legal personality. Loyalty in private fiduciary law, and reasonableness in public law could be understood as the *grundnorms* of trustee and administrative power respectively because they generate and make possible the very concept of representing another in law. The doctrinal consequences of this are that the motives of trustees become relevant to determining validity and administrators must provide reasons for their decisions.

In Chapters Three through Five I apply this power-conferring framework to the doctrines of judicial review in trusts law and in public law. I argue that the doctrine of relevant/irrelevant considerations in trusts law, and the doctrine of reasonableness or proportionality in public law are power-conferring principles that produce trustee and administrative authority. The jurisgenerative interpretation of reasonableness challenges the basis of the *ultra vires* theory of judicial review because it eschews the idea that public authority and judicial intervention exclusively rests upon acting beyond a jurisdictional boundary. Instead, the court sets aside *intra vires* exercises of

interpretive authority that, although did not result in a loss of jurisdiction, were nevertheless inadequately reasoned. Decisions will be deemed inadequately reasoned when the decision-maker does not give due solicitude to the legal subject and/or does not further the purpose for which her power is held. We see this reflected in case law. *Vavilov* requires that decision-makers prioritise the purpose of the statutory scheme as well as requires that decision-makers be responsive to the legal subject's submissions and their vulnerability. However, court intervention is limited on the fiduciary power-conferring approach because to review reasons presupposes the idea that the court must provide deference to those reasons. As such, intervention is determinate and coherent. Furthermore, the turn towards a "culture of justification" in administrative law is easily explained within the fiduciary power-conferring framework.

In Chapter Five, I argue that non-statutory prerogative powers are legal in nature, despite their unauthorized and unqualified nature, because they are constituted by power-conferring principles provided for and presupposed by the common law. We also see in Chapter Five that power-conferring principles explain why the powers held by the sovereign are both political and legal in nature. Even if we could locate a real or fictional 'authorization' of the sovereign's power to create legal order, this would not be enough to render that power legal in nature. This is because the state is a person by fiction, only made possible by an act of representation, which requires fiduciary power-conferring principles to make such normative action possible. Accordingly, the reasons for which officials act in the course of their representation of the state become constitutive of the state itself. Furthermore, because officials must respond to submissions made by legal subjects and implicitly respond to their question "but how is that decision taken on my behalf?", the interactions between legal subjects and officials become folded into the official's reasons and thus folded into the constitution of the state. The law-giver's accountability to legal subjects is thus a condition of authority and legal order.

7.1.2. The Legitimacy of Judicial Review

This thesis set out to challenge the idea that Parliament, the courts, and administrative actors compete for supremacy. The competing supremacies model assumes that the court is constraining or controlling discretions that have been authorized by Parliament. However, interpreting the doctrines of judicial review as power-conferring in nature changes our understanding of judicial review. In particular, it suggests that the legitimacy of intervention rests

less upon the court's regulative nature, upon the need to constrain arbitrary power, and more on the court's jurisgenerative nature, upon the need to confer and constitute legal authority. We can thus interpret the work of the court as sharing similar goals to the work of Parliament – both collaborate to facilitate the legality of regulatory schemes by co-conferring authority onto administrators. Thus, instead of a strict separation of powers model of state, there exists a system of checks and balances, representing the "coordinate effort" to secure the integrity of administration and reach the ideal of "good government," meaning, a government that acts legitimately.[1] While the former creates a system based on competing supremacies, the latter creates a system based on collaboration.

The supervisory jurisdiction therefore is legitimate for four reasons. First, the doctrines of judicial review cannot be derogated from without disabling the decision-maker from being able to bring about valid normative changes. Supervision on these grounds is therefore pertinent because the practice of review is what enables and confers the representative power to act. The court is therefore engaged in institutionally designing the trust and the administrative state as the kind of things that they are, namely as institutions held on trust for beneficiaries or legal subjects. Thus, judicial review cannot be excluded without fundamentally changing the nature of the trust relationship between state and subject to some other kind of relationship.

Second, the supervisory jurisdiction provides accountability for claims of legitimate authority and is a space in which the legal subject can make a claim of recognition. Without spaces in which these claims can be made, and in which accountability can be rendered, there are no legitimate representative acts and interactions with legal subjects. However, it is precisely such acts that that form the basis of legal order.

Third, the practice of judicial review sets the requirements that ensures that public administration and trusts are properly administered. In other words, power-conferring principles assist and protect the trustee and public administrator by explaining how to execute their discretionary powers, enabling trustees and administrators to exercise their powers properly according to law. In Chapter Three and Chapter Six I argue that conferring authority to trustees

[1] Aileen Kavanagh, "The Constitutional Separation of Powers" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law*, first edition. ed (Oxford, UK: Oxford University Press, 2016) at 237.

and administrators is therefore one part of the court's wider jurisdiction to supervise trusts and the administrative state. In trusts law, the court explicitly holds a jurisdiction to intervene in trusts administration, the legitimacy of which is based upon the court's desire to secure the integrity of trust administration. This includes holding a whole host of remedies that deal with systemic problems in the trust fund. In public law, the court does not explicitly hold such jurisdiction, but we have seen that in recent years there has been a rise in remedial discretion, particularly the remedies of direct and indirect substitution. These remedies, as well as the remedy of remitting the decision, aim to restore the integrity of public administration.

Thus, fourth the supervisory jurisdiction secures the integrity of public administration by setting aside invalid decisions so that the power can be subsequently exercised properly. This is because invalid exercises of power threaten not just the integrity of individual exercises of power, but potentially the integrity of the institutions to which their offices are attached. There is an important institutional concern therefore in ensuring that those who represent an institution properly constitute the exercise of their authority.

7.2. Implications and Future Directions

This dissertation develops and applies a power-conferring theory of two common law doctrines in administrative and trusts law and argues that this interpretation suggests the practice of review is jurisgenerative in nature. This thesis' topic and research questions were therefore challenging and broad in scope. Nevertheless, further implications and possible avenues of research emerge from the conclusions of this thesis.

First, there is much potential for this dissertation to be used as a theoretical basis to analyse other doctrines of public or private law. One possible contribution is to how we could interpret the duty of fairness. For instance, we could interpret impartiality as an extension of loyalty and therefore as a standard that facilitates the proper exercise of administrative power.[2] The doctrine of "hearing the other side" perhaps fits less easily within the power-conferring framework because it governs the administrator's conduct prior to the exercise of the power. In my view, the duty to

[2] Shachar Nir, "One Duty to All: The Fiduciary Duty of Impartiality and Stockholders' Conflict of Interest" (2020) 16:1 Hastings Bus LJ 1–42 at 38.

hear the other side can still be interpreted as an aspect of the best interests requirement.[3] This is because the exercise of the power, in order to be responsive to the interests of those for whom one is acting, requires that the decision-maker actually listen to submissions by individuals. From this perspective, substance and procedure overlap as those reasons must be reflective of the dialogue that occurred as part of a procedurally fair process. Furthermore, procedural fairness often involves the exercise of discretion because the decision-maker decides how to conduct procedural fairness. There is some confusion in the case law about whether decision-makers ought to be given deference on these questions of procedure.[4] The implication of this thesis is that such decisions ought to be given deference, particularly where there are reasons for the decision. Another question is whether the court, like in substantive review, holds the same remedial flexibility to not remit the decision back to the decision-maker and hence whether the court can pursue alternative remedies.[5] For instance, recently in *Abrametz*,[6] the Supreme Court of Canada confirmed that courts hold a "spectrum" of remedial responses to respond to undue delay (considered an aspect of the duty of fairness).[7] Perhaps the conclusions of this thesis would enable the courts to more boldly pursue alternative remedies in the field of procedural fairness.

A second possible avenue of future research is to argue that other fiduciaries can be analysed from the power-conferring lens and that supervision works in the same manner as it does in trusts and public law. For example, corporations, like universities, banks, and Inns of Court, were subject to a visitatorial jurisdiction.[8] It seems with regards to corporations, that the Kings Bench, similarly to the Chancery in the Law of Trusts replacing trustees, replaced visitors where there were none.[9] Future research could consider the nature of visitatorial intervention in corporations and compare

[3] See Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford; New York: Oxford University Press, 2011) c VII.
[4] This issue was meant to be put to rest in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (the court made clear that the Vavilov framework only applied to substantive issues not questions of procedural fairness, at para 23); See *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] (for the proposition that correctness review applies to procedural decisions). cf. *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*] (the court argued that the Vavilov framework was relevant to deciding the standard of review in cases where the procedural decision is subject to a statutory appeals clause. The appellate standard for procedural questions is thus whether there is a "palpable and overriding error". This is a much more deferential standard that the potential correctness review applied to decision-makers whose home statutes do not contain statutory appeals clauses).
[5] *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202.
[6] *Abrametz*, *supra* note 4.
[7] *Ibid* at para 76.
[8] Roscoe Pound, "Visitatorial Jurisdiction over Corporations in Equity" (1936) 49:3 Harv L Rev 369.
[9] *King v Lee*, (1689) Shower 251, 252, 89 Eng Rep 554 at 555, Lord Holt CJ.

this to my research findings on public and trust administration. A similar supervisory jurisdiction may also suggest that corporate directors, like trustees and public officials, may have quasi-public institutional mandates attached to their offices. I hypothesise that we could understand corporations as quasi-public institutions, and directors hold legal powers for the other-regarding, quasi-public purpose of long-term growth.[10] As fiduciary officeholders, corporate directors, and corporations as entities, would be understood as public institutions that contribute to and constitute the ongoing authority of the Crown. As office-holders, directors must consider long-term institutional planning of the corporation and public institutions more broadly.[11] As such, environmental sustainability could be conceived of as part of the long-term purpose for which corporate power is held.

A third avenue of future research would be to consider further the observation made in Chapter Six that Fuller did not explain what kind of relationship adjudication was based upon – a relationship of reciprocity or a relationship of common aim. I therefore suggested that adjudication is based on a relationship of accountability and its mode of participation is the presentation of proof and argument in the form of claims of legitimacy. I also argued that relationships of trust are based on a relationship of accountability and its mode of participation is representation. These conclusions warrant more research. One implication of this conclusion is that the adjudication of different organizational relationships governs different kinds of justice. As implied by Rod Macdonald, to adjudicate a relationship of reciprocity would require the administration of corrective justice, whereas the adjudication of a relationship of common aim might demand distributive justice.[12]

The adjudication of a relationship of accountability, however, would not fit either corrective or distributive justice. As demonstrated in Chapter Three, corrective justice cannot explain many facets of the SJTA. This is because supervision focuses on securing the integrity of trusts administration, often in a non-adversarial fashion, rather than adjudicating any claim-rights. If one

[10] David Ciepley, "Beyond Public and Private: Toward a Political Theory of the Corporation" (2013) 107:1 Am Polit Sci Rev 139 (he argues their "principal public benefit [is] generating long-term growth" at 139).
[11] Larissa Katz, "Governing Through Owners: How And Why Formal Private Property Rights Enhance State Power" (2012) 160:7 U Pa L Rev 2029.
[12] Implied Roderick A MacDonald, "Understanding Regulation by Regulations" in Ivan Bernier & Andrée Lajoie, eds, *Regulations, Crown Corporations, and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81 at 136–139.

agrees with the conclusions of Chapter Six, the same reasoning applies to supervision in public law. Distributive justice also is awkward because it tends to focus on what benefits and burdens are distributed in a society. But as Fox-Decent writes, distributive justice does not explain administrative law's concerns with *how* benefits and burdens are given or taken away – that they must be given and taken away reasonably, fairly, for proper purposes etc.[13] Fox-Decent therefore argues that the justice apposite to other-regarding powers is "jurisdictional justice," which assesses the legality of exercises of other-regarding power – liability relationships.[14]

Jurisdictional justice's concern for *how* power is used has a direct link to a republican as opposed to liberal ideology.[15] Equity and public law often ask decision-makers to go above and beyond their objective authorizations, to turn their minds to the manner and purposes for which powers are used and decisions are made.[16] By contrast, corrective justice does not care for *how* a right is exercised. The exercise of a right *per se* is legally legitimate and just, even if it has unfortunate consequences for others. This distinction between the exercise of a right and exercise of a power is based upon the fact that rights and obligations regulate interferences from one another, whereas other-regarding powers do not regulate interferences, but regulate *how* interferences are justifiable. Corrective justice thus cares for freedom as non-interference whereas jurisdictional justice cares for freedom as non-domination.

Furthermore, different kinds of justice hold different visions of humanity. Corrective justice, Manderson writes, assumes humans operate in the realm of "mutual distrust" because humans are self-interested and we thus need rights and obligations to regulate interferences from others who might harm us.[17] Distributive justice, he argues, views humanity as a collective and operates on the "sociopathic" assumption that we are all the same.[18] Manderson thus argues corrective justice is apposite to the bilateral relation of 'you' and 'I' and distributive justice is apposite to the relation of 'us' or 'we'. However, he argues there may be another justice that is apposite to the third-party relationship of 'I' and 'he', 'she' or 'they', which concerns how we regard and respond to another's

[13] Evan Fox-Decent, "Constitution of Equity" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *The Philosophical Foundations of the Law of Equity* (Oxford, New York: Oxford University Press, 2020) at 132.
[14] *Ibid*.
[15] *Ibid* at 142.
[16] Dennis Klimchuk, "Equity and the Rule of Law" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford, United Kingdom: Oxford University Press, 2014) at 250.
[17] Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (MQUP, 2006) at 23.
[18] *Ibid* at 27.

vulnerability. Relationships of trust are characterised by vulnerability and perhaps involve this third-party relation. Other-regarding powers enable us to act *for* one another, presupposing that humans are beneficent and can trust one another. In other words, unlike corrective justice which assumes humans are selfish, "jurisdictional justice" assumes humans are capable of putting others first in the exercise of their choices.[19] Equity and administrative law's mission is to empower persons to act on behalf of others, and unlike the common law, whose natural theoretical bedfellow is deontology or utilitarianism, Equity is perhaps structured around virtue ethics (particularly the duty of beneficence).[20] Future research could thus look further into how the structure of administrative law and trusts law answers to a different kind of vision of humanity, justice, and ethics than other areas of law.

The fourth implication of this thesis is again theoretical. If the power-conferring theory of representative power is persuasive, then at the foundation of legal order lies a representative *grund-rechtsmacht* which is constituted by fiduciary *grundnorms.* Future research could develop this claim and look further into the idea of a fiduciary theory of law, hypothesising that other theories of law likewise presuppose an underlying representative power to act. Fuller's theory of the internal morality of law, for example, could benefit from a fiduciary power-conferring lens. Fuller saw his eight principles of the rule of law as "moralities of aspiration," as opposed to duties in the strict sense.[21] Part of his reasoning as to why the rule of law is a morality of aspiration is that the eight desiderata are imperfect, affirmative duties and it may not always be easy to know when they are fulfilled.[22] For instance, it is not clear exactly how 'clear' or 'congruent' one has to be in promulgating rules to discharge the rule of law requirement. Unlike a duty, there is not a right or wrong way to pursue the activity of law-making, but there is a "conception of proper and fitting conduct."[23] Fuller's argument that the rule of law is a morality of aspiration is thus also connected to Fuller's view that "the power of law"[24] is a purposive interaction between lawmaker and subject

[19] *Ibid* at 43–50.
[20] Lionel Smith, "Can We Be Obliged to Be Selfless?" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, 2014) 141; Matthew Stone, "Equity, Property, and the Ethical Subject" (2017) 11:1 Pólemos 73–95. ; Irit Samet, "Fiduciary Loyalty as a Kantian Virtue" in Gold & Miller, *ibid,* at 125; JE Penner, "Equity, Justice and Conscience" in Klimchuk, Samet & Smith, *supra* note 13 at 65-66
[21] Lon L Fuller, *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1969) at 40–44.
[22] *Ibid* at 43.
[23] *Ibid* at 5.
[24] *Ibid* at 147; Lon L Fuller, "American Legal Philosophy at Mid-Century" (1954) 6:4 J Leg Educ 457 at 462.

that enables human excellence. On this view, law's purpose is subjecting human conduct to rules[25] and accountability therefore "serves the purpose of organizing and facilitating interaction."[26]

The idea that the rule of law is an imperfect duty mirrors some of the ways in which Chapter Two analysed the fiduciary duty of loyalty as imperfect because it is open-ended.[27] Furthermore, the idea that officials act in the service of law's purpose implies there is a fiduciary component to Fuller's idea of law. In fact, Fuller does explicitly invoke a fiduciary metaphor to explain how science, like law, is a morality of aspiration.[28] He argues the morality of science is not found in the outcome or results alone, but in a process and collaborative exercise geared towards discovering scientific truth. It is a fiduciary concept because the self-interest of the scientist may conflict with the ethos of the profession that "no simple formula of duty can possibly resolve."[29] Instead, the lawyer, or scientist, is guided by the methods, strategies and a *fidelity* to achieving the overall ethos or purpose of the profession and is to make deliberative judgments about how best to bring about the deepest possible conformity to the underlying purpose of the enterprise at hand.[30]

The fiduciary interpretation of science as a morality of aspiration can offer us a legal framework within which to situate the rule of law as a morality of aspiration. If we attempt to reframe the aspiration of the rule of law into a duty in order to ground its legality,[31] we may end up cutting away the important point that moralities of aspiration are collaborative processes that involve a fidelity or a loyalty to law as an enterprise. Instead, we can place the rule of law as a morality of aspiration within a fiduciary powers framework. In the framework established in this thesis, we could understand the rule of law as eight power-conferring principles of fitting or congruent form that make possible the enterprise of law as a moral power. Given lawmakers must act with a fidelity to the purpose of law in exercising their powers, that is, deliberate about how best to subject human conduct to rules, there remains an overarching fiduciary *grundnorm* that sits

[25] Fuller, *supra* note 21 at 130.
[26] Lon L Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 4.
[27] Fuller, *Morality of Law, supra* note 21 at 150.
[28] *Ibid* at 120–121.
[29] *Ibid*.
[30] *Ibid* at 149–151.
[31] For instance, see Evan Fox-Decent, "Is the Rule of Law Really Indifferent to Human Rights?" (2008) 27:6 Law & Phil 533–581 at 540.

at the root of the foundation of this legal order.[32] Future research could develop this argument further as well as interpret other theories of law from a fiduciary angle.

7.3. Epilogue

This dissertation's primary contribution to knowledge has been to interpret the doctrines of judicial review in administrative law and trusts law as power-conferring principles. Although interpreting the doctrines of judicial review as power-conferring principles, as opposed to duties, may seem like a small move, we have seen in this thesis that it has profound effects on our ideas about judicial review. The interpretation is significant because it enables us to view judicial review as a jurisgenerative practice. Judicial review's legitimacy thus rests on its ability to create the conditions of administrative and trustee authority. Furthermore, we have seen that judicial review becomes part of a broader practice of supervising the ongoing integrity of trust administration and public administration. Finally, power-conferring principles help us explain the parts of administrative law and trusts law that demand explanation. The common law can legitimately impose requirements on the exercise of powers because there is no such thing as a power that is not constituted by power-conferring principles. Power-conferring principles can even explain why and how law is able to generate law itself; the political power to create legal order is necessarily constituted by power-conferring norms that make representative action possible. In short, the power-conferring framework developed in this thesis enables us to explain why the law insists that unqualified powers are nonetheless constituted by law. This dissertation is thus just the beginning of understanding how power-conferring principles affect our interpretations of law, constitutionalism, and judicial review.

[32] Perhaps this underlying fiduciary principle is how we could interpret the underlying relationship of reciprocity Fuller discusses. See Fuller, *Morality of Law*, *supra* note 21 at 39–40.

Bibliography

Constitutional Statutes

Constitution Act 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5

European Communities Act 1972 (UK)

Statutes and Codes

Alcoholic Liquor Act, RSQ 1941, c 255, s35

The Attorney-General's Department Act, R.S.Q. 1941, c. 46

Canada Labour Code, RSC 1985, c L-2, s 124.Citizenship Act, RSC 1985, c. 29, s 3(2)(a)

The Civil Procedure Order 2004 (UK), s 3

Civil Code of Procedure (1897), Article 88

Civil Procedure Rules 1998 (UK),

Data Protection Act 1998 (UK), para 10 Schedule 7

Data Protection Act 2018(UK)

Environmental Protection Act, SNL 2002, c E-14.2, Part X. s 46

The Executive Power Act, R.S.Q. 1941, c. 7

Federal Courts Act RSC 1985, c. F-7, s 18(1)

Foreign Compensation Act (UK) 1950, 14 Geo VI, c12, ss 3, 4(4).

Freedom of Information Act 2000 (UK)

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 75.06

Public Service Labour Relations Act, RSNB 1973, c. P-25, s 102(3)(a). [PSLR]

Supreme Court Act 1981 (UK)

Tribunals, Courts and Enforcement Act 2007 (UK), s 3(5)

Trusts Act (NZ), 2019/38, s 53

Trustee Act 1925 (UK), s 57(1)

Trustee Act, R.S.O. 1990, c. T.23, s 35(1), s 60

Trustee Act, R.S.B.C. 1996, c.464 s 86(1)

Variation of Trusts Act, R.S.O. 1990, c. V.1

Government Papers

United Kingdom, Ministry of Justice, Faulk's Committee, The Independent Review of Administrative Law, CP 407, (March 2021)

Jurisprudence

3 Individual Present Professional Trustees of 2 Trusts v An Infant Prospective Beneficiary of one Trust & Ors, [2007] EWHC 1922 (Ch).

Abacus Trust Co (Isle of Man) and another v Barr, [2003] EWHC 114 (Ch).

Abacus Trust Co (Isle of Man) Ltd v NSPCC, [2001] STC 1344.

Abbcar Properties, LLC v Vancouver (City), 2022 BCSC 190

AG v Cocke, [1988] Ch 414.

AG v Pearson (1835) 7 Sim, 290

AIB Group (UK) Plc v Mark Redler & Co, [2014] UKSC 58.

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61.

Alexion Pharmaceuticals Inc v Canada (Attorney General), 2021 FCA 157.

Allen v Flood, [1898] AC 1.

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

Australian Securities Commission v AS Nominees Ltd (1995) 62 FCR 504

AXA General Insurance Limited v Lord Advocate, [2011] UKSC 46.

Bagg's Case, (1572-1616) 11 Co Rep 93, (1572) 77 ER 1271.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699 .

Ball v Ball and Anor, [2020] EWHC 1020 (Ch).

Ban v Public Trustee of Queensland, [2012] QCA 93.

Banton v Banton, 1998 CanLII 14926, 164 DLR (4th) 176.

BCE Inc v 1976 Debentureholders, [2008] 3 SCR 560.

Bell Canada, et al v Attorney General of Canada (Applications for Leave), May 2018, Case No 37896.

Bell Canada, et al. v. Attorney General of Canada, Case Dossier, May 2018, Docket 37896

Bell v Ontario Human Rights Commission, [1971] SCR 756.

Bertrand v Acho Dene Koe First Nation, 2021 FC 287.

Bidgoly v Canada (Citizenship and Immigration), 2022 FC 283.

Blanchard v Control Data Canada Ltd, [1984] 2 SCR 476, 1984 CanLII 27

Boardman v Phipps, [1966] UKHL 2.

Boddington v British Transport Police, [1999] 2 AC 143.

Bray v Ford, [1896] AC 44.

Bristol and West Building Society v Mothew, [1998] Ch 1.

British Airways Plc v Airways Pension Scheme Trustee Ltd, [2018] EWCA Civ 1533, CA.

Brown v Higgs, (1803) 32 ER 473.

Brown v. Plata, 563 U.S. 493, 502–10 (2011)

Brumsden v Woolredge, (1765) Amb 507.

Buchanan v Hamilton [1801) 5 Ves. Jr. 702.

Burlacu v Canada (Attorney General), 2021 FC 610.

Burmah Oil v Lord Advocate, [1965] AC 75 (HL), [1964] 2 WLR 1231.

Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society, 2012 SCC 45.

Canada (Attorney General) v Mossop, [1993] 1 SCR 554.

Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2011 SCC 53.

Canada (Citizenship and Immigration) v Canadian Council for Refugees, 2021 FCA 72.

Canada (Citizenship and Immigration) v Galindo Camayo, 2022 FCA 50.

Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12.

Canada (Citizenship and Immigration) v Mason, 2021 FCA 156.

Canada (Citizenship and Immigration) v. Montoya, 2022 FC 105

Canada (Citizenship and Immigration) v Tennant, [2019] 1 FCR 231.

Canada (Director of Investigation and Research) v Southam Inc, [1997] 1 SCR 748, 1997 CanLII 385.

Canada (House of Commons) v Vaid, 2005 SCC 30.

Canada Labour Relations Board v Halifax Longshoremen's Association, [1983] 1 SCR 245.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.

Canada Post Corp v Canadian Union of Postal Workers, 2019 SCC 67.

Canadian Aero Service Ltd v O'Malley, 1973 CanLII 23 (SCC), [1974] SCR 592.

Canson Enterprises Ltd v Boughton & Co, [1991] 3 SCR 534.

Canson Enterprises Ltd v Boughton & Co, [1991] 3 SCR 534, [1991] CarswellBC 269.

Case of Proclamations, (1610) 12 Co Rep 74.

Catalyst Paper Corp v North Cowichan (District), [2012] 1 SCR 5, 2012 SCC 2 (CanLII).

Chan v Zacharia, (1984) 53 ALR 417.

Cherry v Advocate General, 2019 CSIH 49.

Cloutte v Storey, [1911] 1 Ch 18.

Confederation Treasury Services Ltd, [1995] CarswellOnt 1169; 37 CBR (3d) 237.

Conille v Canada (Minister of Citizenship and Immigration), [1998] 2 FC 33.

Conroy v Stokes, 1952 CanLII 227, 4 DLR 124.

Council of Civil Service Unions v Minister for the Civil Service, [1985] AC 374, [1984] 3 WLR 1174.

Cowan v Scargill, [1985] Ch 270.

Crenna v Canada (Citizenship and Immigration), 2020 FC 491.

Crociani v Crociani, [2014] UKPC 40.

CUPE v NB Liquor Corporation, [1979] 2 SCR 227.

CUPE v Ontario (Minister of Labour), 2003 SCC 29.

Cuthbertson v Rasouli, 2013 SCC 53.

Dawson-Damer and others v Taylor Wessing LLP, [2017] EWCA Civ 74.

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing, [1999] 1 AC 69.

Delta Air Lines Inc v Lukács, [2018] 1 SCR 6

D'Errico v Canada (Attorney General), 2014 FCA 95.

Djikounou v Canada (Citizenship and Immigration), 2022 FC 584.

Doré v Barreau du Québec, 2012 SCC 12

Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62.

Dr Q v College of Physicians and Surgeons of British Columbia, 2003 SCC 19.

Duke of Portland v Lady Topham, (1864) 11 HLC 32.

Dundee General Hospitals Board of Management v Walker, [1952] 1 All ER 896.

Dunsmuir v New Brunswick, 2008 SCC 9.

Eclairs Group Ltd v JKX Oil & Gas plc, [2015] UKSC 71.

Edell v Sitzer, 2001 CanLII 27989, 55 OR (3d) 198.

Edge v Pensions Ombudsman, [2000] Ch 602.

Edwards v Cruickshank, (1840) 3 D 282.

Entertainment Software Association v Society of Composers, 2020 Federal Court of Appeal.

Entick v Carrington, (1765) 19 St Tr 1030.

Equitable Life Assurance v Hyman, 2002 1 AC 408.

Erceg v Erceg, 2017 1 NZLR 320.

Ettorre v Ettore Estate, [2004] OTC 780.

Ex p Adamson, (1878), 8 Ch D 807.

Ex parte Lloyd, (1882) 47 LT 64.

Farrier v Canada (Attorney General), 2020 FCA 25.

Fawcett v College of Physicians and Surgeons of Alberta, 2022 ABQB 452

FHR European Ventures LLP v Cedar Capital Partners LLC, [2014] UKSC 45.

Finch v Telstra Super Pty Ltd, [2010] HCA 36.

Finers (a firm) v Miro, [1991] 1 WLR 35.

Fox v Fox Estate, (1996) 28 OR (3d) 496, [1996] OJ No 375.

Frame v Smith, [1987] 2 SCR 99, 42 DLR (4th) 81.

Gailey v Gordon, [2002] 2 NZLR 192.

Gibralter Mines Ltd v Harvey, 2021 BCSC 927.

Gisborne v Gisborne, (1876-1877) LR 2 App Cas 300 (HL).

Gonder v Gonder Estate, 2010 ONCA 172.

Gouriet v Union of Post Office Workers, 1978 AC 435.

Grimaldi v Chameleon Mining NL (No 2), (2012) 287 ALR 22.

Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511, 245 DLR (4th) 33.

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26.

Hills v Canada (Attorney General), [1988] 1 SCR 513.

Hindle v John Cotton Ltd, 1919 SLR 625.

(Hoareau) v Secretary of State for Foreign and Commonwealth Affairs, [2018] EWHC 1508 (Admin).

Hodgkinson v Simms, [1994] 3 SCR 377.

*Hollywood Silver Fox Farm Ltd v Emmett, [*1936] 2 KB 468.

Hospital Products Ltd v United States Surgical Corporation, 1984 HCA 64.

Howard Smith v Ampol Petroleum, [1974] AC 821.

In re Goldcorp Exchange Ltd, [1995] 1 AC 74.

In re Gulbenkian's Settlements, [1970] AC 508, HL, [1968] 3 WLR 1127.

In re Racal Communications Ltd, [1981] AC 374.

In The Matter an Application for a Reference by Chief Brian Francis on behalf of the Abegweit First Nation Band Council and Abegweit First Nation of questions or issues of the constitutional validity of the custom rules governing elections for the Chief and Council of the Abegweit First Nation Band, 2016 FC 750.

JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry, [1990] 2 AC 418.

John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd, [2010] HCA 19.

Jones v Lock, (1865) 1 LR 1 Ch App 25.

Kain v Hutton, 2008 NZSC 61.

Karger v Paul, [1984] VR 161.

King v Lee, (1689) Shower 251, 252, 89 Eng Rep 554.

Klug v Klug, [1918] 2 Ch 67.

Knight v Knight, (1840) 3 Beav 148.

Komolafe v Canada (Citizenship and Immigration), 2013 FC 431.

Lac Minerals Ltd v International Corona Resources Ltd, [1989] 2 SCR 574.

Larochelle v Soucie Estate, 2019 BCSC 1329.

Law Society of New Brunswick v Ryan, 2003 SCC 20, [2003] 1 SCR 247.

Law Society of Saskatchewan v Abrametz, 2022 SCC 29.

Lehtimäki and others v Cooper, 2020 UKSC 33.

Letterstedt v Broers, (1884) 9 App Cas 371.

Lewis v Tamplin, [2018] EWHC 777 (Ch).

Libertarian Investments Ltd v Hall, 2013 HKCFA 93.

M v Home Office, [1993] 3 WLR 433.

M v St Annes Trustees Ltd, 12 Jan 2018 [2018] 1/2018.

Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand, [2008] HCA 42.

MacKenzie v Ottawa Community Housing Corporation, 2021 ONSC 1640.

Malik v Sabha, [2020] OJ No 4679

Malone v Metropolitan Police Commissioner, [1979] Ch 344.

Marley v Mutual Society Merchant Bank and Trust Co Ltd, [1991] 3 All ER 198.

Marsella v Wareham (No 2), [2019] VSC 65.

McCorkill v Streed, 2014 NBQB 148.

McInnes v Onslow Fane and another, [1978] 3 All ER 211.

McLean v British Columbia (Securities Commission), [2013] 3 SCR 895.

McLean v Burns Philp Trustee Co Pty Ltd, [1985] 2 NSWLR 623.

McPhail v Doulton, [1971] AC 424, HL, [1970] 2 WLR 1110.

Medforth v Blake, [2000] Ch 86.

Metropolitan Life Insurance, [1979] SCR 756.

Mettoy Pensions Trustees Ltd v Evans, [1991] 2 All ER 513, [1990] 1 WLR 1587.

MNRPF v Stena Line Ltd & Ors, [2015] EWHC 448 (Ch).

Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board, [1994] 1 SCR 202.

Morice v Bishop of Durham, (1805) 32 ER 947 (Ch).

Murad v Al-Saraj, 2005 EWCA Civ 959.

National Westminster Bank v Lucas, [2014] EWCA Civ 1632.

New Brunswick Liquor Corp v Canadian Union of Public Employees, Local 963, [1978] NBJ No 1, 21 NBR (2d) 441.

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62.

Nicholson v Haldimand-Norfolk Regional Police Commissioners, [1979] 1 SCR 311

Ontario (Energy Board) v Ontario Power Generation Inc, 2015 SCC 44.

Osun v Canada, 2020 FC 295

Otis v Otis, 2004 CanLII 311 (ON SC).

Padfield v Minister of Agriculture, [1968] AC 997.

Palmer v Simmonds, (1854) 2 Drew 221.

Parsons and another v Reid and another, [2022] EWHC 755 (Ch).

Peach Estate (Re), 2009 NSSC 383.

Pearlman v Keepers and Governors of Harrow School, [1979] QB 56.

Pendergast v Sidney (Town), 2020 BCSC 1049.

Peoples Department Stores Inc (Trustee of) v Wise, [2004] 3 SCR 461.

PGT v Colwell, 2004 BCSC 1622.

Pham v Secretary of State for the Home Department, [2015] UKSC 19.

Pilkington v IRC, [1964] AC 612.

Pirani v Pirani, 2020 BCSC 974.

Pitt v Holt, [2011] EWCA Civ 197.

Pitt v Holt and Futter v Futter, 2013 UKSC 26, [2013] 2 AC 108.

Portnov v Canada (Attorney General), 2021 FCA 171.

Primeau v Canada (Attorney General), 2021 FC 829.

Prohibitions del Roy, (1607) 12 Co Rep 63, 77 ER 1342.

Public Trustee v Cooper, [2001] WTLR 901.

*Pushpanathan v Canada (Minister of Citizenship and Immigration), [*1998] 1 SCR 982, 160 DLR (4th) 193.

R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office, [2001] QB 1067.

R (Cart) v Upper Tribunal, [2011] UKSC 28.

*R (Evans) v Attorney General, [*2015] UKSC 21.

R (HS2 Action Alliance Ltd) v Secretary of State for Transport, 2014 UKSC 3.

R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills, [2012] EWHC 201 (Admin).

R (Jackson) v Attorney General, [2006] 1 AC 26

R (Lumba) v Secretary of State for the Home Department, 2011 UKSC 12.

R (Miller) v Secretary of State for Exiting the European Union, [2017] UKSC 5.

R (on the application of Bancoult) v Secretary of State For Foreign and Commonwealth Affairs, [2008] UKHL 61.

R (on the application of Miller) v The Prime Minister, [2019] UKSC 41.

R (on the application of Privacy International) v Investigatory Powers Tribunal and others, 2019 UKSC 22.

R (Plantagenet Alliance) v Secretary of State for Justice, [2015] 3 All ER 261.

R (UNISON) v Lord Chancellor, [2017] UKSC 51.

R v. Barker, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824-25 (K.B. 1762).

R v Bolton, (1841) 1 QB 66.

R v Charity Commissioners, Ex p Baldwin, [2001] WTLR 137.

R v Cheltenham, (1841) 1 QB 468.

R v Hull University Visitor, ex parte Page, [1993] AC 682, HL.

R v Inland Revenue Commissioners, Ex p National Federation of Self Employed and Small Businesses Ltd, [1982] AC 617.

R v Lancashire CC Ex p Huddleston, [1986] 2 All ER 941.

R v Monopolies and Mergers Commission, Ex parte South Yorkshire Transport Ltd, [1993] 1 WLR 23, HL.

R v Secretary of State for the Home Department, Ex p Fire Brigades Union, [1995] 2 AC 513, [1995] 2 WLR 464.

R v Secretary of State for the Home Department, ex parte Leech, [1994] QB 198, [1993] 4 All ER 539

R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority, [1989] 1 QB 26 (CA).

R v Secretary of State for the Home Department, ex parte Pierson, [1998] AC 539 at 587

R v Somerset County Council, ex p Fewings, [1995] 1 All ER 513.

Re Allen-Meyricks Will Trusts, [1966] 1 WLR 499.

Re Application by Brenda Downes for Judicial Review, [2006] NIQB 77.

Re Ashby [1934] O.R. 421, 3 D.L.R. 565 (C.A.)

Re Baden (No 2), [1973] Ch 9.

Re Beddoe, [1893] 1 Ch 547.

Re Beloved Wilkes's Charity, (1851) 3 Mac & G 440.

Re Coomber, [1911] 1 Ch 723, CA.

Re Duke of Northfolk's Settlement Trusts, [1982] Ch D 61, CA.

Re Estate Late Chow Cho-Poon, 2013 NSWSC 844.

Re Gibson's Settlement Trusts, [1981] Ch 179.

Re Haasz, (1959) 21 DLR (2d) 12, [1959] OWN 395.

Re Hastings-Bass, [1975] Ch 25, [1974] 2 All ER 193.

Re Hay's Settlement Trusts, [1982] 1 WLR 202.

Re Kaptyn Estate, 2011 ONSC 3491.

Re Locker's Settlement, [1977] WLR 1323.

Re Londonderry's Settlement, [1965] Ch 918.

Re Manisty's Settlement, [1974] Ch 17.

Re McLaren, (1922) 69 DLR 599, 51 OLR 538.

Re Racal Communications Ltd, [1981] AC 374.

Re Skeat's Settlement, (1889) 42 Ch D 522.

Re T R Technology Investment Trust plc, [1998] BCLC 256.

Re Toigo Estate, 2018 BCSC 936.

Re Whiteley, Whiteley v Learoyd, (1886) 33 Ch D 347.

*Redwood Master Fund Ltd v TD Bank Europe Ltd, [*2002] EWHC 2703 (Ch).

Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.

Reference re Language Rights Under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867, [1985] 1 SCR 721.

Reference re subsection 183(1) of the Federal Courts Act, 2019 FC 261.

Regal Hastings v Gulliver, [1967] 2 AC 134.

Regentcrest plc v Cohen, [2000] 2 BCLC 80.

Richard v MacKay, (1997) 11 Tru LI 23.

Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27.

RL c Ministère du Travail, de l'Emploi et de la Solidarité sociale, 2021 QCCS 3784.

Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35.

Roncarelli v Duplessis, [1959] SCR 121; [1959] 16 DLR (2d) 689.

RSPCA v AG, [2001] 3 All ER 530, [2002] 1 WLR 448.

Safe Food Matters Inc v Canada (Attorney General), 2022 FCA 19.

Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador, 2020 NLSC 34.

Scaffidi v Montevento Holdings Pty Ltd, [2011] WASCA 146.

Scarborough Health Network v Canadian Union of Public Employees, 2020 CanLII 100039 (ON LA).

Scarborough Health Network v Canadian Union of Public Employees, Local 5852, 2020 ONSC 4577.

Schmidt v Rosewood Trust Ltd, [2003] UKPC 26.

Scott v National Trust for Places of Historic Interest or Natural Beauty, [1998] 2 All ER 705.

Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd, [2002] EWCA Civ 1409.

Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Association, [1975] 1 SCR 382.

Sexsmith v Canada (Attorney General), 2021 FCA 111.

Shergill & Ors v Khaira & Ors, [2014] UKSC 33.

Sieff v Fox, [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

Slemko v Canada (Public Safety and Emergency Preparedness), 2020 FC 718.

Smith v East Elloe Rural District Council, [1956] AC 736, HL.

South Asia Firebricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union, [1981] AC 363.

South East Cornerstone School Division No 209 v Oberg, 2021 SKCA 28.

Speight v Gaunt, (1883) LR 22 Ch D 727.

Spence v BMO Trust Company, 2016 ONCA 196.

Spread Trustee Company Ltd v Hutcheson & Ors (Guernsey), [2011] UKPC 13.

Swales v IRC, [1984] 3 All ER 16.

Tamlin v Edgar, 2011 EWHC 3949.

Target Holdings Ltd v Redferns, [1996] AC 421.

Telstra Super Pty Ltd v Flegeltaub, [2000] VSCA 180.

The Case of Alton Woods, (1600), 1 Co R 40b (KB).

The Duchy of Lancaster Case, (1561) 1 Plowden 212.

Thavaratnam v. Canada (Citizenship and Immigration), 2022 FC 967

Thoburn v Sunderland City Council, [2002] EWHC 195 (Admin).

Thomas and Agnes Carvel Foundation v Carvel, 2007 EWHC 1314 (Ch).

Thompson v Lamport, [1945] SCR 343.

Three Individual Present Professional Trustees, [2007] WTLR 1631.

Three Rivers District Council v Governor and Co of the Bank of England (No 3), [2003] 2 AC 1; [2000] 2 WLR 15.

Tito v Waddell (No 2), [1977] 3 All ER 129.

Titterton v Oates, [2001] WTLR 319.

TLC The Land Conservancy of British Columbia v The University of British Columbia, 2014 BCCA 473.

TLC The Land Conservancy of British Columbia v The University of British Columbia, 2014 BCSC 97.

TMO Renewables Ltd (in liquidation) v Yeo, [2021] EWHC 2033 (Ch).

Toronto (City) v Ontario (Attorney General), 2021 SCC 34.

Trump v Hawaii, No. 17-965, 585 U.S. (2018)

Trustees of the Celestial Church of Christ, Edward Street Parish (a charity) v Lawson [2017] EWHC 97 (Ch), .

Turner v Corney, (1841) 5 Beav 515.

Turner v Corney, (1841) 6 Beav 516 617.

Turner v Turner, [1984] Ch 100; [1983] 3 WLR 896.

Turp v Ministry of Justice & Attorney General of Canada 2012 FC 893

UES, Local 298 v Bibeault, [1988] 2 SCR 1048, 1988 CanLII 30.

Valente v The Queen, 1985 CanLII 25 (SCC), [1985] 2 SCR 673.

Vatcher v Paull, [1915] AC 372.

Vieira Sebastiao Melo v. Canada (Citizenship and Immigration) 2022 FC 544

Walters v Walters, 2022 ONCA 38.

Wellesley v Earl of Mornington, (1855) 2 K & J 143; 69 ER 728.

West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal), 2018 SCC 22.

Wewaykum Indian Band v Canada, 2002 SCC 79.

White et al v Upper Thames River Conservation Authority, 2020 ONSC 7822.

Wight & Anor v Olswang, [2000] EWCA Civ 310.

Willion v . Berkley,(1559) Plowden 233a

Wilson v Atomic Energy of Canada Ltd, 2016 SCC 29.

Wrightson v Cooke, [1908] 1 Ch 789.

Yu v. Canada (Citizenship and Immigration), 2021 FC 1236

X v A, [2005] EWHC 2706 (Ch), [2006] 1 WLR 741.

Books

Allan, T R S, Constitutional Justice : A Liberal Theory of the Rule of Law (Oxford: Oxford University Press, 2003).

———, The Sovereignty of Law: Freedom, Constitution and Common Law (Oxford, UK: Oxford University Press, 2013).

Allen, Jason Grant, Constitutional Authority and Judicial Review: A Common Law Theory of Ultra Vires (DPhil Thesis, University of Cambridge, 2017) [unpublished].

Allison, JWF, A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law (Oxford: Oxford University Press, 2000).

Arendt, Hannah, Eichmann in Jerusalem: A Report on the Banality of Evil (New York, N.Y.: Penguin Books, 2006).

———, The Human Condition. (Chicago: University of Chicago Press, 1958).

Austin, J L, How to Do Things with Words, 2nd ed, J. O. Urmson & Marina Sbisà, eds (Cambridge, Massachusetts: Harvard University Press, 1975).

Bell, Joanna, The Anatomy of Administrative Law (Bloomsbury Publishing, 2020).

Benhabib, Seyla, Dignity in Adversity: Human Rights in Troubled Times (John Wiley & Sons, 2013).

Blackstone, William, Commentaries on the Laws of England: in Four Books, 5th ed (Oxford: Clarendon Press, 1773).

Bodin, Jean, Six Books of the Commonwealth., 2nd ed, translated by M.J. Tooley (Oxford: Blackwell, 1967).

Butler, Judith, Giving an Account of Oneself, 1st ed (New York: Fordham University Press, 2005).

Cameron, Edwin et al, Honoré's South African law of trusts. (Lansdowne: Juta, 2002).

Cartier, Geneviève, Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue (SJD Thesis, Department of Law, University of Toronto, 2004) [unpublished].

Chitty, Joseph & John Francis Sir Rotton, Chitty's Prerogatives of the Crown (London: Joseph Butterworth and Son, 1820).

Clarry, Daniel, The Supervisory Jurisdiction Over Trust Administration (Oxford: Oxford University Press, 2018).

Conaglen, Matthew, Fiduciary Loyalty : Protecting the Due Performance of Non-Fiduciary Duties (New York : Hart Publishing, 2010).

Condren, Conal, Argument and Authority in Early Modern England: the Presupposition of Oaths and Offices (Cambridge; New York: Cambridge University Press, 2006).

Constable, Marianne, Our Word is Our Bond: How Legal Speech Acts (Stanford: Stanford University Press, 2014).

Craig, Paul, Administrative Law, 7th ed (London: Sweet & Maxwell, 2012).

Criddle, Evan, et al. Fiduciary Government (Cambridge, United Kingdom: CUP, 2018)

Criddle, Evan & Fox-Decent, Evan, Fiduciaries of Humanity: How International Law Constitutes Authority (Oxford, New York: Oxford University Press, 2016);

Daly, Paul, Understanding Administrative Law in the Common Law World, 1st ed (Oxford: Oxford University Press, 2021).

Dicey, A V, Introduction to the Study of the Law of the Constitution (Indianapolis: LibertyClassics, 1982).

Dworkin, Ronald, Taking Rights Seriously (London: Duckworth, 1977).

Dyzenhaus, David, Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar (Oxford University Press).

———, The Constitution of Law: Legality in a Time of Emergency (Cambridge; New York: Cambridge University Press, 2006).

———, The Long Arc of Legality: Hobbes, Kelsen, Hart (Cambridge, UK: Cambridge University Press, 2022).

Elliott, Mark, The Constitutional Foundations of Judicial Review (Oxford: Hart Publishing, 2001).

Finn, P D, Fiduciary Obligations (Sydney: Law Book Co., 1977).

Fox-Decent, Evan, Sovereignty's Promise: The State as Fiduciary (Oxford; New York: Oxford University Press, 2011).

Fuller, Lon L, The Morality of Law (New Haven, Connecticut: Yale University Press, 1969).

Gold, Andrew S, The Right of Redress (Oxford, UK: Oxford University Press, 2020).

Hamson, C J, Executive Discretion and Judicial Control: An Aspect of the French Conseil d'état (London: Stevens, 1954).

Harlow, Carol & Richard Rawlings, Law and Administration (Cambridge University Press, 2006).

———, Law and Administration (Cambridge, UK: Cambridge University Press, 2009).

Hart, HLA, The Concept of Law, 2d ed (Oxford: Clarendon Press, 1961).

Hayton, David J et al, Law Relating to Trusts and Trustees, 19th ed (London, UK: LexisNexis UK, 2016).

Henderson, Edith G, Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century (Harvard University Press, 2013).

Hobbes, Thomas, Leviathan, revised ed, A.P Martinich & Brian Battiste, eds (Toronto: Broadview Editions, 2011).

Hudson, Jessica, Assuring the Express Trust: The So-Called "Beneficiary's Proprietary Claim" (PhD, University of New South Wales, 2019) [unpublished].

Kantorowicz, Ernst H, The King's Two Bodies: A Study in Mediaeval Political Theology (Princeton, N.J.: Princeton University Press, 1957).

Karstedt, Susanne, ed, Legal Institutions and Collective Memories (Oxford ; Hart Pub., 2009).

Kavanagh, Aileen, Constitutional Review under the UK Human Rights Act (Cambridge, UK: Cambridge University Press, 2009).

Kelsen, Hans, Pure Theory of Law (Berkley: University of California Press, 1967).

Knight, Dean, Vigilance and Restraint in the Common Law of Judicial Review (Cambridge, UK ; Cambridge University Press, 2018).

Leckey, Robert, Contextual Subjects: Family, State and Relational Theory (Toronto: University of Toronto Press, 2008).

Lewans, Matthew, Administrative Law and Judicial Deference (2016).

Lewin, Thomas et al, Lewin on Trusts, 9th ed (London: Sweet & Maxwell, 2012).

Lindahl, Lars, Position and Change: A Study in Law and Logic (Dordrecht, Holland: Reidel Publishing, 1977).

Loughlin, Martin, Foundations of Public Law (Oxford,: Oxford University Press, 2010).

———, The Idea of Public Law (Oxford University Press, 2004).

Loughlin, Martin & Neil Walker, The Paradox of Constitutionalism: Constituent power and Constitutional form (Oxford: Oxford University Press, 2008).

Maitland, Frederic William, State, Trust, and Corporation, David. Runciman & Magnus. Ryan, eds (Cambridge University Press, 2003).

Manderson, Desmond, Proximity, Levinas, and the Soul of Law (MQUP, 2006).

McGarry, John, Intention, Supremacy and the Theories of Judicial Review (Oxford, UK: Routledge, 2017).

McLean, Janet, Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere (Cambridge: Cambridge University Press, 2012).

Miller, Paul B & Andrew S Gold, Contract, Status, and Fiduciary Law, 1st ed (Oxford, United Kingdom ; Oxford University Press, 2016).

Mullan, David J, Administrative law, 2d ed (Agincourt, Ontario: Carswell, 1979).

Oliver, Dawn, Common Values and the Public-Private Divide (Cambridge: Cambridge University Press, 2010).

Oosterhoff, A H, Robert Chambers & Mitchell McInnes, Oosterhoff On Trusts, 9th ed (Toronto: Thomson Reuters Canada, 2019).

Penner, J E, Property Rights: A Re-Examination (Oxford, New York: Oxford University Press, 2020).

Pettit, Philip, Republicanism: A Theory of Freedom and Government (Oxford: Oxford University Press).

Pitkin, Hanna Fenichel, The Concept of Representation (Berkeley: University of California Press, 1967).

Raso, Jennifer Marie, Administrative Justice: Guiding Caseworker Discretion (SJD Thesis, Department of Law, University of Toronto, 2018) [unpublished].

Rawls, John, A Theory of Justice, original ed (Cambridge, Mass.: Belknap Press, 1977).

Raz, Joseph, Engaging Reason: On the Theory of Value and Action, first edition ed (Oxford ; New York: Oxford University Press, 1999).

Raz, Joseph, Practical Reason and Norms (Oxford, UK: Oxford University Press, 1999).

Robson, William A, Justice and Administrative Law; A study of the British Constitution. (London: Stevens, 1951).

Schmitt, Carl, Political Theology: Four Chapters on the Concept of Sovereignty (Chicago: University of Chicago Press, 2005).

Shapiro, Scott, Legality (Cambridge, Mass.: Harvard University Press, 2011).

Smith, Lionel, The Law of Loyalty (Oxford: Oxford University Press, (forthcoming)).

Smith, S A de, Judicial Review of Administrative Action, 3r ed (London: Sweet & Maxwell, 1973).

Smith, Stephen A, Contract Theory (Oxford, UK: Oxford University Press, 2004).

———, Rights, Wrongs, and Injustices: The Structure of Remedial Law, 1st ed (Oxford, United Kingdom: Oxford University Press, 2019).

Stebbings, Chantal, The Private Trustee in Victorian England (Cambridge; New York: Cambridge University Press, 2002).

Sullivan, Ruth, Statutory Interpretation, 3rd ed (Toronto: Irwin Law, 2016).

Tomkins, Adam, Our Republican Constitution (Oxford ; Hart Publishing, 2005).

Tucker, Lynton et al, Lewin on Trusts, 20th ed (London: Sweet & Maxwell, 2020).

Valsan, Remus, Understanding Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law (DCL Thesis, Faculty of Law, McGill University, 2012) [unpublished].

Wade, William, Administrative Law, 1st ed (Oxford: Clarendon Press, 1961).

Wade, William & Christopher Forsyth, Administrative Law, 9th ed (Oxford: Oxford University Press, 2004).

———, Administrative Law, 10th ed (Oxford: Oxford University Press, 2009).

Waters, Donovan, MR Gillen & Lionel Smith, Waters' Law of Trusts in Canada., 4th ed (Toronto: Carswell, 2012).

Watt, Gary, Trusts and Equity, 8th ed (Oxford University Press, 2018).

Weinrib, Ernest J, Corrective Justice (Oxford: Oxford University Press, 2012).

Whitman, James Q, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial (Yale University Press, 2008).

Woolf, Sir Harry, Protection of the Public: A New Challenge, Hamlyn lectures 41st ser (London: Stevens & Sons, 1990).

Journal Articles and Book Sections

Ahmed, Farrah, "The Delegation Theory of Judicial Review" (2021) 84:4 Mod L Rev 772.

Allan, T R S, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61:1 Cambridge LJ 87.

Antaki, Mark, "The Rationalism of Proportionality's Culture of Justification" in Bradley W Miller, Grant Huscroft & Grégoire Webber, eds, Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge: Cambridge University Press, 2014) 284.

Aronson, Mark, "Misfeasance in Public Office: A Peculiar Tort" (2011) 35:1 Melbourne UL Rev 1.

Austin, Lisa M "The Public Nature of Private Property" in J E Penner, ed, Property Theory : Legal and Political Perspectives (Cambridge, United Kingdom ; Cambridge University Press, 2018)

———, "The Power of the Rule of Law" in Lisa M Austin & Dennis Klimchuk, eds, Private Law and the Rule of Law (Oxford: Oxford University Press, 2014).

Baker, John, "Equity and Public Law in England" in Collected Papers on English Legal History (Cambridge: Cambridge University Press, 2013) 945.

Balkin, J M, "The Hohfeldian Approach to Law and Semiotics" (1990) 44:5 U Miami L Rev 1119.

Bell, John, "Legal Research and the Distinctiveness of Comparative Law" in Mark van Hoecke, ed, Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Oxford: Hart Publishing, 2011).

Borrows, John, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37:3 OHLJ 537–596.

Bottomley, Stephen, "From Contractualism to Constitutionalism: A Framework for Corporate Goverance" (1997) 19:3 Sydney L Rev 277.

Boughey, Janina, "Administrative Law: The Next Frontier for Comparative Law" (2013) 62:1 ICLQ 55.

Bray, Samuel L, "Fiduciary Remedies" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, The Oxford Handbook of Fiduciary Law [Oxford handbooks] (New York, NY: Oxford University Press, 2019).

Brazier, Rodney, "Constitutional Reform and the Crown" in Maurice Sunkin, ed, The Nature of the Crown : A Legal and Political Analysis (Oxford ; Oxford University Press, 1999) 337.

Buckle, Paul, "Another wrong turn? The rule in Hastings-Bass in Guernsey" (2018) 24:8 Trusts & Trustees 799–812.

Burns, Fiona R, “The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion” (2000) 21:2 U Queensland LJ 198–219.

Cane, Peter, “Standing up for the Public” (1995) 276 PL.

Cartier, Geneviève, “The Baker Effect : A New Interface between the Canadian Charter of Rights and Freedoms and Administrative Law” in David Dyzenhaus, ed, The Unity of Public Law (Oxford: Hart, 2004).

Cave, Joanna, “Remedies Matter: Evaluating the Efficacy of Remedies in Public Law Litigation for Executive Action” (2021) 30 Dal J Leg Stud 1.

Chayes, Abram, “The Role of the Judge in Public Law Litigation” (1975) 89 Harv L Rev 1281.

Ciepley, David, “Beyond Public and Private: Toward a Political Theory of the Corporation” (2013) 107:1 Am Polit Sci Rev 139.

Cleveland, Steven, “Politicians as Fiduciaries: Public Law and Private Law When Altering the Date of an Election.” 77:4 Washington and Lee Law Review 1463;

Conaglen, Matthew, “Public-Private Intersection : Comparing Fiduciary Conflict Doctrine and Bias” (2008) PL 58.

Coshott, Derwent, “To Benefit Another: A theory of the Express Trust” (2020) 136:2 LQR 221.

Cover, Robert M, “Foreword: Nomos and Narrative Supreme Court 1982 Term” (1983) 97:1 Harv L Rev 4.

Craig, Paul, “Formal and Substantive Conceptions of the Rule of Law” (1997) PL 467.

———, “Ultra Vires and the Foundations of Judicial Review” (1998) 57:1 CLJ 63–90.

Criddle, Evan J, “Fiduciary Foundations of Administrative Law” (2006) 54:1 UCLA law review 117;

Criddle, Evan J & Evan Fox-Decent, “Guardians of Legal Order: The Dual Commissions of Public Fiduciaries” in Evan J Criddle et al, eds, Fiduciary Government (Cambridge, UK: Cambridge University Press, 2018).

———, Human Rights, Emergencies, and the Rule of Law” (2012) 34:1 Hum Rts Q 39.

———, “The Internal Morality of International Law” (2018) 63:3–4 McGill LJ 765.

Daly, Paul, “Canadian Labour Law after Vavilov Commentary on Cases, Legislation and Policy: Comment” (2021) 23:1 Canadian Lab & Emp LJ 103.

Davern, Raymond, “Impeaching the Exercise of Trustees’ Distributive Discretions: ‘Wrong Grounds’ and Procedural Unfairness” in David Hayton, ed, Extending the Boundaries of Trusts and Similar Ring-fenced Funds (New York: Kluwer Law International, 2002).

Dickson, Brian, “The Public Responsibilities of Lawyers” (1983) 13 Man LJ 175.

Dickson, Brice, “The Contribution of Lord Diplock to the General Law of Contract” (1989) 9 Oxford J Leg Stud 441.

Dworkin, Ronald M, “The Model of Rules” (1967) 35:1 The University of Chicago Law Review 14–46.

Dyzenhaus, David, “Accountability and the Concept of (Global) Administrative Law : Definitional Issues in Global Administrative Law. Part I” (2009) 41:2 Acta Juridica 3.

———, “Dignity in Administrative Law: Judicial Deference in a Culture of Justification” in Dieter Grimm, Alexandra Kemmerer & Christoph Möllers, eds, Human Dignity in Context (Bloomsbury Publishing, 2018) 239.

———, “Formalism’s Hollow Victory” (2002) 4 NZ L Rev 525.

———, “The Deep Structure of Roncarelli v Duplessis” (2004) 53 UNB LJ 111.

———, “The Left and the Question of Law” (2004) 17:01 Can JL & Jur 7.

———, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed, The Province of Administrative Law (Oxford, UK: Hart Publishing, 1997).

———, “The Rule of (Administrative) Law in International Law” (2005) 68:3 Law & Contemp Probs 127.

Easton, Robert E, “The Dual Role of the Structural Injunction” (1990) 99:8 Yale LJ 1983.

Easterbrook, Frank H. and Fischel, Daniel R., ‘Contract and Fiduciary Duty’ (1993) 36 J L and Econ 425

Edelman, James, “The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties” in Andrew S Gold & Paul B Miller, eds, Philosophical Foundations of Fiduciary Law (OUP Oxford, 2014)

Ekins, Richard and Forsyth, Christopher, Judging the Public Interest: The Rule of Law vs. The Rule of Courts University of Cambridge Faculty of Law Research Paper No. 49/2016, online: <ssrn.com/abstract=2845448>

Elliott, Mark, “Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context” (2020) 16:4 European Constitutional Law Review 625.

Emery, CT, “The Most Hallowed Principle – Certainty of Beneficiaries of Trusts and Powers of Appointment” (1982) 98 Law Q Rev 551.

Essert, Christopher, “Legal Powers in Private Law” (2015) 21:3–4 Legal Theory 136.

———, “The Office of Ownership” (2013) 63:3 UTLJ 418.

Evans, Sian, “The Rule of Law, Constitutionalism and the MV Tampa” (2002) 13 Public Law Review 94.

Feldman, David, “Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective” in Satvinder Juss & Maurice Sunkin, eds, Landmark Cases in Public Law (Oxford: Hart Publishing, 2018).

———, Error of Law and the Effects of Flawed Administrative Decisions and Rules, University of Cambridge, Legal Studies Research Paper No. 18/2014 at 4–5

———, “Judicial Review: A Way of Controlling Government?” (1988) 66 Pub Admin 21.

———, “The Nature and Significance of ‘Constitutional’ Legislation” (2013) 129 Law Q Rev 343.

Faulkner, Paul “Fiduciary Grounds and Reasons” in Paul Miller & Matthew Harding, eds, Fiduciaries and Trust: Ethics, Politics, Economics and Law (Cambridge University Press, 2020)

Finn, P D, “The Forgotten ‘Trust’: The People and the State” in Malcolm Cope, ed, Equity: issues and trends : the importance and pervasiveness of equitable doctrines and principles in modern private, commercial, and public law (Sydney: Federation Press, 1995);

Ford, Cristie, “Dogs & Tails: Remedies in Administrative Law” in Lorne Mitchell Sossin, ed, Administrative Law in Context (Toronto : Emond Montgomery Publications, 2013).

Forsyth, Christopher, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” (1996) 55:01 CLJ 122.

———, “‘The Metaphysic of Nullity’: Invalidity, Conceptual Reasoning and the Rule of Law” in William Wade, Christopher Forsyth & Ivan Hare, eds, The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC (Oxford; New York: Clarendon Press ; Oxford University Press, 1998).

———, “The Rock and the Sand: Jurisdiction and Remedial Discretion” (2013) 18:4 Judicial Review 360–378.

Fortin, Marie-France, “The King’s Two Bodies and the Crown a Corporation Sole: Historical Dualities in English Legal Thinking” (2021) History of European Ideas 1.

Fox-Decent, Evan, “Constitution of Equity” in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, The Philosophical Foundations of the Law of Equity (Oxford, New York: Oxford University Press, 2020).

———, “Democratizing Common Law Constitutionalism” (2010) 55:3 McGill LJ 511–535.

———, “Fiduciary Authority and the Service Conception” in Andrew S Gold & Paul B Miller, eds, Philosophical Foundations of Fiduciary Law (OUP Oxford, 2014) 363.

———, “Is the Rule of Law Really Indifferent to Human Rights?” (2008) 27:6 Law & Phil 533–581.

———, “Parliamentary Privilege and The Rule of Law” (2007) 20 CJALP 118.

——— “Trust and Authority” in Paul Miller & Matthew Harding, eds, Fiduciaries and Trust: Ethics, Politics, Economics and Law (Cambridge University Press, 2020).

——— “Unseating Unilateralism” in Lisa M Austin & Dennis Klimchuk, eds, Private Law and the Rule of Law (Oxford: Oxford University Press, 2014)

Freedman, C D, “The Opinion, Advice and Direction of the Court: Principles, Procedures and Judicial Blessings” (2012) 32 Est Tr & Pensions J 379–412.

Fuller, Lon L, “American Legal Philosophy at Mid-Century” (1954) 6:4 J Leg Educ 457.

———, “Human Interaction and the Law” (1969) 14 Am J Juris 1.

———, “The Forms and Limits of Adjudication” (1978) 92:2 Harv L Rev 353.

Glover Berger, Kate, “The Missing Constitutionalism of Canada v Vavilov” (2021) 34:1 J L & Soc Pol’y 68.

———, “The Supreme Court in a Pluralistic World: Four Readings of a Reference Democracy, Federalism, and Rule of Law: The Senate Reference Revisited” (2014) 60:4 McGill LJ 839.

Goldberg, John C P & Benjamin C Zipursky, “Torts as Wrongs” (2009) 88:5 Tex L Rev 917.

Green, Michael, “Marmour’s Kelsen” in D A Jeremy Telman, ed, Hans Kelsen in America - selective affinities and the mysteries of academic influence 116 (Switzerland: Springer, 2016) 31.

Haldar, Piyel, “Equity as a Question of Decorum and Manners: Conscience as Vision” (2016) 10:2 Pólemos 311–327.

Halpin, Andrew, “The Concept of a Legal Power” (1996) 16 OJLS 129.

Harding, Matthew, “Equity and Institutions” in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, Philosophical Foundations of the Law of Equity (Oxford, New York: Oxford University Press, 2020).

———, “Responding to Trust: Responding to Trust” (2011) 24:1 Ratio Juris 75–87.

Harris, BV, “The ‘Third Source’ of Authority for Government Action” (1992) 108 Law Q Rev 626.

Harris, J W, “Discretionary Trusts. An End and a Beginning?” (1970) 33:6 Mod L Rev 686–691.

Harry W Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17:1 Osgoode Hall LJ.

Hart, H L A, “Bentham on Legal Powers” (1972) 81:5 Yale LJ 799.

Hayton, David, “‘The Development of Equity and the “Good Person” Philosophy in Common Law Systems’” (2012) 76 The Conveyancer and Property Lawyer 263.

Hickey, Christine, “Reasons First: Post-Vavilov Considerations for Tribunal Participation on Judicial Review or Appeal” (2022) 35:1 Cad J Admin L & Prac 103.

Hohfeld, Wesley Newcomb, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23:1 Yale LJ 16–59.

Honoré, Tony, “Trusts: The Inessentials” in Edward Hector Burn, ed, Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn (London, UK: LexisNexis UK, 2003).

Hornsby, Jennifer, “Illocution and its Significance” in S L Tsohatzidis, ed, Foundations of Speech Act Theory: Philosophical and Linguistic Perspectives (Abingdon, Oxon: Taylor & Francis Group, 1994).

Hunt, Murray, “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in Nicholas Bamforth & Peter Leyland, eds, Public Law in a Multi-Layered Constitution (Bloomsbury Publishing, 2003) 311.

Hutchinson, Allan, “Mice Under a Chair: Democracy, Courts and the Administrative State” (1990) 40 UTLJ 374.

Jacobs, Laverne A & Thomas S Kuttner, “Discovering What Tribunals Do: Tribunal Standing Before the Courts” (2002) 81:3 Can Bar Rev.

Jaffe, Louis L, “Standing to Secure Judicial Review: Public Actions” (1961) 74:7 Harv L Rev 1265.

Janda, Richard, “Law’s Limits” (1990) 63:3 S Cal L Rev 727.

Jenks, Edward, “The Prerogative Writs in English Law” (1923) 32:6 Yale LJ 523.

Jones, Karen, “Trust as an Affective Attitude” (1996) 107:1 Ethics 4.

Kahn, Paul W, “Freedom and Method” in Edward L Rubin, Hans-W Micklitz & Rob van Gestel, eds, Rethinking Legal Scholarship: A Transatlantic Dialogue (Cambridge: Cambridge University Press, 2017) 499.

Katz, Larissa, “Governing Through Owners: How And Why Formal Private Property Rights Enhance State Power” (2012) 160:7 U Pa L Rev 2029.

———, “Ownership and Offices: The Building Blocks of Legal Order” (2020) 70:6 UTLJ 267.

———, “Pathways to Private Rights” in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, Philosophical Foundations of the Law of Equity (Oxford, New York: Oxford University Press, 2020).

———, “Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right” (2012) 122:6 Yale L J 1444–1483.

Kavanagh, Aileen, “The Constitutional Separation of Powers” in David Dyzenhaus & Malcolm Thorburn, eds, Philosophical Foundations of Constitutional Law, first edition. ed (Oxford, UK: Oxford University Press, 2016).

Keenan, Riley, Living Equity, 2022, Alabama Law Review, Forthcoming, online: <dx.doi.org/10.2139/ssrn.4011398>

Klimchuk, Dennis, “Equity and the Rule of Law” in Lisa M Austin & Dennis Klimchuk, eds, Private law and the rule of law (Oxford, United Kingdom: Oxford University Press, 2014).

Klinck, Dennis R, “Lord Nottingham and the Conscience of Equity” (2006) 67:1 Journal of the History of Ideas 123–147.

Koehn, Daryl, “A Role for Virtue Ethics in the Analysis of Business Practice” (1995) 5:3 Business Ethics Quarterly 533.

Laby, Arthur B, “Fiduciary Obligation as the Adoption of Ends” (2008) 56:1 Buff L Rev 99–168.

Laden, Anthony Simon, “The Authority of Civic Citizens” in James Tully, ed, On Global Citizenship: James Tully in Dialogue (London: Bloomsbury, 2014).

Lambert, Nicholas, “Beyond Judicial Review: Governance and Public Administration” in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, The Unbounded Level of the Mind: Rod Macdonald’s Legal Imagination (Montreal, Canada: MQUP, 2015).

Laws, Sir John, “Illegality: The Problem of Jurisdiction” in Michael Supperstone & James Goudie, eds, Judicial Review (London: Butterworths, 1992).

———, “Law and Democracy” (1995) PL 72.

———, “The Rule of Law: The Presumption of Liberty and Justice” (2017) 22:4 Judicial Review 365.

Leckey, Robert, “Complexifying Roncarelli’s Rule of Law” (2010) 55:3 McGill LJ 721.

Lee, Daniel, “‘Office Is a Thing Borrowed’: Jean Bodin on Offices and Seigneurial Government” (2013) 41:3 Political Theory 409.

Leib, Ethan J, Ponet, David L & Serota, Michael “A Fiduciary Theory of Judging” (2013) 101:3 California Law Review 699–753

Ethan Leib, & Ponet, David “Fiduciary Law’s Lessons for Deliberative Democracy” (2011) 91 BU L Rev 1249;

Lichère, François & John Bell, eds, “Courts and Judges” in Contemporary French Administrative Law (Cambridge: Cambridge University Press, 2022) 61.

Liston, Mary, “Bringing the Mixed Constitution Back in” (2021) 30 Constit Forum Constit 9.

Lobban, Michael, “Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I” (2004) 22:2 Law Hist Rev 389–427.

Loughlin, Martin, “Representation and Constitutional Theory” in Carol Harlow, Paul (Law) Craig & Richard Rawlings, eds, Law and administration in Europe: essays in honour of Carol Harlow (Oxford ; Oxford University Press, 2003).

———, “The Functionalist Style in Public Law” (2005) 55:3 UTLJ 361.

———, “The State, the Crown and the Law” in Maurice Sunkin, ed, The Nature of the Crown : A Legal and Political Analysis (Oxford ; Oxford University Press, 1999)

MacCormick, Neil & Joseph Raz, “Voluntary Obligations and Normative Powers” (1972) 46:1 Aristotelian Society, Supplementary Volumes 59.

Macdonald, Roderick A, “Call-Centre Government: For the Rule of Law, Press #” (2005) 55:3 UTLJ 449.

———, “The Acoustics of Accountability—Towards Well-Tempered Tribunals"” in András Sajó, ed, Judicial Integrity (Boston: Brill | Nijhoff, 2004) 141.

———, “Understanding Regulation by Regulations” in Ivan Bernier & Andrée Lajoie, eds, Regulations, Crown Corporations, and Administrative Tribunals (Toronto: University of Toronto Press, 1985) 81.

Macdonald, Roderick A & Richard Janda, “Administrative Law I Recent Developments in Canadian Law” (1984) 16:3 Ottawa L Rev 597–644.

MacDonald, Roderick A & David Lametti, “Reasons for Decision in Administrative Law” (1990) 3 Can J Admin L & Prac 123.

Mackor, Anne Ruth “Explanatory Non-Normative Legal Doctrine. Taking the Distinction between Theoretical and Practical Reason Seriously” in Mark van Hoecke, ed, Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Oxford: Hart Publishing, 2011)

Macnair, Mike, “Equity and Conscience” (2007) 27:4 Oxford Journal of Legal Studies 659–681.

John McGarry, “Intention, Supremacy and Judicial Review” (2013) 1:2 The Theory and Practice of Legislation 255

McHarg, Aileen, “The Supreme Court’s Prorogation Judgment: Guardian of the Constitution Or Architect of the Constitution? Analysis” (2020) 24:1 Ed L Rev 88.

McLean, Janet, “Between Sovereign and Subject: The Constitutional Position of the Official” (2020) UTLJ.

———, “The Authority of the Administration” in Elizabeth Fisher, Jeff King & Alison Young, eds, The Foundations and Future of Public Law: Essays in Honour of Paul Craig (Oxford University Press, 2020).

Meazell, Emily Hammond, “Deference and Dialogue in Administrative Law” (2011) 111:8 Colum L Rev 1722.

Miller, Paul, “The Fiduciary Relationship” in Andrew S Gold & Paul B Miller, eds, Philosophical Foundations of Fiduciary Law (Oxford: Oxford University Press, 2014).

———, “Fiduciary Representation” in Evan J Criddle et al, eds, Fiduciary Government (Cambridge, United Kingdom ; Cambridge University Press, 2018).

Miller, Paul B & Andrew S Gold, “Fiduciary Governance” (2015) 57 Wm & Mary L Rev 513–586.

Morgan, Jonathan, “‘O Lord make me pure - but not yet’: granting time for the amendment of unlawful legislation” (2019) 135:4 Law Q Rev 585–610.

Mouland, Carolyn, “Remedying the Remedy: Bedford’s Suspended Declaration of Invalidity Sex Work: Court Responses and Discursive Analysis” (2018) 41:3 Man LJ 281.

Murray, Philip, “Escaping The Wilderness: R. v Bolton and Judicial Review for Error of Law” (2016) 75 CLJ 333–365.

Nir, Shachar, “One Duty to All: The Fiduciary Duty of Impartiality and Stockholders’ Conflict of Interest” (2020) 16:1 Hastings Bus LJ 1–42.

Nolan, Richard, “Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures” in Paul S Davies & James Penner, eds, Equity, Trusts and Commerce (London: Bloomsbury Publishing PLC, 2017).

———, “The Execution of a Trust Shall Be under the Control of a Court: A Maxim in Modern Times” (2016) 2 Can J Comp & Contemp L 469.

O’Donnell, Jim, “A matter of trust: The Importance of genuine decision making when exercising discretionary powers” (2022) 46:4 Brief 7–9.

Oliver, Dawn, “Is the Ultra Vires Rule the Basis of Judicial Review?” (1987) PL 543.

———, “Review of (Non-Statutory) Discretions” in Christopher Forsyth, ed, Judicial Review and the Constitution (Oxford: Hart Publishing, 2000).

———, “Void and Voidable in Administrative Law: A Problem of Legal Recognition” (1981) 34:1 Current Leg Probs 43.

O’Loughlin, Elizabeth, “Decolonising Jurisprudence: Public Interest Standing in New Constitutional Orders” in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives (Oxford UK ; Portland, Oregon: Hart Publishing, 2018).

Parachin, Adam, “Public benefit, discrimination and the definition of charity” in Darryn Jensen & Kit Barker, eds, Private Law: Key Encounters with Public Law (Cambridge: Cambridge University Press, 2013) 171.

Penner, J E, “Exemptions” in Peter Birks & Arianna Pretto-Sakmann, eds, Breach of Trust (Oxford: Hart Publishing, 2002).

———, “Equity, Justice and Conscience” in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, Philosophical Foundations of the Law of Equity (Oxford, New York: Oxford University Press, 2020).

———, “Justifying (or Not) the Office of Trusteeship With Particular Reference to Massively Discretionary Trusts” (2021) 34:2 Canadian Journal of Law & Jurisprudence 365–390.

———, “Purposes and Rights in the Common Law of Trusts” (2014) 48:2 Revue juridique Thémis de l’Université de Montréal 579.

———, “We All Make Mistakes: A ‘Duty of Virtue’ Theory of Restitutionary Liability for Mistaken Payments” (2018) 81:2 MLR 222.

Perry, Stephen, “Law and Obligation” (2005) 50 Am J Juris 266.

———, “Where have all the powers gone? : Hartian rules of recognition, noncognitivism, and the constitutional and jurisprudential foundations of law” in Matthew D Adler, ed, The Rule of Recognition and the US Constitution (Oxford: Oxford University Press, 2009) 295.

Poole, Thomas, “Constitutional Exceptionalism and the Common Law” (2009) 7:2 International Journal of Constitutional Law 247.

Postema, Gerald J, “Fidelity in Law’s Commonwealth” in Lisa M Austin & Dennis Klimchuk, eds, Private Law and the Rule of Law (Oxford: Oxford University Press, 2014).

———, “Law’s Rule: Reflexivity, Accountability, and the Rule of Law” in Xiaobo Zhai & Michael Quinn, eds, Bentham’s Theory of Law and Public Opinion (New York: Cambridge University Press, 2014) 7.

———, “Trust, Distrust and the Rule of Law” in Paul Miller & Matthew Harding, eds, Fiduciaries and Trust: Ethics, Politics, Economics and Law (Cambridge University Press, 2020).

Pound, Roscoe, “Visitatorial Jurisdiction over Corporations in Equity” (1936) 49:3 Harv L Rev 369.

Pratt, Michael G, “Promises, Contracts and Voluntary Obligations” (2007) 26:6 Law and Phil 531.

Raphael, David K L, “An Australian view on a Trustee’s duty to account and to keep records and identify just what records should be kept and to discuss what are trust documents” (2020) 26:10 Trusts & Trustees 956–996.

Rave, Theodore, “Politicians as Fiduciaries” 126 Harv L Rev 671; John Barratt, “Public Trusts” (2006) 69:4 Mod L Rev 514–542;

Raz, Joseph, “Legal Principles and the Limits of Law” (1972) 81:5 Yale LJ 823.

———, “Normative Powers – Revised”, King's College London Law School Research Paper No. 26-2019, online: <scholarship.law.columbia.edu/faculty_scholarship/2460>

Roach, Kent, “The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies” (1991) 33 Limits 859.

Rojas, Claudio R, “An Indeterminate Theory of Canadian Corporate Law” (2014) 47:1 UBC L Rev 59.

Roughan, Nicole, “The Official Point of View and the Official Claim to Authority” (2018) 38:2 Oxford J Leg Stud 191.

Runciman, David, “What Kind of Person is Hobbes’s State? A Reply to Skinner” (2000) 8:2 Journal of Political Philosophy 268.

Samet, Irit “Fiduciary Loyalty as a Kantian Virtue” in Andrew S Gold & Paul B Miller, eds, Philosophical Foundations of Fiduciary Law (OUP Oxford, 2014) 125

Schlag, Pierre, “How to do Things with Hohfeld” (2015) 78:1–2 Law & Contemp Probs 185–234.

Sitkoff, Robert H, “An Economic Theory of Fiduciary Law” in Andrew S Gold & Paul B Miller, eds, Philosophical Foundations of Fiduciary Law (OUP Oxford, 2014).

Smith, Henry E “Equity and Administrative Behaviour” in P G Turner, ed, Equity and Administration (Cambridge University Press, 2016)

Smith, Lionel, Aspects of Loyalty (July 27, 2017).online: SSRN: <ssrn.com/abstract=3009894> (date accessed 14 September 2022)

———, “Can We Be Obliged to Be Selfless?” in Andrew S Gold & Paul B Miller, eds, Philosophical Foundations of Fiduciary Law (Oxford: Oxford University Press, 2014) 141.

———, “Equity is Not a Single Thing” in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, Philosophical Foundations of the Law of Equity (Oxford, New York: Oxford University Press, 2020)

———, “Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another” (2014) 130 LQR 608.

———, “Prescriptive Fiduciary Duties” (2018) 37:2 U Queensland LJ 261–288.

Smith, S A de, “The Prerogative Writs” (1951) 11:1 Cambridge LJ 40–56.

Sossin, Lorne, “Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law” (2003) 27:4 Adv Q 478.

———, “Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law” (2003) 66 Saskatchewan L Rev 129

Stacey, Jocelyn & Alice Woolley, “Can Pragmatism Function in Administrative Law?” (2016) 74 SCLR (2d) 211.

Stacey, Richard, “A Service Conception of the Constitution: Authority, Justification and the Rule of Law in Proportionality Jurisprudence” (2019) 9 Const Ct Rev 219–246.

———, “A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada” (2021) 71:3 UTLJ 338.

———, “Honour in sovereignty: Can Crown consultation with Indigenous peoples erase Canada’s sovereignty deficit?” 2018 68(3) UTLJ 405

———, “The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication” (2019) 67 Am J Comp L 435.

Stack, Kevin “Overcoming Dicey in Administrative Law” (2018) 68 UTLJ 293

Stewart, Richard, “The Reformation of American Administrative Law” (1975) 88:8 Harv L Rev 1667.

Stone, Matthew, “Equity, Property, and the Ethical Subject” (2017) 11:1 Pólemos 73–95.

———, “The Contradictions of Conscience: Unravelling the Structure of Obligation in Equity” (2019) 30:2 Law Critique 159–178.

Stratas, David and Williams, David, “The Bullet-Proof Administrative Decision-Maker: Maximizing the Chances of Surviving a Judicial Review” (26 October 2020), online: SSRN <ssrn.com/abstract=3719276> (date accessed 4 June 2021).

The Right Honourable Lord Woolf of Barnes, “Droit Public - English Style” (1995) PL 57.

Tomkins, A, “In Defence of the Political Constitution” (2002) 22:1 Oxford Journal of Legal Studies 157.

Troper, Michel, “The structure of the legal system and the emergence of the state” in Baudouin Dupret, Julie Colemans & Max Travers, eds, Legal Rules in Practice: In the Midst of Law’s Life (Routledge, 2020).

Turner, P G, “Equity and Administration” in Equity and Administration (Cambridge University Press, 2016).

Valsan, Remus, “Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment” (2016) 62:1 McGill LJ 1.

Varuhas, Jason, “The Principle of Legality” (2020) 79:3 Cambridge LJ 578.

Vranken, Jan BM “Methodology of Legal Doctrinal Research : A Comment on Westerman” in Mark van Hoecke, ed, Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Oxford: Hart Publishing, 2011)

Waldron, Jeremy, “The Core of the Case against Judicial Review” (2006) 115:6 Yale LJ 1346.

Walters, Mark, “Deliberating about Constitutionalism” in Ron Levy et al, eds, The Cambridge Handbook of Deliberative Constitutionalism (Cambridge: Cambridge University Press, 2018).

———, “Is Public Law Ordinary?” (2012) 75:5 Mod L Rev 894.

———, “Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law” in Christopher Forsyth et al, eds, Effective Judicial Review: A Cornerstone of Good Governance (Oxford: Oxford University Press, 2010).

———, “The Unwritten Constitution as a Legal Concept” in David Dyzenhaus & Malcolm Thorburn, eds, Philosophical Foundations of Constitutional Law (Oxford, United Kingdom: Oxford University Press, 2016) 33.

Wheatle, Se-Shauna, “Common Law Constitutionalism Through Methodology” (2019) 65:2 McGill LJ 341.

William Lucy, “The Normative Standing of Access To Justice: An Argument From Nondomination” (2020) 2 Windsor YB Access Just.

Woolf, Sir Harry, “Public Law-Private Law: Why the Divide? A Personal View” (1986) PL 220.

Worthington, Sarah, “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae” (2013) CLJ 720.

———, “Four Questions on Fiduciaries” (2016) 2:2 CJCCL 723.

Wu, Tang Hang, “Rationalising Re Hastings-Bass as a Duty to Act on Proper Bases” 21:2 Trust Law International 62–79.

Zipursky, Benjamin, “Civil Recourse, Not Corrective Justice” (2003) 91 Geo L J 695.

Working Papers and Conference Proceedings

Daly, Paul, “One Year of Vavilov” Ottawa Faculty of Law Working Paper No 2020-34, online: <10.2139/ssrn.3722312>.

Finnis, John, The Unconstitutionality of The Supreme Court’s Prorogation Judgment, With Supplementary Notes, University of Oxford Research Working Paper No. 6/2020.

Smith, Lionel “Stepping Outside of Ourselves: How we Act for Others in Law", (Manuscript Draft delivered at Faculty of Law, McGill University, 18 September 2020)

Online Resources

Daly, Paul, “Some Qualms about R (Miller) v Prime Minister [2019] UKSC 41”, online: Paul Daly <https://www.administrativelawmatters.com/blog/2019/09/24/some-qualms-about-r-miller-v-prime-minister-2019-uksc-41/>.

Ekins Richard, “Parliamentary Sovereignty and the Politics of Prorogation”, 2019, online: *Policy Exchange* < <policyexchange.org.uk/publication/parliamentary-sovereignty-and-the-politics-of-prorogation/

Hoddinott, Nicole “Trustees’ Powers of Advancement” (29 July 2021), online (blog): *So Legal* < www.solegal.co.uk/insights/trustees-powers-advancement>

Loughlin, Martin “The Case of Prorogation: The UK Constitutional Council’s Ruling on the Appeal from the Judgment of the Supreme Court”, 2019, online: *Policy Exchange* <policyexchange.org.uk/publication/the-case-of-prorogation/>

Munroe, Melody “The Power of Equality in Trustee Decisions” (21 April 2021), online: *Farrer & Co* < www.farrer.co.uk/news-and-insights/considering-equality-in-trustee-decisions/>

OLRB, “The Board and Its History” (2022), online: *Ontario Labour Relations Board* <www.olrb.gov.on.ca/History-EN.asp> [perma.cc/5SSL-XK84]

The Public Law Project, “Judicial Review: Proposals for Reform”, 2021, online: *The Public Law Project* < publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf>